No. 17-4016

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CITY OF GREEN, OHIO,)
)
Petitioner,)
)
v.) O R D E R
)
NEXUS GAS TRANSMISSION, LLC,)
)
Intervenor,)
)
THE OHIO ENVIRONMENTAL PROTECTION AGENCY,)
)
Respondent.)
)

Before: CLAY, McKEAGUE, and DONALD, Circuit Judges.

The City of Green, Ohio ("Green") petitions for review of the Clean Water Act Section 401 Water Quality Standard Certification (the "401 Certification") issued by the Ohio Environmental Protection Agency ("Ohio EPA"). The 401 Certification would allow construction to begin on a 257-mile natural gas pipeline that would run between northern Ohio and southeastern Michigan. Green now moves for an emergency stay of construction on the eight-mile stretch of the pipeline that would run through Green, pending decision on the merits of its petition. Construction on the rest of the pipeline would continue as planned. Ohio EPA and Intervenor Nexus Gas Transmission, LLC ("Nexus") oppose the motion. For the reasons set forth below, we believe a stay is warranted.

Green, as the movant, "bears the burden of showing that the circumstances justify" the exercise of discretion to grant a stay pending review. *Nken v. Holder*, 556 U.S. 418, 433–34 (2009). Four factors guide our consideration of the motion for a stay: (1) whether Green has made a strong showing that it is likely to succeed on the merits; (2) whether Green will suffer irreparable harm in the absence of a stay; (3) whether the requested stay will substantially injure other interested parties; and (4) where the public interest lies. *Id*. at 434; *see also In re EPA*, 803 F.3d 804, 806 (6th Cir. 2015). "The first two factors of the traditional standard are the most critical." *Nken*, 556 U.S. at 434. In deciding whether to grant stay, we must be mindful that a stay motion is made "early in the case based on incomplete factual development and legal research[.]" *In re E.P.A.*, 803 F.3d at 806. Consequently, the parties' arguments, and our view of them, are necessarily preliminary. *See Americans United for Separation of Church & State v. City of Grand Rapids*, 922 F.2d 303, 306 (6th Cir. 1990) ("We strongly emphasize that we are not now deciding the appeal. That must wait until full briefing and the opportunity for oral argument."). In addition, a stay serves "the purpose of preserving the status quo pending further proceedings." *In re EPA*, 803 F.3d at 806. The status quo would be preserved in this case by staying Ohio EPA's 401 Certification. *See id.* (explaining that the status quo was preserved by staying enforcement of a Clean Water Rule promulgated by the Environmental Protection Agency). We now consider the four stay factors in turn.

First, Green has raised strong arguments concerning the appropriateness of the 401 Certification. Although this court will review the Ohio EPA's decision under the deferential arbitrary and capricious standard, *see Del. Riverkeeper Network v. Sec. of Pennsylvania Dep't of Envtl. Prot.*, 833 F.3d 360, 377 (3d Cir. 2016), Green persuasively asserts that the 401 Certification was improper because various important and required procedures were ignored.

Specifically, the relevant portion of Ohio EPA's environmental review process turned on how the pipeline would affect wetlands in Green. Ohio EPA acknowledges that the Ohio Rapid Assessment Method (ORAM) is "the preferred methodology for assessing wetlands[.]" (Ohio EPA's opp. at 9.) In this case, however, Ohio EPA appears to concede that ORAM was not followed. (*Id.* at 9–10.) Although Ohio EPA argues that it had discretion to use other methods, Ohio Rev. Code § 6111.30(A)(2) explicitly requires "a wetland characterization analysis consistent with the Ohio rapid assessment method[.]"

Ohio EPA also argues that many of its actions satisfied ORAM. However, Green has made strong arguments to the contrary. For example, Ohio EPA concedes that it evaluated many of the wetlands outside of the growing season, even though ORAM provides that "the most reliable scores are obtained during the growing season[.]" (Doc. 18-4, ORAM manual, 16.) Ohio EPA has made little attempt to explain why its evaluations were nonetheless reliable. In addition, Ohio EPA apparently conceded during the administrative proceeding that it did not evaluate alternative pipeline routes that avoid Green. (Doc. 9-A, EPA response, 68–69.) Now, however, Ohio states that it "did conduct the required alternatives analysis[.]" (Ohio EPA's opp. at 13.) But it does not support its statement with any citations to the administrative record.

The second stay factor—irreparable harm to Green—also weighs in Green's favor. "Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." *Amoco Prod. Co. v. Vill. of Gambell, Alaska*, 480 U.S. 531, 545 (1987). In this case, Ohio EPA admits that the pipeline would cause long-term environmental harms to at least in one location in Green. (Ohio EPA's opp. at 18.) Although Nexus has agreed to establish

wetlands elsewhere to compensate for these environmental injuries, such actions appear relevant to the public interest prong of the stay test, not to the prong that considers irreparable harm to Green. In addition, Ohio EPA's argument that overall environmental harms will be minimal is undermined by the fact that its wetland evaluations may have been unreliable.

The third stay factor—substantial harm to the nonmovants—weighs against a stay. A stay may cause Nexus to suffer monetary injury, because it will delay construction on part of the pipeline. However, the stay will apply only to the eight-mile section of the pipeline that travels through Green. In addition, harm to Nexus will be minimized because, in addition to granting a stay, this order directs the clerk of the court to expedite the appeal.

The fourth stay factor—whether the stay is in the public interest—does not weigh heavily in either party's favor. Environmental protection is certainly in the public interest; and Ohio EPA and Nexus argue that the prompt construction of the pipeline would also be in the public interest.

On balance, we believe a stay is warranted. Green has made a strong showing that it is likely to succeed on the merits; contrary to the dissent's suggestion, Green is not required to identify bulletproof arguments proving that it will achieve a "landslide victory." In addition, Green will suffer irreparable harm absent a stay. The remaining stay factors do not weigh heavily against a stay. Consequently, Green's strong showing on the first two stay factors, which are the "most critical," *Nken*, 556 U.S. at 434, convince us that a stay is appropriate. Green's motion to stay construction on the eight-mile stretch of the pipeline that would run through Green is therefore **GRANTED**. It is further **ORDERED** that the clerk of the court expedite briefing and submission of the appeal.

McKEAGUE, Circuit Judge, dissenting.

This case does not merit a stay. Green bears the burden of convincing us to take the extraordinary step of interfering with the Ohio EPA's administrative authority and Nexus's right to construct the pipeline. It faces an even higher burden than normal here, when we can only vacate the Ohio EPA's order if we find that it is arbitrary and capricious—one of the most forgiving standards in the law. *Ky. Waterways Alliance v. Johnson*, 540 F.3d 466, 474 (6th Cir. 2008). Green cannot meet its burden here.

First of all, I am not convinced that Green has demonstrated a likelihood of success on the merits. This is a threshold requirement that must be satisfied if the analysis is to move forward at all. *Nken v. Holder*, 556 U.S. 418, 434 (2009). Even irreparable harm does not justify a stay based on some remote chance of success. I can see why Green is unhappy with the Ohio EPA's decision here. But victory on the *merits* under an arbitrary-and-capricious standard is exceedingly rare, as it is meant to be. Based on the briefing currently before us, I do not see how Green has shown the kind of strong showing we require to clear this hurdle. The majority tacitly acknowledges this, because the record contains no evidence that the Ohio EPA's determination actually *was* flawed. The most Green can say about it is that it "may have been unreliable." With due respect to the concerns of the majority, this is not enough.

The majority places significant emphasis on the fact that the Ohio EPA did not use the "ORAM method" indicated in Ohio Rev. Code § 6111.30. But this ignores the fact that both the Ohio Administrative Code and the ORAM manual itself give the Ohio EPA director discretion to decide whether ORAM is "appropriate," considering "the conditions present at each particular wetland." Ohio Admin. Code § 3745-1-54; Ohio EPA Resp., Ex. 4, *Ohio Rapid Assessment*

Method for Wetlands v. 5.0, at 1. Green's reply brief makes no attempt to explain why this regulation or the manual is invalid under Ohio administrative law.

But this is not the most serious flaw in the order. It is true that the likelihood-of-success and irreparable harm factors are the "most critical" to the analysis. *Nken*, 556 U.S. at 434. But even the strongest threshold claims must be balanced against "the harm to the opposing party" and "the public interest." *Id.* at 435. Furthermore, these two concerns merge where, as here, "the Government is the opposing party," since the government has a strong interest in executing its own orders. *Id.* 435-36. As the Supreme Court reminded us in *Nken*, we "cannot simply assume that 'ordinarily, the balance of hardships will weigh heavily in the applicant's favor.'" *Id.* And unless they actually weigh heavily in the applicant's favor, we should not grant a stay.

The order contradicts the Court's precedent in this regard. A stay imposes massive economic costs on Nexus, which will have to halt construction and remobilize if it wins on the merits. In this sense, Green is really asking us for an injunction "*altering* the legal status quo." *Turner Broadcasting Sys. v. FCC*, 507 U.S. 1301, 1302 (1993). Further, the delay has serious downstream economic effects, as a prolonged delay will jeopardize contracts or negotiations for the sale of gas that are already in existence. And, not to belabor the point, but the pipeline is knocking on the gates of the city; Nexus has already sunk quite a bit of money into construction.

The majority reasons that this factor "weighs against" granting a stay because the stay "only appl[ies] to the eight-mile section of the pipeline that travels through Green" and because we are expediting this appeal. I disagree. First of all, this ignores how pipelines work. Like a chain, it is only as strong as its weakest link—a pipeline with one missing section is just as useless as a pipeline that doesn't exist at all. By shutting down one eight-mile section of the pipeline, then, the court effectively shuts down the entire operation. That harm is not minimal.

Second, although I have no quarrel with expediting the appeal, this does not minimize the harm to Nexus. If, as the majority concludes, Green has made the requisite strong showing of success on the merits, then the delay will extend far beyond the resolution of this appeal, as the Ohio EPA conducts all the additional testing that Green deems necessary. So expedited consideration is of relatively little comfort unless Nexus will probably *win* on the merits—in which case we could not grant a stay in the first place. And as the Court has consistently reminded us, the cost of delay (which is ultimately what Green seeks here) is a substantial factor in the emergency-stay analysis. *Nken*, 556 U.S. at 434-36. Regulatory agencies cannot function if we order them to "try again" every time their testing "may have been unreliable." Again, that is why the standard on the merits searches for arbitrariness and caprice, not merely imperfection.

Economic and environmental harms are notoriously difficult to weigh against each other. But Green has the burden of persuasion *and* must satisfy an arbitrary-and-capricious standard on the merits. To grant a stay in these circumstances, we should predict something just short of a landslide victory. This game could go into overtime. Therefore, I respectfully dissent from the order granting a stay.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

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Re: Case No. 17-4016, *City of Green, Ohio v. OH EPA*
Originating Case No. : 1546699

Dear Counsel,

The Court issued the enclosed Order today in this case. The briefing schedule set on

10/13/17, remains in effect.

Sincerely yours,

s/Michelle M. Davis
Case Manager
Direct Dial No. 513-564-7025

Enclosure