UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
TRENTON VICINAGE

PENNEAST PIPELINE COMPANY, LLC,	
Plaintiff,	DOCUMENT ELECTRONICALLY FILED
v.	Hon. BRIAN R. MARTINOTTI, U.S.D.J.
A PERMANENT EASEMENT FOR 1.74 ACRES ± AND TEMPORARY EASEMENT FOR 2.24 ACRES ± IN HOPEWELL TOWNSHIP, MERCER COUNTY, NEW JERSEY, TAX PARCEL NO. 1106-92-2.011	CIVIL ACTION Civ. Action No.: See Exhibits A & B attached
RENZE WEN, JERSEY CENTRAL POWER & LIGHT COMPANY, STATE OF NEW JERSEY, BY THE SECRETARY OF THE DEPARTMENT OF AGRICULTURE, STATE AGRICULTURE DEVELOPMENT COMMITTEE, THE TOWNSHIP OF HOPEWELL, FIRST CHOICE BANK; AND ALL UNKNOWN OWNERS,	RETURN DATE: 1/22/2019
Defendants.	

STATE DEFENDANTS BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION

GURBIR S. GREWAL
ATTORNEY GENERAL OF NEW JERSEY
Attorney for State Defendants
Division of Law
R.J. Hughes Justice Complex
P.O. Box 093
Trenton, New Jersey 08625-0112
(609) 376-2803 (phone)
(609) 341-5030 (fax)
mark.collier@law.njoag.gov

Mark Collier (MC6192)
Deputy Attorney General
On the Brief

EXHIBIT A

Dkt. No.	Case Name
18-01684	PennEast Pipeline Company, LLC vs. 1.74 acres
18-01774	PennEast Pipeline Company, LLC vs. 0.26 acres
18-01603	PennEast Pipeline Company, LLC vs. 2.14 acres
18-01771	PennEast Pipeline Company, LLC vs. 0.88 acres
18-01699	PennEast Pipeline Company, LLC vs. 1.41 acres
18-01709	PennEast Pipeline Company, LLC vs. 2.35 acres
18-01670	PennEast Pipeline Company, LLC vs. 1.29 acres
18-01682	PennEast Pipeline Company, LLC vs. 0.01 acres
18-01638	PennEast Pipeline Company, LLC vs. 0.57 acres
18-01701	PennEast Pipeline Company, LLC vs. 1.06 acres
18-01689	PennEast Pipeline Company, LLC vs. 1.53 acres
18-01754	PennEast Pipeline Company, LLC vs. 1.86 acres
18-01756	PennEast Pipeline Company, LLC vs. 0.73 acres
18-01668	PennEast Pipeline Company, LLC vs. 0.03 acres
18-01743	PennEast Pipeline Company, LLC vs. 1.20 acres
18-01669	PennEast Pipeline Company, LLC vs. 1.29 acres
18-01778	PennEast Pipeline Company, LLC vs. 2.23 acres
18-01643	PennEast Pipeline Company, LLC vs. 2.11 acres
18-01721	PennEast Pipeline Company, LLC vs. 1.89 acres
18-01597	PennEast Pipeline Company, LLC vs. 1.92 acres
18-01672	PennEast Pipeline Company, LLC vs. 4.55 acres
18-01673	PennEast Pipeline Company, LLC vs. 1.93 acres

EXHIBIT B

Dkt. No.	Case Name
18-02014	PennEast Pipeline Company, LLC vs. 2.35 acres
18-01863	PennEast Pipeline Company, LLC vs. 2.21 acres
18-01974	PennEast Pipeline Company, LLC vs. 0.06 acres
18-01845	PennEast Pipeline Company, LLC vs. 0.26 acres
18-01855	PennEast Pipeline Company, LLC vs. 1.52 acres
18-01874	PennEast Pipeline Company, LLC vs. 2.62 acres
18-01905	PennEast Pipeline Company, LLC vs. 0.23 acres
18-01801	PennEast Pipeline Company, LLC vs. 0.01 acres
18-01869	PennEast Pipeline Company, LLC vs. 0.61 acres
18-01851	PennEast Pipeline Company, LLC vs. 0.06 acres
18-01859	PennEast Pipeline Company, LLC vs. 1.10 acres
18-01896	PennEast Pipeline Company, LLC vs. 3.07 acres
18-02003	PennEast Pipeline Company, LLC vs. 2.11 acres
18-01942	PennEast Pipeline Company, LLC vs. 0.94 acres
18-02001	PennEast Pipeline Company, LLC vs. 4.33 acres
18-01990	PennEast Pipeline Company, LLC vs. 0.48 acres
18-01973	PennEast Pipeline Company, LLC vs. 1.65 acres
18-01806	PennEast Pipeline Company, LLC vs. 1.12 acres
18-01938	PennEast Pipeline Company, LLC vs. 0.36 acres
18-01951	PennEast Pipeline Company, LLC vs. 1.45 acres
18-01976	PennEast Pipeline Company, LLC vs. 0.54 acres
18-01995	PennEast Pipeline Company, LLC vs. 2.48 acres

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

CASES

STATUTES

FEDERAL RULES

OTHER SOURCES

PRELIMINARY STATEMENT

The United States Supreme Court has made clear that Congress cannot delegate to private citizens, or private entities such as PennEast, the United States' sovereign exemption from Eleventh Amendment restrictions. In Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991), the Supreme Court rejected an argument that the United States delegated its authority to bring suit against a state in federal court to the plaintiffs in that case. Notably, in doing so the Court doubted that the United States could delegate its sovereign exemption. The Court reasoned that, while states consented to suit by the federal government when they ratified the Constitution, states did not consent to suit by anyone whom the United States might select. A few years later in Alden v. Me., 527 U.S. 706, (1999), the Court reiterated this principle: History, precedent and the structure of the Constitution make clear that, under the plan of the Convention, the States have consented to suits by the federal government on behalf of private citizens but have not consented to suit by private citizens.

Finding that New Jersey is not entitled to Eleventh Amendment immunity, this Court held that "PennEast has been vested with the federal government's eminent domain powers and stands in the shoes of the sovereign." Neither the holding nor reasoning can be reconciled with the Supreme Court's statements in Blatchford and

Alden. The State of New Jersey has not consented to this lawsuit by PennEast in federal court. Accordingly, the Eleventh Amendment bars PennEast's claims against the State. As such, the State's motion for reconsideration should be granted and PennEast's Complaints should be dismissed as to the State.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

On January 19, 2018, the Federal Energy Regulatory Commission ("FERC") issued an Order granting Plaintiff, PennEast Pipeline Company ("PennEast" or "Plaintiff") a Certificate of Public Convenience and Necessity ("CPCN") pursuant to Section 7(c) of the Natural Gas Act ("NGA"), 15 U.S.C. § 717 et seq. to construct and operate a new natural gas pipeline in Pennsylvania and New Jersey ("Project").

In February 2018, PennEast filed with this court individual Notices of Condemnation ("Notice of Condemnation") and Verified Complaints in Condemnation ("Complaint") for 131 separate properties (collectively "Condemnation Actions"). Of those properties, State Defendants[2] hold property rights to approximately

[1] State Defendants incorporate by reference the STATEMENT OF FACTS AND PROCEDURAL HISTORY set forth in State Defendants' Brief Seeking Dismissal and in Opposition to Preliminary Injunction Application filed on March 20, 2018.

[2] "State Defendants" refers to the State of New Jersey, New Jersey Department of Environmental Protection, State Agriculture Development Committee, Delaware & Raritan Canal Commission, New Jersey Department of the Treasury, New Jersey Department of

40 parcels as permanently preserved for recreational, conservation and/or agricultural uses ("State Preserved Properties"). Through the Condemnation Actions, PennEast sought to condemn permanent and temporary rights-of-way over and through the State Preserved Properties as well as a preliminary injunction for immediate access to those properties.

On February 15 and 23, 2018, upon review of PennEast's applications, U.S.D.J. Brian Martinotti signed individual Orders To Show Cause ("OTSC") directing State Defendants to show cause why an Order should not be entered granting PennEast's applications. On March 20, 2018, State Defendants submitted opposition papers that sought dismissal of the Condemnation Actions on multiple grounds, chief among them that State Defendants were immune from suit under Eleventh Amendment sovereign immunity principles. OTSC Hearings were held on April 5, 19 and 26, 2018.

On December 14, 2018, U.S.D.J. Martinotti issued his decision denying State Defendants request for dismissal and granting PennEast's application for orders of condemnation and for preliminary injunctive relief allowing immediate possession of the State Preserved Properties in advance of any award of just compensation ("District Court Decision"). Specifically, the

---

Transportation, New Jersey Water Supply Authority, and the New Jersey Motor Vehicle Commission, each of which has been named as a Defendant in one or more of the Condemnation Actions.

District Court Decision held that Eleventh Amendment immunity did not apply because PennEast "has been vested with the federal government's eminent domain powers and stands in the shoes of the sovereign." In Re PennEast Pipeline Company, LLC, No. 18-1585, slip op. at 24 (D.N.J. December 14, 2018)

LEGAL ARGUMENT

I. THE DISTRICT COURT DECISION SHOULD BE RECONSIDERED BECAUSE THE FEDERAL GOVERNMENT'S EXEMPTION FROM ELEVENTH AMENDMENT RESTRICTIONS CAN NOT BE DELEGATED

Standard of Review

"The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence." Harsco Corp. v. Zlotniccki, 779 F.2d 906, 909 (3rd Cir. 1985). Local Rule of Civil Procedure 7.1 requires that the motion focus on only those matters, factual or legal, "which counsel believes the court has overlooked." L.Civ.R.7.1; See LITE, N.J. FEDERAL PRACTICE RULES, Comment 6(e). The three independent grounds for relief are: "(1) an intervening change in controlling law has occurred; (2) evidence not previously available has become available; or (3) it is necessary to correct a clear error of law or prevent manifest injustice." Carmichael v. Everson, 2004 U.S. Dist. LEXIS 11742 (D.N.J. May 21, 2004).

District Court Decision Overlooks Blatchford

The conclusion that PennEast, a private entity, stands in the shoes of the Federal Government, fully delegated with the federal government's ability to bring suit against New Jersey overlooks the United States Supreme Court's decision in Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991). In Blatchford, Alaska Native villages brought suit against an Alaskan state official, seeking an order requiring payment to them of money allegedly owed under a state revenue-sharing statute. The matter turned on whether the Eleventh Amendment acted as a bar to such a suit. The Alaska Native villages argued the federal government had delegated its authority to bring suit against a state in federal court to the tribes through a federal jurisdictional statute, 28 U.S.C. § 1362. Blatchford, supra, 501 U.S. at 783. In other words, they argued that Eleventh Amendment immunity was inapplicable to their lawsuit because the federal government was exempt from Eleventh Amendment restrictions and had delegated this exemption to the tribes. Ibid.

The Court disagreed, first reiterating long-established precedent that:

> the [s]tates entered the federal system with their sovereignty intact, that the judicial authority in Article III is limited by this sovereignty, … and that a [s]tate will therefore not be subject to suit in federal court unless it has consented to suit, either

> expressly or in the "plan of the convention". Id., at 779 (citations omitted).

Moreover, the states' surrender of sovereign immunity in the plan of the [Constitutional] convention has been recognized "in only two contexts: suits by sister States … and suits by the United States." Id., at 782 (citations omitted).

Blatchford rejects the Alaska Native villages' specific argument that the federal government's exemption from Eleventh Amendment restrictions had been delegated to them. The Court explained that consent to suit by the United States is not consent to suit by anyone whom the United States might select. Id. at 785. Additionally, consent to suit by the United States for a particular person's benefit is not consent to suit by that person. Id. Indeed, the Court doubted that the United States can delegate its sovereign exemption to Eleventh Amendment immunity. Id. Referring to respondents' "delegation theory" as "a creature of [Alaska Native villages'] own invention", the Court dismissed the argument as beyond what Congress could have contemplated when it enacted 28 U.S.C. § 1362.

Relying on Blatchford, the Fifth and Sixth Circuits have held that the federal government's exemption from Eleventh Amendment restrictions cannot be delegated. United States ex rel. Foulds v. Texas Tech Univ., 171 F.3d 279 (5th Cir. 1999); Tenn. Dep't of Human Servs. v. U.S. Dep't of Educ., 979 F.2d 1162, 1166 (6th Cir.

1992). In Foulds, a University employee brought a qui tam action on behalf of the United States against the University for violations of the False Claims Act, 31 U.S.C. § 3729 et seq. Even though the private plaintiff brought the action on behalf of the federal government in accordance with a federal statute, the Fifth Circuit decided the Eleventh Amendment barred the lawsuit because a private citizen commenced and prosecuted the case. "The Supreme Court has made clear … that Congress cannot delegate to private citizens the United States' sovereign exemption from Eleventh Amendment restrictions." Foulds, supra, 171 F.3d at 291-292; see Tenn. Dep't of Human Servs., supra, 979 F.2d at 1167 (Private citizen could not enforce a federal arbitration award in federal court).

Moreover, the Fourth Circuit, in allowing a suit by the federal government on behalf of private citizens to proceed against the Virginia Department of Transportation, explained that "political responsibility" distinguishes suits brought by the federal government on behalf of private citizens from suits brought by private citizens. Chao v. Va. Dep't of Transp., 291 F.3d 276, 280-82 (4th Cir. 2002). The lack of political responsibility in a suit by a private citizen explains the principle set forth in Blatchford and Alden: the States have not consented to suit by anyone whom the United States might select. Id. at 282.

Here, what would allow the federal government to bring New Jersey into court and condemn its lands is not the federal government's eminent domain authority, but rather, the consent or exemption the otherwise sovereign states like New Jersey gave to the federal government when ratifying the Constitution. See Sabine Line v. A Permanent Easement of 4.25 +/ Acres of Land in Orange County, Tex., et al., 327 F.R.D. 116, at 139-141 (E.D.Tex. 2017) (In condemnation action brought by a pipeline company under the NGA, district court expresses doubt on delegation theory, ultimately holding that NGA does not contain an express delegation). New Jersey, however, did not consent to suit by any private entity selected by the federal government or another state.

> A suit which is commenced and prosecuted against a State in the name of the United States by those who are entrusted with the constitutional duty to "take Care that the Laws be faithfully executed," U.S. Const., Art. II, § 3, differs in kind from the suit of an individual: While the Constitution contemplates suits among the members of the federal system as an alternative to extralegal measures, the fear of private suits against nonconsenting States was the central reason given by the founders who chose to preserve the States' sovereign immunity. Suits brought by the United States itself require the exercise of political responsibility for each suit prosecuted against a State, a control

> which is absent from a broad delegation to private persons to sue nonconsenting States.
>
> Alden, supra, 527 U.S. at 755-756.

To rule otherwise would eviscerate Eleventh Amendment immunity. For instance, if the federal government is allowed to delegate its exemption to a private entity, it stands to reason that a state could do so as well (after all, States consented to suit by the federal government and sister states). Such reasoning, however, would allow a citizen of one state to sue another state in federal court without consent, a result at complete odds with the Eleventh Amendment. So yes, PennEast has been delegated the federal government's eminent domain authority but they have not been delegated the federal government's exemption to New Jersey's sovereign immunity protection, nor can they be according to Blatchford and Alden. Accordingly, even assuming the United States on behalf of PennEast can file suit against New Jersey in federal court, PennEast, itself, cannot do so.

Moreover, the case law relied upon by this Court -- Newark v. Central R. Co., 297 F. 77, 78 (3rd Cir 1924), Georgia Power Co. v. 54.20 Acres of Land, 563 F.2d 1178, 1189 (5th Cir. 1977), and Davenport v. Three-Fifths of An Acre of Land, 252 F.2d 354 (1958 7th Cir)-- predates Blatchford and Alden. Additionally, because a state entity was not a party in Georgia Power Co. and not a defendant in Davenport, Eleventh Amendment immunity was not at

issue. And in Newark v. Central R. Co., the State of New Jersey waived sovereign immunity by affirmatively joining litigation in federal court.

Separately, New Jersey's "apparent failure to raise this Eleventh Amendment argument in prior pipeline cases" is immaterial. First, a State may raise sovereign immunity at any point in a proceeding, Wheeling & Ry. Co. v. Public Util. Comm'n, 141 F.3d 88, 91 (3d Cir. 1998), cert. denied, 528 U.S. 928 (1999), let alone a different proceeding. Further, "a State's sovereign immunity is a personal privilege which it may waive at pleasure." College Sav. Bank v. Florida Prepaid Post Secondary Educ. Expense Bd., 527 U.S. 666, 675 (1999)(citation and quotation omitted). An individual state's waiver of sovereign immunity protection must be clear and unmistakable. Pennhurst State School Hosp. v. Halderman, 465 U.S. 89, 99 (1984). "Courts indulge every reasonable presumption against waiver" of fundamental constitutional rights. State sovereign immunity, no less than the right to trial by jury in criminal cases, is constitutionally protected." College Sav. Bank, supra, 527 U.S. at 682 (1999)(citations and quotations omitted). Even when a state does consent, it "may withdraw its consent whenever it may suppose that justice to the public requires it." Beers v. Ark., 61 U.S. 527, 529 (1858). As such, it is irrelevant whether New Jersey has consented to federal court

jurisdiction in a previous suit. The single relevant fact is that New Jersey does not consent to this one.

New Jersey's Sovereign Immunity Has Not Been Abrogated

Since the delegation theory does not allow PennEast to sidestep New Jersey's sovereign immunity protections, the Condemnation Actions must be analyzed under the two-step abrogation test set forth in Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996). According to the Supreme Court, "[i]n order to determine whether Congress has abrogated the States' sovereign immunity, [the Supreme Court] ask[s] two questions: first, whether Congress has "unequivocally expressed its intent to abrogate the immunity," and second, whether Congress has acted "pursuant to a valid exercise of power," Id., at 55 (1996). Both of these questions must be answered affirmatively before a state may be brought into court without its consent. Here, since neither prong can be satisfied - much less both - these actions should be dismissed.

With regard to the first Seminole Tribe question, "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." Dellmuth v. Muth, 491 U.S. 223, 227-228 (1989)(emphasis added) "Evidence of congressional intent [to abrogate State sovereign immunity] must be both

unequivocal and textual." Id., at 230. Here, the NGA says nothing about the ability to bring a state into federal court. The NGA is a general authorization for suit, which the Supreme Court has ruled definitively as insufficient to show abrogation. Atascadero State Hospital v. Scanlon, 473 U.S. 234, 246 (1985).

With regard to the second Seminole Tribe question, the Supreme Court has made it clear that Congress lacks power under Article I of the Constitution to abrogate the states' sovereign immunity from suits commenced or prosecuted in the federal or state courts. Alden v. Me., 527 U.S. 706, 712 (1999)(citing Seminole Tribe of Florida, supra, 517 U.S. 44). Here, no one disputes that the NGA was enacted pursuant to Congress' Article I power to regulate interstate commerce. 15 U.S.C. § 717. Therefore, even if this court were to find the requisite clear and unmistakable Congressional intent to abrogate state sovereign immunity under the NGA, which the State would argue it cannot, such abrogation would not be a valid exercise of Congressional power under the Supreme Court's decision in Alden. Accordingly, these actions should be dismissed.

CONCLUSION

For the reasons set forth herein, State Defendants request that the District Court Decision by reconsidered and the Condemnation Actions be dismissed for lack of jurisdiction.

GURBIR S. GREWAL
ATTORNEY GENERAL OF NEW JERSEY

By: s/ Mark Collier
Mark Collier (MC6192)
Deputy Attorney General