United States Court of Appeals

FIFTH CIRCUIT
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August 11, 2016

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 16-60448 ExxonMobil Pipeline Company v. TRAN, et al
USDC No. 4-2013-5027

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Cindy M. Broadhead, Deputy Clerk
504-310-7707

Mr. Matthew Miles Collette
Ms. Catherine H. Dorsey
Mr. John Drake
Mr. Richard Bernard Farrer
Mr. Paul Maitland Geier
Mr. Colin G. Harris
Mr. Robert Elling Hogfoss
Mr. Reagan William Simpson

P.S. An expedited briefing schedule will issue under separate cover.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-60448

EXXONMOBIL PIPELINE COMPANY,

Petitioner

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION; PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION; OFFICE OF PIPELINE SAFETY,

Respondents

Petition for Review of an Order of the
Department of Transportation, Pipeline and
Hazardous Materials Safety Administration

Before SMITH, DENNIS, and SOUTHWICK, Circuit Judges.

JAMES L. DENNIS, Circuit Judge:

Petitioner ExxonMobil Pipeline Company (EMPCo) moves for a stay pending appeal of a Compliance Order issued by the Pipeline and Hazardous Materials Safety Administration (PHMSA), a federal agency operating under the Department of Transportation. For the reasons set forth below, EMPCo's motion is DENIED.

I. BACKGROUND

This appeal arises from a PHMSA action in response to the failure of EMPCo's Pegasus pipeline near Mayflower, Arkansas, in March 2013. The pipeline's failure resulted in approximately 5,000 barrels of crude oil spilling

into a residential area, causing more than $57 million in property damage and leading to evacuation of twenty-two homes. PHMSA investigated the incident and issued EMPCo a Notice of Probable Violation, a Proposed Civil Penalty, and a Proposed Compliance Order. The Notice alleged nine violations of pipeline safety regulations; PHMSA assessed a civil penalty of $2,630,500 against EMPCo and required it to take a series of actions[1] to improve its pipeline integrity management procedures to ensure proper testing and assessment of its pipelines.

EMPCo requested and received an agency hearing, after which PHMSA issued its Final Order confirming the agency's initial findings, enforcing

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[1] EMPCo was directed to:

1.
   a. Identify all pre-1970 electric-resistance welded (ERW) pipe covered by integrity management regulations.
   b. Identify all integrity management procedures used in risk assessment that are used in determining susceptibility to seam failure, in development of seam integrity assessment plans, and assessments of pre-1970 ERW pipe.
   c. Review and revise process for scoring risk of pre-1970 ERW pipe to ensure pipe segments susceptible to seam failure receive heightened risk score.
   d. Revise process for analyzing seam failure susceptibility to include, inter alia, results from failure analyses.
   e. Revise process for conducting crack growth analysis through pressure cycle fatigue modeling to ensure conservative assumptions are used for developing re-inspection timelines.
2. Revise procedures regarding assessment intervals to ensure all risk factors are assessed within regulatory timeframes.
3. Revise integrity management procedures to ensure timely discovery of immediate repair conditions.
4. Revise integrity management procedures to ensure timely discovery of anomalous conditions within 180 days of integrity assessment.
5. Conduct internal investigation of certain processes to adequately identify and assess the risk of potential seam failures on the Pegasus line.
6. Revise risk assessment procedures to ensure that risk assessment assumptions are appropriately conservative.
7. Revise risk assessment and data integration processes to ensure identified threats are not discounted.
8. Provide EMPCo's total cost for complying with the ordered safety improvements.

substantially all of the civil penalty, and approving the Compliance Order. EMPCo requested reconsideration, which PHMSA ultimately denied. PHMSA also denied EMPCo's request to postpone the effective date of its order pending judicial review. Pursuant to 49 U.S.C. §60119(a)(1), EMPCo timely filed a petition for review of the Final Order with this Court and now seeks a stay pending review pursuant to 5 U.S.C. § 705 and Fed. R. App. P. 18.

II. DISCUSSION

We have the power to stay agency action pending judicial review. 5 U.S.C. § 705. A stay is not a matter of right, even if irreparable injury might otherwise result; it is "an exercise of judicial discretion," and "[t]he propriety of its issue is dependent upon the circumstances of the particular case." *Nken v. Holder*, 556 U.S. 418, 433 (2009) (quoting *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672-73 (1926). The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion. *See, e.g.*, *Clinton v. Jones*, 520 U.S. 681, 708 (1997); *Adams v. Thaler*, 679 F.3d 312, 318 (5th Cir. 2012). In deciding whether to grant a stay pending appeal we consider four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken*, 556 U.S. at 426 (internal quotation marks omitted). The first two factors of the standard are the most critical. *Id.* at 434. We will discuss each factor in turn.

A.

We begin by considering whether EMPCo has made a strong showing that it is likely to succeed on the merits. It is not enough that the chance of success on the merits be "better than negligible." *Nken*, 556 U.S. at 434. The

party must establish a "a substantial likelihood of success on the merits." *See Byrum v. Landreth*, 566 F.3d 442, 446 (5th Cir. 2009) (quoting *ICEE Distribs., Inc. v. J&J Snack Foods Corp.*, 325 F.3d 586, 596 n. 34 (5th Cir. 2003)). On merits review, the court will review the agency's Final Order and its decision denying reconsideration to determine whether the agency's conclusions were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *See* 5 U.S.C. § 706.

Review of agency action under the arbitrary and capricious standard is "extremely limited and highly deferential." *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 243 (5th Cir. 2015) (internal quotation marks omitted). "[T]here is a presumption that the agency's decision is valid." *La. Pub. Serv. Comm'n v. F.E.R.C.*, 761 F.3d 540, 558 (5th Cir. 2014) (internal quotation marks omitted). Where an agency's particular technical expertise is involved, we are at our most deferential in reviewing the agency's findings. *Medina Cty. Envtl. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 699 (5th Cir. 2010) (citing *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 376–77 (1989)). We must be mindful not to substitute our judgment for the agency's; agency action should be upheld "if its reasons and policy choices satisfy minimum standards of rationality." *10 Ring Precision, Inc. v. Jones*, 722 F.3d 711, 723 (5th Cir. 2013) (internal quotation marks omitted).

In support of its claim that it will likely succeed on the merits, EMPCo claims that it complied with existing regulations and that the PHMSA Final Order is not supported by the existing regulations or the technical guidance. According to EMPCo, PHMSA "essentially [rewrote] the regulations to add a new 'susceptible to seam failure' risk factor" that EMPCo had not previously considered. EMPCo further alleges that PHMSA departed from its own guidance for determining seam-failure susceptibility, namely the guidelines

set out in the Baker Report,[2] which provides guidance on determining susceptibility to seam failure in electric-resistance welded (ERW) pipe. In other words, EMPCo claims that PHMSA determined that there had to have been a violation due to the fact that the Pegasus pipeline failed and then worked backwards to create a new standard. EMPCo also asserts that PHMSA's interpretation of its regulations are not entitled to deference under *Chevron USA v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984), because the Final Order conflicts with previous interpretations of the regulations, *Akzo Nobel Salt, Inc. v. Fed. Mine Safety & Health Review Comm'n*, 212 F.3d 1301, 1304-05 (D.C. Cir. 2000), or alternatively because PHMSA has effectively rewritten regulations under the guise of interpreting them, citing *Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000). They also claim that no deference is due when an interpretation would subject a regulated party to "unfair surprise." *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012).

We do not find these arguments persuasive. The Pegasus Pipeline is covered by the PHMSA's integrity management regulations. These regulations require EMPCo to have in place a written integrity management program. Under the existing regulations, EMPCo's integrity management program must include a plan to carry out periodic integrity assessments of each pipeline and address conditions discovered. 49 C.F.R. § 195.452(b)(3), (f)(2)-(5). The regulations require EMPCo to have a schedule for conducting integrity assessments and prioritizing those assessments, based on all risk factors, to include results of previous integrity assessments, pipe material,

[2] *See* Michael Baker & John Kiefner, Low Frequency ERW and Lap Welded Longitudinal Seam Evaluation, Final Report (rev. 3) (Apr. 2004), available at https://primis.phmsa.dot.gov/iim/docstr/TTO5_LowFrequencyERW_FinalReport_Rev3_April2004.pdf

manufacturing, seam type, and leak history. 49 C.F.R. § 195.452(e)(1). After completing an integrity assessment, the regulations set forth a schedule and procedures for addressing any anomalies discovered. 49 C.F.R. § 195.452(h).

PHMSA found EMPCo in violation of these regulations because the company should have determined that the Pegasus pipeline was susceptible to seam failure because it was constructed of pre-1970 ERW pipe which was widely known to exhibit an increased risk of seam failure due to the method of manufacturing. The regulations clearly state that all pre-1970 ERW pipe is considered susceptible to seam failure unless an engineering analysis proves otherwise. 49 C.F.R. § 195.303(d). Any pipeline that is "susceptible to longitudinal seam failure must be subject to periodic reassessment to ensure the integrity of the seam." 49 C.F.R. § 195.452(j)(5). This alone should have triggered additional regulatory requirements on the part of EMPCo to prioritize assessment of the Pegasus pipeline. PHMSA also reasoned that due to the Pegasus Pipeline's long history of seam failure—testing in 1969, 1991, and 2005-2006 showed multiple seam failures and an in-service seam failure in 1984 resulted in an actual leak—EMPCo's conclusion that the pipeline was not susceptible to seam failure, and thus not a high priority, was flawed.

As PHMSA points out, the risk factors listed in the regulations are explicitly meant to be illustrative and not exhaustive. *See* 49 C.F.R. § 195.452(e)(1). Moreover, the enumerated risk factors include factors like pipe size, material, manufacturing, seam type, and leak and repair history. *Id.* In light of these factors, it is not unreasonable to conclude that the Pegasus pipeline was susceptible to seam failure. We do not find that this to be an arbitrary or capricious reading of the regulations as EMPCo claims.

The agency faulted EMPCo for concluding that the pipe was not susceptible to seam failure based on the lack of evidence of pressure cycling

fatigue or preferential seam erosion. But as PHMSA notes, the Baker Report—which EMPCo concedes sets agreed upon guidelines for evaluating seam failure susceptibility—advises operators to consider the brittleness or toughness of the pipe material as well. PHMSA faulted EMPCo for dismissing the history of seam failure on the Pegasus pipeline based exclusively on an absence of fatigue evidence and found that its failure to consider other possible factors discussed in the regulations and the Baker Report was a contributing factor to the Mayflower spill.

We agree with PHMSA that EMPCo has not demonstrated that it is likely to succeed on the merits. EMPCo has shown that, at most, there may exist room for disagreement with the agency's interpretation of the regulations, but disagreement alone is not enough to demonstrate that the agency acted arbitrarily and capriciously. *See Medina Cty. Envtl. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 699 (5th Cir. 2010) ("When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, we might find contrary views more persuasive." (citing *Marsh v. Or. Natural Res. Council,* 490 U.S. 360, 378 (1989))).

We also find that EMPCo's arguments under *Chevron* are also unavailing. We must give substantial deference to an agency's interpretation of its own regulations. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (citing *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 150–151 (1991)). An agency's interpretation is entitled to deference so long as that interpretation is not "plainly erroneous or inconsistent with the regulation." *Texas Clinical Labs, Inc. v. Sebelius*, 612 F.3d 771, 777 (5th Cir. 2010) (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997). PHMSA's findings are in line with the statutory authority delegated by Congress to the agency.

See 49 U.S.C. § 60101 *et. seq*. And broad deference is "all the more warranted when, as here, the regulation concerns a complex and highly technical regulatory program." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (internal quotations omitted). Under our precedents, we do not see why deference is inappropriate here. Similarly, we find that it is also unlikely that EMPCo will succeed under its lack of notice theory since PHMSA's Final Order relies almost exclusively on either the existing regulations or the relevant technical guidance in the Baker Report. In short, we do not believe that EMPCo has made a strong showing that PHMSA's findings do not "satisfy minimum standards of rationality." *10 Ring Precision, Inc*, 722 F.3d at 723. At the merits stage, EMPCo will have a full opportunity to argue that PHMSA's application of the regulations was improper under the applicable law; for now, however, we cannot say that EMPCo has made a sufficiently strong showing that it will succeed on the merits to grant a stay pending appeal.

B.

We now consider whether EMPCo has shown that "[it] will be irreparably injured absent a stay." *Nken*, 556 U.S. at 426. "Federal courts have long recognized that, when 'the threatened harm is more than de minimis, it is not so much the magnitude but the irreparability that counts'" for the purposes of a stay. *Dennis Melancon, Inc. v. City of New Orleans*, 703 F.3d 262, 279 (5th Cir. 2012) (quoting *Enter. Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 472 (5th Cir. 1985)). However, the party seeking a stay must demonstrate a "likelihood" of irreparable injury—not just a possibility—in order to obtain preliminary relief. *Winter v. Nat. Res. Def. Council, Inc.,* 555 U.S. 7, 21, (2008).

EMPCo argues that without a stay it will be forced to fully and strictly comply with the Compliance Order pending judicial review which would be costly and could possibly moot the proceedings. *See, e.g.*, *Comfort Lake Ass'n v. Dresel Contracting, Inc.*, 138 F.3d 351, 356 (8th Cir. 1998). EMPCo states that revising its integrity management and risk assessment procedures would cost it millions of dollars and put it at a competitive disadvantage relative to other pipeline operators. EMPCo further states that the Compliance Order is vague and that this creates additional expenses as it tries to navigate these new compliance requirements.

EMPCo has demonstrated that injury is likely in the absence of a stay before a decision on the merits can be rendered because it will be forced to come into compliance with the Final Order prior to a decision on the merits. *Winter*, 555 U.S. at 22 (citing 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948.1, p. 139 (2d ed. 1995) In a regulatory action such as this one, "complying with a regulation later held invalid almost always produces the irreparable harm of nonrecoverable compliance costs." *Texas v. United States Envtl. Prot. Agency*, No. 16-60118, 2016 WL 3878180, at *19 (5th Cir. July 15, 2016) (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220–21 (1994) (Scalia, J., concurring in part and in the judgment)). Thus, EMPCo has shown a likelihood that it will suffer some irreparable harm in the absence of a stay.

C.

Next, our stay inquiry calls for assessing the harm to the opposing party and weighing the public interest, but these factors merge when the Government is the opposing party. *Nken*, 556 U.S. at 435. EMPCo argues that a stay would not harm the public interest because the Pegasus pipeline is offline for the foreseeable future. It further argues that a stay would serve the

public interest because of the far reaching effects that EMPCo argues will occur if the Compliance Order is permitted to stand and other pipeline operators are required to adopt these policies.

More persuasively, PHMSA responds that safety concerns weigh against a stay because its investigation into EMPCo's seam failure susceptibility analysis revealed significant flaws in the company's compliance policies. Even though the Pegasus pipeline is offline, not implementing these policies and procedures could result in a similar accident at another location on the same scale as what occurred in Mayflower. With regard to the burdens on other operators, they will not be affected prior to a merits decision in this case. We therefore find that EMPCo has failed to demonstrate that a stay better serves the public interest.

D.

In summary, we find that a stay is unwarranted because EMPCo has not demonstrated a likelihood of success on the merits or that a stay would be in the public interest. Although EMPCo has demonstrated that it will suffer an injury, this factor is insufficient to warrant a stay when considered in conjunction with the other stay factors and considering the particular facts at issue here. First, as PHMSA points out, EMPCo has already fully complied or submitted responses as required with regard to more than half of the action items in the Final Order. EMPCo's argument that a stay will put them at a competitive disadvantage, is similarly unpersuasive because the company provided no demonstrative evidence that other pipeline operators are not already in compliance with PHMSA regulations. EMPCo's argument that full compliance would moot the proceedings is also flawed; at the very least EMPCo can still recover the civil penalty that it paid if it succeeds on the merits. *See Walker v. U.S. Dep't of Hous. & Urban Dev.*, 912 F.2d 819, 825 (5th Cir. 1990)

("payment of $1.8 million in compliance with the court's order does not operate to moot the larger issue here presented."). Thus, although EMPCo has demonstrated the likelihood of irreparable injury, it has not shown that circumstances warrant a stay pending litigation.

III. CONCLUSION

For the foregoing reasons, petitioner's motion for stay pending judicial review and its alternative motion to extend the effective date of the Compliance Order in the Final Order dated October 1, 2015, until after review in this Court is concluded is DENIED. The clerk's office is directed to issue an expedited briefing schedule, for briefing to conclude on October 25, 2016, and for the case to proceed directly to the oral argument calendar.