In the

United States Court of Appeals for the Third Circuit

Case No. 23-2052

TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC,

Appellant,

v.

PENNSYLVANIA ENVIRONMENTAL HEARING BOARD, ET AL.,

Appellees.

On Appeal from an Order Entered by the United States District Court for the Middle District of Pennsylvania (The Honorable Christopher C. Conner)

INTERVENOR PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION'S BRIEF

FOR THE COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION

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GLOSSARY

EHB	Pennsylvania Environmental Hearing Board
EHB Appeal	EHB Appellants' appeals of the REAE Permits at EHB Docket No. 2023-026-L
EHB Appellants	Citizens for Pennsylvania's Future, Delaware Riverkeeper Network, and Maya K. van Rossum
FERC	Federal Energy Regulatory Commission
NGA	Natural Gas Act
NJDEP	New Jersey Department of Environmental Protection
PADEP	Pennsylvania Department of Environmental Protection
Project	Transco's Regional Energy Access Pipeline Expansion
REAE Permits	Erosion and Sediment Control Permit No. ESG830021002-00, Water Obstruction and Encroachment Permit No. E4083221-006, and Water Obstruction and Encroachment Permit No. E4583221-002 issued by PADEP for Transco's Project
Riverkeeper	EHB Appellant, Delaware Riverkeeper Network
Transco	Appellant, Transcontinental Gas Pipe Line Company, LLC

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the District Court's denial of Transcontinental Gas Pipe Line Company, LLC's ("Transco") motion for preliminary injunction under 28 U.S.C. § 1292(a)(1) because the District Court's order is an interlocutory order of a district court of the United States refusing an injunction. Transco's appeal of the District Court's June 5, 2023 Order was timely filed on June 7, 2023. *See* Fed. R. App. P. 4(a)(1)(A) (notice of appeal must be filed within 30 days after entry of the order appealed from). The District Court had subject matter jurisdiction over this action under 28 U.S.C. § 1331 because the causes of action asserted in Transco's complaint arise under the Constitution and laws of the United States, including, but not limited to, the Natural Gas Act, 15 U.S.C. §§ 717-717z.

STATEMENT OF ISSUES

Should the U.S. District Court for the Middle District of Pennsylvania have enjoined administrative proceedings occurring before the Pennsylvania Environmental Hearing Board related to Pennsylvania Department of Environmental Protection ("PADEP") permits for a project regulated by the Federal Energy Regulatory Commission under the Natural Gas Act because the Natural Gas Act grants the Third Circuit original and exclusive jurisdiction to review state agency actions related to interstate domestic energy projects?

STATEMENT OF RELATED CASES AND PROCEEDINGS

Pursuant to Third Circuit Local Appellate Rule 28.2 (L.A.R. 28.2), PADEP files the following Statement of Related Cases and Proceedings:

1. This case has not been before this Court previously.

2. There is a related administrative proceeding before the Pennsylvania Environmental Hearing Board ("EHB"): *Citizens for Pennsylvania's Future, et al. v. Dep't of Envtl. Prot.*, EHB Docket No. 2023-026-L. There, Appellees in this case are challenging "Federal authorizations" issued by PADEP that also are at issue in this federal litigation. Transco filed a motion to stay that EHB proceeding and filed an Emergency Motion for Preliminary Injunction with the Federal District Court to enjoin the EHB proceeding from moving forward. Transco is arguing that original and exclusive jurisdiction over challenges to the PADEP issued permits lies with this Court under 15 U.S.C. § 717f(d). PADEP concurs. Both Transco's motion for stay before the EHB and Transco's motion for preliminary injunction before the District Court were denied. The matter *sub judice* is Transco's appeal of the District Court's denial of its motion for preliminary injunction.

3. There are also related cases before the Pennsylvania Supreme Court that are on appeal from a Pennsylvania Commonwealth Court decision. The general issue before the Pennsylvania Supreme Court is whether the Pennsylvania

Commonwealth Court erred in deciding that the EHB has jurisdiction to hear appeals of a PADEP air plan approval required under the federal Clean Air Act, 42 U.S.C. §§ 7401 – 7671q, issued to Adelphia Gateway, LLC ("Adelphia") associated with an interstate natural gas pipeline projects regulated under the Natural Gas Act, when the Natural Gas Act, in 15 U.S.C. § 717r(d)(1), grants the Federal Circuit Courts of Appeal original and exclusive jurisdiction over civil actions for the review of such State administrative agency actions. The Pennsylvania Supreme Court granted petitions for allowance of appeal in the following cases, in which opening briefs are due on September 18, 2023:

a. *Cole v. Dep't of Envtl. Prot.*, No. 415 MAL 2021 (Pa. S. Ct.);

b. *Cole v. Dep't of Envtl. Prot.*, No. 312 EAL 2021 (Pa. S. Ct.);

c. *West Rockhill Twp. v. Dep't of Envtl. Prot.*, No. 416 MAL 2021 (Pa. S. Ct.); and

d. *West Rockhill Twp. v. Dep't of Envtl. Prot.*, No. 313 EAL 2021 (Pa. S. Ct.).

Citizens for Pennsylvania's Future v. Dep't of Envtl. Prot., EHB Docket No. 2023-026-L.

STATEMENT OF CASE

The Parties, the REAE Project and the REAE Permits

PADEP is the state administrative agency charged with administering various environmental statutes in Pennsylvania. PADEP has the duty and authority to issue, administer and enforce, *inter alia*, certifications of compliance with Pennsylvania Water Quality Standards pursuant to Section 401 of the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 – 1387 ("Clean Water Act"); and permits pursuant to the Pennsylvania Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1 – 691.1001 ("Clean Streams Law"); the Pennsylvania Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, No. 325, *as amended*, 32 P.S. §§ 693.1 – 693.27 ("Dam Safety and Encroachments Act"); Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 510 – 17 ("Administrative Code"); and the rules and regulations promulgated under those statutes, including 25 Pa. Code Chapters 102 and 105.

Transcontinental Gas Pipe Line Company, LLC ("Transco") is a natural gas pipeline company that has been authorized by the Federal Energy Regulatory Commission ("FERC"), acting under the Natural Gas Act, 15 U.S.C. §§ 717 – 717z ("Natural Gas Act" or "NGA"), to construct and operate a natural gas pipeline in

Pennsylvania, known as the Regional Energy Access Expansion Pipeline Project ("REAE Project"). *See* Certificate Order, ¶ 1, Appx208.

Consistent with its statutory authority, PADEP issued permits to Transco for the REAE Project. Additionally, the authorizations from FERC for Transco's REAE Project triggered a requirement under Section 401 of the Clean Water Act, 33 U.S.C. § 1341, for Transco to obtain a certification from Pennsylvania that its project complies with Pennsylvania Water Quality Standards ("401 Water Quality Certification" or "Certification"). ADD12, ¶ 1.

In April 2022, PADEP issued Transco a conditional 401 Water Quality Certification for the REAE Project, pursuant to 33 U.S.C. § 1341. *See* Certification, Conditions 2 and 3, Appx 204. The Certification provided that the REAE Project would comply with Pennsylvania Water Quality Standards, as long as Transco obtained certain state permits and approvals. In accordance with the 401 Water Quality Certification, Transco applied to PADEP for those permits under 25 Pa. Code Chapter 102 (relating to erosion and sedimentation) and 25 Pa. Code Chapter 105 (relating to dam safety and waterway management). In February 2023, PADEP issued permits to Transco pursuant to 25 Pa. Code Chapters 102 and 105, which together regulate erosion and sediment control and water obstructions and encroachments (collectively the "REAE Permits"). REAE Permits, R.1, Appx. 130-

202. PADEP ensures that Pennsylvania Water Quality Standards are satisfied through the REAE Permits.

Citizens for Pennsylvania's Future, the Delaware Riverkeeper Network, and the Delaware Riverkeeper, Maya van Rossum, (collectively "EHB Appellants") have appealed the REAE Permits to the EHB.

Procedural History

In March 2023, EHB Appellants appealed the REAE Permits to the EHB, ("EHB Appeal"). Notice of Appeal, R.1, Appx 121. Shortly after, the EHB issued an order to establish litigation deadlines for the appeal. Order, Appx245. Discovery has commenced and the parties are discussing the scheduling of depositions.

Also that month, Transco filed a Complaint for Declaratory and Injunctive Relief ("Transco's Complaint") with the U.S. District Court for the Middle District of Pennsylvania ("District Court") seeking declaratory and injunctive relief to prohibit the EHB Appeal from proceeding. Complaint, R.1, Appx32. Transco's Complaint requested, among other things, a declaration that federal law preempts the EHB from acting on the EHB Appeal and a judgment declaring that the Third Circuit has original and exclusive jurisdiction over the EHB Appellants' challenge to the REAE Permits. Complaint, R.1, Appx32.

Transco then filed an Emergency Motion for Preliminary Injunction to

Confirm the Original and Exclusive Jurisdiction of the Third Circuit ("Transco's Motion for Preliminary Injunction"), arguing primarily that Section 717r(d)(1) of the Natural Gas Act, 15 U.S.C. § 717r(d)(1) (also referred to as Section 19(d)(1)), vests exclusive jurisdiction over challenges to the REAE Permits issued by PADEP for projects subject to the Natural Gas Act in the U.S. Court of Appeals for the Third Circuit ("Third Circuit"). Memorandum of Law, R.8-2, Appx263.

PADEP successfully intervened, Order, R.15, Appx304, and then filed a brief joining in Transco' requested relief, Brief, R.23, Appx305.

In June 2023, the District Court issued an Order and supporting Memorandum denying Transco's Motion for Preliminary Injunction, finding that Transco failed to satisfy two threshold elements of the preliminary injunction test, namely demonstrating a likelihood of success on the merits and showing that Transco would suffer irreparable harm. Memorandum Opinion and Order, R. 29-30, Appx 5-6. In reaching its decision, the District Court relied heavily on this Court's decision in *Twp. of Bordentown v. FERC*, 903 F.3d 234 (3d Cir. 2018), which the District Court found to support its position that the NGA "does not preempt state administrative review of interstate pipeline permitting decisions." *Transcontinental Gas Pipe Line Company, LLC v. Pa. Envtl. Hearing Bd.,* Docket No. 1:23-CV-00463, Mem. Op. at 13 (M.D.Pa. June 5, 2023) (citing *Twp. of Bordentown*, 903 F.3d at 269).

Memorandum Opinion, R. 29, Appx18.

Transco timely appealed this decision to the Third Circuit, Notice of Appeal, R.31, Appx1, and then filed a motion with the EHB to stay the EHB proceedings while Transco's Third Circuit appeal is pending. The EHB denied Transco's motion to stay, and the EHB matter is currently proceeding through the discovery process.

STANDARD OF REVIEW

Generally, a three-part standard of review is employed for refusals to issue preliminary injunctions: (1) The District Court's findings of fact are reviewed for clear error, (2) legal conclusions are assessed *de novo*, and (3) the decision to deny (or grant) the injunction is reviewed for abuse of discretion. *K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist.,* 710 F.3d 99, 105 (3d Cir. 2013) (citing *Highmark, Inc. v. UPMC Health Plan, Inc.,* 276 F.3d 160, 170 (3d Cir. 2001)). An abuse of discretion may be established by showing that the court made a clear error of judgment in weighing relevant factors or exercised its discretion based upon an error of law. *Novo Nordisk of N. Am., Inc. v. Genentech, Inc.*, 77 F.3d 1364, 1367 (Fed. Cir. 1996).

Because the District Court's denial of Transco's motion was based solely on an issue of law (i.e. whether the Third Circuit has original and exclusive jurisdiction under the Natural Gas Act over challenges to the permits issued by PADEP), there are no factual findings to review for clear error. The Third Circuit reviews the District Court's legal conclusions *de novo* and denial of Transco's motion for preliminary injunction for an abuse of discretion.

The four factors the District Court was to consider when ruling on Transco's motion for preliminary injunction are: (1) whether the petitioner has shown a

reasonable probability of success on the merits; (2) whether the petitioner will be irreparably injured by denial of the relief; (3) whether granting preliminary relief will result in even greater harm to the nonmoving party; and (4) whether granting preliminary relief will be in the public interest. *Tennessee Gas Pipeline Co. LLC v. Delaware Riverkeeper Network*, 921 F. Supp. 2d 381, 385 (M.D. Pa. 2013); *Am. Exp. Travel Related Serv., Inc. v. Sidamon–Eristoff,* 669 F.3d 359, 366 (3d Cir. 2012). The petitioner bears the burden of proof and must establish all four elements in its favor. *Tennessee Gas Pipeline Co. LLC.*; *P.C. Yonkers, Inc. v. Celebrations the Party and Seasonal Superstore, LLC,* 428 F.3d 504, 508 (3d Cir. 2005).[1]

[1] PADEP does not reargue the merits of the preliminary injunction in its brief here, but instead refers to Transco's brief for that argument.

SUMMARY OF ARGUMENT

PADEP agrees with Transco that the proper forum for these REAE Permit challenges is the Third Circuit. The Third Circuit has held several times that it has exclusive jurisdiction over civil actions challenging PADEP permitting decisions related to interstate pipeline projects under Section 717r(d)(1) of the NGA, 15 U.S.C. § 717r(d)(1). The Third Circuit's jurisdiction over such challenges is original and exclusive.

This Court should reverse the District Court's denial of Transco's motion for preliminary injunction, and particularly its determination that the NGA does not preempt the pending EHB Appeal, because the NGA preempts the EHB's review of state-issued federal permits for interstate gas pipeline projects. The District Court's decision conflicts with the express intent of the law; it creates an absurd, impractical and unworkable result that would require PADEP to litigate challenges to its permitting decisions concerning FERC-regulated interstate pipeline projects in different forums, under different standards of review, and be subject to potentially conflicting caselaw; and precedent holds that jurisdiction to review FERC-regulated pipeline "Federal authorizations" is properly before the Third Circuit.

For these reasons, PADEP respectfully requests that this Honorable Court reverse the decision by the District Court and find that the Third Circuit has original

and exclusive jurisdiction over challenges to permits issued by PADEP for FERC-approved projects involving interstate natural gas pipelines.

ARGUMENT

I. The Natural Gas Act Gives this Court Original and Exclusive Jurisdiction Over Challenges to Permits Issued by PADEP for Interstate Pipelines

The NGA is a comprehensive statute that provides for the regulation of facilities, like pipelines, used in the interstate transportation and sale of natural gas. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299–301 (1988); *see also Islander East Pipeline Co. v. Conn. Dep't of Envtl. Prot.,* 482 F.3d 79, 90 (2nd Cir. 2006) ("Congress wholly preempted and completely federalized the area of natural gas regulation by enacting the NGA."). The statute declares at the outset "that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest." 15 U.S.C. § 717(a).

Section 717f of the NGA applies to the "construction, extension or abandonment" of natural gas facilities and gives FERC the authority to regulate these activities. 15 U.S.C. § 717f; *Twp. of Bordentown*, 903 F.3d at 243. It states, in part, that no natural gas company shall extend or operate any natural gas facilities, or engage in the transportation or sale of natural gas upon completion of any extension of a natural gas facility, unless FERC has issued "a certificate of public convenience

and necessity" ("Certificate") authorizing the extension or operation. 15 U.S.C. 717f (c)(1)(A). Natural gas companies are required to apply for Certificates, which may be issued if FERC determines that the applicant is able and willing to properly perform the service proposed and to comply with the requirements, rules, and regulations of the NGA and FERC. 15 U.S.C. 717f (d) and (e).

The issuance of a Certificate is conditioned on the receipt of "Federal authorizations" issued by federal agencies and state agencies that are required for a proposed project. *Del. Riverkeeper Network v. Sec'y Pa. Dep't of Envtl. Prot.*, 833 F.3d 360, 368 (3d Cir. 2016) ("*Riverkeeper I*"). This includes authorizations under the federal National Environmental Policy Act, 42 U.S.C. §§ 4321 – 4370h ("NEPA") and the federal Clean Water Act, 33 U.S.C. §§ 1251 – 1388. *Id.* at 368. One of those authorizations is a Water Quality Certification required under Section 401 of the Clean Water Act, 33 U.S.C. § 1341.

Section 401 of the Clean Water Act requires that applicants, like Transco, who are seeking to construct or operate facilities that may result in discharges to navigable waters first obtain from the state where the discharges will originate a certification that the discharges will comply with federal Clean Water Act requirements and the state's water quality standards. 33 U.S.C. § 1341; *Riverkeeper I*, 833 F.3d at 368. As it did in this case, PADEP often issues conditional Section

401 Water Quality Certifications certifying that applicants, like Transco, will comply with Pennsylvania's water-quality standards if they obtain permits under Pennsylvania's regulations in 25 Pa. Code Chapter 102, governing erosion and sediment control (25 Pa. Code §§ 102.1 – 102.43), and 25 Pa. Code Chapter 105, governing obstructions of and encroachments on waterways (25 Pa. Code §§ 105.1 – 105.451). Certification, Appx199, Appx204, ¶¶ 2 and 3. *Del. Riverkeeper Network v. Sec'y Pa. Dep't of Envtl. Prot.*, 903 F.3d 65, 69 (3d Cir. 2018) ("*Riverkeeper III"*). Those permits issued by PADEP help ensure that state water quality standards are protected in accordance with Section 401 of the Clean Water Act, 33 U.S.C. § 1341.

Certifications and any associated permits and authorizations issued by PADEP for interstate gas pipeline projects may be challenged under Section 717r(d) of the NGA, 15 U.S.C. § 717r(d), titled "Judicial Review," which 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 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 … required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.).

Further, judicial review by the Courts of Appeal is based on a consolidated

administrative record of decisions and authorizations to be maintained by FERC related to a project, including State administrative agency actions like the issuance of the REAE Permits. 15 U.S.C. § 717n(d).

This statutory framework establishes a comprehensive and exclusive procedure for the permitting and regulation of interstate natural gas facilities, including challenges to related permitting decisions. Congress established such procedures because "Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest." 15 U.S.C. § 717(a).

A. The NGA Broadly Preempts the Regulation of Interstate Natural Gas Pipelines

It is undisputed that the NGA preempts and brings under federal regulation the interstate transportation and sale of natural gas. The United States Supreme Court has concluded that the NGA broadly preempts the regulation of interstate gas transportation and sale. *Schneidewind,* 485 U.S. at 300–301. In accordance with those determinations, this Court has recognized that the NGA preempts state environmental regulation of interstate natural gas facilities, except for state actions taken under the Federal Coastal Zone Management Act, the Federal Clean Air Act and the Federal Clean Water Act. 15 U.S.C. § 717b(d); *Riverkeeper I*, 833 F.3d at

372. "In other words, the only state action over interstate natural gas pipeline facilities that could be taken pursuant to federal law is state action taken under those [federal] statutes." *Id.* States participate in the regulation of interstate natural gas facilities by congressional permission, rather than through inherent state authority. *Id.* at 376.

Limited state participation is authorized under Section 717n(b) of the NGA, 15 U.S.C. § 717n(b), which designates FERC as the lead agency for coordinating all applicable "Federal authorizations" and requires state agencies considering applications for "Federal authorizations" to cooperate with FERC and comply with FERC deadlines in its role as the lead agency. 15 U.S.C. § 717n(b). The term "Federal authorizations" is defined under Section 717n and it includes any permits, certifications or other approvals required under federal law related to an application for a certificate of public convenience and necessity including those issued by states under federal law. 15 U.S.C. § 717n(b).

The REAE Permits that PADEP issued to Transco in this case are "Federal authorizations." When PADEP issued a Section 401 Water Quality Certification for the REAE Project, that Certification was conditioned on Transco obtaining the REAE Permits. Certification, Appx204, ¶¶ 2-3. This Court has previously found that, when PADEP issues a 401 Water Quality Certification for an interstate natural

gas pipeline project, it is acting pursuant to federal law. *Del. Riverkeeper Network v. Sec'y of Pa. Dep't of Envtl. Prot.*, 870 F.3d 171, 175 (3d Cir. 2017) ("*Riverkeeper II*"). It is also settled that because the REAE Permits are conditions of the 401 Water Quality Certification, they are issued "pursuant to federal law." *See, e.g., Riverkeeper I*, 833 F.3d at 386 ("Because the Chapter 105 Permit was a condition of the Water Quality Certification, it is inextricably intertwined with the Water Quality Certification").

Under this regulatory structure, it is clear that Congress federalized the interstate transportation and sale of natural gas, limiting state participation in the field, and it is against this backdrop that the NGA's limits on judicial review should be examined.

B. The Only Remedy to Challenge a Federal Authorization Under the NGA Is by Pursuing a "Civil Action" in the U.S. Courts of Appeal

In denying Transco's preliminary injunction, the District Court misinterpreted the Natural Gas Act by incorrectly concluding that challenges to "Federal authorizations" could be filed in tribunals other than the Courts of Appeal. This is inconsistent with the NGA's plain language and fundamental purpose of preempting the field of interstate natural gas transportation and sale.

Congressional intent to preempt in a particular field may be explicit, implicit

or found where state law conflicts with federal law. *Schneidewind*, 485 U.S. at 293, 300–301. All three forms of preemption are present in this case. The District Court's erroneous conclusion was based on a limited reading of the NGA, which focused on a portion of the NGA's judicial review provision, 15 U.S.C. § 717r(d), and the words "civil action." However, it is black-letter law that when interpreting a statute, a court must evaluate statutory language along with the whole statute, and it is improper to interpret one provision in isolation from the remainder of the statute. *United States v. Cooper*, 396 F.3d 308, 312 (3rd Cir. 2005) (quoting *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974)).

It was critical for the District Court to consider the language in the statute as a whole in reviewing Transco's motion for preliminary injunction. This includes not only the language in 15 U.S.C. § 717r(d), where Congress explicitly provides an *exclusive* avenue for challenging permits issued by state administrative agencies acting pursuant to federal law, but it also includes 15 U.S.C. § 717n. Notably, section 717n is not mentioned at all in the District Court's decision. Yet section 717n provides an important limited carve out for states to participate in the regulation of interstate natural gas facilities through the issuance of permits and other "Federal authorizations." 15 U.S.C. § 717n(b)(2). It also provides that challenges to those authorizations under Section 717r are to be based on a consolidated record developed

in cooperation with FERC. 15 U.S.C. § 717n(d). Therefore, the NGA contains express language providing a review process for "Federal authorizations" before the federal Courts of Appeal.

The NGA is also notable for what it lacks, which is any carve out for review in any other forum, other than actions taken under the Coastal Zone Management Act. The Third Circuit has taken note of the Coastal Zone Management Act being excepted from review by the Circuit Courts of Appeal, finding that Congress intended actions taken under the two non-excepted statutes in 15 U.S.C. § 717r(d), the Clean Air Act and the Clean Water Act, to be subject to review by the Courts of Appeal:

> This interpretation is supported by the legislative history of the bill amending Section 19(d), which indicates that the purpose of the provision is to streamline the review of state decisions taken under federally-delegated authority. Thus, a state action taken pursuant to the Clean Water Act or Clean Air Act is subject to review exclusively in the Courts of Appeals. To bar this Court's review of PADEP's actions in permitting an interstate natural gas facility pursuant to the Natural Gas Act and the Clean Water Act would frustrate the purpose of Congress's grant of jurisdiction and render superfluous the explicit exception from federal judicial review of the Coastal Zone Management Act.

Riverkeeper I, 833 F.3d at 372 (citing *Islander East Pipeline Co.*, 482 F.3d at 85 (discussion of legislative history of the judicial review provision in 15 U.S.C. § 717r(d)). Based on this reading, if Congress intended to provide for the review of

state-issued "Federal authorizations" in a forum other than the Courts of Appeal, Congress would have explicitly said so in the NGA. Instead, the NGA provides only one avenue for such challenges, vesting original and exclusive jurisdiction in the Courts of Appeal.

Congress's intent to give the Courts of Appeal original and exclusive jurisdiction over state issued "Federal authorizations" is also implicit in the NGA. *See Schneidewind*, 485 U.S. at 299-300 ("In the absence explicit statutory language…Congress may implicitly indicate an intent to occupy a given field to the exclusion of state law."). The District Court below emphasized that the "original and exclusive" jurisdiction given to the Courts of Appeal applies only to civil actions, thereby allowing for separate state administrative reviews. *Transcontinental Gas Pipe Line Company, LLC v. Pa. Envtl. Hearing Bd.,* Docket No. 1:23-CV-00463, Mem. Op. at 16 (M.D.Pa. June 5, 2023). Memorandum Opinion, R. 29, Appx 16. However, that reading of 15 U.S.C. § 717r(d) is inconsistent with Congress's intent to comprehensively regulate interstate natural gas sales and transportation at the federal level, and the NGA's structure, which includes no other means to challenge "Federal authorizations."

In interpreting a statute to effectuate Congress's intent, the plain meaning is conclusive, except in rare instances where the literal application will produce a result

that is at odds with the intentions of its drafters. *United States v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989). Congress's intent may be inferred where the federal interest in the field is dominant, as it is here. *Schneidewind*, 485 U.S. at 300. "Congress occupied the field of matters relating to wholesale sales and transportation of natural gas in interstate commerce." *Id.* at 305. Interpreting 15 U.S.C. § 717r(d) as allowing the review of state administrative agency actions on "Federal authorizations" to proceed outside the federal Courts of Appeal is at odds with the congressional intent to occupy the field of interstate natural gas transportation and sales and "to streamline the review of state decisions taken under federally-delegated authority." *Riverkeeper I,* 833 F.3d at 372.

Congressional preemption may be also found where, although Congress has not entirely displaced state action in a particular field, that state action stands in the way of accomplishing Congress's full purposes and objectives. *Schneidewind*, 485 U.S. at 300. Recognizing the purposes and objectives underlying 15 U.S.C. § 717r(d), this Court, in *Riverkeeper I,* noted the Second Circuit's discussion of the legislative history in *Islander East Pipeline Co., LLC*, 482 F.3d 79. In *Islander*, the Second Circuit stated:

> The limited legislative history accompanying the [Energy Policy Act of 2005 amending the Natural Gas Act of 1938] indicates that Congress enacted section [Section § 717r(d)] because applicants, like Islander

> East, were encountering difficulty proceeding with natural gas projects that depended on obtaining state agency permits. *See* Reg'l Energy Reliability & Sec.: DOE Auth. to Energize the Cross Sound Cable: Hearing Before the H. Subcomm. on Energy & Air Quality, 108th Cong. 8 (2004) (statement of Rep. Barton) (discussing an earlier version of the [Energy Policy Act of 2005], and explaining that "the comprehensive energy bill requires States to make a decision one way or another, and removes the appeal of that decision to Federal court," which "will help get projects, like the Islander East natural gas pipeline, constructed"); Natural Gas Symposium: Symposium Before the S. Comm. on Energy & Natural Res., 109th Cong. 41 (2005) (statement of Mark Robinson, Director, Office of Energy Projects, FERC) (observing that, prior to the enactment of the EPACT, NGA applicants were subject to "a series of sequential administrative and State court and Federal court appeals that [could] kill a project with a death by a thousand cuts just in terms of the time frames associated with going through all those appeal processes").

Id. at 85. As further discussed below, this legislative history shows that Congress's full purpose and objective was to eliminate obstacles to obtaining state agency permits for interstate natural gas projects and "death by a thousand cuts" as a result of having to go through a series of state and federal court challenges. To that end, the NGA was designed to remove appeals of those state court decisions to federal court. Interpreting 15 U.S.C. § 717r(d) as allowing the review of state administrative agency actions on "Federal authorizations" to proceed outside the federal Courts of Appeal and possibly at the same time frustrating Congress's objective of eliminating obstacles by subjecting the state permitting process to multiple layers of review in different forums—cannot be what Congress intended when it drafted 15 U.S.C.

§ 717r(d)(1).

C. The District Court's Decision is Contrary to Authority of Several Third Circuit Decisions

In line with this textual analysis, the Third Circuit had consistently found that the NGA grants them original and exclusive jurisdiction to entertain challenges of the PADEP's actions related to interstate natural gas pipelines. In several cases involving the Delaware Riverkeeper Network, one of the appellees here, this Court has held that it has (original and exclusive) jurisdiction over the review of PADEP-issued permits or approvals pursuant to the Clean Water Act that are associated with FERC-regulated pipelines under the Natural Gas Act. This series of *Riverkeeper* cases provides clear direction, stated with the language articulated below, as to this Court's conclusion that it is the proper venue for challenge of such permits issued by PADEP for these pipeline projects:

- *Del. Riverkeeper Network v. Sec'y of Pa. Dep't of Envtl. Prot.*, 833 F.3d 360, 372 (3d Cir. 2016) ("*Riverkeeper I*") (Finding original and exclusive jurisdiction to hear challenge of PADEP's actions relating to a Clean Water Act Section 401 State Water Quality Certification):

> Thus, a state action taken pursuant to the Clean Water Act or Clean Air Act is subject to review exclusively in the Courts of Appeals. To bar this Court's review of PADEP's actions in permitting an interstate natural gas facility pursuant to the Natural Gas Act and the Clean Water Act would frustrate the purpose of Congress's grant of jurisdiction and render superfluous the explicit exception from federal judicial review of the Coastal Zone Management Act.

- *Del. Riverkeeper Network v. Sec'y of Pa. Dep't of Envtl. Prot.*, 870 F.3d 171, 175 (3d Cir. 2017) ("*Riverkeeper II*") (Rejecting a request to transfer challenge to a PADEP permit to the EHB and holding that Third Circuit had jurisdiction):

> Our jurisdiction is controlled by Section 19(d) of the Natural Gas Act, as amended in 2005. Where an interstate pipeline project is proposed to be constructed, *see* 15 U.S.C. § 717f, this Court has '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 ... any permit, license, concurrence, or approval ... required under Federal law,' *id.* § 717r(d)(1).

- *Del. Riverkeeper Network v. Sec'y Pa. Dep't of Envtl. Prot.,* 903 F.3d 65, 74-75 (3d Cir. 2018) ("*Riverkeeper III*") (Noting that the "provision of the Natural Gas Act that actually grants us jurisdiction, 15 U.S.C. § 717r(d)(1) is quite capacious" the Third Circuit held it has jurisdiction):[2]

> PADEP's issuance of a Water Quality Certification…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.

- *Del. Riverkeeper Network v. Sec'y Pa. Dep't of Envtl. Prot*., 751 F. App'x 169, 172-173 (3d Cir. 2018) ("*Riverkeeper IV*") (Regarding a challenge to a Clean Water Act Section 401 State Water Quality Certification the Third Circuit held that they had original and exclusive jurisdiction):

> We have original and exclusive jurisdiction to hear 'any civil action for the review of an order or action of a [f]ederal agency ... or State administrative agency ... to issue, condition, or deny any permit, license, concurrence, or approval' of a permit required by the Natural Gas Act. 15 U.S.C. § 717r(d)(1).

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[2] *Riverkeeper III* is particularly notable here as, like in this case, there was also an existing EHB appeal pending -- and that did not prevent the Third Circuit from holding that it had exclusive jurisdiction, nonetheless.

> PADEP's decisions are 'immediately effective' and '[t]he PADEP and [EHB] are entirely independent agencies.' *Riverkeeper III*, 903 F.3d at 73. Thus, DRN's petition is now ripe and we have jurisdiction to review the merits of its claim.

- *Del. Riverkeeper Network v. Sec'y Pa. Dep't of Envtl. Prot.*, 783 F. App'x 124, 127 (3d Cir. 2019) ("*Riverkeeper V*") (Finding the Third Circuit had exclusive jurisdiction over a permit issued by PADEP for a FERC-regulated pipeline):

> The Natural Gas Act provides us with original and exclusive jurisdiction to hear 'any civil action for the review of an order or action of a ... State administrative agency ... to issue, condition, or deny any permit, license, concurrence, or approval.' Despite this broad grant of review, Riverkeeper argues that the Court lacks jurisdiction to hear its petition because the matter is not ripe. It asserts that the [PADEP's] decision must be first reviewed by Pennsylvania's Environmental Hearing Board and is therefore not a final order or action. However, we have previously addressed this question in *Riverkeeper III*. There, we held that a final decision by the [PADEP] is a final agency action and is ripe for review. The [PADEP's] decisions are 'immediately effective' and '[t]he [PADEP] and the Board are entirely independent agencies.' Riverkeeper gives us no reason to disturb that conclusion here. Its petition is ripe, and we have jurisdiction to hear the merits of the claim.

(footnotes omitted). Thus, as outlined above, the Third Circuit has held five times in four years that it is the court vested with jurisdiction under 15 U.S.C. § 717r(d)(1) over challenges to PADEP-issued permits and approvals for FERC-regulated pipelines. The *Riverkeeper* cases coupled with the preemptive nature of the NGA, discussed above, through which Congress only provided for challenges to "Federal authorizations" before the Court of Appeals in Section 717r, leads to a conclusion

that review of state issued "Federal authorizations" is within exclusive jurisdiction of the Third Circuit.

D. The District Court's Decision is Inconsistent with Other Circuit Court Decisions

The District Court's decision also appears to conflict with cases from outside the Third Circuit, most notably the *Berkshire* case from the First Circuit and the *Islander* case from the Second Circuit, among others.

In *Berkshire Environmental Action Team v. Tennessee Gas*, 851 F.3d 105 (1st Cir. 2017), the First Circuit dismissed a petition for review regarding the Massachusetts Department of Environmental Protection's approval of a pipeline-related 401 Water Quality Certification application for lack of jurisdiction. Berkshire filed a Notice of Claim for Adjudicatory Hearing and also "hedged their bets" by dually filing a petition before the First Circuit. *Berkshire Environmental Action Team*, 851 F.3d at 108. Citing the finality requirement under 15 U.S.C. 717r(d)(1), the court dismissed the matter finding that the agency had not yet finally acted, a requirement to invoke jurisdiction. The court held that "Congress, though, has addressed the matter of delay directly by divesting states of their customary review of state agency orders and opinions in this field." *Id.* at 112. The *Berkshire* Court noted:

> The very fact that Congress has granted us the unusual ability to review directly…action by a state agency can itself be seen as further evidence that Congress sought to reduce the potential for the use of delay to block natural gas projects…A Congress that placed so much emphasis upon avoiding delay in the adjudication of requests for certification of this type would not likely have intended to authorize the delay that interlocutory reviews of every state agency action, final or not, would inevitably engender.

Id., 851 F.3d at 110.

The Second Circuit expressed a similar position in *Islander East Pipeline Co., LLC*, 482 F.3d 79. There, the court reviewed a state Order denying Petitioner's application for a 401 Water Quality Certificate. In remanding to the agency for further proceedings, the court reiterated that the purpose of the NGA's judicial review provision is to streamline the review of state decisions that administer federal law so that appeals are reviewed immediately in the Court of Appeals:

> Congress enacted 19(d) because applicants…were encountering difficulty proceeding with natural gas projects that depended on state permits and…were subject to a series of sequential administrative and State court and Federal court appeals that could kill a project with a death by a thousand cuts just in terms of the time frames associated with going through all those appeal processes.

Islander East Pipeline Co., LLC, 482 F.3d at 85.[3]

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[3] Several other cases of note showing Court of Appeals' action on state issued "Federal authorizations" include: *Algonquin Gas Transmission, LLC v. Weymouth Conservation Comm'n*, No. 17-10788-DJC, 2017 WL 6757544, (D. Mass. Dec. 29,

II. Reading the NGA's Judicial Review Provisions to Allow Multiple Forums for Permit Challenges Conflicts with the Express Intent of the NGA and Creates an Absurd, Impractical and Unworkable Result

A. The District Court's Decision Does Not Effectuate Congress's Intent

As discussed above, the plain language of the NGA shows Congress's intent to broadly preempt the regulation of interstate gas transport projects, and that the sole means of challenging a "Federal authorization" for such a project is by a civil action in the Court of Appeals. However, assuming, for the sake of argument, that this language is ambiguous, the District Court's result is still contrary to Congress's intent.

2017), aff'd sub nom. *Algonquin Gas Transmission, LLC v. Weymouth, Mass.*, 919 F.3d 54 (1st Cir. 2019) (First Circuit affirmed the District Court's ruling that a local ordinance was preempted, as applied to the building of a natural gas compressor station); *Sierra Club v. State Water Control Board*, 64 F.4th 187 (4th Cir. 2023) (Fourth Circuit denied a petition for review of the decision of Virginia's State Water Control Board to adopt the recommendation of Virginia's Department of Environmental Quality to approve application for water protection individual permit under Clean Water Act for natural gas pipeline project. The Court found that the record supported the agencies' decision and that they did not act arbitrarily and capriciously by determining that the project would comply with Virginia's narrative water quality standard) and *Rockies Express Pipeline LLC v. Ind. State Nat. Res. Comm'n*, 2010 WL3882513 (S.D. Ind. Sept. 28, 2010) (holding that quasi-judicial administrative reviews by a separate state agency were preempted).

Congress most directly and succinctly expressed its intent in the first few lines of the NGA. In Section 717(a) Congress declares "that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest." 15 U.S.C. § 717(a). Having established the need for federal regulation, Congress next directs that "[t]he provisions of [the NGA] shall apply to the transportation of natural gas in interstate commerce." 15 U.S.C. § 717(b). Thus, Congress's intent is not complicated: natural gas transportation is important to the public interest, federal regulation of natural gas regulation is important, and interstate gas transport is subject to this federal law.

The legislative history makes clear that among the problems Congress was hearing about from FERC and the bill's sponsor were the inefficiency and delay associated with multiple review records created by states, as well as records being created by federal agencies associated with their reviews of projects pursuant to federal laws. Likewise, the multiple state and federal administrative appeals of associated state "Federal authorizations," and the distinct authorizations required for projects from other federal agencies (such as the U.S. Army Corps of Engineers or U.S. Environmental Protection Agency), were cited as sources of delay.

FERC's General Counsel provided the following salient testimony based on FERC's experience:

> All federal and state agencies should work with the lead agency [FERC] as it develops the record, and provide their decisions under their respective laws to the lead agency, within a timeframe set by that agency. Such a requirement would avoid sequential permitting. Finally, direct appeal to a United States court of appeals would avoid the long delays as individual permit appeal processes wind their way through state and federal administrative appeals, state court and finally federal court appeals over several years.

Energy Policy Act of 2005, Federal Energy Regulatory Commission at hearing on 2005 EPACT, 109th Congress, First Session, Feb. 10, 2005 (related to siting of LNG Facilities) (Statement of Cynthia A. Marlette, General Counsel). (Copy in Addendum, ADD1).

Mark Robinson, the Director of the Office of Energy Projects at FERC, also provided testimony to Congress on the siting challenges overseen by FERC. Prior to this portion of his testimony, Robinson had clarified that FERC's record and appeal recommendations were not aimed at eliminating the states' roles in administration of federal environmental statutes. Rather, Robinson emphasized the need for coordination regarding the various records created by state agency reviews and other federal agencies reviews and the need for a streamlined appeal process

associated with those state and federal agency decisions. He made three specific recommendations:

> Three points to have a rational siting process.
>
> First, you have to have clear jurisdiction for a lead agency, an agency that people look to to make that decision.
>
> Second, you need the development of one Federal record. All agencies that operate under Federal statute or State agencies that operate under delegated actions from the Federal statutes need to cooperate with the commission and develop one record from which all those actions can be taken in a time frame established by that lead agency. That is just good government, to have everybody do it at one time and use one record.
>
> There needs to be some teeth in it, however. If an agency does not take that action within the time frame required by that Federal agency, it should be assumed waived, that their authority is assumed waived if they do not take that action in a reasonable time frame.
>
> The third element that you need, beyond the clear jurisdiction and one Federal record, is you need to have a direct appeal of all of those actions to the Federal Court of Appeals, not a series of sequential administrative and State court and Federal court appeals that can kill a project with a death by a thousand cuts just in terms of the time frames associated with going through all those appeal processes.
>
> If we have those three elements in a siting process that only you can provide to us, we can rationalize the siting for not only natural gas, but I offer it as a model for any infrastructure development that people are interested in seeing move forward in this country.

Energy Policy Act of 2005, Federal Energy Regulatory Commission, Natural Gas Symposium Before the Committee on Energy and Natural Resources United States Senate, 109th Congress, First Session, January 24, 2005 (Statement of Mark Robinson, Director, Office of Energy Projects). (Copy in Addendum, ADD2).

Finally, the bill's lead sponsor, Representative Joe Barton, explained in testimony that:

> As to the question of whether a State can delay a decision on a natural gas pipeline indefinitely, the comprehensive energy bill requires States to make a decision one way or another, and removes the appeal of that decision to Federal court. This, and other provisions in the comprehensive energy bill, will help get projects, like the Islander East natural gas pipeline, constructed. These provisions in the comprehensive energy bill will help the citizens of New York by increasing energy security and reliability, reducing the price consumers pay for electricity, and providing more, and more affordable, clean-burning natural gas to heat their homes and generate electricity.

Energy Policy Act of 2005, Hearing Before the Subcommittee on Energy and Air Quality of the Committee on Energy and Commerce House of Representatives 108th Congress, Second Session, May 19, 2004 (Statement of Hon. Joe Barton, Chairman, Committee on Energy and Commerce). (Copy in Addendum, ADD3).

Several Courts have examined Congress's intent for enacting the NGA and have uniformly concluded that the intent was to limit state involvement and streamline the process for authorizing interstate gas transport projects. In an early leading decision, *Tennessee Gas Pipeline v. Delaware Riverkeeper,* the U.S. District Court for the Middle District of Pennsylvania held that:

> Congress's intent in passing the NGA was to bypass the exhaustive rounds of administrative, state, and federal appeals and to provide for a mechanism whereby an aggrieved party could appeal directly to a

> federal circuit court. This policy is especially forceful in a case such as this when the EHB reviews PADEP's decisions *de novo.*

921 F. Supp. 2d 381, 396 (M.D. Pa. 2013).[4]

Similarly, the U.S. Court of Appeals for the Second Circuit found that by enacting the NGA Congress intended to streamline the review of permits by requiring "all appeals of Federal and state agency decisions that administer Federal law [are] reviewed immediately in a single U.S. Court of Appeals." *Islander East Pipeline Co., LLC*, 482 F.3d at 85. *See also Weaver's Cove Energy, LLC v. Rhode Island Coastal Res. Mgmt. Council*, 589 F.3d 458, 473 (1st Cir. 2009) (NGA intended to prevent delays from state permit reviews).

Finally, this Court held, based on its review of the NGA legislative history, that Congress intended to streamline reviews of state-issued "Federal authorizations" for interstate gas transport projects and that Congress intended that "Federal authorizations" under the Clean Water Act or Clean Air Act undertaken by states would be reviewed by the Courts of Appeal. *Riverkeeper I*, 833 F.3d at 372.

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[4] The Third Circuit only rejected the assumption in the *Tennessee Gas* decision that the NGA gives appellate courts jurisdiction over state permits before they are final. No one disputes the permits in the present case were final. Moreover, the Third Circuit in *Riverkeeper III* reached the same ultimate conclusion as the *Tennessee Gas* court: that original and exclusive jurisdiction to hear a civil action challenging a final PADEP decision – in that case, the 401 Water Quality Certification – was in the Third Circuit, and not the EHB.

Thus, Congressional intent also shows that the District Court erred by holding that "Federal authorizations" could be challenged in either or both the Court of Appeals and the EHB.

B. Allowing Multiple Forums for Permit Challenges Under the NGA Creates an Absurd Result by Slowing Down a Review Process Congress Intended to be Streamlined

In ruling on Transco's Motion for Preliminary Injunction, the District Court concluded that challengers of PADEP permitting decisions for interstate natural gas pipeline projects may *either* file an appeal before the EHB *or* a collateral civil action in the Third Circuit Court of Appeals pursuant to 15 U.S.C. § 717r(d)(1). However, reading the NGA Judicial Review provision to say that Congress did not intend to foreclose state administrative review conflicts with one of the NGA's fundamental purposes, streamlining natural gas projects.

Interpreting the judicial review provision in the NGA as allowing the EHB to share jurisdiction with the Third Circuit over the permit challenges does not "streamline" the review of such actions. "Streamline" means "to make simpler or more efficient." *Merriam-Webster.com Dictionary, Merriam-Webster,* (accessed 12 Sep. 2023), https://www.merriam-webster.com/dictionary/streamline. But interpreting the judicial review provision in the NGA to allow for the EHB to have concurrent jurisdiction of these actions double the venues for appeals of PADEP

"Federal authorizations," and renders the review more complicated and less efficient, creating an absurd result that Congress would not have intended.

An absurd result or interpretation "is one that defies rationality or renders the statute nonsensical and superfluous." *Riccio v. Sentry Credit, Inc.*, 954 F.3d 582, 588 (3d Cir. 2020). Even where the plain meaning of a statute leads to an absurd result, the courts may construe the statute to avoid that result. *See Douglass v. Convergent Outsourcing*, 765 F.3d 299, 302 (3d Cir. 2014) (if the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters, then courts are obligated to construe statutes sensibly and avoid constructions which yield absurd or unjust results); s*ee also In re Kaiser Aluminum Corp.*, 456 F.3d 328, 330 (3d Cir. 2006) (a basic principle of statutory construction is that courts should avoid statutory interpretations that lead to absurd results).

The legislative history makes it clear that Congress intended to improve and expedite the review process for publicly needed interstate pipeline projects which were being held up for years by multiple rounds of administrative and state court appeals. *Islander East Pipeline Co., LLC*, 482 F.3d at 85. Congress did so by requiring all challenges to "Federal authorizations" be filed directly with a Circuit Court—a much quicker process than going through a state board and then through state appellate courts. Finding that the NGA allows for challenges in multiple forums

simultaneously is completely contrary to Congress's intent.

C. Allowing Multiple Forums for PADEP's "Federal Authorization" Challenges Under the NGA Creates Impractical and Unworkable Problems for All Parties Involved

According to the interpretation of the court below, a PADEP permit or other approval that is also a "Federal authorization" for an interstate gas transport project could be challenged in the Third Circuit and the EHB, by the same parties or by different parties or by a combination, and at the same time. This holding creates a scheme for challenging "Federal authorizations" that is confusing and chaotic. It expands opportunities to challenge interstate gas transport projects rather than streamlining the process as Congress intended. As a result, PADEP, permittees, and other parties could be forced to expend resources to litigate in two different forums simultaneously. These increased costs are not just a problem for government and industry, but also for public interest advocates and citizens, who often lack deep pockets. Further, this more complicated and less efficient challenge process certainly delays the delivery of domestic energy. This is clearly not what Congress intended when it drafted 15 U.S.C. § 717r(d)(1).

The nature of the proceedings in the EHB and Third Circuit are vastly different, increasing the burden on parties and potential for conflicting results. Under the NGA, challenges to "Federal authorizations" to the Third Circuit are heard on a

record created by the FERC and the state agency. 15 U.S.C. § 717n(d)(2). In contrast, the EHB hears challenges to PADEP actions *de novo*, and the EHB typically allows the introduction of evidence beyond the record that is made by DEP through its review. *Pennsylvania Trout v. Dep't of Envtl. Prot.,* 863 A.2d 93, 106 (Pa. Cmwlth. 2004); *Warren Sand & Gravel Co., Inc. v. Dep't of Envtl. Res.*, 341 A.2d 556, 565 (Pa. Cmwlth. 1975). Further, the EHB provides parties full rights to discovery and pre-hearing motion practice. 25 Pa. Code §§ 1021.91 – 1021.96d, 1021.101 – 1021.102 (EHB Rules of Practice and Procedure).

These two paths remain separate once the EHB renders a decision. EHB decisions are appealable as of right to the Pennsylvania Commonwealth Court, and then a party may petition for allowance of appeal to the Pennsylvania Supreme Court. 42 Pa.C.S. §§ 724, 763. Appeals from an EHB decision could continue for many years. This additional delay further taxes the parties' resources, delays a final resolution, and delays obtaining certainty about the project's status, thwarting the Congressional intent of streamlining the appeal process.

A worst case, but very real scenario, is that the EHB and Pennsylvania state courts, and the Third Circuit, could render conflicting decisions, creating significant uncertainty about the interstate gas transport project's legal status. Conflicting decisions would affect the parties and also many persons not involved in "Federal

authorization" litigation, such as residents and contractors.

For example, if the Third Circuit found the REAE Permits (the "Federal authorization" in play here) issued by PADEP to Transco for its interstate pipeline project here invalid and the EHB and/or Pennsylvania state courts were still reviewing it, would Transco be legally allowed to construct and operate the pipeline? Conversely, if the Third Circuit upheld the REAE Permits, would that decision be moot pending EHB or state court proceedings? The EHB can remand an authorization to PADEP with instructions to revise it consistent with its decision. After PADEP revises and reissues the permit, what happens to a challenge to the initial permit pending before the Third Circuit? Is the federal proceeding rendered moot by the reissued permits? Moreover, the Third Circuit and the EHB could render inconsistent decisions on the "Federal authorization," leading to a plethora of problems too numerous to list here. There is no provision for reconciling conflicting state court and federal appellate court decisions on challenges to state-related "Federal authorizations" under the NGA.[5]

[5] This is not some abstract concern. As noted above in PADEP's Statement of Related Cases and Proceedings, PADEP is currently a party to cases on which the Pennsylvania Supreme Court recently granted allocatur. Those cases relate to a PADEP air plan approval – a Federal authorization under the Clean Air Act – associated with the Adelphia compressor station, which is connected to an interstate

In the NGA, Congress intended to streamline the record and appeal process for decisions related to pipeline siting, construction and environmental compliance. This not only facilitates efficient delivery of domestic energy, but also provides greater certainty and predictability to all involved in that process—citizens, permittees and state and federal environmental agencies, as well as FERC. The District Court's decision below undoubtedly hampers certainty by creating this very inefficient dual jurisdiction track for the "Federal authorizations" of each state where the project is located, in contravention of clear Congressional intent. If the "literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters" then Courts are obligated to "construe statutes sensibly and avoid constructions which yield absurd or unjust results." *United States v. Fontaine*, 697 F.3d 221, 227 (3rd Cir. 2012).

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natural gas pipeline, like the REAE pipeline, subject to regulation by FERC under the Natural Gas Act. The Pennsylvania Supreme Court in the *Adelphia* cases is reviewing a Pennsylvania Commonwealth Court determination that Section 717r of the NGA allows appeals of PADEP's Federal authorization to proceed before the EHB, the Third Circuit, or both. That PADEP is raising these same issues regarding NGA jurisdiction simultaneously before both the Pennsylvania Supreme Court and this Court, highlights the reality of an inefficient dual jurisdiction track. Dual jurisdiction creates the potential for conflicting rulings between federal courts and state tribunals, leading to continuing legal uncertainty.

III. The District Court's Reliance on the *Bordentown* Case is Misplaced

The District Court largely based its contrary decision on this Court's opinion in *Township of Bordentown*, 903 F.3d 234. However, the District Court's reliance on *Bordentown* is flawed, and its decision contradicts *Bordentown*. The District Court misconstrued the holding in *Bordentown* and overlooked the significance of the very real differences between Pennsylvania's environmental regulatory framework and New Jersey's environmental regulatory framework for purposes of the NGA.

The New Jersey Department of Environmental Protection ("NJDEP") is the state agency that administers the Clean Water Act in New Jersey. NJDEP is responsible for issuing water quality certifications for interstate gas transport projects subject to the NGA. *Twp. of Bordentown*, 903 F.3d at 244. PADEP fulfills the same role in Pennsylvania. *Riverkeeper I*, 833 F.3d at 369. PADEP and NJDEP conduct similar technical evaluations of applications for water quality certifications and other "Federal authorizations." However, NJDEP's process includes a step that PADEP does not have: the opportunity for an administrative hearing that is conducted within the NJDEP. *See* N.J. Admin. Code §§ 7:7A-21.1(b); 7:14A-17.2(c); *Twp. of Bordentown*, 903 F.3d at 245-246. After the NJDEP administrative law judge reaches a decision, the Commissioner of NJDEP has 45 days to "accept,

reject or modify" the decision. N.J. Admin. Code § 7:7A-21.1(g). All of these processes occur within NJDEP, and NJDEP issues the water quality certification or other Federal authorization.

In *Bordentown* several parties requested an internal NJDEP hearing, but NJDEP denied the request. The denial was based on NJDEP's interpretation that the NGA prohibited the internal NJDEP administrative review. *Twp. of Bordentown*, 903 F.3d at 245-246. This Court reversed the "Federal authorizations" because NJDEP denied the internal administrative review requests, and stated its holding as follows:

> Our holding is *only* that (1) instead of bringing a civil action in this Court, the petitioners were entitled under New Jersey law to have alternatively first sought *an intra-agency adjudicative hearing*, and (2) the NJDEP violated New Jersey law by unreasonably denying the petitioners' request for such a hearing based on its misreading of the NGA and this Court's precedent.

Id. at 271-272 (emphasis added). This Court did not make a holding about whether a hearing by a state agency that was *different from* the one that issued the "Federal authorization" would violate the NGA or not, which is an important distinction.

In reaching its holding in *Bordentown*, this Court discussed the scope and meaning of the process to challenge "Federal authorizations" by commencing a "civil action" in a Court of Appeals under 15 U.S.C. § 717r(d). *Id.* at 266-269. It

determined that "barring any specific statutory language to the contrary, a hearing before an administrative body is not a 'civil action.'" *Id.* at 268. "[T]he 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.* Thus, in *Bordentown* the Court found that based on the statutory structure of the NGA, and implicitly from other decisions interpreting § 717r(d)(1), state administrative review of interstate gas permitting decisions is not preempted by the NGA. *Id.* at 268-269.

However, not all state administrative review processes are alike. This Court recognized in *Bordentown*, "the myriad 'state procedures giving rise to orders reviewable under § 717r(d)(1) may (and undoubtedly do) vary widely from jurisdiction to jurisdiction,' some of which may permit intra-agency review and others which may not." *Id.* at 268, (citing *Berkshire Envtl. Action Team, Inc. v. Tenn. Gas Pipeline Co.*, 851 F.3d 105, 112–13 (1st Cir. 2017)). Simply put, the administrative frameworks in Pennsylvania and New Jersey are different.

In New Jersey, the New Jersey DEP is the agency responsible for issuing "Federal authorizations" for interstate gas transport projects in New Jersey. Affected persons in New Jersey can request an administrative hearing within NJDEP regarding the Federal authorization. The NJDEP Commissioner has discretion to accept the results of the hearing or not. N.J. Admin. Code § 7:7A-21.1(g). Thus, the

administrative hearing is part of the Federal authorization approval process within NJDEP. No other state agency is involved.

In Pennsylvania, the Pennsylvania DEP is the agency responsible for issuing "Federal authorizations" for interstate gas transport projects in Pennsylvania. However, administrative hearings under Pennsylvania's environmental regulatory framework are conducted by a different agency that is independent from PADEP, the EHB. The EHB is an independent, quasi-judicial agency. Section 3(a) of the Environmental Hearing Board Act ("EHB Act"), Act of July 13, 1988, P.L. 530, 35 P.S. § 7513. The EHB reviews PADEP actions, such as permits, on a record that is created before the EHB, which is not limited to PADEP's record from its review of the application. 35 P.S. § 7514(c); *see also Riverkeeper III,* 903 F.3d at 72 ("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."). In Pennsylvania under the EHB Act, the EHB Administrative Law Judges are independent of PADEP and, unlike in New Jersey, the PADEP Secretary has no power to "accept, reject or modify" EHB decisions. The EHB's decisions are binding on DEP and appealable to Commonwealth Court, which reviews those decisions using an appellate standard of review.

The instant case illustrates Pennsylvania's process. DEP conditioned the 401 Water Quality Certification for this project with the requirement to obtain two permits that implement Pennsylvania's water quality standards. This case concerns those two permits (the REAE Permits), which are issued by PADEP under Pennsylvania's regulations. *See generally* 25 Pa. Code Chapters 102 and 105 (related to erosion control and waterway encroachments). Only PADEP issues these permits. The EHB does not. The EHB reviews PADEP actions, including the issuance of permits, 25 Pa. Code § 1021.2 (definition of "action"). The EHB issues "adjudications," not permits or other authorizations. Section 4(c) of the EHB Act, 35 P.S. § 7514(c). PADEP actions, including issuance of the REAE Permits issued to Transco, are effective immediately and do not require action by the EHB or any other agency. *See Riverkeeper III,* 903 F.3d at 73, 75 (finding that PADEP's issuance of a 401 Water Quality Certification is a final action, and the Court has "exclusive jurisdiction to hear any 'civil action for the review' of such a decision."). Most significantly, PADEP and other parties to such appeals are bound by the EHB adjudications, opinions and orders, and, if PADEP or another party disagrees, the recourse is to appeal to the Pennsylvania Commonwealth Court in that court's appellate jurisdiction.

As already discussed in detail above, Congress broadly preempted the field of regulating interstate gas transport projects through the NGA. However, Congress added a limited preemption carve out to the NGA that allows state agencies to participate in the regulation of interstate gas transport projects, to the extent necessary to issue "Federal authorizations" for the projects. 15 U.S.C. § 717n. Those "Federal authorizations" are the approvals required under federal law for the project. 15 U.S.C. § 717n(a). Section 717n does not provide for participation of state agencies other than those that approve "Federal authorizations."

Applying the preemption carve out in 15 U.S.C. § 717n to the Pennsylvania and New Jersey environmental regulatory frameworks shows that only PADEP and NJDEP are covered by Section 717n's carve out, because these are the state agencies that issue "Federal authorizations." The fact that NJDEP includes an additional step in its permitting process, an internal administrative hearing, is not relevant under Section 717n. The Section 717n preemption carve out only applies to *state agencies that issue "Federal authorizations."* In Pennsylvania that agency is PADEP, not the EHB.

Accordingly, the District Court's failure to consider that the limited preemption carve out in the NGA applies differently to the Pennsylvania and New Jersey environmental regulatory frameworks led the Court to improperly rely on

Bordentown. The foregoing shows that the District Court's decision is actually not supported by and is contrary to *Bordentown,* the main appellate decision upon which it relies.

CONCLUSION

For the foregoing reasons, PADEP respectfully requests that this Court reverse the District Court's denial of Transco's motion for preliminary injunction, and find that the Third Circuit has original and exclusive jurisdiction under the Natural Gas Act over challenges to the REAE Permits issued by PADEP for Transco's FERC-approved interstate natural gas pipeline project, therefore preempting the EHB Appeal.

Respectfully submitted this 19th day of September 2023,

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CERTIFICATE OF BAR ADMISSION

3d Cir. L.A.R. 28.3(d) Bar Membership Certification

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Dated: September 19, 2023

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I hereby certify that the foregoing document was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record in this appeal, and that any counsel who have not yet entered their appearances in this appeal were served true and correct copies via electronic mail and U.S. mail, all as indicated below:

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Dated: September 19, 2023

ADDENDUM

Other Materials

THE ENERGY POLICY ACT OF 2005

HEARINGS

BEFORE THE

SUBCOMMITTEE ON ENERGY AND AIR QUALITY

OF THE

COMMITTEE ON ENERGY AND COMMERCE

HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

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be modified only if it would be contrary to the public interest to allow the contract to remain, e.g., where the financial integrity of the selling utility might be impaired, the rate is unduly discriminatory, or the rate would cast an excessive burden on other customers. Section 1286 of the conference report on H.R. 6 addresses the sanctity of contracts and requires a "public interest" standard of review for new contracts unless a contract expressly provides otherwise. This section would clarify an unclear body of judicial and administrative precedent in an appropriate way that ensures greater preservation of the terms of contracts.

Alaska Natural Gas Pipeline

Last year, the Congress enacted the Alaska Natural Gas Pipeline Act, which clarified issues regarding proposed Alaska transportation projects, and established a framework for the Commission's consideration of applications for such projects. Emergency Supplemental Appropriations for Hurricane Disasters Assistance Act, 2005, Pub. L. No. 108-324, ch. 12, sec. 1201, § 101-116, 118 Stat. 1220, 1255-67 (2005). That Act and the pre-existing NGA and Alaska Natural Gas Transportation Act provide the Commission with sufficient authority to address such matters.

An Alaska natural gas pipeline is one of the Commission's highest regulatory priorities. As required by the Alaska Natural Gas Pipeline Act, the Commission is in the process of drafting regulations governing open seasons for the allocation of capacity on Alaska pipeline projects, and is scheduled to issue those regulations this week. The Commission stands ready to work with potential pipeline proponents, shippers, the State of Alaska, other government agencies, Canada and the public to do everything possible to ensure prompt consideration of proposals to move Alaska natural gas to markets in the lower 48 states.

Alternative Conditions and Fishways for Hydroelectric Projects

Section 231 of the conference report on H.R. 6 would require federal resource agencies that have authority under the FPA to prescribe fishways and establish mandatory conditions in hydroelectric licenses to consider alternative prescriptions and conditions proposed by license applicants. It would also allow alternatives to be proposed by other interested entities.

FPA Refund Effective Date

Section 1284 of the conference report on H.R. 6 would allow refunds from the date a complaint is filed or from publication of a notice that the Commission has instituted a proceeding under its own motion under section 206 of the FPA. This provision appropriately would protect customers by providing an additional 60 days of refund protection.

Additional Legislation

The conference report on H.R. 6 adequately addresses the urgent need for energy legislation. However, there are three additional areas the Congress might want to consider addressing, as described below.

Siting of LNG Facilities

With regard to liquefied natural gas (LNG), in order to effectively and efficiently site infrastructure that is in the public interest, the Congress should consider clarifying the Commission's jurisdiction to site LNG facilities onshore or in state waters, and provide for a single federal record and for direct appeal of LNG-related decisions to a United States court of appeals. The Commission currently is involved in litigation in the U.S. Court of Appeals for the 9th Circuit with respect to the scope of its authority to site LNG terminal facilities. Legislation could end regulatory uncertainty by clarifying the Commission's authority in this area. A single federal agency should have the statutory authority to determine whether a specific proposal for LNG infrastructure development is in the public interest. While no federal or state agency acting under federal law should lose its existing statutory authority, for example, Coastal Zone Management Act determinations and Clean Water Act certifications, a single agency should be responsible for the final public interest determination and be held accountable for that determination. In addition, the creation of one federal record would allow a single agency to serve as the lead agency for National Environmental Policy Act purposes. All federal and state agencies should work with the lead agency as it develops the record, and provide their decisions under their respective laws to the lead agency, within a timeframe set by that agency. Such a requirement would avoid sequential permitting. Finally, direct appeal to a United States court of appeals would avoid the long delays as individual permit appeal processes wend their way through state and federal administrative appeals, state court and finally federal court appeals over several years. Economic Dispatch of Electric Facilities

Statement of Mark Robinson, FERC Director, Office of Energy Projects.....ADD2

[Senate Hearing 109-2]
[From the U.S. Government Publishing Office]

S. Hrg. 109-2

NATURAL GAS SYMPOSIUM

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SYMPOSIUM

before the

COMMITTEE ON
ENERGY AND NATURAL RESOURCES
UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

ON

NATURAL GAS

JANUARY 24, 2005

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statutes, but what we are asking for is a little adult supervision. Congress should do these six things.

One, affirm FERC's role as lead agency for pipeline and LNG terminal permitting and construction under the Natural gas Act.

Two, task FERC with coordinating all environmental reviews under Federal law, including NEPA.

Three, affirm that FERC has siting authority for LNG terminals.

Four, codify FERC's Hackberry decision. This, by the way, is one excellent example of how common sense and a commitment to process improvement can make a difference.

Five, require other Federal and State agencies to use the FERC administrative record as sole record for all reviews and appeals. This will prevent other agencies from sitting out the FERC review process and then subsequently conducting their own duplicate proceedings with a duplicate record.

And finally, number six, require expedited judicial review by the U.S. Court of Appeals for the D.C. Circuit when disputes do arise over FERC-approved projects.

And I will be glad to explain all of this in Q&A. Thank you.

The Chairman. Thank you very much.

Mr. Robinson.

Mr. Robinson. Senators, we need help. We need help with siting, and we need help with siting basically because it is not good enough to site infrastructure where people want it, where people can accept it. I will use LNG as an example. We have 13 pending LNG applications at the commission right now. Probably two-thirds of those have no real opposition whatsoever. We have also authorized three new LNG facilities in this country. Those LNG facilities that are not opposed and those LNG facilities that have been authorized are all in the Gulf. It is not enough to put LNG in the Gulf. We will probably never see or I would be hard-pressed to imagine that we will ever get another pipeline across the Hudson River. You can put all the LNG that you want to in the Gulf of Mexico and you will not do one thing for New England in terms of their gas supplies. So we need a siting policy which is rational and allows for everybody's input and decisions to be made that are in the regional interests, not governed by parochial restraints.

Three points to have a rational siting process.

First, you have to have clear jurisdiction for a lead agency, an agency that people look to to make that decision.

Second, you need the development of one Federal record. All agencies that operate under Federal statute or State agencies that operate under delegated actions from the Federal statutes need to cooperate with the commission and develop one record from which all those actions can be taken in a time frame established by that lead agency. That is just good government, to have everybody do it at one time and use one record.

There needs to be some teeth in it, however. If an agency does not take that action within the time frame required by that Federal agency, it should be assumed waived, that their authority is assumed waived if they do not take that action in a reasonable time frame.

The third element that you need, beyond the clear jurisdiction and one Federal record, is you need to have a direct appeal of all of those actions to the Federal Court of Appeals, not a series of sequential administrative and State court and Federal court appeals that can kill a project with a death by a thousand cuts just in terms of the time frames associated with going through all those appeal processes.

If we have those three elements in a siting process that only you can provide to us, we can rationalize the siting for

not only natural gas, but I offer it as a model for any infrastructure development that people are interested in seeing move forward in this country.

The Chairman. Thank you very much.

Mr. Davies.

STATEMENT OF PHILIP DAVIES, VICE PRESIDENT AND GENERAL COUNSEL, ENCANA GAS STORAGE, INC.

Mr. Davies. Thank you, sir. My name is Phil Davies. I am Vice president and general counsel of EnCana Gas Storage, Inc. However, today I am here to speak on behalf of my company and two others, Pine Prairie Energy, a Sempra company, and eCORP, LLC. Together those companies represent amongst the largest independent storage developers operating in North America today.

I would like to talk very quickly about the changing nature of gas demand. We are all aware that demand is increasing, but its nature is changing as well and it is changing in a radical way. It has become increasingly weather-dependent and it has become much more variable. Stable industrial load is being displaced by more variable residential and commercial demand and by gas-fired generation, the latter being the largest single contributor to increasing gas demand spikes.

Now, the extreme price volatility that we have seen during periods of peak gas demand demonstrates that the current delivery infrastructure can no longer consistently satisfy the demand spikes that frequently challenge its capacity. And failing to identify and respond to this dynamic by increasing investment in our gas delivery grid will only perpetrate the extreme price volatility that we have witnessed over recent winters.

Mr. Rattie and others have spoken about the need for additional transmission capacity. Our focus is on the need for more storage and on looking for vehicles or ways in which policies can be adopted to encourage incremental investment in storage. Storage is unusual because it requires a substantial up-front investment in the form of cushion gas and cushion gas at today's prices can easily equal 50 percent of the capital costs of the storage facility if it is a reservoir facility. With salt it is somewhat less. By contrast, cushion gas would have represented less than 10 percent of capacity invested in a similar project were it built in 1975 and less than 25 percent were that project sited in 1995.

At prevailing gas prices, simply put, new gas storage development is becoming cost prohibitive. We would recommend reforms to tax depreciation rules which recognize this reality and we have outlined some of the suggestions we have in our more detailed proposal.

I would like one more word to express a comment about leadership. I think these are uncertain times and those are the times for leaders to emerge. I compliment you and your committee members for convening this conference.

I also want to compliment the FERC for focusing on storage. It has been a subject which has had a lot of staff time. They have issued a storage report and made storage the feature the piece for this year's natural gas state of the industry conference. They have also shown regulatory flexibility in relaxing some of the more onerous regulations that apply to independent storage, and we congratulate them for that as well.

The Chairman. Thank you very much.

Please.

Mr. Cruickshank. Good afternoon once again, Mr. Chairman.

The Chairman. Yes, indeed.

Mr. Cruickshank. Walter Cruickshank with Minerals

REGIONAL ENERGY RELIABILITY AND SECURITY: DOE AUTHORITY TO ENERGIZE THE CROSS SOUND CABLE

HEARING

BEFORE THE

SUBCOMMITTEE ON ENERGY AND AIR QUALITY

OF THE

COMMITTEE ON ENERGY AND COMMERCE

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to has just put up a regulatory fence and is threatening to turn out our lights this summer.

The continuing objections and obstacles to the operation of the Cross Sound Cable are creating a public policy failure in the making by placing irrational regulatory obstruction over the needs of families and businesses in the Northeast. In order to rise above this regulatory game of "Gotcha" and prevent blackouts this summer, the Department of Energy needs to show some leadership and reactivate the cable.

It's even more clear after the events of last summer that the Department has a responsibility to ensure that blackouts don't again affect millions of Americans. If the Department does not activate the cable and blackouts result the cause would be nothing short of negligence.

By paving the way for the reactivation of the Cross Sound Cable, Congress and the Administration have the opportunity to send the message that needed improvements in transmission can be made, and that the federal government has indeed made a serious commitment to preserving reliability. I urge the Subcommittee to send that message before it is too late.

Mr. HALL. Without objection, and if you would continue to bless us with your presence——

Senator SCHUMER. I am going to stay Mr. Chairman.

Mr. HALL. Until the chairman of the big committee speaks, in order that the chairman of the little committee can keep his chairmanship.

I would ask you if you would—Joe Barton. We are going to recognize Mr. Barton at this time for as much time as he needs to consume.

Chairman BARTON. I won't take that Mr. Chairman. I would ask that my formal statement be included in the record.

[The prepared statement of Hon. Joe Barton follows:]

PREPARED STATEMENT OF HON. JOE BARTON, CHAIRMAN, COMMITTEE ON ENERGY AND COMMERCE

Today's hearing presents a number of interesting issues. Some of these issues are addressed in the Conference Report for H.R. 6, the comprehensive energy bill, which was passed by the House and is awaiting action in the Senate. Other issues raised by today's hearing will require renewed discussions between officials in Connecticut and New York in order to be resolved. I hope that by the end of today's hearing we have an agreement from the witnesses here today to work on resolving both sets of issues.

The issues raised by today's hearing that would be resolved in the comprehensive energy bill are as follows:

- As to the question of whether the Cross Sound Cable should remain in operation, the comprehensive energy bill keeps the cable energized unless Congress decides it should be turned off.
- As to the question of whether a State can delay a decision on a natural gas pipeline indefinitely, the comprehensive energy bill requires States to make a decision one way or another, and removes the appeal of that decision to Federal court. This, and other provisions in the comprehensive energy bill, will help get projects, like the Islander East natural gas pipeline, constructed.

These provisions in the comprehensive energy bill will help the citizens of New York by increasing energy security and reliability, reducing the price consumers pay for electricity, and providing more, and more affordable, clean-burning natural gas to heat their homes and generate electricity.

These provisions will also help the citizens of Connecticut, by reducing transmission congestion costs in their State and, in the words of the Connecticut Siting Council, "enhance[ing] the inter-regional electric transmission infrastructure and improve[ing] the reliability and efficiencies of the electric system here in Connecticut as well as in New York." If Connecticut is concerned that New York is not doing enough to generate their own power, then help them construct a gas pipeline to fuel their own power plants.

Other issues that may arise today will need to be worked out between officials in New York and Connecticut. As to who should pay to upgrade the existing transmission cables between Connecticut and New York, that issue needs to be worked out between those States and the FERC. On the question of whether New York is