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.

EMERGENCY MOTION OF PETITIONERS FOR A STAY OF FINAL AGENCY ACTION OF THE PENNSYLVANIA DEPARTMENT OF ENVIRONMETNAL PROTECTION UNDER RULE 18

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INTRODUCTION AND FACTS

Petitioners seek an emergency stay of the February 23, 2017, Pennsylvania Department of Environmental Protection's ("Department" or "Respondents") issuance of two Chapter 105 Water Obstruction and Encroachment permits (collectively, the "permits") for Tennessee Gas Pipeline Company ("Tennessee") LLC's proposed Orion pipeline Project ("Project"). All Construction activity was authorized to begin on March 15, 2017, by the Federal Energy Regulatory Commission ("FERC"). *See* Letter Order Granting Construction Activity, Ex. 17; *see also* Implementation Plan, Ex. 15.

On October 9, 2015, Tennessee filed a request to the Federal Energy Regulatory Commission ("Commission") for a Certificate of Public Convenience and Necessity authorizing the Orion Project. *See* Application for Certificate of Public Convenience and Necessity, Ex. 1. Under the Natural Gas Act, the Commission is the lead federal agency responsible for authorizing applications to construct and operate interstate natural gas pipeline facilities. *See* 15 U.S.C. §717f. The Commission required Tennessee to obtain a Clean Water Act Section 401 water quality certificate from the Department. *See* FERC Order Granting Certification, 158 FERC ¶ 61,110, at ¶ 95, Ex. 2.[1] A condition of the Section 401

[1] The Department exercises delegated authority to issue federal Section 401 water quality certifications, which includes the authority to require applicants to obtain Water Obstruction and Encroachment permits. *See* 25 Pa. Code 105.15(b); *see also*

water quality certificate issued by the Department to Tennessee required Tennessee to obtain two Water Obstruction and Encroachment permits from the Department pursuant to 25 Pa. Code Chapter 105. *See* Section 401 Water Quality Certificate, Ex. 3 (Tennessee "shall obtain and comply with a PADEP Chapter 105…Permit"). Petitioners here challenge the the issuance of the Water Obstruction and Encroachment permits as arbitrary, capricious, or otherwise not in accordance with law. *See* Chapter 105 Permit, Pike County, Ex. 4; Chapter 105 Permit, Wayne County, Ex. 5. Furthermore, as result of the unlawful issuance of the permits, the Section 401 water quality certificate that relies on the permits is similarly unlawful.

The proposed Project involves the construction of approximately 13 miles of pipeline loop[2] along Tennessee's existing pipeline system. *See* Tennessee Chapter 105 Application, Project Description, at 1, Ex. 6. Portions of pipeline facilities would cross Pennsylvania State Game Lands, a wildlife management unit, a federally designated Appalachian Landscape Conservation Cooperative, five Core Habitat areas, three private hunting properties, and a Pennsylvania-designed Important Bird Area. As explained in more detail below, the wrongly-issued permits promise to inflict significant and irreparable harm on the environment, and irreparable harm on Petitioners, their members, and the public. This harm includes,

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Tennessee Gas Pipeline L.L.C. v. Delaware Riverkeeper Network, 921 F.Supp.2d 381, 390 (M.D. Pa. 2013).

[2] Pipeline "loops" are new pipelines sited alongside and adjacent to one or more pre-existing pipelines.

but is not limited to, the substantial and permanent deforestation of "exceptional value" wetlands, destruction of wetland wildlife habitat, and permanent degradation of the functions and values of those wetlands. *See* Chapter 105 Permit Pike County, Ex. 4; Chapter 105 Permit, Pike County, Ex. 5.

The primary reason these permits are unlawful is that they fail to comply with the Commonwealth's regulations protecting wetlands, and specifically 25 Pa. Code § 105.18a(a)(2). In 1992 the Commonwealth codified a strict regulatory regime for its wetlands, noting that:

> Wetlands are a valuable public resource, the destruction of which is **contrary to the public interest**. Wetlands provide valuable fish, waterfowl and wildlife habitat, harbor many of our endangered plant species and are essential for the maintenance of surface water quality and quantity. These amendments will allow the Department to **more adequately protect wetlands in Pennsylvania by establishing more specific permit information requirements**, clear standards for permit review and specific replacement criteria.

21 Pa.B. 4911 (emphasis added), Ex. 7. As part of these new protections the Commonwealth created a hierarchy of wetland classification based on an enumerated set of criteria. *See* 25 Pa. Code §§ 105.17(1)(i)-(v). Based on these criteria wetlands in the Commonwealth are classified into two categories: "exceptional value" ("EV") wetlands or "other" wetlands. *See* 25 Pa. Code §§ 105.18a(a)-(b). EV wetlands enjoy several distinctive protections under Pennsylvania's water quality standards that "other" wetlands do not. The most significant special protection afforded to EV wetlands is codified in section

105.18a(a)(2). This provision states that the Department "will not grant a permit… in, along, across or projecting into an exceptional value wetland" unless the applicant affirmatively demonstrates that the proposed project is "water dependent." 25 Pa. Code § 105.18a(a)(2). This section therefore unequivocally elevates the protection of EV wetlands above the economics or convenience of projects that are non-water dependent.

Here, the proposed Project is not water dependent for two reasons. First, Tennessee has admitted that a "compression alternative" to the Project is feasible, which would not require any pipeline construction across any EV wetlands. Second, even if that alternative were not to exist, pipelines by definition are not water dependent projects. Therefore, the Department was expressly prohibited from issuing the Water Obstruction and Encroachment permits for the Project. The interpretation and application of section 105.18a(a)(2) to the proposed Project is the primary issue raised here on appeal.

JURISDICTION AND STANDING

This Court has jurisdiction to hear this case pursuant to 15 U.S.C. § 717r(d)(1), of the Natural Gas Act ("NGA"). *See* 15 U.S.C. § 717r(d)(1). Section 717r(d)(1) provides that:

> [t]he United States Court of Appeals for the circuit in which a facility subject to . . . section 717f of this title is proposed to be constructed, expanded, or operated shall have original and exclusive jurisdiction over any civil action for the review of an order or 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.

Id. Chapter 105 permits comprise many of the substantive conditions of the Section 401 Certificate that Respondents issued to Tennessee for the proposed Project. *See* Section 401 Water Quality Certificate, Ex. 3. Because the issuance of the underlying Chapter 105 permits is an "action" by a "state administrative agency" acting "pursuant to Federal law" to issue "permit[s]," Petitioners meet the standard articulated in Section 717r(d)(1). *See Tennessee Gas Pipeline Company LLC v. Delaware Riverkeeper Network*, 921 F.Supp.2d 381, 387-88 (M.D. Pa. 2013); *see also Delaware Riverkeeper Network, et al. v. Secretary Department of Environmental Protection, et al.*, 833 F.3d 360, 370-374 (3d Cir. 2015).

Petitioners are a non-profit organization representing members who reside, work, and recreate in the areas that will be affected by the Project. *See* Declarations, Exs. 8-10. Tennessee's construction and operational activities will cause Petitioners' members concrete, particularized, and imminent harm, which this Court can redress by granting a stay. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Petitioners therefore have standing to assert this claim.

STANDARD OF REVIEW

In order to obtain a preliminary injunction, "'the moving party must generally show: (1) a reasonable probability of eventual success in the litigation,

and (2) that it will be irreparably injured *pendente lite* if relief is not granted to prevent a change in the status quo.'" *Delaware River Port Auth. v. Transamerican Trailer Transp., Inc.*, 501 F.2d 917, 919–20 (3d Cir. 1974) (quoting *A.L.K. Corp. v. Columbia Pictures Indus., Inc.*, 440 F.2d 761, 763 (3d Cir. 1971)). The Court should also take into account, "(3) the possibility of harm to other interested persons from the grant or denial of the injunction, and (4) the public interest." *Id.* at 920 (footnote omitted). Agency action under the NGA is reviewed pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701-706, whereby courts hold unlawful and set aside agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 706(2)(A).

ARGUMENT

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

a. The Department's Finding that the Project is "Water Dependent" is Arbitrary, Unreasonable, and Not Supported by the Evidence in Tennessee's Applications

The Pennsylvania Code requires that a proposed project be considered "water dependent" before the Department issues Chapter 105 permits authorizing activities in EV wetlands. *See* 25 Pa. Code § 105.18a(a)(2). As described above, EV wetlands are the most ecologically important wetlands in the Commonwealth, and provide irreplaceable functions improving human health and the environment. Here, the Department issued the permits despite the fact that the proposed Project

is clearly not "water dependent," as its basic purpose can be achieved without access or proximity to water resources. Furthermore, even if a pipeline were required, such a project is not a "water dependent" activity as contemplated by the Pennsylvania Code. *See* 25 Pa. Code § 105.18a(a)(2).

The Department's governing regulations dictate that it will be the Department's policy to "encourage activities to protect the natural condition of the wetlands." *See N. Pocono Taxpayers' Ass'n N. Pocono C.A.R.E. v. Pennsylvania*, 1994 EHB 449, 489. As per the explicit instruction of 25 Pa. Code § 105.17, the rules under Chapter 105 "will be construed broadly" to protect EV wetlands, because these wetlands are a "valuable public resource" deserving "special protection." 25 Pa. Code §§ 105.17 and 105.17(1). With regard to Chapter 105's special protections of EV wetlands, "[f]rom all practical perspectives, it is rare that a project **in or affecting** an exceptional value wetland will be permitted. Very few projects can meet . . . these tests." *Pennsylvania Environmental Law and Practice*, ch. 6-4.3, Permit Review (8th ed. 2015) (emphasis added).

One of the most significant special protections afforded to EV wetlands pursuant to Pennsylvania's water quality standards is codified in Section 105.18a(a)(2). Specifically, Section 105.18a(a)(2) requires that the Department:

> will not grant a permit under this chapter for a dam, water obstruction or encroachment located in, along, across or projecting into an exceptional value wetland, or otherwise affecting an exceptional value

> wetland, unless the applicant affirmatively demonstrates in writing . . . that the following requirements are met:
> . . .
> (2) The project is water-dependent. 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). This water dependency analysis is a special protection afforded only to EV wetlands. *Compare* 25 Pa. Code § 105.18a(a), *with* 25 Pa. Code § 105.18a(b).

The Pennsylvania Environmental Hearing Board[3] has recognized that Chapter 105 permits are properly denied when a project is not "water dependent." *See Eagle Environmental, L.P. v. DEP*, 1998 EHB 896, 937 ("It is beyond peradventure that the proposed landfill is not a water dependent project"); *see also Hatchard v. DER*, 612 A.2d 621, fn. 2 (Pa. Commw. 1992) (parking for the Family Care Center is not a water-dependent activity; finding that a "dock" would be a typical example of a water-dependent project).

1. <u>The Defined "Basic Purpose" of the Project Can Be Achieved by the "Compression Alternative," Which Does Not Require Access or Proximity to Water</u>

The "basic purpose" of the Project here can be achieved through other alternatives that do not require "access" or "proximity" to wetlands. *See* 25 Pa. Code § 105.18a(a)(2). Specifically, Tennessee expressly admits in its applications

[3] The Pennsylvania Environmental Hearing Board has jurisdiction over all appeals of Chapter 105 permits **except** for Chapter 105 permits that have been issued pursuant to a FERC jurisdictional natural gas pipeline.

that it can achieve the "basic purpose" of the Project by simply adding only compression to the existing pipeline system.

Section 105.18a(a)(2) states, "[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). Tennessee states that the basic purpose of its Project is "to transport 135,000 dekatherms 1 per day ("Dth/d") of additional firm natural gas transportation capacity on Tennessee's pipeline system." Tennessee Chapter 105 Apps., Project Description at 1, Ex. 6. Tennessee proposes to add this capacity by, *inter alia*, installing roughly 13 miles of pipeline loops across numerous EV wetlands. *Id*.

Tennessee contends that the Project is water dependent "due to the linear nature [of pipeline construction] and length of the Project and the abundance of wetlands in Pennsylvania." Tennessee Chapter 105 Apps., Alternatives Analysis, at 18, Ex. 11. However, the "basic purpose" of the Project of "transporting 135,000 dekatherms of natural gas" to select delivery points can be achieved without requiring "access" or "proximity" to water resources. 25 Pa. Code § 105.14(b)(7). Indeed, Tennessee **directly admits** such an alternative is viable in the application.

This alternative is described by Tennessee as its "Compression Alternative." Tennessee Chapter 105 Apps., Alternatives Analysis, at 16, Ex. 11. Tennessee states that this alternative involves the construction of "new (greenfield)

compressor stations each with approximately 10,000 horsepower of compression equipment" that could transport the 135,000 dekatherms to the desired delivery points along Tennessee's existing system. *Id*. This alternative would not require any new looping pipeline into wetlands. There was no question that this alternative was logistically and technically feasible, and could achieve the specific goals of the Project. *Id*. Furthermore, while this alternative would require Tennessee to obtain roughly forty acres per site, even assuming that all of those acres would need to be disturbed by construction (which is highly unlikely), this alternative would still disturb less than a third of what the proposed Project would impact. *See* Orion Environmental Assessment, at 8, Ex. 12 ("The footprint of all Project-related disturbances during construction is estimated at 262.6 acres"). Additionally, because of the non-linear nature of the construction of this alternative, there is a high likelihood that it would impact far fewer, if any, aquatic resources.

Because Tennessee has expressly conceded that it does not need to build the pipeline loops in EV wetlands to achieve the basic purpose of the Project, it was arbitrary and capricious for the Department to issue the Chapter 105 Permits allowing Tennessee to do so.

2. <u>In the Alternative, Pipeline Projects, such as the Proposed Project, Are Not "Water-Dependent" Projects Pursuant to 25 Pa. Code § 105.18a(a)(2)</u>

Even if the "basic purpose" of the Project necessarily required the construction of a pipeline loops – which it does not – pipeline projects are categorically not "water-dependent." Pipeline projects, similar to roads or any other linear infrastructure, can perform their basic purpose without being sited in or across water resources. As described below, this fundamental concept pervades both federal and state case law addressing this issue. Petitioners are unaware of any court, in any jurisdiction, in any context, that has found that a pipeline project such as that proposed by Tennessee to be "water dependent."

Because there is no Pennsylvania-specific case law examining the application of Section 105.18a(a)(2) to pipeline projects specifically, or linear infrastructure projects generally, and because the Clean Water Act also requires a "water dependency" analysis, it is appropriate to look to federal court opinions interpreting similar provisions in the Clean Water Act for guidance. *See, e.g.*, *DER v. PBS Coals, Inc.*, 677 A.2d 868, 873–874 (Pa. Commw. 1996) ("Because there is no Pennsylvania case law interpreting the statutes and because the Clean Water Act encompasses similar aims . . . we find it appropriate to consider the Federal Courts' interpretation of the Clean Water Act for guidance in ascertaining our General Assembly's intent").

Federal courts have specifically relied on a United States Army Corps of Engineers' statement of standard operating procedures when interpreting what constitutes a "water dependent" activity pursuant to the Clean Water Act:

> The basic purpose of the project must be known to determine if a given project is "water dependent." For example, the purpose of a residential development is to provide housing for people. Houses do not have to be located in a special aquatic site to fulfill the basic purpose of the project, i.e., providing shelter. Therefore, a residential development is not water dependent . . . Examples of water dependent projects include, but are not limited to, dams, marinas, mooring facilities, and docks. The basic purpose of these projects is to provide access to the water.

Sierra Club v. Antwerp, 709 F.Supp. 2d 1254, 1261 (S.D. Fla. 2009) (*citing* Army Corps of Engineers Standard Operating Procedures for the Regulatory Program (October 15, 1999) (updated July 2009)) (emphasis added); *see also Fla. Clean Water Network, Inc. v. Grosskruger*, 587 F.Supp.2d 1236 (M.D. Fla. 2008). Here, there can be no doubt that a pipeline simply does not require access or proximity to water for it to carry out its basic purpose. Unlike a dam, marina, mooring facility, or dock, a pipeline can carry out its function without proximity to water.

Tennessee makes the specious claim in its application that because the desired location of the Project extends across Pennsylvania, and because its chosen route crosses numerous water resources, it must be considered "water dependent." *See* Tennessee Chapter 105 Apps., Alternatives Analysis, at 18, Ex. 11. However, federal courts are in universal agreement that linear construction activities similar

to pipelines are not water dependent activities, even where the desired location of those activities required crossings of waterbodies and wetlands. *See, e.g.*, *Northwest Bypass Group v. United States Army Corps of Eng'rs*, 552 F.Supp. 2d 97, 108–109 (D. N.H. 2008) (construction of roadway not water dependent); *Hoosier Envt'l. Council v. United States DOT*, 2007 WL 4302642, at *16 (S.D. Ind., Dec 10, 2007) (construction of highway not water dependent); *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"); *Bailey v. United States*, 116 Fed. Cl. 310, 313 (2014) (citing Army Corps of Engineers' conclusion that roads are not water dependent); *N. Idaho Cmty. Action Network v. Hofmann*, 2009 WL 1076165, at *4 (D. Idaho, Apr. 21, 2009) (implicitly finding highway non-water dependent). Therefore, a desire to locate a project in a certain area "does not mean that the [project] activity requires siting in wetlands. Housing developers presumably would always choose to build on waterfront property, but that does not make the provision of housing a 'water dependent' activity." *Sierra Club v. Flowers*, 423 F.Supp.2d 1273, fn. 231 (S.D. Fla. 2006) (overturned on other grounds).

Additionally, many states have adopted provisions of their federally-delegated water quality standards regarding water dependency that parallel

Pennsylvania's Chapter 105 regulations. These states have consistently found that pipelines are not water-dependent projects, even ones that are sited in and around waterbodies. For example, the New Jersey Department of Environmental Protection ("NJDEP") considers the water dependency of a proposed project with regard to its state water quality standards pursuant to the Clean Water Act. *See* N.J.A.C. 7:7A-1.4 ("Additional requirements for a non-water dependent activity in exceptional resource value wetlands or trout production waters").[4]

NJDEP regularly finds that pipeline projects are *not* water dependent. Indeed, NJDEP recently determined that Transcontinental Natural Gas Pipeline Company's Leidy Southeast Expansion Project, which crossed 37 wetlands and 49 waterbodies, was not water dependent. *See* Environmental Summary Report, Leidy Southeast Expansion Project, Flood Hazard Area Permit, NJDEP, Ex. 13. This was the case despite the fact that FERC controlled the siting of the Project, and determined that the pipeline project must be sited in those water resources. *See* Leidy Southeast Environmental Assessment, at 18, Ex. 14.[5]

[4] *See also Islander East Pipeline Co., LLC v. CDEP*, 482 F.3d 79 (2nd Cir. 2006) (Connecticut Department of Energy and Environmental Protection found that a pipeline that "cross[ed] the Long Island Sound" to be "non-water dependent").

[5] Similarly, the NJDEP found that the Tennessee Gas Pipeline Company's Northeast Upgrade Project, which crossed the Delaware River itself, was not water dependent. *See* Environmental Summary Report, Northeast Upgrade Project, Flood Hazard Area Permit, NJDEP.

Therefore, not only has Tennessee admitted that it can transport the necessary volume of natural gas to complete its Project by simply adding additional compression instead of adding pipeline loops through EV wetlands; but Orion's looping pipeline is not a water dependent project. As such, the Department's issuance of the permits was unambiguously prohibited by section 105.18a(a)(2).

II. Petitioners Will Suffer Irreparable Harm in the Absence of a Stay

The issuance of the permits allows Tennessee to commence construction activities, including clearing and trenching in EV wetlands, that would be otherwise prohibited. Further irreparable harm to Petitioners' aesthetic and recreational interests will result from long-term damage to streams, wetlands, and forest areas because tree replanting requires decades before saplings can replace the environmental services provided by cleared trees. As such, there is no legal remedy for these harms.

The Supreme Court has recognized that environmental harm, "by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987); *see also Brady*, 612 F. Supp. 2d at 25 ("[E]nvironmental and aesthetic injuries are irreparable."). It is well established that the clearing of trees **alone** constitutes irreparable harm, let alone the deforestation of "exceptional

value" wetlands. *See, e.g.*, *Concerned Citizens of Chappaqua v. U.S. Department of Transportation*, 579 F.Supp.2d 427, 432 (S.D.N.Y. 2008) (the felling of only sixty-one trees warranted a preliminary injunction.); *Lichterman v. Pickwick Pines Marina, Inc.*, 2007 WL 4287586, at *6 (N.D. Miss. Dec. 6, 2007) (finding that clearing trees in a shoreline buffer zone constituted irreparable harm to residents with views of the shore); *Saunders v. Wash. Metro. Area Transit Auth.*, 359 F.Supp. 457, 462 (D. D.C. 1973) (enjoining construction because, "[p]laintiffs would suffer irreparable harm in the removal of trees from their neighborhood"); *Merritt Parkway Conservancy v. Mineta*, 424 F.Supp.2d 396, 425 (D. Conn. 2006) (holding the "felling of mature trees" together with other effects to aesthetic and historic features to be irreparable harm). Additionally, the irreparable harm requirement is satisfied when, as here, the proposed Project will likely irreparably harm Plaintiffs' interests in using, recreating in, and conserving the project area. *See AWR v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011); *See* Declarations, Ex. 8 at ¶¶ 9-19; Ex. 9 at ¶¶ 7-11; Ex. 10 at ¶¶ 8-11.

On March 15, 2017 FERC issued a Letter Order to Tennessee authorizing all construction activity now that the FERC had received all "of the required federal authorizations relevant to the proposed activities." March 15, 2017 Letter Order Granting All Construction Activity, Ex. 17. The construction activity related to the Chapter 105 permits includes mechanized clearing and trenching, irreversible

deforestation of wetlands, and the permanent loss of wetland functions and values of numerous wetlands located in state gamelands and other public natural areas. Specifically, the Project will result in the permanent deforestation of roughly 6.25 acres of currently-forested wetlands. *See* Chapter 105 permit, Pike County, at 3, Ex. 4; Chapter 105 permit, Wayne County, at 3, Ex. 5. By the specific design of the Project, the mature trees in these wetlands will forever cease to exist, and never be permitted to regrow. Furthermore, the Department has admitted that the construction activity will "result in permanent wetland impacts" that require Tennessee to "offset" the impacts by calculating the "functions and values lost as a result of the Project." Orion Mitigation Plan, at 2. This statement is a clear admission of permanent functional degradation of the impacted wetlands. The permanent clearing and trenching through these wetlands constitutes irreparable harm to the environment and to the interests of Petitioners' members.

To put the scope of the harm in perspective, the Sunoco Mariner East II pipeline – which is proposed to stretch over 300 miles across Pennsylvania and impact over 500 wetlands – will result in **less than half an acre** of permanent deforestation of wetlands. *See* Sunoco Chapter 105 Permit, at 10, Ex. 9. Here, the Orion Project is roughly **twenty times** smaller than the Mariner East II pipeline project, yet will irreversibly harm **10 times more** forested wetlands. Yet, what is more troubling is that had the Department performed the appropriate analysis as

required by its regulations none of these resources would be impacted. Petitioners satisfy the irreparable harm factor because not only are the harms significant and irreversible, but they are also immediate and ongoing in nature. *See* Implementation Plan, Ex. 15 (providing a generalized construction time schedule).

Given the express violation of Pennsylvania law just described, Petitioners can also show irreparable harm *per se*. The Pennsylvania Environmental Hearing Board has found that in the context of alleged environmental harms, "where unlawful activity is occurring or is threatened or there is a violation of express statutory or regulatory provisions, there is irreparable harm per se." *Rausch Creek Land v. DEP*, 2011 EHB 708, 710 (citing *Pleasant Hills Construction Co. v. Public Auditorium Authority of Pittsburgh*, 782 A.2d 68, 79 (Pa. Commw. Ct. 2001); *Tinicum Township v. DEP*, 2002 EHB 822, 826. Pennsylvania's Environmental Hearing Board has explained this rationale, stating:

> it is presumed that the Legislature or in this case the Environmental Quality Board was trying to prevent [the environmental] harm in the first place by promulgating the applicable regulations. It is counterintuitive to allow a project to move forward notwithstanding a likely finding that the Department acted unlawfully in approving it.

Hudson v. DEP, 2015 EHB 719, 743.

III. A Stay Will Not Cause the Department or Tennessee Substantial Injury

In evaluating whether injunctive relief is appropriate the court considers "harm [to] other interested persons." *Constructors Ass'n of Western Pennsylvania*

v. Kreps, 573 F.2d 811 (3d Cir. 1978). However, "[t]he more likely the [movant] is to win, the less heavily need the balance of harms weigh in [the movant's] favor." *Karakozova v. University of Pittsburgh*, 2009 WL 1652469, at *3 (W.D. Pa. June 11, 2009) (quoting *NLRB v. Electro–Voice, Inc.*, 83 F.3d 1559, 1568 (7th Cir. 1996)). Also, "[t]he injury a [nonmoving party] might suffer if an injunction were imposed may be discounted by the fact that the [nonmoving party] brought that injury upon itself." *Novartis Consumer Health Inc. v. Johnson & Johnson–Merck Consumer Pharm. Co.*, 290 F.3d 578, 596 (3d Cir .2002); s*ee also Pappan Enterprises, Inc. v. Hardee's Food Systems, Inc.*, 143 F.3d 800, *806* (3d Cir. 1998).

Although Tennessee may allege that delay to its construction schedule may result in economic harm, any such harm should be weighed in light of the fact that Tennessee is ultimately responsible for that delay; Tennessee chose to design and submit a proposed pipeline project that clearly violated the express provisions of the Pennsylvania Code.

IV. A Stay Pending Review is in the Public Interest

In cases involving preservation of the environment, the balance of harms generally favors the grant injunctive relief. *See Amoco Prod. Co*., 480 U.S. at 545 ("If such injury is sufficiently likely…the balance of harms will usually favor the issuance of an injunction to protect the environment"). There also is no question that the public has an interest in having the Commonwealth's mandates protecting

EV wetlands be carried out accurately and completely. Here, the improper clearing of mature trees and trenching through EV wetlands, and the concomitant loss of the ecological services those EV wetlands provide, is a significant environmental harm, and therefore a harm to the public interest in protecting natural resources pursuant Chapter 105.

The costs of complying with the Chapter 105 cannot fairly be characterized as harm, particularly when those costs are the self-inflicted. S*ee Cronin v. U.S. Dep't of Agriculture*, 919 F.F2d 439, 445 (7th Cir. 1990) (The felling of trees that will not grow back in plaintiff's lifetime outweighs "the time value of the profit component of [the anticipated] revenue[s]" of the project); *Citizen's Alert Regarding the Environment v. United States Department of Justice*, 1995 WL 748246 at *11 (D. DC. Dec. 8, 2995) (potential loss of revenue, jobs, and investment caused by delay did not outweigh "permanent destruction of environmental values that, once lost, may never again be replicated").

CONCLUSION

Petitioners request a temporary stay during the pendency of this Court's consideration of this Emergency Motion for Stay, and for this Emergency Motion for Stay to be granted. Petitioners have no objection to an expedited schedule for resolution of the Emergency Motion for Stay. *See* LAR Rule 27.7.

Respectfully submitted this 16th day of March 2017,

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CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2017, the foregoing Emergency Motion and Exhibits have been served via the Court's CM/ECF system, via Overnight Mail, and via email upon Respondents in this matter:

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