No. ______

In the Supreme Court of the United States

DELAWARE RIVERKEEPER NETWORK; DELAWARE RIVERKEEPER, MAYA VAN ROSSUM, AND LANCASTER AGAINST PIPELINES,

Petitioners,

v.

SECRETARY PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION; PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION; AND TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 401 of the Clean Water Act requires an applicant for an interstate natural gas pipeline project to obtain "a certification from the State in which the discharge . . . will originate . . . that any such discharge will comply with" that State's water-quality standards. 33 U.S.C. § 1341(a)(1). The Clean Water Act leaves the states with primary responsibility to regulate such discharges based on the state's individual water quality standards. Each state has its own unique state defined administrative process for the issuance and review of any such water quality certifications. The Third Circuit ruled that despite the fact that Pennsylvania's administrative review process was not complete, and therefore not "final" pursuant to state law, Section 717r(d)(1) of the Natural Gas Act required an appeal of a water quality certificate to be heard directly by the Third Circuit Court of Appeals. In doing so, the Third Circuit discarded Pennsylvania's statutory definition of finality, and instead inserted its own federal standard of finality.

1. May a federal court preempt a state's administrative review process by substituting a federal finality standard for a state finality standard, where the state finality standard is clearly defined by state law?

2. Whether the federal court's preemption of the Pennsylvania Environmental Hearing Board's state administrative review process violates the Tenth Amendment?

LIST OF PARTIES

Petitioners are the Delaware Riverkeeper Network and the Delaware Riverkeeper, Maya van Rossum, and Lancaster Against Pipelines. Respondents are the Secretary of the Pennsylvania Department of Environmental Protection and the Pennsylvania Department of Environmental Protection. Intervenor-Respondent is Transcontinental Gas Pipe Line Company LLC.

CORPORATE DISCLOSURE

This Petition is not filed on behalf of a corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Delaware Riverkeeper Network, the Delaware Riverkeeper, Maya van Rossum, and Lancaster Against Pipelines petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

This case strikes at the heart of our federal system. State governments have traditionally played a central role in regulating environmental impacts of various types of construction projects. Congress' intent to maintain and reinforce this "cooperative federalism" framework is explicitly stated in the Clean Water Act: "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use . . . of land and water resources." 33 U.S.C. § 1251(b). Here, a federal court decision has upended this balanced framework and stripped Pennsylvania, and potentially many other states, from discharging its statutory role in issuing certifications based on state law.

Specifically, the Third Circuit in *Delaware Riverkeeper Network, et al. v. Secretary Pennsylvania Department of Environmental Protection, et al.*, 903 F.3d 65 (3d Cir. 2018) (hereinafter "*DRN*"), supplanted Pennsylvania's definition of finality with regard to a state issued certification and instead substituted a federal standard. In doing so, the Third Circuit has prematurely invoked the Natural Gas Act's appeal mechanism, which has wrought uncertainty as to which states will have their administrative review process preserved and which states will have them preempted. Indeed, this uncertainty has already

materialized in the Third Circuit itself, whereby the administrative review process in Pennsylvania is preempted, while in neighboring New Jersey the same administrative process is unchanged. Further, the Third Circuit's decision irreconcilably conflicts with the way in which the First Circuit addressed the preemptive effect of the Natural Gas Act. Furthermore, the *DRN* decision commandeers Pennsylvania's legislative and administrative processes in violation of the 10th Amendment.

Here, Petitioners Delaware Riverkeeper Network, the Delaware Riverkeeper, and Lancaster Against Pipelines' challenged the issuance of a conditional water quality certification pursuant to Section 401 of the Clean Water Act, 33 U.S.C. § 1341(a) ("water quality certification"). The Pennsylvania Department of Environmental Protection ("Department") issued the Section 401 water quality certification to Transcontinental Pipeline Company, LLC ("Transco") for the Atlantic Sunrise Pipeline Project ("Project") on or about April 5, 2016. The issuance was noticed in the *Pennsylvania Bulletin* on April 23, 2016. The notice directed any person aggrieved by the action to an appeal with the Pennsylvania Environmental Hearing Board (hereinafter "Board"). On or about May 5, 2016, Petitioners filed the above-captioned action for review of the Department's decision to grant water quality certification for the Project. On or about May 5, 2016, Lancaster Against Pipelines also filed an administrative appeal of the Department's decision with the Board.

There are no disputed issues of fact for the Court to resolve. The issues are limited to matters of law.

Furthermore, the questions to be resolved by the Court have industry wide import, as the this Court's resolution will determine the preemption or preservation of state administrative review processes for all appeals taken pursuant to Section 717r(d)(1) of the Natural Gas Act in every state.

OPINIONS BELOW

The Court of Appeals opinion is reported at *Delaware Riverkeeper Network, et al. v. Secretary Pennsylvania Department of Environmental Protection, et al.*, 903 F.3d 65 (3d Cir. 2018). Petitioners' Appendix ("App.") A.

JURISDICTION

The judgment of the Third Circuit was entered on September 4, 2018. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Tenth Amendment to the United States Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

15 U.S.C. § 717r(d)(1) of the Natural Gas Act states: "The United States Court of Appeals for the circuit in which a facility subject to section 717b of this title or 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 . . . ."

STATEMENT OF THE CASE

A. Statutory Background

The Natural Gas Act prohibits construction or operation of a natural gas pipeline without a Certificate of Public Convenience and Necessity from the Federal Energy Regulatory Commission ("Commission"). 15 U.S.C. § 717f(c)(1)(A). The Natural Gas Act further requires that, prior to issuing a Certificate of Public Convenience and Necessity, the applicant must demonstrate compliance with the many other federal laws and regulations that apply to the pipeline project. *See id.* § 717f(e) (authorizing the Commission to grant Certificates subject to "reasonable terms and conditions"). In the instant matter the Commission found that Transco demonstrated such compliance because "it has received all applicable authorizations required under federal law." *Transcontinental Gas Pipe Line Co, LLC*, 158 F.E.R.C. ¶ 61125, at App. C ¶ 10 (2017).

One of the applicable authorizations is a water quality certification issued under Section 401 of the Clean Water Act. 33 U.S.C. § 1341(a)(1). Section 401 requires a permit applicant to obtain "a certification from the State in which the discharge . . . will originate [to ensure] that any such discharge will comply with" that State's water-quality standards. *Id.* Therefore, in order to receive a Certificate of Public Convenience and Necessity from the Commission, a pipeline company must apply for and receive water quality certifications

from each of the affected states. Pennsylvania has specific statutes, regulations, and administrative procedures that relate to the process of obtaining a water quality certification. *See* Pennsylvania Clean Streams Law, 35 P.S. § 691.1 *et seq*., the Stormwater Management Act, 32 P.S. § 680.1 *et seq*., the Dam Safety and Encroachments Act, 32 P.S. § 673.1 *et seq.*, and the Flood Plain Management Act, 32 P.S. § 679.101 *et seq.*, and the regulations found in 25 Pa. Code §§ 92a, 102, 105.

B. Appeals Process

1. Under The Natural Gas Act

The Natural Gas Act provides:

> The United States Court of Appeals for the circuit in which a facility subject to section 717b of this title or 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 . . . .

15 U.S.C. § 717r(d)(1) (hereafter, "§ 717r(d)(1)"). The Natural Gas Act does not amend the Clean Water Act by implication nor displace the primacy Congress expressly assigned to state control of water pollution. *See* 15 U.S.C. § 717b(d) (nothing in this chapter affects the rights of States under . . . the [Clean Water Act]").

2. Under State Law

In Pennsylvania, after the Pennsylvania Department of Environmental Protection issues a water quality certification, aggrieved parties are afforded the right to appeal such a decision for administrative review before the Pennsylvania Environmental Hearing Board within 30 days. 25 Pa. Code § 1021.52. Decisions of the Board may be appealed to the appropriate federal or state court. 42 Pa. C.S. §§ 763(a), 723(a).

C. Procedural History

In response to the requirements of the Natural Gas Act and Clean Water Act, Transco was required to obtain a water quality certification from the Pennsylvania Department of Environmental Protection for the Project. App.48-54. In 2015, Transco formally applied both to the Commission for a Certificate of Public Convenience and Necessity and to the Department for a Section 401 water quality certification. App.6. Shortly thereafter, the Department published notice in the *Pennsylvania Bulletin* (Pennsylvania's analogue to the *Federal Register*) of its intent to grant Transco a water quality certification. App.48-54. In April 2016, the Department issued Transco's Water Quality Certification. App.6.

In response to the Department's notice, the Petitioners filed two parallel challenges to the issued Water Quality Certification. First, Delaware Riverkeeper Network, the Delaware Riverkeeper, Maya van Rossum, and Lancaster Against Pipelines sought relief directly from the Third Circuit Court of Appeals under the exclusive review provision of the Natural

Gas Act, 15 U.S.C. § 717r(d)(1). Second, Lancaster Against Pipelines appealed the Department's decision to the Pennsylvania Environmental Hearing Board.[1]

Pennsylvania law specifically vests the Board with the exclusive "power and duty to hold hearings and issue adjudications" on orders, permits, licenses and decisions of the Department, including a Section 401 water quality certification. 35 P.S. § 7514(a); *see also* 25 Pa. Code § 1021.52. In fact, the Board has thrice determined that it has jurisdiction over precisely this type of appeal. App.43; App.33-34; *Delaware Riverkeeper Network v. Commonwealth of Pennsylvania, Department of Environmental Protection*, EHB Docket No. 2012-196-M, 2013 WL 604393 (February 1, 2013).

Nevertheless, the Board stayed its proceedings pending a jurisdictional ruling from the Third Circuit. In the Third Circuit case, petitioners argued that the Board has jurisdiction over the Department's issuance of Transco's Water Quality Certification and must provide finality by administratively reviewing the proceeding before the Third Circuit hears any appeal pursuant to Section 717r(d)(1). App.8. On September 4, 2018, the Third Circuit rejected Petitioners' arguments, and held that the Natural Gas Act preempted Pennsylvania's administrative review process at the Board for the water quality certification. App.1-26.

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[1] *See Lancaster Against Pipelines v. Commonwealth*, No. 2016-075-L (Pa. Envtl. Hrg. Bd.).

REASONS FOR ALLOWANCE OF THE WRIT

I. UNDER RULE 10(a) THIS COURT SHOULD RESOLVE THE CIRCUIT SPLIT OVER WHETHER STATE ADMINISTRATIVE LAW PROCEDURES ARE PRESERVED PURSUANT TO APPEALS TAKEN UNDER SECTION 717r(d)(1) OF THE NATURAL GAS ACT

A. The Third Circuit's Opinion In *DRN* Irreconcilably Conflicts With The First Circuit's Opinion In *Berkshire* And The Second Circuit's Opinion In *Murphy*

The question raised in *DRN* was whether or not the issuance of a Clean Water Act Section 401 water quality certificate by the Department was a final action subject to § 717r(d)(1) of the Natural Gas Act such that the state administrative review process was entirely preempted.

The Third Circuit's resolution of that question irreconcilably conflicts with the First Circuit's handling of precisely that same question in *Berkshire Environmental Action Team, Inc. v. Tennessee Gas Pipeline, LLC*, 851 F.3d 105 (1st Cir. 2017). It also conflicts with the Second Circuit's holding in *Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342 (2d Cir. 2005). Lastly, not only is the Third Circuit's decision in *DRN* at conflict with decisions of the First Circuit and Second Circuit, but the decision cannot be reconciled with the Third Circuit's later decision in *Township of Bordentown, New Jersey v. Federal Energy Regulatory Commission*, 903 F.3d 234 (3d Cir. 2018).

1. The Third Circuit's Finding Of Finality In *DRN* Conflicts With The First Circuit's Holding In *Berkshire*

The First Circuit squarely addressed the scope of the preemptive effect of Section 717r(d)(1) in *Berkshire Environmental Action Team, Inc. v. Tennessee Gas Pipeline, LLC*, 851 F.3d 105 (1st Cir. 2017) (hereinafter "*Berkshire*"), where the court found that the state administrative appeal process is preserved and must be completed prior to United States Court of Appeals review pursuant to Section 717r(d)(1). Here, the Third Circuit came to the opposite conclusion when faced with the same question.

i. The Determination Of The Finality Of A State Issued Permit Must Respect State Law

The lynchpin of the Third Circuit's ruling in *DRN*, is that the "finality requirement itself, along with the presumption that Congress intended us to apply it, are creatures of federal, not state, law." App.10. The court applied "a federal finality standard to determine whether Congress has made the results of that process reviewable under the Natural Gas Act." App.12. This is a crucial determination because to the extent state law – and not federal law – informs the finality determination for a state issued permit there is no question that the Department's action was not final. The Third Circuit does not cite any authority supporting its decision to disregard this aspect of Pennsylvania law, and, in any case, the Third Circuit's conclusion expressly conflicts with the First Circuit's interpretation of finality in *Berkshire*. App.14-16. As

such, the Third Circuit prematurely invoked Section 717r(d)(1), prior to "final" agency action.

The *Berkshire* panel was faced with the question of whether the federal circuit court had jurisdiction to review a water quality certification issued by the Massachusetts Department of Environmental Protection ("MassDEP") prior to the completion of a state administrative appeal process. *Berkshire*, 851 F.3d at 108. The panel first noted that it is "a long-standing and well-settled 'strong presumption . . . that judicial review will be available only when agency action becomes final.'" *Id*. at 109 (*quoting Bell v. New Jersey*, 461 U.S. 773, 778 (1983)). "In a literal sense, state agencies repeatedly take 'action' in connection with applications for water quality certifications . . . we see no reason, though, to think that Congress wanted us to exercise immediate review over such preliminary and numerous steps that state agencies may take in processing an application before they actually act in the more relevant and consequential sense of granting or denying it." *Id.* at 108. "An agency action is 'final' only where it 'represents the culmination of the agency's decision making process and conclusively determines the rights and obligations of the parties with respect to the matters at issue.'" *Id.* at 111 (*quoting Rhode Island v. EPA*, 378 F.3d 19, 23 (1st Cir. 2004)).

To determine whether MassDEP's action was final, the First Circuit relied on the "substance of the Massachusetts regulatory regime" to direct its decision. *Id*. at 112. In doing so, the *Berkshire* panel examined several provisions of the Massachusetts Code to come to its conclusion on finality. Specifically, the panel

looked to portions of state law which mandate that only after the administrative process is complete is there an "issuance of a final decision." *Id*. at 112 (citing 310 MCR § 1.01(c)); *see also id*. (citing 314 MCR § 9.10(1)). Relying on these provisions, the *Berkshire* panel found state law dictated that the "initial letter granting a water quality certification . . . [was] not a final agency action." *Id*.

Additionally, the First Circuit concluded, "[w]e see no indication that Congress otherwise intended to dictate how (as opposed to how quickly) MassDEP conducts its internal decision-making before finally acting." *Id*. at 113. The *Berkshire* panel's reliance on state law to determine finality respects the well-established "scheme of cooperative federalism" upon which the Clean Water Act is built. *United States v. Cooper*, 482 F.3d 658, 667 (4th Cir. 2007); *see also S. Ohio Coal Co. v. Office of Surface Mining, Reclamation & Enf't, Dep't of Interior*, 20 F.3d 1418, 1427 (6th Cir. 1994) ("[T]he CWA sets up a system of 'cooperative federalism,' in which states may choose to be primarily responsible for running federally-approved programs").

Rather than respecting this system of cooperative federalism, the Third Circuit, in *DRN*, discarded the way in which Pennsylvania defined finality and inserted its own federal standard, usurping the power of administrative review from Pennsylvania's long-established state administrative review process. App.10. Pennsylvania state law leaves no doubt on the issue of finality, by expressly and unequivocally stating that "no action of [the Department] adversely affecting a person shall be final as to that person until the

person has had the opportunity to appeal the action to the [B]oard . . . ." 35 P.S. § 7514(c). As further explained by the Board:

> As far as the [Board] is concerned, a [Department] action only becomes final following an opportunity to appeal the action to the Environmental Hearing Board. **Pennsylvania law is very clear on this point:** "[N]o action of the department [of environmental protection] adversely affecting a person shall be final as to that person until the person has had an opportunity to appeal the action to the [environmental hearing] board. . . ." 35 P.S. § 7514(c). **Courts in Pennsylvania have long held "that a Department action is not final until an adversely affected party has had an opportunity to appeal the action to this Board."**

App.33-34 (emphasis added). In this context, the Board has stated that "[w]hether a state agency action is final is a question of state law," not federal law. App. 33.

As such, Pennsylvania law dictates that no action of the Department is "culminated" or "conclusively decided" unless and until a person has had the opportunity for review by the Board. *See* 35 P.S. § 7514(c). Indeed, a proper appeal to the Board may very well negate the Department's initial certificate approval by virtue of the Board's power to grant a supersedeas upon cause shown. 35 P.S. § 7514(d)(1); *see also Bradley and Amy Simon v. DEP*, EHB Docket No. 2017-019-L, 2017 WL 2399755 (May 25, 2017); *Center for Coalfield Justice and Sierra Club v. DEP*, EHB Docket No. 2016-155-B, 2017 WL 663900 (February 1,

2017). Therefore, "there is no doubt whatsoever that the Department's certification of Transco's project was not a final action." App.43.

Furthermore, this Court in *Darby v. Cisneros*, 509 U.S. 137 (1993), recognized that an agency may require an initial administrative decision to be appealed administratively before it may be deemed to be the kind of "final" administrative action that may be challenged in court. *Id.* at 153–54; *see also Global Tower Assets, LLC v. Town of Rome*, 810 F.3d 77, 86 (1st Cir. 2016) (administrative review can "impose[] an exhaustion requirement and make[] plain that the underlying agency action is not a final one") (internal quotations omitted) (emphasis original). Here, Pennsylvania has enacted a comprehensive regulatory and administrative scheme for the protection of the environment within the Commonwealth, and, pursuant to this structure, the water quality certificate at issue was not "final". *See* 35 P.S. § 7514(c). This scheme specifically dictates, in no uncertain terms, that Department action is not final, and therefore subject to Section 717r(d)(1) of the Natural Gas Act, until aggrieved parties have had an opportunity to appeal such action for administrative review to the Board.

Therefore, the Third Circuit's dismissal of the way in which state law addresses finality, and conjuring of its own federal standard, conflicts with the reasoning and statements of law in *Berkshire* and those previously articulated by this Court.

ii. The Substantive Functions Of The Administrative Review Process in *DRN* and *Berkshire* Are The Same

Beyond the plain statement of finality in the Pennsylvania Code, the substance and function of the administrative process in Massachusetts parallels the process in Pennsylvania. Indeed, the Board has reviewed the procedures in Massachusetts, compared it with its own procedures, and found that "Pennsylvania's procedures are **nearly identical in substance** to the Massachusetts procedures that the First Circuit found not to be final until the adversely affected party had an opportunity to take advantage of that state's hearing process." App.43 (emphasis added).

In all consequential forms, the Pennsylvania Code and Massachusetts code function in the same manner. This comes as no surprise, as the court in *Berkshire* predicted that parallel review processes would likely be found in numerous states noting, "the manner in which Massachusetts has chosen to structure its internal agency decision-making strikes us as hardly unusual . . . ." *Berkshire*, 851 F.3d at 112. For example, in both states the state agency action is not "final" until opportunity for an administrative appeal. *Compare* 35 P. S. § 7514(c); *with Berkshire*, 851 F.3d at 112. In both states agency action is subject to an administrative appeal with an adjudicatory hearing. *Compare* 35 P. S. § 7514; 25 Pa. Code § 1021.51; *with* 314 CMR 9.10(1). Both states have an administrative adjudication that is *de novo* review of agency action. *Compare Leatherwood, Inc. v. Com., Dept. of Environmental Protection*, 819 A.2d 604, 611 (Pa. Cmwlth. 2003); *with Berkshire*, 851 F.3d at 112. Both states' adjudicatory

hearings can include witness testimony and other evidence. *Compare* 25 Pa. Code § 1021.117; *with* 310 CMR 1.01(5)(a), (b). Both states allow for the adjudication to include pre-hearing discovery. *Compare* 25 Pa. Code § 1021.102; *with* 310 CMR 1.01(12). And, finally, in both states a party can appeal to the state judiciary following a decision by an administrative law judge. *Compare* 25 Pa. Code § 1021.201; *with* 310 CMR 1.01(14)(f).

Similar to the administrative process in *Berkshire*, the Board does nothing more than provide the administrative review of the Department's actions. In creating the Board, the Pennsylvania legislature directed that "[t]he board shall continue to exercise the powers to hold hearings and issue adjudications which (powers) were vested in agencies listed in section 1901-A of the act of April 9, 1929 (P.L.177, No.175), known as The Administrative Code of 1929." 35 P.S. § 7514(c). In the judgment of the Pennsylvania Legislature, the optimal administrative procedure for the Commonwealth of Pennsylvania was to create the Board to perform some of the duties of the Department, including the administrative review process for Department decisions. *See* 35 P.S. § 7514. Indeed, the Pennsylvania Supreme Court characterized the Department and the Board as together being part-and-parcel of the governing environmental administrative structure. *See Tire Jockey Serv., Inc. v. Dep't of Envtl. Prot.*, 915 A.2d 1165, 1185 (2007) (describing "[t]he administrative structure that governs environmental regulation in Pennsylvania" as consisting of three "inter-related branches" including the Environmental Quality Board, the Department, and the Board). The Board is, in essence, operating down the hall from,

instead of within the same office as, the Department. As such, despite the fact that the Board is not within the Department as it is in *Berkshire*, it is a superficial distinction without a difference as the structural and operational administrative processes in Pennsylvania and Massachusetts are the same.

Considering the substantively matching provisions governing administrative appellate review in *DRN* and *Berkshire*, the conclusions of the First and Third Circuits irreconcilably conflict.

2. The Third Circuit's Finding Of Finality In *DRN* Conflicts With The Second Circuit's Holding In *Murphy*

Similar to *Berkshire*, other Circuit Courts have looked to state law to determine the finality of state agency action in federal court proceedings. All of these decisions are also now at conflict with the Third Circuit's decision in *DRN*.

For example, in *Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342 (2d Cir. 2005), the Second Circuit relied on the way in which state law defined finality to guide its decision with regard to a zoning issue. There, homeowners were served by the local zoning commission with a cease and desist order related to large prayer meetings being held at their home. *Id*. at 345. The homeowners brought an action in federal court alleging, among other things, that their First Amendment rights had been violated. *Id*. at 345-346. The Second Circuit deferred judgement, accepting the state's definition of what constituted a "final" decision and noting the importance of state administrative procedures. *Id*. at 351 (looking to the

Connecticut General Statutes to determine whether a cease and desist order was final). In this context, the Second Circuit found "courts have recognized that federalism principles also buttress the finality requirement." *Murphy*, 402 F.3d at 348; *see also Kurtz v. Verizon New York, Inc.*, 758 F.3d 506, 512 (2d Cir. 2014) (allowing the full record to be developed "gives proper respect to principles of federalism"). Specifically, the *Murphy* court held that:

> The Zoning Board of Appeals possessed the authority to review the cease and desist order *de novo* to determine whether the zoning regulations were properly applied. In fact, a zoning board of appeals "is in the most advantageous position to interpret its own regulations and apply them to the situations before it." . . . For this reason, the Connecticut Supreme Court recognized in *Port Clinton* that a zoning board of appeals will typically be the venue from which a final, definitive decision will emanate. It thus stated: "In many instances a final decision by the 'initial decisionmaker,' really means a decision by the zoning board of appeals, when that body ... is exercising its power to grant variances and exceptions."

Id. at 352-53 (citations omitted). The *Murphy* court found that the requirement that the homeowners obtain a final definitive decision from the local zoning authority as directed under Connecticut law ensures that there will be a record of concrete and established facts should the occasion of federal review arise. *Id*. at 352. Concluding that, "[u]ntil this variance and appeals process is exhausted and a final, definitive decision

from local zoning authorities is rendered, this dispute remains a matter of unique local import over which we lack jurisdiction." *Murphy*, 402 F.3d at 354. Further, such a structure ensures "that federal review – should the occasion eventually arise – is premised on concrete and established facts" as proscribed by state law. *Id*. at 353.

A number of other US Court of Appeals have followed the Second Circuit's logic, including the Third Circuit. *See Taylor Inv., Ltd. v. Upper Darby Tp.*, 983 F.2d 1285, 1292 (3d Cir. 1993) (federal court relying on the Pennsylvania Code to determine finality of a zoning decision); *Hoehne v. County of San Benito*, 870 F.2d 529, 532 (9th Cir. 1989) (decision is not final until the "government entity charged with implementing the regulations has reached a final decision"); *see also Spence v. Zimmerman*, 873 F.2d 256, 262 (11th Cir. 1989). While these decisions are largely zoning cases, the underlying rationale regarding deference to state finality standards when making decisions implicating state law nevertheless applies with equal force.[2]

[2] The singular case cited by the court in *DRN* to support its holding, *Williamson Cly. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194, (1985) (hereinafter "*Williamson*"), is inapposite. *Williamson* involved a developer's lawsuit against a planning commission for an alleged taking of property. The court held that the takings claim was not ripe because "the Commission's denial of approval does not conclusively determine whether respondent will be denied all reasonable beneficial use of its property, and therefore is not a final, reviewable decision." *Id.* 473 U.S. at 194. While the court held that "[t]he question whether administrative remedies must be exhausted is conceptually distinct . . . from the question whether an administrative action must be final before it is judicially

The finality of particular agency action must be considered in light of the whole statutory scheme within which the particular action is undertaken. *State of Tex. v. U.S. Dept. of Energy*, 764 F.2d 278 (5th Cir. 1985). As noted by the *DRN* panel, the "Administrative Procedure Act authorizes a broad scope of review," and specifically does not "limit[] courts to considering only federal law." App 25. "The presumption against federal preemption of state law is one of 'dual jurisdiction' which results from reasons of comity and mutual respect between the two judicial systems that form the framework of our democracy." *Kiak v. Crown Equip. Corp.,* 989 A.2d 385, 390 (Pa. Super. Ct. 2010) (internal citation omitted). Nothing in case law, statutory law, or the Third Circuit's decision provides that a federal court should disregard Pennsylvania law, with regard to a state issued authorization, and instead adopt its own definition of finality.

The proper presumption is that the federal courts must respect Pennsylvania procedure. Pennsylvania, in its wisdom, established the Board as an administrative body with special expertise in reviewing actions of the Department and tasked with establishing the record for those Department actions, and, therefore, its review. *See Harman Coal Co. v. Com., Dept. of Environmental Resources*, 384 A.2d 289, 292 (Pa. Cmwlth. 1978) (finding that "members of the [Board] and its staff workers have an expertise in the scientific and technical aspects of environmental protection not possessed by this Court") (citations omitted). As such,

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reviewable," the *Williamson* court did not, in any way, hold that a state's definition of finality in its regulatory scheme may be disregarded by the courts. *Id.* 473 U.S. at 192.

the Board is uniquely qualified, and in the most advantageous position to interpret and apply Pennsylvania environmental law to Department actions. Absent a final determination by the Board, as required by state law, any later judicial review would proceed without: (1) development of a full record, (2) a precise demonstration of how the state specific regulations should be applied to particular project, and (3) thus would risk premature interference in complex environmental matters of local concern more aptly suited for resolution by a body specifically designed to address precisely these issues.[3]

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[3] Ironically, the Natural Gas Act requires the Federal Energy Regulatory Commission to complete its administrative process prior to judicial review of its actions, despite the fact that the Commission's issuance of a Certificate of Public Convenience and Necessity immediately imbues a possessor of the Certificate with a number of concrete rights, including eminent domain rights. *Papago Tribal Utility Auth. v. FERC*, 628 F.2d 235, 238-39 & n.11 (D.C. Cir. 1980) (explaining that a party must complete the administrative appeals process before it may file a petition for review, and that the order denying the requests for rehearing is the final, reviewable agency order); *see also Energy Transfer Partners, LP v. FERC*, 567 F.3d 134, 141 (5th Cir. 2009). "There is good reason to prohibit any litigant from pressing its cause concurrently against both the judicial and the administrative fronts: a favorable decision from the agency might yet obviate the need for review by the court," or the agency appeals process might alter the issues ultimately presented for review, "mak[ing] the case moot and [the court's] efforts supererogatory." *Clifton Power v. FERC*, 294 F.3d 108, 111-12 (D.C. Cir. 2002)(citations omitted). *See also Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 967 (D.C. Cir. 2011) (citing *Devia v. NRC*, 492 F.3d 421, 424 (D.C. Cir. 2007) (claim may be unripe because the court may never need to decide it)). The same logic applies here.

B. The Third Circuit's *DRN* Decision Has Resulted In An Intra-Circuit Split That Preserved The Administrative Review Process In New Jersey But Preempted The Same Process In Pennsylvania

The question of the preemptive scope and reach of Section 717r(d)(1) has implications far beyond this case. Each state has different statutory schemes regarding the way in which the state reviews and approves water quality certifications – and other related state permits issued for Commission jurisdictional projects. The Third Circuit's *DRN* opinion sows uncertainty as to how, and in what forum, an appeal of a state water quality certification, or any other state approval required pursuant to a Commission jurisdictional project, occurs.

This uncertainty has already manifested within the Third Circuit, as the Third Circuit's decision engendered an intra-circuit split regarding how the administrative appeals process is preserved in New Jersey, yet, preempted in neighboring Pennsylvania. A day after the *DRN* decision, the Third Circuit panel in *Township of Bordentown, New Jersey v. Federal Energy Regulatory Commission*, 903 F.3d 234 (3d Cir. 2018) (hereinafter "*Bordentown*"), held that the Natural Gas Act "leaves untouched the state's internal administrative review process, which may continue to operate as it would in the ordinary course under state law." *Bordentown*, 903 F.3d at 268.

In *Bordentown*, Transco planned a separate upgrade of its natural gas pipeline system in New Jersey and applied to both the Commission for a Certificate of Public Convenience and Necessity and to the New

Jersey Department of Environmental Protection ("New Jersey") for a Section 401 water quality certification. *Id*. at 244. In 2015, the Commission granted the Certificate of Public Convenience and Necessity contingent on Transco's compliance with all other required authorizations. *Id*. at 245. On March 13, 2017, New Jersey issued the water quality certification, among other approvals. *Id*. In accordance with New Jersey administrative procedures, the petitioners timely sought an administrative hearing with regard to New Jersey's issuance of the permits. *Id*. at 243. New Jersey denied the petitioners' request for an administrative hearing because it believed that its administrative procedures were preempted by the Natural Gas Act. *Id.*

Yet, the Third Circuit *Bordentown* panel found that "the only plausible" conclusion to draw from the text of the Natural Gas Act is "that § 717r(d)(1) **does not preempt** state administrative review of interstate pipeline permitting decisions." *Id*. at 269 (emphasis added). In finding this, the *Bordentown* panel closely analyzed the language of the Natural Gas Act and held that a state's administrative proceedings are not "civil actions" over which the Third Circuit has exclusive jurisdiction:

> …§ 717r(d)(1)—which is titled "Judicial review"— grants "original and exclusive jurisdiction over any **civil action for the review** of an order or action of a ... or State administrative agency." [emphasis in original]. Congress therefore clearly understood the difference between establishing direct judicial "review" over agency action (supplanting any

> alternative intra-agency process) and creating an exclusive judicial forum in the federal Courts of Appeals for a "civil action" challenging an agency's decision-making (separate from the agency's own internal review process). **As opposed to affirmatively installing federal courts to oversee the administrative process, as it did in § 717r(b) by placing the "review" of all FERC action in the Courts of Appeals, Congress did not interject federal courts into the internal workings of state administrative agencies**.

Id. at 268 (emphasis added).

The *Bordentown* panel took pains to discuss how, if it had accepted Transco's arguments, the Natural Gas Act would "cut off any state review other than the initial decision," making all initial state administrative decisions by default final decisions. *Id*. at 269. Finding that, if all initial decisions are final decisions, then the state administrative review of pipeline permitting decisions provided for in the Natural Gas Act would be eviscerated.[4] Specifically, the *Bordentown* panel concluded that,

> viewed in light of both federal and New Jersey authority, and barring any specific statutory language to the contrary, a hearing before an administrative body is not a "civil action." Accordingly, such hearings are not impacted by

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[4] For a detailed discussion of state's rights in this context, *see* Channing Jones, "The Natural Gas Act, State Environmental Policy, and the Jurisdiction of the Federal Circuit Courts," 42 Colum. J. Envtl. L. 163 (2016).

> § 717r(d)(1)'s assignment to the federal Courts of Appeals the exclusive jurisdiction over civil actions challenging a state agency's permitting decision made pursuant to federal law. Because, as relevant here, **the NGA explicitly permits states "to participate in environmental regulation of [interstate natural gas] facilities"** under the CWA, *Delaware I*, 833 F.3d at 368, **and only removes from the states the right for their courts to hear civil actions seeking review of interstate pipeline–related state agency orders made pursuant thereto, the NGA leaves untouched the state's internal administrative review process, which may continue to operate as it would in the ordinary course under state law**.

Id. at 268 (citations omitted)(emphasis added). The Natural Gas Act "only removes from the states the right for **their courts** to hear civil actions seeking review of interstate pipeline–related state agency orders made pursuant thereto . . ." *Id*. (emphasis added). In other words, the primary question is whether the proceeding is one before an administrative agency and therefore not a "civil action" over which the Third Circuit has exclusive jurisdiction. Therefore, it is without dispute that the proceeding before the Board is one before an administrative agency.

In contrast, the *DRN* panel cut off state administrative review after the initial decision of the Department. App.10-13. The *DRN* panel held that the decision of the Department was the final decision despite Pennsylvania administrative procedure that

provides for a hearing before the Board. App.10-13. *DRN* and *Bordentown* are therefore in conflict, and future petitioners and state administrative agencies are left to wonder how to proceed.

Additionally, in *DRN*, the panel found significant the fact that that the Department's decision "was immediately effective."App.14. The *DRN* panel noted the "First Circuit, by contrast, faced a Massachusetts regulatory regime in which the agency's initial decision was ineffective until either the time to appeal expired or a final decision on appeal issued." App.14 (*citing* 310 MASS. CODE REGS. 9.09(1)(e)). The *DRN* court further clarified that:

> Put another way, *Berkshire Environmental* addressed a provisional order that could become final in the absence of an appeal, while we are presented with a final order that could be overturned in the event of an appeal. In that regard, PADEP's order is no less final for the availability of EHB review than a federal agency's is for the availability of review in this Court.

App. 15.

However, like the Board, the administrative appeals process in the state of New Jersey is also "immediately effective." *See, e.g.*, Freshwater Wetlands Protection Act Rules, N.J.A.C. 7:7A-21.3(b), ("the operation of the permit or authorization is not automatically stayed" by a request for an adjudicatory hearing); Coastal Zone Management Rules, N.J.A.C. 7:7-28.3(b) ("the operation of the permit or authorization is not automatically stayed" by a request for an adjudicatory

hearing); and the New Jersey Pollutant Discharge Elimination System, N.J.A.C. 7:14A-17.6 ("The Department's grant of a request for an adjudicatory hearing shall not automatically stay any contested permit condition(s)"). As such, the primary reason the *DRN* panel distinguished the *Berkshire* decision is undercut by *Bordentown*.

If this Court were to allow the decisions in *DRN* and *Bordentown* to remain, there would be conflicting and inequitable standards intact in the Third Circuit. *Under* the *DRN* rationale, the Department action was final, Pennsylvania state administrative procedures were preempted, and the Third Circuit had exclusive jurisdiction over petitioners' objections to the Department's action. Under the *Bordentown* rationale, the Department action is final but Pennsylvania administrative procedures are not subject to preemption by the Third Circuit and may continue to operate as they would in the ordinary course under state law. These holdings are not reconcilable.

The fact is that the *DRN* panel's decision has already wrought uncertainty to state agencies under the Third Circuit's own jurisdiction – as evinced by New Jersey's initial denial of the administrative review hearing based on jurisdiction. This foretells even greater confusion outside of the Third Circuit as various courts must attempt to juggle the positions and interpretations of finality and the uncertain preemptive force of Section 717r(d)(1).

C. The Third Circuit's Decision In *DRN* Condemns The Third Circuit To Reviewing Incomplete And Inadequate Records In Section 717r(d)(1) Appeals And Strips Aggrieved Parties Of Their Due Process Rights

The Third Circuit's usurpation of Pennsylvania's clearly defined and well-established administrative review process has significant consequences for both the quality of the Third Circuit's review of future appeals, and the due process rights of aggrieved parties; as the rationale in the *DRN* decision dictates that any future rulings with regard to 717r(d)(1) challenges of state issued permits will rely on piecemeal administrative records.

In Pennsylvania, appeals to the Environmental Hearing Board are the means by which the record of a Department action is developed and "[a] party's due process rights are protected . . . ." *Fiore v. Department of Environmental Protection,* 655 A.2d 1081 (Pa. Cmwlth. 1995) *modified,* 351 A.2d 606 (Pa. 1976)) *(citing Commonwealth v. Derry Township*, 314 A.2d 868 (Pa. Cmwlth. 1973), *modified*, 351 A.2d 606 (Pa. 1976)); *see also Domiano v. Commonwealth, Department of Environmental Resources*, 713 A.2d 713, 717 (Pa. Cmwlth. 1998) (The Board exercises its primary jurisdiction so that, *inter alia*, "a record can be fully developed . . . ."). Specifically, the Pennsylvania Department of Environmental Protection does not have internal hearing examiners and, therefore, does not prepare formal written findings, a formal administrative record, or issue adjudications as part of its permit application review process. Rather, the

Department – by express statutory design – is specifically exempt from these record-keeping and record-developing requirements. *See* 35 P.S. § 7514(a)-(c), 2 PA. CONS. STAT. Ch. 5, Subchapter A, and the regulations thereunder at 1 Pa.Code Chapters 31–35, 1021. As such, the supposed record produced by the Department, and later relied upon by the Third Circuit in reviewing the agency's action cannot resemble a traditional administrative record.

Pennsylvania's laws and regulations mandate that the record be compiled during the state administrative review process, so it is the Board that is charged with creation of the administrative record. Indeed, the Board's administrative review is a *de novo* review and requires pre-hearing discovery, an evidentiary hearing, and post-hearing submissions. 25 Pa. Code §§ 1021.101-1021.134; *see also Leatherwood, Inc. v. Com., Dept. of Environmental Protection*, 819 A.2d 604, 611 (Pa. Cmwlth. 2003). This process is key because it is by virtue of an appeal to the Board that the Department and aggrieved parties develop the record that the Third Circuit can later review under the arbitrary and capricious standard. *See, e.g.*, *Morcoal Company v. Dep't of Envit. Resources*, 459 A.2d 1303 (Pa. Cmwlth. 1983) (an appeal to the Board protects important constitutional due process right of appellants). It is axiomatic that bad facts make bad law, and, without a full record to review, the Third Circuit relegates itself to deciding complex state law environmental issues on incomplete records. This is contrary to the holdings it other circuits as, it is precisely this concern of creating a complete factual record which undergirds the decisions in *Murphy* and its progeny, allowing aggrieved parties to complete the

state administrative process prior to judicial review. *See Murphy*, 402 F.3d at 352-53.

Furthermore, the *DRN* decision strips the due process rights of Pennsylvania citizens aggrieved by the issuance of the substantive permits issued pursuant to the water quality certifications by limiting the record of review and opportunity for participation in the process. For example, three underlying substantive state permits comprise Pennsylvania's water quality certificate. App.48-49. One of these permits is a National Pollutant Discharge Elimination System ("NPDES") permit for the discharge of water pursuant to Pennsylvania's Clean Streams Law (35 P.S. §§ 691.1 – 691.1001). App.49. Like appeals of the water quality certification itself, an appeal of the underlying NPDES permit is also taken pursuant to Section 717r(d)(1). However, unlike water quality certification, the Department does not provide any opportunity for comment or notice prior to the Department approving a NPDES permit. *See* Transcript of Oral Argument page number 44, lines 20-23, *Delaware Riverkeeper Network, et al. v. Pennsylvania Department of Environmental Protection, et al.*, Third Circuit Court of Appeals, Docket No. 16-2211, Oral Argument (November 7, 2017) (Department admitting that, "[t]here is no comment period. There is no notice in the Pennsylvania Bulletin of receipt for a request and notice of intent to use an [NPDES] general permit").

The Department does not publish notice of an NPDES general permit application in the Pennsylvania Bulletin, does not provide public notice in public newspapers, does not provide public notice anywhere

else, and does not accept comments on the NPDES general permit. Indeed, the Department simply does not have a process for a party to comment on this type of NPDES permit. This may not be a problem if an aggrieved party has the right to challenge the NPDES permit and develop a record *de novo* before the Board; however, the Third Circuit's decision eliminates this opportunity. Thus, an aggrieved party is left without notice and an opportunity to comment on an NPDES permit application, and without an opportunity to create a meaningful record before the Board. The *DRN* panel itself noted that "[t]he essence of due process is notice and an opportunity to be heard," and that "opportunity to comment and to petition this Court for review is enough" to satisfy due process concerns. App.17. Yet, the court's ruling in *DRN* strips aggrieved parties of the very same opportunity for notice and comment that it recognized as providing due process.

Moreover, under the Third Circuit's scheme articulated in *DRN*, a challenge to a NPDES permit in a federal circuit court pursuant to Section 717r(d)(1) – without administrative review by the Board – would be a futile effort as the record for such an appeal would be strictly limited to the record that was before the agency at the time that it rendered its decision. *See Camp v. Pitts*, 411 U.S. 138, 142 (1973) (holding that "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court"). Because aggrieved parties have no ability to create a meaningful record, they cannot cite or rely on any evidence challenging or questioning the Department's decision in any subsequent judicial proceeding before the Third Circuit.

Finally, it is not surprising that the Department lacks notice and comment procedures for the NPDES permits because the Department's review and approval process was never contemplated to be reviewed in a case where original jurisdiction is the US Court of Appeals for the Third Circuit. Rather, the permits issued by the Department have always been heard *de novo* by the Board. Indeed, as described above, Board review is an integral part of Pennsylvania environmental permitting and cannot be truncated without affecting the finality of a permit and causing serious due process problems. *See* 35 P.S. § 7514(d); *Consol Pa. Coal Co. v. Dept. of Env'tl Prot.*, 2011 WL 4943794, at *3 (Pa. Env. Hrg. Bd., Aug. 26, 2011).

As a result of the Third Circuit's decision, a landowner with a stream running through her back yard has no opportunity to engage with the Department regarding the issuance of a NPDES permit prior to the Department's authorization of a potential withdrawal from or discharge to that landowner's stream. Aggrieved parties have no notice of when a project applicant submits an application, what was in the application, when the Department considered the application complete, and therefore whether the application met the substantive criteria for coverage under the NPDES general permit and governing technical standards. Based on the *DRN* decision, such an aggrieved party would have no opportunity to build or otherwise challenge the record prior to judicial review by a federal appellate court. This is not how Section 717r(d)(1) was designed to operate, as such a draconian interpretation not only reduces the quality of the record the Third Circuit must rely on when deciding whether the Department's action was in

conformance with law, but also fatally undercuts an aggrieved party's ability to challenge the permit.[5]

II. THE THIRD CIRCUIT COURT'S PREEMPTION OF BOARD REVIEW VIOLATES THE 10TH AMENDMENT

The Tenth Amendment to the United States Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." As set forth *supra,* the Natural Gas Act and the Clean Water Act do not preempt state regulatory authority. To the contrary, they expressly recognize a role for the states in the regulatory process.

The Clean Water Act provides that any person applying for a federal license or permit for any project "which may result in any discharge into the navigable waters," must receive a certification from the state in which the project is located certifying that the expected discharge into navigable waters will comply with applicable provisions of the Clean Water Act and state water quality standards. *See Alabama Rivers Alliance*

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[5] To the extent there is concern that a Board proceeding would cause undue delay to a Commission jurisdictional Project, the Natural Gas Act accounts for this concern. The Natural Gas Act specifically provides project applicants with the ability to seek relief from agency delay in the U.S. Court of Appeals for the District of Columbia, which has the ability to "set a reasonable schedule and deadline for the agency to act on remand." 15 U.S.C. § 717r(d)(2)-(3). *See also Weaver's Cove Energy, LLC v. State of Rhode Island Dept. of Env'tl Management*, 524 F.3d 1330 (D.C. Cir. 2008) (considering appeal by company under Section 717r(d)(2) of the Natural Gas Act to an action on appeal to state administrative agency).

v. F.E.R.C., 325 F.3d 290, 297 (D.C. Cir. 2003) (citing 33 U.S.C. § 1341(a)(1)). Since the federal government has not preempted the state's role in approvals for natural gas pipelines but, to the contrary, has specifically given the states a role in this process, on what authority does the federal government then disregard the very administrative procedure that the state has developed to comply with the federal requirements?

As the Honorable Richard P. Mather of the Board has stated:

> Congress may not simply commandeer state officials and agencies, rewrite state laws, and direct that state agency officials defend state agency decisions in federal court in violation of state laws enacted by the Pennsylvania General Assembly.

App.34. The federal government does not have the power to issue a direct order to the government of a state thereby "conscript[ting] state governments as its agents" and may not dictate "what a state legislature may and may not do." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1476, 1477, 1478 (2018). This is exactly what the Third Circuit has done in *DRN* by commandeering Pennsylvania's legislative and administrative processes.

In usurping Pennsylvania law, the Third Circuit is, in effect, forcing the Commonwealth to legislate its administrative scheme to conform to the structure preferred by the Third Circuit. If the Commonwealth wants its preferred scheme for review of Department actions and its definition of finality to be respected, the

Commonwealth will be required to dissolve the Board and move its functions back within the Department. This is unconstitutional. Further, such a change would be nothing but a shuffling of furniture down the hall. Functionally, there would be absolutely no change in Pennsylvania's administrative process; the only change would be the roof under which that process occurs.

"While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York v. United States*, 505 U.S. 144, 162 (1992).

III. THE QUESTIONS PRESENTED ARE EXCEPTIONALLY IMPORTANT AND HAVE WIDE-RANGING IMPACT

If left intact, federal courts bound by the First and Third Circuits will be forced to apply conflicting and amorphous standards to determine whether individual state's administrative review processes are preserved or preempted by Section 717r(d)(1). The unclear timing for invoking Section 717r(d)(1) creates enormous uncertainty for the regulated community, aggrieved parties, and state agencies implementing their water quality certification programs. Therefore, it is critical that this Court create a unified standard that not only protects the due process rights of aggrieved parties, but also respects the well-developed and long-relied upon regulatory schemes of the states who are responsible for issuing the water quality certifications.

This Court should grant certiorari to resolve the conflicts to which the decision below contributes, and return the Natural Gas Act to its intended scope.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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January 9, 2019

APPENDIX

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APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 16-2211, 16-2212, 16-2218, 16-2400

[Filed September 4, 2018]

DELAWARE RIVERKEEPER NETWORK; DELAWARE RIVERKEEPER MAYA VAN ROSSUM,
Petitioners No. 16-2211

LANCASTER AGAINST PIPELINES,
Petitioner No. 16-2212

GERALDINE NESBITT,
Petitioner No. 16-2218

SIERRA CLUB,
Petitioner No. 16-2400

v.

SECRETARY PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION; PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Respondents

Transcontinental Gas Pipe Line)
Company, LLC,)
Intervenor Respondent)
———————————————)

On Petition for Review of an Order
of the Pennsylvania Department of
Environmental Protection
(FERC No. CP-15-138-000)

Argued November 7, 2017

Before: JORDAN, HARDIMAN, and SCIRICA,
Circuit Judges

(Filed: September 4, 2018)

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OPINION OF THE COURT

HARDIMAN, *Circuit Judge*.

These consolidated petitions for review concern the Atlantic Sunrise Project, an expansion of the natural-gas distribution network owned by Intervenor Transcontinental Gas Pipe Line Company (Transco). At issue is a decision of the Pennsylvania Department of Environmental Protection (PADEP or the Department) granting Atlantic Sunrise a Water Quality Certification under Section 401 of the Clean Water Act, 33 U.S.C. § 1341(a)(1).

In addition to their challenge to the merits of PADEP's decision to grant the Water Quality Certification, Petitioners raise an important

jurisdictional question we left open in *Delaware Riverkeeper Network v. Secretary of Pennsylvania Department of Environmental Protection* (*Riverkeeper II*), 870 F.3d 171, 178 (3d Cir. 2017): whether our exclusive jurisdiction under the judicial review provisions of the Natural Gas Act, 15 U.S.C. § 717r(d), requires finality and how such a requirement would interact with Pennsylvania's administrative scheme.

For the reasons that follow, we hold that we have jurisdiction over the petitions and that Petitioners' challenges fail on the merits.

I

A

We begin with a brief overview of the regulatory background. The Natural Gas Act prohibits construction or operation of a natural gas pipeline without a Certificate of Public Convenience and Necessity from the Federal Energy Regulatory Commission (FERC). 15 U.S.C. § 717f(c)(1)(A). And since many other federal laws and regulations apply to pipeline projects, FERC often requires a showing of compliance with those other mandates as part of its permitting process. *See id.* § 717f(e) (authorizing FERC to grant Certificates subject to "reasonable terms and conditions"). FERC did so here, preventing Transco from starting construction on Atlantic Sunrise until it demonstrates "that it has received all applicable authorizations required under federal law." *Transcontinental Gas Pipe Line Co, LLC* (*Transco*), 158 F.E.R.C. ¶ 61125, at App. C ¶ 10 (2017).

One such authorization is a discharge permit under Section 404 of the Clean Water Act. 33 U.S.C.

§ 1344(a). Because obtaining a Section 404 permit is a federal requirement and the construction and operation of Atlantic Sunrise "may result in a[] discharge into . . . navigable waters," Transco must also comply with Section 401 of the Clean Water Act. *Id.* § 1341(a)(1). Section 401 requires permit applicants to obtain "a certification from the State in which the discharge . . . will originate . . . that any such discharge will comply with" that State's water-quality standards. *Id.* Because of these statutory requirements, Transco had to obtain a Water Quality Certification from PADEP before FERC would approve the pipeline project.

B

In an attempt to satisfy the obligations just described, in the spring of 2015 Transco applied both to FERC for a Certificate of Public Convenience and Necessity and to PADEP for a Water Quality Certification. Shortly thereafter, PADEP published notice in the *Pennsylvania Bulletin* (Pennsylvania's answer to the *Federal Register*) of its intent to grant Transco a Water Quality Certification. After a public comment period, the Department certified in April 2016 that Atlantic Sunrise would comply with Pennsylvania's water-quality standards if it satisfied certain conditions. Three of those conditions are relevant here, requiring Transco to obtain the following from PADEP:

1. a permit under the National Pollutant Discharge Elimination System, 25 PA. CODE §§ 92a.1–.104, covering the discharge of water during hydrostatic pipeline testing;

2. a permit under Chapter 102 of PADEP's own regulations, 25 PA. CODE §§ 102.1–.51, covering erosion and sediment disturbance associated with pipeline construction; and

3. a permit under Chapter 105 of the Department's regulations, 25 PA. CODE §§ 105.1–.449, covering obstructions of and encroachments on Pennsylvania waters.

In response to PADEP's notice, Petitioners immediately filed two parallel challenges to the approved Water Quality Certification. First, they sought relief directly from this Court under the exclusive review provision of the Natural Gas Act, 15 U.S.C. § 717r(d)(1). Second, three of the petitioners also appealed PADEP's decision to the Pennsylvania Environmental Hearing Board (EHB or the Board).[1] The Board has stayed its proceedings pending our jurisdictional ruling, so we turn to that issue now.

II

Under the Natural Gas Act, the courts of appeals have "original and exclusive jurisdiction over any civil action for the review" of a state administrative agency's "action" taken "pursuant to Federal law to issue . . . any . . . concurrence" that federal law requires for the construction of a natural-gas transportation facility. 15 U.S.C. § 717r(d)(1) (cross-referencing 15 U.S.C. § 717f). We have previously held that when PADEP issues a

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[1] *See Lancaster Against Pipelines v. Commonwealth*, No. 2016-075-L (Pa. Envtl. Hrg. Bd.); *Nesbitt v. Commonwealth*, No. 2016-076-L (Pa. Envtl. Hrg. Bd.); *Sierra Club v. Commonwealth*, No. 2016-078-L (Pa. Envtl. Hrg. Bd.).

Water Quality Certification, it does so "pursuant to federal law," *Del. Riverkeeper Network v. Sec'y Pa. Dept. of Envtl. Prot.* (*Riverkeeper I*), 833 F.3d 360, 370–72 (3d Cir. 2016), and the parties do not dispute that federal law requires the Department to concur before construction on Atlantic Sunrise can move forward.

Nevertheless, Petitioners contend that we lack jurisdiction to review their claims. Relying on the First Circuit's decision in *Berkshire Environmental Action Team, Inc. v. Tennessee Gas Pipeline Co., LLC*, 851 F.3d 105 (1st Cir. 2017), they argue (1) that the Natural Gas Act permits this Court to hear suits challenging only a state agency's *final* action, and (2) that PADEP's Water Quality Certification is non-final until the EHB rules on Petitioners' administrative appeal. We address both issues in turn.

A

Like the petitions here, *Berkshire Environmental* involved the Natural Gas Act, the Clean Water Act, and a state's administrative procedures. In that case, FERC granted a pipeline company a Certificate of Public Convenience and Necessity subject to essentially the same condition imposed here—the company would have to demonstrate it had received all of its federal permits in order to build its pipeline. *Berkshire Environmental*, 851 F.3d at 107. The company subsequently applied for and received a Water Quality Certification from the Massachusetts Department of Environmental Protection (MassDEP) after a notice-and-comment procedure. *Id.* at 107–08. Under Massachusetts law, aggrieved parties then had 21 days to "appeal" that initial decision by demanding a hearing before MassDEP. *Id.* at 108, 112–13.

Like Transco here, the pipeline company argued that MassDEP had no authority to hear such an appeal in light of the First Circuit's original and exclusive jurisdiction under the Natural Gas Act. *Id.* at 108. And like Petitioners here, the challengers in *Berkshire Environmental* asked for a declaration that the Water Quality Certification would become final and reviewable by the Court of Appeals only at the conclusion of their state administrative appeals. *Id.* The First Circuit agreed with the challengers on the jurisdictional question, holding that the Natural Gas Act permits review of only an agency's final decisions. *Id.* at 111.

Our sister court's reasoning is straightforward and persuasive: Although "[i]n a literal sense, state agencies repeatedly take 'action' in connection with applications for water quality certifications," Congress did not intend for us to "exercise immediate review over [the many] . . . preliminary . . . steps that state agencies may take in processing an application before they actually act in the more relevant and consequential sense of granting or denying it." *Id.* at 108. To be sure, the Natural Gas Act's reference to state "action" does not expressly restrict our review to an agency's ultimate decisions, but there is a "well-settled 'strong presumption that judicial review will be available only when agency action becomes final.' To say that silence on the subject implies no requirement of finality would be to recognize this 'strong presumption' only when it is of little benefit." *Id.* at 109 (quoting *Bell v. New Jersey*, 461 U.S. 773, 778 (1983)) (citations and alterations omitted). We therefore join the First Circuit in holding that the Natural Gas Act provides jurisdiction to review only "final agency action

of a type that is customarily subject to judicial review." *Id.* at 111.

In resisting that conclusion, PADEP and Transco rely almost entirely on *Tennessee Gas Pipeline Co. LLC v. Delaware Riverkeeper Network*, 921 F. Supp. 2d 381 (M.D. Pa. 2013), which held that the Natural Gas Act gives this Court "an unqualified right of review" over even non-final Water Quality Certifications. *Id.* at 391. We reject that proposition. *Tennessee Gas* failed to acknowledge our longstanding presumption that Congress intends judicial review over only final administrative action. Instead, it framed the issue as whether to graft onto the Natural Gas Act a finality requirement that the district court regarded as "originating in state law." *Id.* To be sure, deciding on a PADEP decision's finality requires reference to the Pennsylvania procedures that produced it. But it remains the case that the finality requirement itself, along with the presumption that Congress intended us to apply it, are creatures of federal, not state, law.

We are likewise unpersuaded by *Tennessee Gas*'s analysis of the Second Circuit's decisions in *Islander East Pipeline Co., LLC v. Connecticut Department of Environmental Protection*, 482 F.3d 79 (2d Cir. 2006), and *Islander East Pipeline Co., LLC v. McCarthy*, 525 F.3d 141 (2d Cir. 2008). In both *Islander* cases, the Second Circuit confronted a situation much like this one and proceeded without analysis, "as if there were no hurdles in appealing directly from the determination of a state administrative body." *Tennessee Gas*, 921 F. Supp. 2d at 393. Implicit in that course of action, the district court concluded, was a "determination that it is not necessary for a state

administrative quasi-judicial body to first review the . . . issuance . . . of permits by a state administrative agency before judicial review . . . may be sought." *Id.* *Tennessee Gas* incorrectly treated the *Islander* cases, in which "jurisdiction [was] . . . assumed by the parties, and assumed without discussion by the court," as authority on the question presented here. *Goldman v. Citigroup Glob. Mkts. Inc.*, 834 F.3d 242, 251 (3d Cir. 2016). Such "drive-by jurisdictional ruling[s]" would have carried no precedential weight even had they been decided by *this* Court. *Id.*

B

We turn next to whether the Department's decision is a conclusive agency action, such that a "civil action for [its] review" is committed to our exclusive jurisdiction under the Natural Gas Act. This is not the first time we have considered the finality of a PADEP Water Quality Certification issued for a federally-regulated pipeline. In *Riverkeeper II*, we held that such an approval was final and reviewable because the time to appeal to the EHB had already passed. 870 F.3d at 177. Noting the pendency of the petitions now before us—in which most of the Petitioners had already taken parallel protective appeals to the EHB—*Riverkeeper II* expressly declined to consider whether the availability of further state administrative review would render the Department's decision non-final. *Id.* at 178. We answer that question now.

The standard for whether agency action is final is a familiar one: "Final agency action 'must mark the consummation of the agency's decisionmaking process,' 'must not be of a merely tentative or interlocutory nature,' and 'must be one by which rights or obligations

have been determined, or from which legal consequences will flow.'" *Id.* at 176 (quoting *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)) (internal quotation marks omitted); *accord Berkshire Environmental*, 851 F.3d at 111.[2] Although the decisionmaking process we are reviewing is defined by Pennsylvania law, we nevertheless apply a federal finality standard to determine whether Congress has made the results of that process reviewable under the Natural Gas Act.

We begin by surveying Pennsylvania's procedures for obtaining and appealing a Water Quality Certification. First, the applicant submits a request to PADEP. PENNSYLVANIA DEPT. OF ENVTL. PROT. BUREAU OF WATER QUALITY PROTECTION, NO. 362-2000-001, PERMITTING POLICY AND PROCEDURE MANUAL [hereinafter PERMITTING MANUAL] § 400 at 6. The Department places a notice in the *Pennsylvania Bulletin*, beginning a 30-day comment period. *Id.* PADEP then makes its decision, and "[t]he issuance or denial of [the] Water Quality Certification[] . . .is published in the Pennsylvania Bulletin as a final action of the Department." *Id.* Aggrieved parties have 30 days from the date of publication to file an appeal to the EHB. 25 PA. CODE § 1021.52(a)(1), 2(i).

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[2] We recognize that many (if not most) decisions addressing administrative finality arise in the context of the Administrative Procedure Act, *see* 5 U.S.C. § 704, rather than agency-specific review provisions like the one we consider here. Nevertheless, we think that the case law evaluating finality under the APA is instructive, and see no reason why finality under the Natural Gas Act should be evaluated any differently. We will therefore follow *Riverkeeper II*'s approach of measuring finality in this context against "the traditional hallmarks of final agency action." 870 F.3d at 178.

The EHB is wholly separate from PADEP. The Board is an "independent quasi-judicial agency," 35 PA. STAT. ANN. § 7513(a), and its members—full-time administrative law judges—are appointed by the Governor of Pennsylvania without any involvement by either PADEP or the state's Secretary of Environmental Protection, *id.* § 7513(b). Final orders of the EHB may be appealed to the Commonwealth Court. 42 PA. CONS. STAT. § 763(a)(1).

Two features of the Board's review deserve special mention. First, an appeal to the EHB does not prevent PADEP's decision from taking immediate legal effect. The statute creating the Board expressly provides that "[n]o appeal shall act as an automatic supersedeas," 35 PA. STAT. ANN. § 7514(d)(1), and the EHB itself regards it as "axiomatic that the mere pendency of litigation before the Board . . . has no effect on the validity or viability of the Department action being appealed . . . . An appeal to the Board does not operate as a stay," *M&M Stone Co. v. Commw. of Pa., Dept. of Envtl. Prot.*, EHB Docket No. 2007-098-L, 2009 WL 3159149, at *3 (Pa. Envtl. Hrg. Bd. Sept. 7, 2009) (citations omitted). Second, the EHB's review of PADEP decisions is conducted largely de novo, with parties entitled to introduce new evidence and otherwise alter the case they made to the Department. While Pennsylvania law refers to proceedings before the EHB as an "appeal," the Commonwealth Court has explained that the Board is not an "appellate" tribunal in the ordinary sense of that term. The Board does not have "a limited scope of review attempting to determine if [PADEP]'s action can be supported by the evidence received . . . [by PADEP]. Rather, the [Board's] duty is to determine if [PADEP]'s action can be sustained or supported by the evidence

taken *by the* [*Board*].” *Leatherwood, Inc. v. Commw., Dept. of Envtl. Prot.*, 819 A.2d 604, 611 (Pa. Commw. Ct. 2003) (emphasis added) (citation omitted).

Once again relying heavily on *Berkshire Environmental*, Petitioners claim we may not review PADEP’s issuance of a Water Quality Certification until the Board adjudicates their appeal. After holding that its jurisdiction under the Natural Gas Act covered only final action, the First Circuit concluded that the Massachusetts Water Quality Certification then under its review was non-final so long as the petitioners could still appeal within MassDEP. Citing similarities between the Massachusetts and Pennsylvania procedures, Petitioners ask us to reach the same conclusion here. We disagree, primarily because there are important distinctions between the Massachusetts and Pennsylvania schemes.

Two aspects of Pennsylvania’s system for issuing Water Quality Certifications distinguish PADEP’s decision from the non-final one in *Berkshire Environmental*. First, the Department’s decision here was immediately effective, notwithstanding Petitioners’ appeals to the EHB. The Department’s decision was neither “tentative [n]or interlocutory” and was one “from which legal consequences . . . flow[ed].” *Riverkeeper II*, 870 F.3d at 176 (quoting *Bennett*, 520 U.S. at 177–78) (internal quotation marks omitted). The First Circuit, by contrast, faced a Massachusetts regulatory regime in which the agency’s initial decision was ineffective until either the time to appeal expired or a final decision on appeal issued. *See* 310 MASS. CODE REGS. 9.09(1)(e); *see also Berkshire Envtl.*, 851 F.3d at 108 (noting that the Water Quality

Certification expressly forbade any work under its auspices until "the expiration of the Appeal Period . . . and any appeal proceedings"). Put another way, *Berkshire Environmental* addressed a provisional order that could become final in the absence of an appeal, while we are presented with a final order that could be overturned in the event of an appeal. In that regard, PADEP's order is no less final for the availability of EHB review than a federal agency's is for the availability of review in this Court.

Second, unlike in Massachusetts, Pennsylvania law does not "make[] clear that [Transco]'s application seeking a . . . water quality certification initiated a single, unitary proceeding" taking place within one agency and yielding one final decision. *Berkshire Envtl.*, 851 F.3d at 112. Quite the opposite. The Department and the Board are entirely independent agencies. Each conducts a separate proceeding, under separate rules, overseen by separately appointed officers. *Compare* 25 PA. CODE. Part I (Department of Environmental Protection), *with* 25 PA. CODE. Part IX (Environmental Hearing Board). Both in formal terms, *see* PERMITTING MANUAL, *supra*, § 400 at 6 (noting that publication in the *Pennsylvania Bulletin* marks a "final action of the Department"), and in the immediate practical effect discussed above, PADEP's issuance of a Water Quality Certification is that agency's final action, leaving nothing for the Department to do other than await the conclusion of any proceedings before the Board.[3]

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[3] Petitioners emphasize another parallel between EHB review in Pennsylvania and an adjudicatory hearing in Massachusetts: both conduct de novo review without deference to the appealed decision.

Whether state law permits further review by the same agency that makes the initial decision or provides for an appeal to a structurally-separate body is probative of whether that decision is final. Finality, at bottom, is "concerned with whether the *initial decisionmaker* has arrived at a definitive position on the issue," and PADEP has said its piece regardless of whether Pennsylvania law gives a different agency the last word. *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 193 (1985) (emphasis added). In that respect, finality is "conceptually distinct" from the related issue of exhaustion of administrative remedies. *Id.* at 192–93. Here, Petitioners confine themselves to challenging the finality of PADEP's decision, and do not argue that we lack jurisdiction because of a failure to exhaust an appeal to the EHB.

Petitioners do not rest exclusively on the comparison between this case and *Berkshire Environmental*. Nevertheless, we find their other arguments no more persuasive.

And to be sure, the First Circuit relied in part on the fact that "the adjudicatory hearing [was] a review of [the pipeline company]'s application, rather than a review of a prior agency decision." *Berkshire Envtl.*, 851 F.3d at 112. But the court in *Berkshire Environmental* did not rely on the fact of de novo review for its own sake in finding the agency's initial decision non-final. Rather, it concluded that the decision was non-final because several features of Massachusetts's administrative scheme—de novo review among them—combined to produce a "review" process that "continue[d] more or less as though no decision ha[d] been rendered at all." *See id.* The same cannot be said of review by the EHB in Pennsylvania, which takes place after a decision that has immediate legal effect.

Petitioners are incorrect that the Department's decision is non-final for purposes of this Court's review because a Pennsylvania statute provides that "no action of [PADEP] shall be final as to [a] person until the person has had the opportunity to appeal the action to the [EHB]" or the time to appeal has expired. 35 Pa. Stat. Ann. § 7514(c). Despite this language, Pennsylvania cannot declare when and how an agency action taken pursuant to federal law is sufficiently final to be reviewed in federal court. State law's use of the word "final" to characterize an agency's decision is irrelevant in that context, except so far as that language is relevant to the substantive effect of the order in question and the practical character of the procedures surrounding it. Here, those underlying realities indicate that PADEP has taken final action.

Nor does due process require that Petitioners have an opportunity to present evidence at a hearing before the EHB. "There are instances in which due process requires that an agency afford an adversarial mode of procedure and an evidentiary hearing," but this "is not such an instance." *See Nat'l Labor Relations Bd. v. ARA Servs., Inc.*, 717 F.2d 57, 67 (3d Cir. 1983). The essence of due process is notice and an opportunity to be heard, and with respect to decisions like the one under review here, the public comment period provided Petitioners "with meaningful hearing rights sufficient under the circumstances to protect [their] interests." *See Bank of N. Shore v. Fed. Deposit Ins. Corp.*, 743 F.2d 1178, 1184 (7th Cir. 1984). Due process does not entitle Petitioners to a de novo evidentiary hearing; the opportunity to comment and to petition this Court for review is enough.

Notwithstanding the availability of an appeal to the EHB, PADEP's issuance of a Water Quality Certification was final in precisely the most important ways that the permit in *Berkshire Environmental* was not. The Department's action presents all the "traditional hallmarks of final agency action," *Riverkeeper II*, 870 F.3d at 178, and we have exclusive jurisdiction to hear any "civil action for the review" of such a decision. We now turn to Petitioners' challenges to the merits of the Department's decision.

III

Petitioners make four separate arguments on the substance of their claims.[4] First, they claim PADEP failed to provide the public notice the Clean Water Act requires prior to issuing a Water Quality Certification. Second, they contend the Department acted arbitrarily and capriciously by issuing a Water Quality Certification that was immediately effective despite being conditioned on Transco obtaining additional permits in the future. Third, pointing out that PADEP's approval was necessary for Transco to begin eminent domain proceedings under the Natural Gas Act, Petitioners argue that the Department's decision deprived them of due process and violated the Fifth Amendment's Takings Clause. Finally, Petitioners assert that the Department's action violated its obligation to safeguard the Commonwealth's natural resources under Article I, Section 27 of the Pennsylvania Constitution. We address these arguments *seriatim*.

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[4] Not every petitioner joins in every argument. For the sake of simplicity we refer generically to "Petitioners."

A

The Clean Water Act obliges state agencies to comply with a number of procedural requirements before issuing a Water Quality Certification. As relevant here, Section 401 requires PADEP to "establish procedures for public notice in the case of all applications for certification." 33 U.S.C. § 1341(a)(1). No party disputes that the Department has a longstanding written policy, published in its Permitting Manual, that when it "receives a request for Water Quality Certification, a notice is published in the *Pennsylvania Bulletin* for a 30-day comment period." PERMITTING MANUAL, *supra*, § 400 at 6. And no party disputes that the Department followed that policy here. Nevertheless, Petitioners claim it was insufficient to satisfy Section 401. We disagree.

First, Petitioners cite several cases in which "[c]ourts have found that Section 401(a)(1)'s notice requirements are met where the state codifies the notice requirements by statute or regulation." Riverkeeper Br. 25–26. But none of those decisions—and nothing in the text of the Clean Water Act—requires a State to establish its notice procedures by way of *regulation*. The fact that formal rulemaking is sufficient to satisfy the requirement of established notice procedures does not mean it is necessary.

Second, Petitioners claim this Court has already "held" that PADEP has "failed to 'establish' procedures for public notice" under Section 401. Riverkeeper Br. 26–27. Petitioners' only support for that claim is a single clause in our decision in *Riverkeeper I*: "PADEP has not published any procedures for issuing Water Quality Certifications." 833 F.3d at 385. Reading that

clause in context, however, makes clear that it does not refer to PADEP's procedures for providing public notice of Section 401 applications. Indeed, PADEP's *notice* procedures were not at issue in that case. Rather, we considered PADEP's procedures for *processing* such applications—what information the agency would gather and evaluate before issuing a Water Quality Certification. *Id.* at 385–86. Contrary to Petitioners' suggestion, we have never held anything with respect to PADEP's notice procedures.

Third, Petitioners suggest that "PADEP itself has implicitly conceded" its failure to establish adequate notice procedures by publishing a draft of new procedures for considering Section 401 Certifications, including notice procedures. Riverkeeper Br. 27–28. We are unpersuaded. The Department has not conceded that its existing notice procedures are legally inadequate by moving to promulgate a single set of rules governing the entire Water Quality Certification process.

Finally, Petitioners contend that Section 401 required PADEP to immediately give full notice not only of Transco's application for a Water Quality Certification, but also of the three substantive permits on which the Department proposed to condition its approval. That argument also fails. Notice need only be adequate to allow interested parties to participate meaningfully in the process that is actually pending, and PADEP's process for granting Water Quality Certifications does not involve immediate consideration of any substantive permits. This Court approved that arrangement just two years ago, holding that when the Department conditions a Certification on the later

acquisition of other permits, the agency may issue the Certification without engaging in the substantive review that will eventually be required to grant the permits. *Riverkeeper I*, 833 F.3d at 387–88. Since PADEP is not required to conduct that review at this stage, it would make little sense to require it to provide notice of the same.

B

Petitioners also assert that the Department's decision to issue a Water Quality Certification now, conditioned on Transco obtaining substantive permits later, was arbitrary, capricious, or otherwise not in accordance with law. Petitioners make two versions of that argument. First, they claim PADEP's decision was arbitrary because it certified Atlantic Sunrise's water quality compliance based on a pledge that Transco would demonstrate substantive compliance in a future permit application rather than in the application for the Water Quality Certification itself. Without that present demonstration of compliance, Petitioners argue, PADEP's decision that Atlantic Sunrise would comply with Pennsylvania water quality standards could not have been based on anything but guesswork. Second, Petitioners say the Department failed to follow its own procedures, which they claim require the agency to consider applications for Water Quality Certifications simultaneously with any applicable substantive permits.

Both of those arguments—which at bottom focus on the timing rather than the substance of the Department's decision—are foreclosed by our decision in *Riverkeeper I*. In that case, we held that PADEP's preferred procedure for considering Certifications along

with other permits was not arbitrary or capricious because—since no construction can begin before the Department grants the substantive permits, and all interested parties will have a full opportunity to weigh in when PADEP considers applications for those permits—the petitioners could not show they had been harmed by the Department's sequencing choice. *Riverkeeper I*, 833 F.3d at 386–87. The same analysis applies with equal force here. Petitioners attempt to distinguish this case by arguing that they have been harmed by the Department's choice not to provide notice of the substantive permits upon which it conditioned the Water Quality Certification. But as we discussed herein, Petitioners will suffer no harm from PADEP's decision to provide notice of those permits at the time it actually considers them.

C

Petitioners next argue that PADEP's issuance of a conditional Water Quality Certification violates the Takings Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment. Under the Natural Gas Act, any natural gas company holding a Certificate of Public Convenience and Necessity may acquire a pipeline right-of-way through eminent domain. 15 U.S.C. § 717f(h). The Certificate of Public Convenience and Necessity establishes the legal right to take property; in a condemnation proceeding under the Natural Gas Act, the "only open issue [is] the compensation the landowner defendant will receive in return for the easement." *Columbia Gas Transmission, LLC v. 1.01 Acres, More or Less in Penn Twp., York Cty., Pa., Located on Tax ID #440002800150000000 Owned By Brown*, 768 F.3d 300, 304 (3d Cir. 2014).

Petitioners assert that PADEP violated the Fifth and Fourteenth Amendments when it issued a conditional Water Quality Certification—a condition precedent for initiating eminent domain proceedings under Transco's Certificate of Public Convenience and Necessity—based on a relatively restricted administrative process.

Regardless of its underlying merits, and setting aside questions about whether the Clean Water Act could ever provide a vehicle to raise a takings argument, *see Gunpowder Riverkeeper v. FERC*, 807 F.3d 267, 274–75 (D.C. Cir. 2015) (concluding that "an injury arising specifically by reason of eminent domain" falls outside the zone of interests protected by the statute), that claim cannot succeed because Petitioners have presented it in the wrong forum. Their argument does not challenge PADEP's judgment that Transco will comply with Pennsylvania's water-quality standards. Nor does it ask this Court to review the Department's reasoning, its procedures, or the facts on which it based its decision. Rather, Petitioners' eminent-domain argument is in substance a challenge to FERC's order granting a Certificate of Public Convenience and Necessity. And that order may only be challenged by a request for rehearing before FERC itself, or by a petition for review by an appropriate federal circuit court. *See* 15 U.S.C. § 717r(a)–(b); *Williams Nat. Gas Co. v. City of Okla. City*, 890 F.2d 255, 264 (10th Cir. 1989). Petitioners respond, in essence, that those avenues are inadequate because if Petitioners took advantage of them, Transco would resist and Petitioners might lose. That argument refutes itself.

D

Petitioners' final argument—that PADEP failed to comply with its obligations under the Pennsylvania Constitution—also fails. Article I, Section 27 of the Pennsylvania Constitution establishes a common right to the Commonwealth's natural resources and obligates its government to hold those resources in trust. Petitioners argue that PADEP failed to live up to that obligation when it issued a Water Quality Certification conditioned on Transco later obtaining certain substantive permits.

Transco responds that a state constitutional claim is not cognizable in this proceeding, arguing that by vesting jurisdiction in this Court to review PADEP's Certification decision, the Natural Gas Act provides for only a narrow scope of review that does not permit us to hear state-law claims. Transco points to § 717r(d)(3) of the Act, which states that if the reviewing court of appeals finds that an agency's action was "inconsistent with the Federal law governing such permit *and* would prevent the construction, expansion or operation of the facility . . . , the Court shall remand the proceeding to the agency." 15 U.S.C. § 717r(d)(3) (emphasis added). In Transco's view, the statute's requirement that we remand to the agency when certain conditions are met implies that remand is the only remedy available to us, and then only under the conditions just quoted. Therefore, Transco asserts, we may not reach the merits of Petitioners' claim under the Pennsylvania Constitution. We cannot agree.

The provision of the Natural Gas Act that actually grants us jurisdiction, 15 U.S.C. § 717r(d)(1), is quite capacious. It empowers us to hear "any civil action"

seeking "review" of federal permits required by interstate pipelines. And ordinarily, when such agency action is "made reviewable by statute," 5 U.S.C. § 704, the Administrative Procedure Act authorizes a broad scope of review, without limiting courts to considering only federal law, *see id.* § 706. Nothing in § 717r(d)(3) says differently; it simply requires reviewing courts to apply a particular remedy when certain conditions are met. It says nothing about other circumstances, and we will not imply from the statute's silence that Congress intended to restrict the language of its text. Congress does not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns. Inc.*, 531 U.S. 457, 468 (2001).[5]

Nevertheless, Petitioners' claim under the Pennsylvania Constitution cannot succeed on the merits. Petitioners essentially complain that PADEP could not have met its obligation to safeguard Pennsylvania's natural resources because it granted a Water Quality Certification before collecting the environmental impact data that would be required to issue the substantive permits on which it was conditioned. That fails for the same reason that we rejected Petitioners' argument that PADEP's decision to grant a Water Quality Certification conditioned on obtaining other permits was arbitrary and capricious. *See supra* III.B. Because Transco will have to obtain those substantive permits to begin construction—and

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[5] The United States Court of Appeals for the Fourth Circuit has recently reached the same conclusion. *Sierra Club v. U.S. Dep't of the Interior*, — F.3d —, 2018 WL 3717067, at *25 (4th Cir. Aug. 6, 2018) (holding that when an agency's action would not "prevent the construction" of a pipeline, § 717r(d)(3) did not apply and "the APA's default rule" governed)

PADEP will have to consider Article I, Section 27 in deciding whether to grant or deny them—Petitioners cannot show that they have been harmed by the Department's decision to issue a conditional Water Quality Certification.

* * *

For the reasons stated, we will deny the petitions for review.

APPENDIX B

COMMONWEALTH OF PENNSYLVANIA ENVIRONMENTAL HEARING BOARD

EHB Docket No. 2015-060-M

[Filed June 2, 2017]

THE DELAWARE RIVERKEEPER NETWORK AND MAYA K VAN ROSSUM, THE DELAWARE RIVERKEEPER

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC

Issued June 2, 2017

OPINION AND ORDER ON THE TERMINATION OF THE ABOVE-CAPTIONED APPEAL

By Richard P. Mather, Sr., Judge

Synopsis

The Board agrees to terminate Appellant's appeal in the above-captioned matter in light of the Appellant's March 24, 2017 letter and following a conference call with the Parties on May 16, 2017. The Board nonetheless notes that it did not decide to terminate

the appeal for lack of jurisdiction. The Board believes that it would have jurisdiction over this appeal.

OPINION

The above captioned appeal was filed by the Delaware Riverkeeper Network and Maya K. Van Rossum, the Delaware Riverkeeper ("Appellant") on May 5, 2015 in response to the Department's grant of two 401 Water Quality Certifications – Permits No. EA 40-013 and EA 45-002 – to Transcontinental Gas Pipe Line Company, LLC ("Permittee") on April 6, 2015.

On May 21, 2015, the Parties submitted a joint request for a stay in this appeal, pending the Third Circuit Court of Appeals' review of its jurisdiction over a petition for review filed by the Delaware Riverkeeper Network. This petition for review concerns the same Department decision as challenged here, which relates to Transco's Leidy Southeast Expansion Project.[1] The Board granted the request for an approximately two-month stay, at which point the Parties were required to submit a status report on or before July 28, 2015. As there were no new developments, the Board continued to issue orders extending the stay and requiring joint status reports. Status reports were due

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[1] *See Delaware Riverkeeper Network v. Quigley*, No. 15-2122 (3d. Cir., filed May 5, 2015). On May 8, 2015, the Court of Appeals for the Third Circuit issued an order requiring the parties to address the Court's authority over the petition within fourteen days of the order. The parties in this matter requested that the appeal pending before the Board be stayed for a reasonable duration so as to give the Court of Appeals time to consider the submissions in response to its order.

on October 1, 2015, November 6, 2015, February 5, 2016, April 1, 2016, June 3, 2016, and August 1, 2016.

On August 8, 2016, the Court of Appeals for the Third Circuit issued its opinion in *Delaware Riverkeeper Network v. Quigley*, in which it held that state action taken pursuant to the Clean Water Act in permitting an interstate natural gas facility pursuant to the Natural Gas Act "is subject to review exclusively in the Court of Appeals." Slip op. at 17-18. Permittee filed a letter with the Board on August 8, 2016 requesting that the Board dismiss the appeal for lack of jurisdiction, given the Court of Appeals' ruling. The Board issued an order on August 11, 2016 staying the appeal and ordering the Appellant to file a status report on or before September 12, 2016 indicating whether they have an objection to Permittee's request to dismiss the appeal.

On September 15, 2016, the Appellant filed a status report that alerted the Board to the Delaware Riverkeeper Network's request for a re-examination of a number of issues ruled upon in the Third Circuit's decision. If granted, this request, while unrelated to jurisdictional issues, would delay the Third Circuit's issuance of a mandate and could potentially modify the Third Circuit's August 8, 2016 Opinion. The Appellant therefore requested that the Board extend its stay of this appeal. On October 31, 2016, the Board granted this request and stayed the matter until the Third Circuit issued a mandate in *Delaware Riverkeeper Network v. Quigley*.

On March 24, 2017, the Appellant submitted a letter alerting the Board to the Third Circuit's issuance of an amended opinion on the same date. While the

Third Circuit Court of Appeal's adopted several changes requested by the Delaware Riverkeeper, none of those changes impacted the Court's holding on jurisdiction. In light of this, the Appellant had no objection to the termination of its appeal before the Board. However, in a footnote, Appellant also drew the Board's attention to a recent ruling out of the First Circuit in which the Court dismissed a petition for review under Section 19(d)(1) of the Natural Gas Act, 15 U.S.C. § 717r(d)(1). The Court determined that it lacked subject matter jurisdiction over a Section 401 Water Quality Certificate because aggrieved parties had the right to appeal the Certificate to the state department of environmental protection before it could be appropriately reviewed by the First Circuit of Appeals.[2]

Prior to the Board addressing Appellant's March 24, 2017 letter, Judge Labuskes issued an Opinion and Order in *Lancaster Against Pipelines, Geraldine Nesbitt and Sierra Club v. DEP*, EHB Docket No. 2016-075-L (Opinion and Order, May 10, 2017). In this Opinion, Judge Labuskes determined that the Board has jurisdiction over appeals of Water Quality Certifications pursuant to Section 401 of the Clean Water Act. In light of this related matter, the Board scheduled a conference call with all parties in the instant appeal on May 16, 2017 to confirm that Appellant had no objection to the termination of its appeal before the Board. During the call, the Appellant confirmed that it did not object to the termination its appeal, and neither the Department nor Permittee were opposed. Therefore, the Board will close

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[2] *See Berkshire Environmental Action Team, Inc. v. Tennessee Gas Pipeline Company, LLC*, 851 F.3d 105 (1st Cir. 2017).

and discontinue this docketed appeal. The Board nonetheless feels that a brief discussion of its jurisdiction over such appeals is useful because the issue may arise in later appeals and was correctly decided by Judge Labuskes in the pending related appeal.

Discussion

In *Lancaster Against Pipelines, Geraldine Nesbitt and Sierra Club v. DEP*, Permittee Transcontinental Gas Pipeline Company, LLC ("Permittee" or "Transco") requested that the Board dismiss the appeal regarding the Department's issuance of a Section 401 Water Quality Certificate following the ruling by the Third Circuit in *Delaware Riverkeeper Network v. Secretary, Pennsylvania Department of Environmental Protection* 833 F.3d 360 (3d Cir. 2016). Transco argued that the Board could not review the Department's issuance of the 401 Certification because the Third Circuit has exclusive jurisdiction over that section. The Department notified the Board that it would "abide by" the Third Circuit's ruling. The Appellants, however, have asked the Third Circuit to dismiss their petitions for review for lack of jurisdiction because the Board has not yet acted on the appeals before it, thereby rendering the petitions before the Third Circuit not yet ripe for review. Appellants further argued that the Board does have jurisdiction and should issue a stay in *Lancaster Against Pipelines v. DEP* until the Third Circuit rules on whether it has jurisdiction in the pending parallel proceedings. The Board agreed with the Appellants and determined that it had jurisdiction under the Natural Gas Act, 15 U.S.C. §§ 717-717z.

Although the Natural Gas Act makes the regulation of natural gas pipelines a federal function, it leaves

open a limited role for states that have primacy to implement the Clean Water Act. *Lancaster Against Pipelines, Geraldine Nesbitt and Sierra Club v. DEP*, EHB Docket No. 2016-075-L, slip op. at 3 (Opinion and Order, May 10, 2017). Pennsylvania is such a state. In these instances, the state retains the right to determine whether the project complies with federal and state water quality standards. *Id*. If the project is in compliance, then the state will issue a 401 Certification. *Id*.

The jurisdictional issue involved here arises from Section 19(d)(1) of the Natural Gas Act:

> The United States Court of Appeals for the circuit in which a facility subject to section 717b of this title or 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 Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval (hereinafter collectively referred to as "permit") required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.).

15 U.S.C. § 717r(d)(1). As Judge Labuskes stated, "the Third Circuit's opinion in the *Delaware Riverkeeper* case is not particularly helpful" in resolving the jurisdictional issue of concern to the Board. The jurisdictional issue before the Third Circuit was both broader and more general: whether the Department's issuance of a 401 Certification was the act of a state

administrative agency acting "pursuant to Federal law." *Delaware Riverkeeper*, 833 F.3d at 370. This is not the jurisdictional issue that is of concern to the Board. Rather, the Board is faced with whether a final state action is required before the Court of Appeals may act upon a petition for review under Section 19(d)(1). If a final state action is required under Section 19(d)(1), then the follow-up question is whether a final state action has occurred in a given matter.

The question of whether a final "state administrative agency" action is required under Section 19(d)(1) is a question of federal law that is already pending before the Third Circuit. Both the First and Ninth Circuits have ruled that it is required. *See Berkshire Env. Action Team, Inc. v. Tenn. Gas Pipeline, LLC*, 851 F.3d 105 (1st Cir. 2017); *Columbia Riverkeeper v. U.S. Coast Guard*, 761 F.3d 1084 (9th Cir. 2014). The Middle District of Pennsylvania has ruled that it is not required. *Contra Tennessee Gas Pipeline LLC v. Del. Riverkeeper Network*, 921 F. Supp. 381 (M.D. Pa. 2013). The Board particularly finds the First Circuit Court of Appeals' position to be highly persuasive. The First Circuit's position was that there was ample reason to continue to have the strong presumption that judicial review is available only upon a state agency action becoming final. *Berkshire Env. Action Team*, 851 F.3d at 111 (citing *Bell v. New Jersey*, 461 U.S. 773, 778 (1973)).

Whether a state agency action is final is a question of state law. As far as the Board is concerned, a Department action only becomes final following an opportunity to appeal the action to the Environmental Hearing Board. Pennsylvania law is very clear on this

point: "[N]o action of the department [of environmental protection] adversely affecting a person shall be final as to that person until the person has had an opportunity to appeal the action to the [environmental hearing] board. . . ." 35 P.S. § 7514(c). Courts in Pennsylvania have long held "that a Department action is not final until an adversely affected party has had an opportunity to appeal the action to this Board." *Lancaster Against Pipelines*, EHB Docket No. 2016-075-L, slip op. at 5 (Opinion and Order, May 10, 2017), citing *Fiore v. DER*, 655 A.2d 1081, 1086 (Pa. Cmwlth. 1995); *Morcoal v. DER*, 459 A.2d 1303, 1307 (Pa. Cmwlth. 1983).

This is very much like the Massachusetts procedures that the First Circuit found were not final until the adversely affected party had the opportunity to go through the state's hearing process. *Berkshire*, 851 F.3d at 111-14. Unless the Third Circuit holds that a final action is not required, or that Pennsylvania's may be disregarded, the Board finds that it has jurisdiction over appeals such as that found in *Lancaster Against Pipelines* and the matter here. Therefore, while we will close and terminate this appeal because Appellant have no objection, we maintain that we have jurisdiction over it.[3]

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[3] Aside from the statutory construction issue arising under Section 19(d)(1) regarding the need for a *final* state agency action, I believe there is a more fundamental concern with Section 19(d)(1) that arises under the Tenth Amendment of the United States Constitution. U.S. CONST. amend. X. There is no question that Congress has the authority to preempt state regulatory authority regarding interstate pipelines subject to regulation by the Federal Energy Regulatory Commission under the Natural Gas Act. 15

U.S.C. §§ 717-717z. Section 19(d)(1) does not, however, preempt state regulatory authority, but rather expressly recognizes a limited state role for a "state administrative agency acting pursuant to federal law . . ." Section 19(d)(1) does more than simply authorize a limited state role, however. It commandeers state agency officials and compels them to violate longstanding state administrative law. Section 19(d)(1) purports to rewrite state laws by directing state agency officials to litigate the state agency's decisions before the United States Court of Appeals for the circuit in which the facility is located. It is a fundamental principle of law that Pennsylvania state agencies are entities established by Pennsylvania state law, and that they have only the authority given to them by the Pennsylvania General Assembly. *Small v. Horn*, 722 A.2d 664, 669 (Pa. 1998). Congress's attempt to commandeer the Department and its officials and to compel them to defend their actions in federal court rewrites longstanding state administrative law. 35 P.S. § 7514. I believe that this attempt violates the Tenth Amendment and its anti-commandeering principle. *See New York v. United States*, 505 U.S. 144 (1992) and *Printz v. United States*, 521 U.S. 898 (1997). Congress may not simply commandeer state officials and agencies, rewrite state laws, and direct that state agency officials defend state agency decisions in federal court in violation of state laws enacted by the Pennsylvania General Assembly. If the Third Circuit Court of Appeals decides that a final state action is required under Section 19(d)(1) then the clear conflict with longstanding Pennsylvania state law involving appeals of Department actions to the Environmental Hearing Board will be addressed. However, the Pennsylvania General Assembly has also directed that appeals from decisions of the Pennsylvania Environmental Hearing Board go to the Pennsylvania Commonwealth Court. 42 Pa. C.S.A. § 763. Therefore, such a decision from the Third Circuit confirming the necessity of a final state action could nonetheless still implicate constitutional issues of commandeering by circumventing state laws directing such appeals to the Commonwealth Court. *See generally* Josh Blackman, *Article: State Judicial Sovereignty*, 2016 U. Ill. L. Rev. 2033 (2016) (Discussing the constitutionality of exclusive federal jurisdiction as it relates both to Article III of the Constitution and the anti-commandeering principle of the Tenth Amendment).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

EHB Docket No. 2015-060-M

[Filed June 2, 2017]

THE DELAWARE RIVERKEEPER NETWORK AND MAYA K VAN ROSSUM, THE DELAWARE RIVERKEEPER

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC

O R D E R

AND NOW, this 2nd day of June, 2017, in consideration of the Permittee's request to terminate the appeal, the above-captioned matter will be marked closed and discontinued in the docket.

ENVIRONMENTAL HEARING BOARD

s/ Richard P. Mather, Sr.
RICHARD P. MATHER, SR.
Judge

DATED: June 2, 2017
c: DEP, General Law Division:
Attention: Maria Tolentino
(via electronic mail)

For the Commonwealth of PA, DEP:
Joseph S. Cigan III, Esquire
(*via electronic filing system*)

For Appellant:
Aaron Stemplewicz, Esquire
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For Permittee:
Pamela S. Goodwin, Esquire
Andrew T. Bockis, Esquire
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APPENDIX C

COMMONWEALTH OF PENNSYLVANIA ENVIRONMENTAL HEARING BOARD

EHB Docket No. 2016-075-L
(Consolidated with 2016-076-L and 2016-078-L)

[Filed May 10, 2017]

LANCASTER AGAINST PIPELINES)
GERALDINE NESBITT AND SIERRA CLUB)
)
v.)
)
COMMONWEALTH OF PENNSYLVANIA,)
DEPARTMENT OF ENVIRONMENTAL)
PROTECTION and TRANSCONTINENTAL)
GAS PIPE LINE COMPANY, LLC, Permittee)
)

Issued May 10, 2017

OPINION AND ORDER ON REQUEST TO DISMISS

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Environmental Hearing Board has jurisdiction in an appeal from the Department of Environmental Protection's issuance of a Water Quality Certification pursuant to Section 401 of the Clean Water Act.

OPINION

On April 5, 2016, the Pennsylvania Department of Environmental Protection (the "Department") issued a Water Quality Certification pursuant to Section 401 of the Clean Water Act, 33 U.S.C. § 1341(a), to Transcontinental Gas Pipe Line Company, LLC ("Transco"). The Department certified among other things that the construction, operation, and maintenance of Transco's Atlantic Sunrise Pipeline Project complies with the Commonwealth's water quality standards, provided that Transco obtained and complied with some yet-to-be-issued state permits. Lancaster Against Pipelines, Geraldine Nesbitt, and the Sierra Club filed these consolidated appeals from the Department's issuance of the 401 certification. The Appellants also filed petitions with the Court of Appeals for the Third Circuit seeking review of the same Department action. *Lancaster Against Pipelines v. Quigley*, No. 16-2212; *Nesbitt v. Quigley*, No. 16-2218; and *Sierra Club v. Quigley*, No. 16-2400. Soon thereafter, the parties asked for and received a series of stays in both our appeals and the Third Circuit cases. The parties told us that they wished to await the Third Circuit Court of Appeal's decision in a case said to involve similar issues, *Delaware Riverkeeper Network v. Secretary, Pennsylvania Department of Environmental Protection*, 833 F.3d 360 (3d Cir. 2016).

On August 8, 2016, Transco by letter informed us that the Third Circuit had issued its Opinion in the *Delaware Riverkeeper* case. Transco requested that we dismiss the appeal. However, a petition for rehearing was thereafter filed in the *Delaware Riverkeeper* case, so the parties once again agreed to a continuing stay

pending the ruling on that petition. The parties asked us to issue an Order providing that, within fourteen days of the Third Circuit's mandate in the *Delaware Riverkeeper* case, the parties could file written responses addressing this Board's authority to proceed in this matter. We agreed and issued an appropriate Order on September 13, 2016.

On March 13, 2017, the parties notified us that the Third Circuit had issued its mandate in the *Delaware Riverkeeper* case. They indicated that they would be filing their respective jurisdictional statements as contemplated in our Order, which they have now done. Transco has renewed its "request" that the Board dismiss these consolidated appeals for lack of jurisdiction. It argues that this Board cannot review the Department's issuance of the 401 certification because the Third Circuit has exclusive jurisdiction to review that action. The Department sent us a short letter indicating that it was willing to "abide by" the Third Circuit's ruling in *Delaware Riverkeeper*. The Appellants tell us that they have asked the Third Circuit to dismiss their own petitions for review for lack of jurisdiction, arguing that the petitions are not ripe for review because this Board has not yet acted on their appeals before us. They tell the Court that, because the Board has not yet acted on the appeal of the 401 certification, there is no final state action for the Court to review. Similarly, the Appellants argue before us that we do indeed have jurisdiction, and that at a minimum we should issue another stay until the Third Circuit rules on its jurisdiction in the parallel proceedings pending there.

Although a challenge to our jurisdiction must ordinarily take the form of a motion, 25 Pa. Code §§ 1021.91 and 1021.94, we are willing to view Transco's request for dismissal together with the parties' jurisdictional statements as the functional equivalent of a motion. Transco's request is denied and the Appellant's request for a stay is granted because, in our view, until the Third Circuit holds otherwise, this Board does have jurisdiction to review the Department's action.

Ordinarily there would be no question that we have jurisdiction to review the Department's issuance of a 401 certification. *See Solebury Twp. v. DEP*, 928 A.2d 990 (Pa. 2007). The question arises here, however, because the certification at issue involves an interstate natural gas pipeline subject to regulation by the Federal Energy Regulatory Commission (FERC) under the Natural Gas Act, 15 U.S.C. §§ 717-717z. The Natural Gas Act for the most part makes the regulation of natural gas pipelines a federal function, but it carves out a limited role for states such as Pennsylvania that have primacy to implement the Clean Water Act. The state retains the right to determine whether the project complies with federal and state water quality standards. If it does, the state issues a 401 certification. The jurisdictional issue arises because Section 19(d)(1) of the Natural Gas Act provides:

> The United States Court of Appeals for the circuit in which a facility subject to section 717b of this title or 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 Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval (hereinafter collectively referred to as "permit") required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.).

15 U.S.C. § 717r(d)(1).

We do not believe the Third Circuit's Opinion in the *Delaware Riverkeeper* case is particularly helpful. The only jurisdictional issue before the Court was whether the Department's issuance of a 401 certification was the act of a state administrative agency acting "pursuant to Federal law." *Delaware Riverkeeper*, 833 F.3d at 391. The Court held that it was, and it proceeded to address the merits. The Court was not faced with and did not address whether the state's action needed to be final and whether the Department's issuance of the certification was final. The precise question presented in our case is not whether the Department was acting pursuant to federal law; it is whether a final action is required before the Court of Appeals can act upon a petition for review, and whether a final action has taken place in this case.

There is little point in us opining on the first question. Whether a final action is required is a question of federal law that is pending before the Court in the Appellants' petitions for review in the proceedings parallel to this one. The First Circuit Court of Appeals in what we believe to be a highly persuasive decision that respects the state's administrative

process recently held that a final agency decision *is* required. *Berkshire Env. Action Team, Inc. v. Tenn. Gas Pipeline, LLC*, 851 F.3d 105 (1st Cir. 2017). *See also, Columbia Riverkeeper v. U.S. Coast Guard*, 761 F.3d 1084 (9th Cir. 2014) (final action required). *Contra, Tennessee Gas Pipeline LLC v. Del. Riverkeeper Network*, 921 F.Supp. 381 (M.D. Pa. 2013) (final agency action not required). The First Circuit said that there was ample reason to stick with the strong presumption that judicial review is only available when an agency action becomes final. *Id.*, 851 F.3d at 111 (citing *Bell v. New Jersey*, 461 U.S. 773, 778 (1973)).

As to the second question, there is no doubt whatsoever that the Department's certification of Transco's project was not a final action. Pennsylvania law is very clear on this point: "[N]o action of the department [of environmental protection] adversely affecting a person shall be final as to that person until the person has had an opportunity to appeal the action to the [environmental hearing] board…" 35 P.S. § 7514(c). Pennsylvania courts have long held that a Departmental action is not final until an adversely affected party has had an opportunity to appeal the action to this Board. *Fiore v. DER*, 655 A.2d 1081, 1086 (Pa. Cmwlth. 1995); *Morcoal v. DER*, 459 A.2d 1303, 1307 (Pa. Cmwlth. 1983). Pennsylvania's procedures are nearly identical in substance to the Massachusetts procedures that the First Circuit found not to be final until the adversely affected party had an opportunity to take advantage of that state's hearing process. *Berkshire*, 851 F.3d at 111-14. Unless the Third Circuit holds that no final action is required, or that the one that is required by Pennsylvania law may simply be disregarded, the appeal before us may proceed.

Accordingly, dismissal would be premature. We, therefore, issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

EHB Docket No. 2016-075-L
(Consolidated with 2016-076-L and 2016-078-L)

[Filed May 10, 2017]

LANCASTER AGAINST PIPELINES	)
GERALDINE NESBITT AND SIERRA CLUB	)
	)
v.	)
	)
COMMONWEALTH OF PENNSYLVANIA,	)
DEPARTMENT OF ENVIRONMENTAL	)
PROTECTION and TRANSCONTINENTAL	)
GAS PIPE LINE COMPANY, LLC, Permittee	)
	)

O R D E R

AND NOW, this 10th day of May, 2017, upon consideration of the parties' responses regarding this Board's jurisdiction over the above-captioned appeal pursuant to the Board's Order of March 21, 2017, it is hereby ordered that:

1. This matter is stayed until the Third Circuit rules upon its jurisdiction over the matters docketed at *Sierra Club v. Secretary, Pennsylvania Department of Environmental Protection, et al.*, No. 16-2400, *Nesbitt v. Secretary, Pennsylvania Department of Environmental Protection, et al.,* No. 16-2218, and *Lancaster Against Pipelines v. Secretary, Pennsylvania Department of Environmental*

Protection, et al., No. 16-2212 ("the pending Third Circuit matters").

2. The parties shall promptly notify the Board upon the Third Circuit's decision on jurisdiction in the pending Third Circuit matters, or file a collective status report by **July 17, 2017**, whichever comes first.

ENVIRONMENTAL HEARING BOARD

s/ Bernard A. Labuskes, Jr.
BERNARD A. LABUSKES, JR.
Judge

DATED: May 10, 2017
c: DEP, General Law Division:
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(*via electronic mail*)

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For Permittee:
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(*via electronic filing system*)

APPENDIX D

PENNSYLVANIA BULLETIN, VOL. 46, NO. 17, APRIL 23, 2016

Water Quality Certification under Section, 401 of the Federal Clean Water Act for the Atlantic Sunrise Pipeline Project

Natural Gas Pipeline Project and Related Mitigation; FERC Docket No. CP15-138-000; PADEP File No. WQ02-001

Northeast Region: Waterways & Wetlands Program, 2 Public Square, Wilkes-Barre, PA 18711, Joseph Buczynski, Program Manager 570-826-2511

On April 5, 2016, the DEP issued Section 401 Water Quality Certification to Transcontinental Gas Pipe Line Company, LLC for the Atlantic Sunrise Pipeline Project. The Pennsylvania Department of Environmental Protection (Department) certifies that the construction, operation and maintenance of the Project complies with the applicable provisions of sections 301—303, 306 and 307 of the Federal Clean Water Act (33 U.S.C.A. §§ 1311—1313, 1316 and 1317). The Department further certifies that the construction, operation and maintenance of the projects complies with Commonwealth water quality standards and that the construction, operation and maintenance of the projects does not violate applicable Commonwealth water quality standards provided that the construction, operation and maintenance of the projects complies

with the conditions for this certification, including the criteria and conditions of the following permits:

1. *Discharge Permit*—Transcontinental Gas Pipe Line Company, LLC shall obtain and comply with a Department National Pollutant Discharge Elimination System (NPDES) permit for the discharge of water from the hydrostatic testing of the pipeline pursuant to Pennsylvania's Clean Streams Law (35 P.S. §§ 691.1—691.1001) and all applicable implementing regulations (25 Pa. Code Chapter 92a).

2. *Erosion and Sediment Control Permit*—Transcontinental Gas Pipe Line Company, LLC shall obtain and comply with the Department's Chapter 102 Erosion and Sediment Control General Permit for Earth Disturbance Associated with Oil and Gas Exploration, Production, Processing or Treatment issued pursuant to Pennsylvania's Clean Streams Law and Storm Water Management Act (32 P.S. §§ 680.1—680.17) and all applicable implementing regulations (25 Pa. Code Chapter 102).

3. *Water Obstruction and Encroachment Permits*—Transcontinental Gas Pipe Line Company, LLC shall obtain and comply with a Department Chapter 105 Water Obstruction and Encroachment Permits for the construction, operation and maintenance of all water obstructions and encroachments associated with the project pursuant to Pennsylvania's Clean Streams Law, Dam Safety and Encroachments Act (32 P.S. §§ 673.1—693.27), and Flood Plain Management Act (32 P.S. §§ 679.101—679.601.) and all applicable implementing regulations (25 Pa. Code Chapter 105).

4. *Water Quality Monitoring*—The Department retains the right to specify additional studies or monitoring to ensure that the receiving water quality is not adversely impacted by any operational and construction process that may be employed by Transcontinental Gas Pipe Line Company, LLC.

5. *Operation*—For each Project under this certification, Transcontinental Gas Pipe Line Company, LLC shall at all times properly operate and maintain all Project facilities and systems of treatment and control (and related appurtenances) which are installed to achieve compliance with the terms and conditions of this Certification and all required permits. Proper operation and maintenance includes adequate laboratory controls, appropriate quality assurance procedures, and the operation of backup or auxiliary facilities or similar systems installed by Transcontinental Gas Pipe Line Company, LLC.

6. *Inspection*—The Projects, including all relevant records, are subject to inspection at reasonable hours and intervals by an authorized representative of the Department to determine compliance with this Certification, including all required permits required, and Pennsylvania's Water Quality Standards. A copy of this Certification shall be available for inspection by the Department during such inspections of the Projects.

7. *Transfer of Projects*—If Transcontinental Gas Pipe Line Company, LLC intends to transfer any legal or equitable interest in the Projects which is affected by this Certification, Transcontinental Gas Pipe Line Company, LLC shall serve a copy of this Certification upon the prospective transferee of the legal and

equitable interest at least thirty (30) days prior to the contemplated transfer and shall simultaneously inform the Department Regional Office of such intent. Notice to the Department shall include a transfer agreement signed by the existing and new owner containing a specific date for transfer of Certification responsibility, coverage, and liability between them.

8. *Correspondence*—All correspondence with and submittals to the Department concerning this Certification shall be addressed to the Department of Environmental Protection, Northeast Regional Office, Waterways and Wetlands Program, 2 Public Square, Wilkes-Barre, PA 18701-1915.

9. *Reservation of Rights*—The Department may suspend or revoke this Certification if it determines that Transcontinental Gas Pipe Line Company, LLC has not complied with the terms and conditions of this Certification. The Department may require additional measures to achieve compliance with applicable law, subject to Transcontinental Gas Pipe Line Company, LLC's applicable procedural and substantive rights.

10. *Other Laws*—Nothing in this Certification shall be construed to preclude the institution of any legal action or relieve Transcontinental Gas Pipe Line Company, LLC from any responsibilities, liabilities, or penalties established pursuant to any applicable federal or state law or regulation.

11. *Severability*—The provisions of this Certification are severable and should any provision of this Certification be declared invalid or unenforceable, the remainder of the Certification shall not be affected thereby.

Any person aggrieved by this action may appeal, pursuant to Section 4 of the Environmental Hearing Board Act, 35 P.S. § 7614, and the Administrative Agency Law, 2 Pa.C.S. Chapter 5A, to the Environmental Hearing Board, Second Floor Rachel Carson State Office Building, 400 Market Street, PO Box 8457, Harrisburg, PA 17105-8457, 717-787-3483. TDD users may contact the Board through the Pennsylvania AT&T Relay Service, 800-654-5984. Appeals must be filed with the Environmental Hearing Board within 30 days of receipt of written notice of this action unless the appropriate statute provides a different time period. Copies of the appeal form and the Board's rules of practice and procedure may be obtained from the Board. The appeal form and the Board's rules of practice and procedure are also available in braille or on audiotape from the Secretary to the Board at 717-787-3483. This paragraph does not, in and of itself, create any right of appeal beyond that permitted by applicable statutes and decisional law.

If you want to challenge this action, your appeal must reach the board within 30 days. You do not need a lawyer to file an appeal with the board.

Important legal rights are at stake, however, so you should show this document to a lawyer at once. If you cannot afford a lawyer, you may qualify for free pro bono representation. Call the secretary to the board (717-787-3483) for more information.

DAM SAFETY

Central Office: Bureau of Waterways Engineering and Wetlands, Rachel Carson State Office Building, Floor 3, 400 Market Street, P.O. Box 8460, Harrisburg, PA 17105-8460

D51-012. East Park Reservoir Dam, Aramark Tower, 2nd Floor, 1101 Market Street, Philadelphia, PA 19103. Permit issued to modify, operate, and maintain East Park Reservoir Dam within Schuylkill River Watershed, for the purpose of meeting the Commonwealth's regulations (Philadelphia, PA Quadrangle Latitude: 35.985833; Longitude: -75.188333) in Philadelphia City, Philadelphia County.

EROSION AND SEDIMENT CONTROL

The following Erosion and Sediment Control permits have been issued.

Persons aggrieved by an action may appeal that action to the Environmental Hearing Board (Board) under section 4 of the Environmental Hearing Board Act and 2 Pa.C.S. §§ 501—508 and 701—704. The appeal should be sent to the Environmental Hearing Board, Second Floor, Rachel Carson State Office Building, 400 Market Street, PO Box 8457, Harrisburg, PA 17105-8457, (717) 787-3483. TDD users may contact the Board through the Pennsylvania AT&T Relay Service, (800) 654-5984. Appeals must be filed with the Board within 30 days of publication of this notice in the *Pennsylvania Bulletin* unless the appropriate statute provides a different time period. Copies of the appeal form and the Board's rules of practice and procedure may be obtained from the Board. The appeal form and the Board's rules of

practice and procedure are also available in Braille or on audiotape from the Secretary to the Board at (717) 787-3483. This paragraph does not, in and of itself, create a right of appeal beyond that permitted by applicable statutes and decisional law.

For individuals who wish to challenge an action, the appeal must reach the Board within 30 days. A lawyer is not needed to file an appeal with the Board.

Important legal rights are at stake, however, so individuals should show this notice to a lawyer at once. Persons who cannot afford a lawyer may qualify for free pro bono representation. Call the Secretary to the Board at (717) 787-3483 for more information.

Southwest Region: Waterways & Wetlands Program Manager, 400 Waterfront Drive, Pittsburgh, PA 15222-4745.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 16-2211, 16-2212, 16-2218, 16-2400

[Filed October 11, 2018]

DELAWARE RIVERKEEPER)
NETWORK; DELAWARE RIVERKEEPER)
MAYA VAN ROSSUM,)
Petitioners, No. 16-2211)
)
LANCASTER AGAINST PIPELINES,)
Petitioner, No. 16-2212)
)
GERALDINE NESBITT,)
Petitioner, No. 16-2218)
)
SIERRA CLUB,)
Petitioner, No. 16-2400)
)
v.)
)
SECRETARY PENNSYLVANIA)
DEPARTMENT OF ENVIRONMENTAL)
PROTECTION; PENNSYLVANIA)
DEPARTMENT OF ENVIRONMENTAL)
PROTECTION,)
Respondents)
)
TRANSCONTINENTAL GAS PIPE LINE)
COMPANY, LLC,)

Intervenor Respondent)
)

SUR PETITION FOR REHEARING

Present: SMITH, *Chief Judge*, MCKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE, SHWARTZ, KRAUSE, RESTREPO, BIBAS, and SCIRICA,[1] *Circuit Judges*.

The petition for rehearing filed by petitioners in Nos. 16-2211, 16-2212 and 16-2400 having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ *Thomas M. Hardiman*
Circuit Judge

Dated: October 11, 2018
CJG/cc: All Counsel of Record

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[1] Judge Scirica's vote is limited to panel rehearing.