Case No. 23-2052

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC,
Appellant,

v.

PENNSYLVANIA ENVIRONMENTAL HEARING BOARD, et al.,
Appellees.

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

BRIEF FOR APPELLEES DELAWARE RIVERKEEPER NETWORK, MAYA K. VAN ROSSUM, THE DELAWARE RIVERKEEPER, and CITIZENS FOR PENNSYLVANIA'S FUTURE

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I. INTRODUCTION

Appellant Transcontinental Gas Pipe Line Company, LLC ("Transco") seeks review of an interlocutory order of the District Court for the Middle District of Pennsylvania denying Transco's request for a preliminary injunction that would prevent Appellee Pennsylvania Environmental Hearing Board ("EHB") from exercising its jurisdiction over an administrative appeal filed by Appellees Citizens for Pennsylvania's Future, Delaware Riverkeeper Network, and Maya K. van Rossum, the Delaware Riverkeeper (collectively, "EHB Appellants"). Transco's request was based on the argument that administrative appeals of permits issued by Appellee Pennsylvania Department of Environmental Protection ("PADEP") pursuant to the Federal Water Pollution Control Act ("Clean Water Act" or "CWA"), 33 U.S.C. §§ 1251 *et seq*., for natural gas pipeline infrastructure is preempted by the federal Natural Gas Act ("NGA"), 15 U.S.C. §§ 717–717z.

Transco's position directly contradicts this Court's precedent, dooming their likelihood of success on the merits. Transco also fails to allege any irreparable harm, citing only the potential for delays in its pipeline project, which is mostly constructed and set to be in-service in

less than four weeks. Because Transco is unable to establish the threshold elements required to support a preliminary injunction, the District Court acted well within its discretion to deny the motion for preliminary injunction, and this Court should affirm its decision.

II. STATEMENT OF ISSUES ON APPEAL

I. In *Bordentown*, this Court held that the NGA does not preempt state administrative review of permits for interstate natural gas pipelines. Did the District Court accurately conclude that Transco was unlikely to succeed on the merits of its claim that the NGA preempts the EHB's jurisdiction over an appeal of state-issued permits for its interstate natural gas pipeline project?

Suggested Answer: Yes.

II. Transco claimed it would be irreparably harmed by participating in an appeal that it believes is preempted, and alleged only economic harm as a potential outcome of an adverse ruling from the EHB. Did Transco carry its burden of establishing irreparable harm caused by participation in the EHB Appeal?

Suggested Answer: No.

III. Within the Third Circuit, when a movant fails to establish likelihood of success on the merits and irreparable harm, a court need not consider the remaining factors in the preliminary injunction inquiry. Did the District Court appropriately decline to consider the remaining two factors in exercising its discretion to deny Transco's request for the extraordinary remedy of a preliminary injunction?

Suggested Answer: Yes.

III. CONCISE STATEMENT OF THE CASE

A. Relevant Facts and Procedural History

This matter concerns an appeal to the EHB by EHB Appellants of permits issued by PADEP to Transco to build a pipeline and associated facilities known as the Regional Energy Access Expansion ("Project").

Transco's Project is an expansion of existing natural gas infrastructure that would involve the construction of new natural gas facilities in Pennsylvania, New Jersey, and Maryland. Because the Project would transport natural gas in interstate commerce, Transco obtained a certificate from the Federal Energy Regulatory Commission ("FERC") pursuant to Section 7 of the NGA, 15 U.S.C. § 717f, on January 11, 2023. *See Transcontinental Gas Pipe Line Company, LLC*, 182 FERC ¶ 61,006 (2023) ("Certificate Order").

The Certificate Order is a federal license or permit to conduct an activity that may result in a discharge into navigable waters, and Section 401 of the CWA therefore requires Transco to obtain a certification from Pennsylvania ensuring that its Project will comply with Pennsylvania's water quality standards and the state and federal laws that protect water quality. 33 U.S.C. § 1341(a). Conditions included in a Section 401

certification automatically become conditions of the federal authorization. *Id.* § 1341(d). In addition, FERC's Certificate Order includes a series of environmental conditions, including the requirement that "[a]ll conditions attached to the water quality certificate issued by [PADEP] . . . constitute mandatory conditions of the Certificate Order." Certificate Order, Appx. B, ¶ 13 (Appx243).

On March 31, 2021, Transco applied to PADEP for a Section 401 water quality certification. On April 9, 2021, Transco submitted (1) an application for an Erosion and Sediment Control General Permit (ESCGP-3) pursuant to Chapter 102 of the Pennsylvania Code for construction of the Project in Luzerne, Monroe, Bucks, Northampton, and Chester Counties in Pennsylvania; and (2) a joint permit application for a Water Obstruction and Encroachment Permit pursuant to Chapter 105 of the Pennsylvania Code and a Section 404 permit pursuant to the CWA for construction and operation of the Project in Luzerne and Monroe counties.

PADEP issued the section 401 water quality certification (the "WQC") on March 30, 2022. *See* Pl.'s Compl., R1, Ex. C (Appx199–205). The WQC certified that "the construction, operation, and maintenance of

the Project complies with" the CWA and "Pennsylvania water quality standards provided that [the Project] complies with the following [PA]DEP water quality permitting programs, criteria and conditions established pursuant to Pennsylvania law . . . ." (Appx204). The WQC then goes on to list several permits required by Pennsylvania law, including the Chapter 102 and 105 permits at issue in this case. *See id.*

On February 3, 2023, PADEP issued a Chapter 102 Erosion and Sediment Control Permit, Permit No. ESG830021002-00, as well as a Chapter 105 Water Obstruction and Encroachment Permit for Luzerne County, Permit No. E4083221-006, and Monroe County, Permit No. E4583221-002, to Transco for its Project ("REAE Permits"). *See* Pl.'s Compl., R.1, Ex. A (Appx53–120). After learning of the REAE Permits through a submission Transco made to FERC, EHB Appellants filed a timely notice of appeal with the EHB on March 14, 2023 ("EHB Appeal"). *See* Pl.'s Compl., R.1, Ex. B (Appx121–198).

The EHB is a "quasi-judicial agency independent of [PADEP]" pursuant to the Environmental Hearing Board Act, 35 P.S. §§ 7511–7516, and also serves as "the adjudicator for purposes of compliance with" Pennsylvania's Administrative Agency Law, 2 Pa. C.S. §§ 101, 501–508,

701–704. *Cole v. Pa. Dep't of Env't Prot.*, 257 A.3d 805, 809 (Pa. Commw. Ct. 2021) *petitions for allowance of appeal filed*, Nos. 312 EAL 2021 & 415 MAL 2021 (Pa. July 15, 2021). The EHB conducts a *de novo* review to determine whether PADEP's decision can be supported, and the burden of proof lies with the party seeking review of the PADEP action. *Id.* at 808 (citing *Pa. Trout v. Dep't of Env't Prot.*, 863 A.2d 93, 106 (Pa. Commw. Ct. 2004)).

In response to the filing of the EHB Appeal, Transco filed a complaint in the United States District Court for the Middle District of Pennsylvania on March 16, 2023, seeking a declaration that the Third Circuit has original and exclusive jurisdiction pursuant to § 717r(d)(1) of the NGA to review the issuance of the REAE Permits by PADEP, that the EHB appeal is preempted by federal law, and that the EHB is without authority to assert and maintain jurisdiction over the proceedings. *See* Pl.'s Compl., R.1 at 18–19 (Appx49–50). Transco also seeks an injunction prohibiting the EHB from maintaining jurisdiction, conducting a hearing, or rendering a decision on the EHB Appeal, and an injunction prohibiting EHB Appellants from seeking any other relief before the EHB. *Id.* The relevant section of the NGA reads as follows:

> The United States Court of Appeals for the circuit in which a facility . . . 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, other than the Coastal Zone Management Act of 1972 (16 U.S.C. §§ 1451 *et seq*.)

15 U.S.C. § 717r(d)(1).

On March 24, 2023, Transco filed an Emergency Motion for Preliminary Injunction, *see* R.10 (Appx263–303), which was supported by PADEP as intervenor. *See* R.23 (Appx305–330). EHB Appellants opposed the motion, arguing that Transco failed to establish any of the factors required to support a preliminary injunction. *See* R.24 (Appx331). Transco submitted a reply on May 1, 2023. *See* R.25 (Appx372).

On June 5, 2023, the District Court denied Transco's motion. *See* Order Denying Motion for Preliminary Injunction, R.30 (App5) *and* Memorandum, R.29 (Appx6–25). On June 7, 2023, Transco appealed the District Court's decision to this Court. *See* Notice of Appeal (Appx1–4). While Transco's motion for preliminary injunction was pending, EHB Appellants filed a motion to dismiss Transco's complaint, which was

opposed by both Transco and PADEP and remains pending before the District Court. *See* District Court Docket Sheet (Appx30).

B. Ruling Presented for Review

Transco seeks review of the District Court's June 5, 2023 Order denying Transco's motion for preliminary injunction. (Appx5).

In the memorandum accompanying the Order, the District Court found that Transco failed to "show[] that the extraordinary remedy of a preliminary injunction is warranted in this case," (Appx25), as "the existing decisional law favors the EHB Appellants" and because Transco did not "carr[y] its burden of showing it will suffer irreparable harm if the PAEHB appeal is not enjoined." (Appx12, Appx24). Because Transco's argument failed to meet these threshold requirements, the District Court found it unnecessary to address whether a preliminary injunction would harm EHB Appellants more than it would harm Transco, or whether a preliminary injunction would be in the public interest. (Appx24).

Specifically, the District Court ruled that Transco was unlikely to succeed on the merits of its claim that § 717r(d)(1) of the Natural Gas Act deprives the EHB of its jurisdiction over an administrative appeal of a permit decision by PADEP, as that statutory provision limits only where

"civil actions"—judicial proceedings in courts of law or equity—may be brought. (Appx13–14). Transco's claim that the EHB Appeal was otherwise preempted by the NGA was also found to be unsupported, as this Court has explicitly stated that the NGA "does not preempt state administrative review of interstate pipeline permitting decisions." (Appx18 (quoting *Twp. of Bordentown, N.J. v. F.E.R.C.*, 903 F.3d 234, 269 (2018))). The District Court noted that, as recognized in *Bordentown*, an objector to a state permitting decision may have two options—seek an administrative appeal with the state, or challenge the decision in federal court pursuant to § 717r(d)(1), assuming that decision is final for federal jurisdictional purposes. (Appx18–19).

Nor did Transco establish irreparable harm, according to the District Court. In order to accept Transco's irreparable harm assertion, the District Court would have had to accept Transco's legal theory—that the EHB lacked jurisdiction over the EHB Appeal. Since the District Court rejected that theory, Transco's complaint of irreparable harm necessarily failed. (Appx22–23). Additional harms associated with a risk of potential construction delays were also rejected, as those harms were purely economic as well as speculative. (Appx23–24). Because Transco

did not meet its burden to demonstrate the two most significant gateway factors necessary to support a preliminary injunction, the District Court declined to consider the remaining factors. (Appx24).

IV. SUMMARY OF ARGUMENT

The District Court's decision to deny Transco's motion for preliminary injunction was well-reasoned and based on controlling Third Circuit precedent. Transco's arguments on appeal continue to misconstrue this Court's rulings, and fail to present a convincing case for departing from them. The NGA preserves state authority to regulate pipelines under the Clean Water Act, including any administrative appeal process under state law. The only limitation imposed is the requirement that any "civil action" for the review of a state permit be brought in the federal Courts of Appeals. This limitation does not depend on the nature of a particular state's administrative appeals process. As a result, the District Court correctly surmised that Transco would not succeed on the merits.

Because Transco's allegations of irreparable harm depend almost entirely on its feeble merits argument, it fails to carry its burden on this element. Even assuming Transco was correct on the merits, there is no

support for the contention that participating in the EHB Appeal rises to the level of irreparable harm, and in fact, controlling case law explains that the cost of litigation does not qualify as irreparable harm. Any potential delay in construction or operation of the Project is highly speculative, and belied by the fact that Transco is set to begin operation in less than a month from the date of this filing. Yet Transco continues to rely on a declaration from over six months ago before any construction on the Project began.

A failure to establish the first two "gateway" factors of the irreparable harm inquiry relieves the District Court of the task of evaluating the remaining factors, and this Court should uphold that decision. Regardless, the harm to EHB Appellants wrought by enjoining the EHB Appeal would outweigh any inconvenience to Transco by tying EHB Appellants' hands as the Project continues apace. Additionally, the public interest favors a denial of the preliminary injunction request so that there is an opportunity for the REAE Permits' deficiencies to be remedied.

V. ARGUMENT

A. Standard of Review

Transco faces a "heavy burden" on appeal from the District Court's order denying its request for a preliminary injunction, which is reviewed by this Court for an abuse of discretion. *Issa v. School Dist. of Lancaster*, 847 F.3d 121, 130 (3d Cir. 2017). "An abuse of discretion occurs only if the decision reviewed rests upon a clearly erroneous finding of fact, an errant conclusion of law, or an improper application of law to fact. *Id.* at 131 (citing *Mancini v. Northampton Cty.*, 836 F.3d 308, 314 (3d Cir. 2016)).

To determine whether a preliminary injunction is warranted, a District Court must consider "(1) whether the movant has a reasonable probability of success on the merits; (2) whether irreparable harm would result if the relief sought is not granted; (3) whether the relief would result in greater harm to the non-moving party, and (4) whether the relief is in the public interest." *Amalgamated Transit Union Loc. 85 v. Port Auth. of Allegheny Cty.*, 39 F.4th 95, 102–103 (3d Cir. 2022) (quoting *Swartzwelder v. McNeilly*, 297 F.3d 228, 234 (3d Cir. 2002)). Because the first two factors are "prerequisites," if a movant fails to establish them, a

court need not evaluate the remaining two. *Id.* at 103; *Greater Phila. Chamber of Com. v. City of Philadelphia*, 949 F.3d 116, 133 (3d Cir. 2020) (citing *Reilly v. City of Harrisburg*, 858 F.3d 173, 179 (3d Cir. 2017)).

B. Existing Third Circuit precedent supports the District Court's conclusion that Transco is not likely to succeed on the merits.

Transco spills much ink rehashing this Court's precedent on the issue of whether a permit issued by PADEP is sufficiently final for judicial review in federal court, but then entirely sidesteps the well-reasoned discussion in *Bordentown* distinguishing the issues of administrative finality (thoroughly discussed in the *Delaware Riverkeeper* cases) and preemption (addressed for the first time in *Bordentown*). Transco Br. at 16–20.

Significantly, EHB Appellants do not argue that this Court lacks jurisdiction to review PADEP's decision in a civil action, or that the EHB is a "necessary precursor" to a civil action for review in this Court.[1] *Cf.* Transco Br. at 27, 32–35. Nor do they argue that *Bordentown* somehow

[1] In fact, this Court has explained that its "own limitation to hearing final orders is not necessarily tantamount to creating an exhaustion requirement in the state process" and that it "may consider a judicial challenge to [a state order] despite the petitioner's failure to exhaust . . . further state remedies." *Bordentown*, 903 F.3d at 271 n.25.

"overrules" the *Delaware Riverkeeper* series of cases. Instead EHB Appellants merely acknowledge the obvious—the *Delaware Riverkeeper* cases do not *require* EHB Appellants to file a civil action in this Court, and administrative recourse remains available before the EHB. *See Bordentown*, 903 F.3d at 271 n.25 ("[E]ven though a petitioner might have the right immediately to commence a civil action in this Court, this does not necessarily extinguish his or her right instead to seek redress via the available administrative avenues before filing that civil action.").

1. *The Delaware Riverkeeper Cases*

Transco attempts to distort the holdings in this Court's series of *Delaware Riverkeeper* cases, claiming that each was a resounding deprivation of EHB jurisdiction over the review of PADEP permits. Instead, each was an affirmation that PADEP permits are final when issued, and thus any civil action—as opposed to the administrative action at issue here—challenging PADEP's decision must be appropriately filed in the United States Courts of Appeals.

In *Delaware Riverkeeper I*, petitioners sought review in the Third Circuit of a water quality certification issued by PADEP. At that time, PADEP argued that the Third Circuit lacked jurisdiction because the

certification was not issued *pursuant* to federal law, but rather as a *requirement* of federal law. *See Del. Riverkeeper Network v. Sec'y Pa. Dep't of Env't Prot.* (*Del. Riverkeeper I*), 833 F.3d 360, 371 (3d Cir. 2016). This Court concluded that a water quality certification ensures compliance with federal CWA standards, and that if the water quality certification was merely a state law requirement, then that law would be preempted by the NGA. *Id.* at 371–72. Thus, this Court affirmed that "a state action taken pursuant to the [CWA] . . . is subject to review exclusively in the Courts of Appeals." *Id.* at 372.[2] The role of the EHB in Pennsylvania's administration of the CWA was not discussed in the opinion, and instead the issue was focused on whether petitioners properly filed their civil action in the Third Circuit.

In *Delaware Riverkeeper II*, petitioners argued that PADEP's water quality certification and Chapter 105 permits were "non-final" because they had yet to be reviewed by the EHB. *Del. Riverkeeper Network v. Sec'y of Pa. Dep't of Env't Prot.* (*Del. Riverkeeper II*), 870 F.3d 171, 175 (3d Cir.

[2] The court also held, regarding separate permits issued by the New Jersey Department of Environmental Protection, that where those permits are effectively conditions of the water quality certification, they were also issued pursuant to federal law. *Del. Riverkeeper I*, 833 F.3d at 374.

2017). Without deciding whether § 717r(d)(1) includes a "finality" requirement, this Court held that the permits issued by PADEP *were* final because petitioners had not timely perfected an appeal before the EHB, and because the permits "b[ore] the traditional hallmarks of final agency action." *Id.* at 176–78 (citing *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)).

In *Delaware Riverkeeper III*, this Court squarely addressed the issue of whether there is a "finality" requirement included in § 717r(d)(1), concluding that "the [NGA] provides jurisdiction to review only 'final agency action of a type that is customarily subject to judicial review.'" *Del. Riverkeeper Network v. Sec'y Pa. Dep't of Env't Prot.* (*Del. Riverkeeper III*), 903 F.3d 65, 71 (3d Cir. 2018). The opinion went on to address whether the parallel timely appeals at the EHB rendered PADEP's decisions non-final, ultimately concluding the PADEP decision was final as a matter of federal law regardless of the EHB appeals, and thus capable of being reviewed in federal court. *Id.* at 71–74. *Delaware Riverkeeper III* therefore stands for the proposition that PADEP permits are final when issued and can be immediately challenged by filing a civil action in the Third Circuit.

In sum, the *Delaware Riverkeeper* series of cases[3] establish that water quality certifications issued by PADEP, as well as the permits issued by PADEP required as conditions of those water quality certifications, are "order[s] or action[s] of a . . . State administrative agency acting pursuant to Federal law" within the meaning of § 717r(d)(1), and that those actions are final and ripe for review in the Courts of Appeals "[n]otwithstanding the availability of an appeal to the EHB." *Del. Riverkeeper III*, 903 F.3d at 74.

2. *Township of Bordentown*

The question that the *Delaware Riverkeeper* series of cases did not squarely address, however, was whether the EHB *retains* its jurisdiction over administrative appeals notwithstanding the availability of an appeal to the Third Circuit. That question was answered in *Bordentown*,

[3] *Delaware Riverkeeper IV* and *Delaware Riverkeeper V* were unpublished decisions that merely applied the holding of *Delaware Riverkeeper III* to similar facts in cases that were filed and fully briefed before *Delaware Riverkeeper III* was decided. *See Del. Riverkeeper Network v. Sec'y Pa. Dep't of Env't Prot.* (*Delaware Riverkeeper IV*), 751 Fed. App'x 169, 172–73 (3d Cir. 2018), *Del. Riverkeeper v. Sec'y Pa. Dep't of Env't Prot.* (*Delaware Riverkeeper V*), 783 Fed. App'x 124, 127 (3d Cir. 2019).

in which this Court explained that if § 717r(d)(1) eliminated the availability of EHB review, then the *Delaware Riverkeeper* series of cases would never have examined whether PADEP permits were final "because the NGA would have cut off any state review other than the initial decision, making that decision *by default* final." *Bordentown*, 903 F.3d at 269. In other words, "those cases would not have proceeded based on the understanding—express or implicit—that state administrative review was available if desired." *Id.* Accordingly, the "only plausible conclusion to draw from [the *Delaware Riverkeeper* cases and *Berkshire*] and from the text of the statute itself is that § 717r(d)(1) does not preempt state administrative review of interstate pipeline permitting decisions." *Id.*[4]

In *Bordentown*, petitioners challenged New Jersey Department of Environmental Protection ("NJDEP") permits issued to Transco for its Garden State Expansion Project by first seeking an adjudicatory hearing from NJDEP, which denied the request based on its erroneous interpretation of the *Delaware Riverkeeper* series of cases, believing that

[4] Puzzlingly, Transco claims *Bordentown* was not a preemption case, despite that this Court discussed at length the distinction between its earlier case law on administrative finality and the holding of *Bordentown*. *See Bordentown*, 903 F.3d at 268–69.

all final permits must be appealed directly to the Third Circuit and that the state administrative hearing process provided by New Jersey statute was "not applicable to permits for interstate natural gas projects." *Id*. at 245–46. This Court rejected that interpretation, holding that the statutory term "'civil action' refers only to civil cases brought in courts of law or equity and does not refer to hearings or other quasi-judicial proceedings before administrative agencies." *Id*. at 267. Instead, this Court held:

> the NGA explicitly permits states to participate in environmental regulation of interstate natural gas facilities under the CWA, and only removes from 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 (cleaned up) (emphases added) (quoting *Del. Riverkeeper I*, 833 F.3d at 368).

The *Bordentown* opinion also highlighted the difference between § 717r(b)—which provides for review of FERC orders in the Courts of Appeals—and § 717r(d)(1)—which provides exclusive jurisdiction over

"civil actions" for review of state administrative agency decisions. *Id.* at 268. This distinction highlighted Congress's intent to avoid "affirmatively installing federal courts to oversee the administrative process, as it did in § 717r(b)," and instead allow those processes to remain intact. *Id.* Directly addressing the *Delaware Riverkeeper* series of cases, the *Bordentown* opinion explained that those decisions focused on the finality of PADEP decisions "*notwithstanding* the availability of an appeal to the EHB." *Id.* at 268–69 (cleaned up) (emphases added).Thus, this Court concluded, those decisions were "based on the understanding—express or implicit—that state administrative review was available *if desired*." *Id.* (cleaned up) (emphases added).

The Commonwealth Court of Pennsylvania recently applied *Bordentown* to Pennsylvania's administrative scheme. Reviewing a decision from the EHB—similar to NJDEP's decision in *Bordentown*—to dismiss an appeal of PADEP-issued permits for lack of jurisdiction,[5] the Commonwealth Court held that § 717r(d)(1) does not divest the EHB of

[5] One of those orders, now reversed, is included in the addendum to Transco's brief. *See Cole v. Pa. Dep't of Env't Prot.*, EHB Docket No. 2019-046-L (Pa. Env. Hrg. Bd. Oct. 9, 2019), *rev'd on appeal* 257 A.3d 805 (2021).

its jurisdiction over appeals from PADEP decisions. *See Cole*, 257 A.3d at 805. In that case, petitioners challenged the EHB order dismissing their appeal of a plan approval issued by PADEP pursuant to the Clean Air Act for a compressor station associated with an interstate natural gas pipeline project. *Id.* at 809–10. The Commonwealth Court held that "[p]roceedings before the EHB, an administrative agency independent of PADEP, are administrative proceedings, not civil actions" and that the petitioners' appeal to the EHB was thus not prohibited by § 717r(d)(1). *Id.* at 815. The Commonwealth Court explained:

> Section 717r(d)(1), by its express terms, precludes state court review—*i.e.*, *this* Court's review—of permitting decisions by DEP that fall under the scope of the provision. It does not preempt the Commonwealth's administrative review process, which vests within the EHB the authority to conduct administrative reviews of DEP permitting decisions. That review remains available, *if desired*.

Id. at 820–21 (emphasis in original). This decision correctly affirms the principle that petitioners have a choice of seeking administrative review of PADEP decisions through the EHB process, or seeking direct judicial review in the Third Circuit. *See id.* at 821.

C. The District Court correctly concluded that the NGA does not preempt an administrative appeal before the Pennsylvania Environmental Hearing Board.

The permits at issue in this case are an action by a state agency (PADEP) to issue a permit required by Federal law (the CWA). Accordingly, any "*civil action* for the review" of PADEP's action (or any subsequent action by the EHB) belongs in this Court—the Third Circuit Court of Appeals—the circuit in which the Project is proposed to be constructed and operated. It is correct that Congress specifically ousted state courts from concurrent jurisdiction with federal courts, however, in this case, no action has been filed in state court, and thus § 717r(d)(1) does not apply.

1. *An appeal before the EHB is not transformed into a civil action because of its similarity to a trial.*

Because the statutory term "civil action" applies only to cases brought before a court, by the plain terms of § 717r(d)(1), it does not apply to the EHB Appeal, a quasi-judicial administrative proceeding. *Bordentown*, 903 F.3d at 267. Although Transco likens the EHB to a court, these similarities cannot transform an administrative body into a court of law or equity, regardless of its procedures. *See id*. ("The Supreme Court has long recognized that administrative hearings, even to the

extent that they in some ways mirror an adversarial trial, do not constitute proceedings in courts of law or equity."). That is especially true where this Court has explicitly held that the term "civil action" in the NGA does not include any administrative proceeding, despite the variety of administrative procedures across states. *See id.* at 268.

Throughout its brief, Transco makes much of the fact that Pennsylvania's administrative process is unique, and that an analysis of this unique process drove the outcome in *Riverkeeper III*. Transco fails to explain why, however, that analysis, which was conducted for the purpose of determining *finality*, should be applied in the context of preemption and federal statutory interpretation.

As the Third Circuit explained in *Bordentown*,

> Assuming that a state considers an order final even though additional state agency procedures may be available—and that the classification is consistent with federal finality standards—we may consider a judicial challenge to the order despite the petitioner's failure to exhaust those further state administrative remedies. And conversely, even though a petitioner might have the right immediately to commence a civil action in this Court, this does not necessarily extinguish his or her right instead to seek redress via the available administrative avenues before filing that civil action.

903 F.3d at 272 n.25 (*citing Del. Riverkeeper III*, 903 F.3d at 72, 74). Accordingly, far from depriving the EHB of its jurisdiction, the *Delaware Riverkeeper* series of cases applied the finality requirement—which, in the words of the Third Circuit, is "a constraint on our own jurisdiction, not a determination that we are the only forum available to consider final orders." *Id*. at 271.

In fact, the *Bordentown* court clearly explained that "[i]f the plain impact of § 717r(d)(1) was to remove from the states any and all review over the issuance of such permits, [the *Delaware Riverkeeper* cases and *Berkshire*] would not have proceeded based on the understanding—express or implicit—that state administrative review was available if desired." *Id*. at 269. Indeed, this Court in *Delaware Riverkeeper III* held that it had jurisdiction over a final PADEP permit "[n]otwithstanding the availability of an appeal to the EHB." 903 F.3d at 74–75.[6] In other words, while a determination of finality may depend on a particular state's

[6] Transco takes the position that this Court's use of the word "notwithstanding" negates the availability of an appeal to the EHB. *See* Transco Br. at 27 n.16. Reading the word in the context of both the *Delaware Riverkeeper III* and *Bordentown* opinions, the meaning is obvious—the availability of an EHB appeal does not deprive the Third Circuit of its jurisdiction over a civil action for review in a court of law or equity.

administrative processes and structure, the determination of whether § 717r(d)(1) preempts an appeal does not—as it does not affect the availability of administrative review.

2. *An appeal before the EHB is not transformed into a civil action because it is a separate agency from PADEP.*

The unique administrative structure used in Pennsylvania to effectuate environmental laws does not alter the calculus. This Court could not have been more explicit in its *Bordentown* opinion that § 717r(d)(1)'s preemptive effect is limited only to state court review in *all* states, not just New Jersey, and that all states' administrative processes remain "untouched" by § 717r(d)(1) and free to operate as they would "in the ordinary course under state law." *Bordentown*, 903 F.3d at 268. This Court now has the opportunity to emphasize that the holding of *Bordentown* also applies in Pennsylvania, as the holding did not depend on NJDEP's internal review process:

> 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. Perhaps in recognition of this diversity, § 717r(d)(1) merely establishes that a party who seeks judicial review of a state agency decision via a collateral civil action challenging the correctness of the decision,

> may only bring that civil action directly to the federal Courts of Appeals, not the state courts or federal district courts.

Id. (citation omitted) (quoting *Berkshire Env't Action Team, Inc. v. Tenn. Gas Pipeline Co.*, 851 F.3d 105, 109 (1st Cir. 2017)). The reason why the *Bordentown* opinion *also* referred to internal agency review *in addition* to the state's administrative scheme generally is simply because the state at issue—New Jersey—has an internal administrative appeal process. *See* N.J.A.C. 7:7A–21.1 to 21.4.

In Pennsylvania, the responsibility for regulating pursuant to the Clean Water Act is shared among PADEP, the EHB, and the Environmental Quality Board ("EQB"). As explained by Pennsylvania's Commonwealth Court in *Cole*, "environmental regulation and enforcement are split between three bodies . . . ." 257 A.3d at 808. This means that the EHB is an integral part of Pennsylvania's environmental administrative scheme. The fact that each of these agencies have well-defined and distinct roles does not mean that any one of them are excluded from the process of environmental regulation under the Clean Water Act.

Transco's assertion that the EHB does not have a role in Pennsylvania's administration of the CWA is false, and not supported by the case law cited. The Commonwealth Court in *U.S. Steel Corporation v. Commonwealth* affirmed the EHB's dismissal of a facial challenge to water quality standards established by the EQB, because the EHB does not have direct appellate jurisdiction over EQB actions, *not* because it has no role in reviewing water quality standards. 442 A.2d 7, 8 (Pa. Commw. Ct. 1982) (citing 71 P.S. § 510-21(a) (repealed 1988)).[7] The EHB has jurisdiction over PADEP actions, and can only review water quality standards on an as-applied basis in the context of an action taken by PADEP. *See Concerned Citizens of Chestnuthill Twp. v. Dept. of Env't Res.*, 632 A.2d 1, 2–3 (Pa. Commw. Ct. 1993), *appeal denied*, 642 A.2d 488 (Pa. 1994).

Where a party seeks *pre-enforcement* review of an EQB regulation due to its immediate harmful effect (without application by PADEP), the appropriate forum is the Commonwealth Court of Pennsylvania. *See Arsenal Coal Co. v. Commw.*, 477 A.2d 1333, 1338 (Pa. 1984). However,

[7] In 1988, the applicable statute was replaced by the EHB Act, 35 P.S. §§ 7511–16, which continued the EHB's jurisdiction over "orders, permits, licenses or decisions of [PADEP]." *Id.* § 7514(a).

the EHB undeniably has a role in reviewing water quality standards in the context of an appeal from an action of PADEP *applying* those standards to a party. Similarly, the EHB has a role in implementing the CWA when it reviews permits required by a water quality certification under Section 401 of the CWA. Transco's argument that EHB has no role in administering the CWA is akin to arguing that the EQB, the regulatory body charged with environmental rulemaking, has no role in Pennsylvania's implementation of the CWA. This Court should soundly reject this misconstruction of Pennsylvania's administrative system.

3. *A challenge to an EHB decision on a permit for an NGA jurisdictional project will necessarily be filed in the Courts of Appeals under § 717r(d)(1).*

In an attempt to avoid both a plain-text analysis of § 717r(d)(1) and directly controlling Third Circuit precedent, Transco quibbles that a civil action challenging the ultimate outcome of the EHB Appeal might be brought in Pennsylvania's Commonwealth Court, but that theory is unfounded. *Compare* Transco Br. at 22 ("Given this Court's acknowledgment that review of an EHB decision may only go to the state courts, if the EHB Appeal is allowed to proceed, there is no path by which this Court may exert its original and exclusive jurisdiction to review the

REAE Permits." (citation omitted) (citing *Del. Riverkeeper III*, 903 F.3d at 72)) *with Bordentown*, 903 F.3d at 268 (holding that the NGA "removes from the states the right for their courts to hear civil actions").

Transco specifically complains that the EHB is not the agency that issued the REAE Permits, but the statutory language of § 717r(d)(1) is not limited to a single state administrative actor. Instead, § 717r(d)(1) refers to "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). The EHB, like PADEP, is a "state administrative agency," and any decision by the EHB affecting Transco's permit would be an "issuance," "conditioning," or "denial" of a permit required under Federal law.

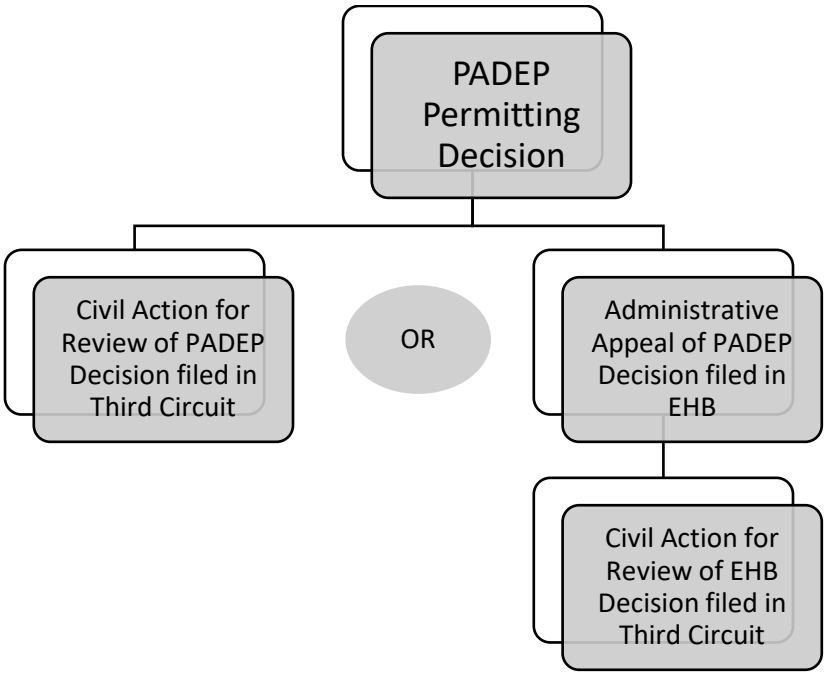
Any civil action seeking review of such a decision would thus be subject to the "original and exclusive jurisdiction" provision of § 717r(d)(1), which deprives Pennsylvania's Commonwealth Court of its jurisdiction to hear appeals from final orders of Pennsylvania agencies acting pursuant to federal law to issue, condition, or deny a permit. *Id.*; *see* 42 Pa. C.S.A. § 763(a)(1) (providing that the Commonwealth Court

has exclusive jurisdiction of appeals from final orders of "Commonwealth agencies," specifically including the EHB).

In its opinion, the District Court correctly noted that in New Jersey, the state at issue in *Bordentown*, a decision resulting from an adjudicatory hearing is not an issuance, conditioning, or denial of a permit by name, but rather a decision to "affirm, reject, or modify" the original permitting decision. (Appx18 (quoting N.J.S.A. § 13:9B-20)). If this distinction did not determine the outcome in *Bordentown*, there is no reason why a decision from the EHB should be treated differently.

Transco provides a concerning but ultimately nonsensical graphic in its brief allegedly demonstrating the impossibility of an appeal from the EHB to this Court. *See* Transco Br. at 23, Fig. 1. This figure, far from illuminating a complex legal process, only serves to illustrate Transco's own legal position. The actual process, which results in any civil action being filed in the Third Circuit, is outlined below in EHB Appellant's own Figure 1.

Figure 1



This simple graphic represents this Court's reasoning in *Bordentown*—both a civil action and an administrative appeal may be available where an agency (such as PADEP's) permitting decision qualifies as a final action for the purposes of federal review, and § 717r(d)(1) only restricts where any civil action may be filed.

D. The NGA does not otherwise preempt the EHB Appeal.

Transco's alternative argument that the EHB's jurisdiction is preempted by the NGA via the Supremacy Clause appears to be based on Transco's own desire to read the NGA as a federal bulldozer expediting all legal processes in favor of rapid pipeline construction. *See* Pl.'s Compl.,

R.1 at ¶¶ 15–16, 46–56 (Appx40, Appx47–49). Instead, the NGA's explicit preservation of state authority to regulate pursuant to the CWA while simultaneously ensuring that civil actions challenging state permit decisions are heard in Courts of Appeals provides a clear textual basis for a more nuanced interplay between state and federal power. *See* 15 U.S.C. §§ 717b(d)(3), 717r(d)(1).

The EHB's jurisdiction to hear the EHB Appeal exists well within Pennsylvania's administrative authority to act pursuant to the CWA. Transco's desire to simplify the process of securing and defending a permit from PADEP is simply that—an aspiration to reshape the permit process more beneficially to their business interests—untethered from the legal regime in which it operates. This desire should not translate to an interpretation of the NGA that runs roughshod over the statutory language and state authority.

While the NGA preempts state authority to regulate the transportation and sale of natural gas in interstate and foreign commerce, it specifically and explicitly preserves state authority to regulate natural gas facilities pursuant to the CWA. *See* 15 U.S.C. § 717b(d)(3) ("Except as specifically provided in this chapter, nothing in

this chapter affects the rights of States under . . . the Federal Water Pollution Control Act (33 U.S.C. § 1251 *et seq*.).") Pennsylvania's administrative scheme implementing the CWA, which includes EHB review of PADEP action,[8] remains intact. *Cf. Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988) (concluding that a state law regulating the issuance of long-term securities by natural gas companies is "field" preempted by the NGA), *but see id.* at 299 ("Of course, Congress explicitly may define the extent to which its enactments pre-empt state law.").

This Court has explained that "the NGA explicitly permits states to participate in environmental regulation of interstate natural gas facilities under the CWA . . . [and] leaves untouched the state's internal administrative review process." *Bordentown*, 903 F.3d at 268 (cleaned up) (quoting *Del. Riverkeeper I*, 833 F.3d at 368). The EHB Appeal, as a part of Pennsylvania's internal administrative review process, is not preempted.

The REAE Permits in this case are conditions of the WQC—a federal approval pursuant to the CWA—and are therefore explicitly

[8] *See* Section V.C.2, *supra*.

exempted from the NGA's preemptive effect. *See Del. Riverkeeper II*, 870 F.3d at 175–76. In addition, FERC's Certificate Order specifically requires compliance with the WQC and its conditions. *See* Certificate Order at P (C)(3), Appx. B ¶ 13 (Appx243) ("All conditions attached to the water quality certificate issued by [PADEP] . . . constitute mandatory conditions of the Certificate Order."). Rather than "conflict[ing] with the Certificate Order," Pl.'s Compl., R.1 at ¶ 48 (Appx47), the REAE Permits and any subsequent state administrative process—such as the EHB Appeal—are expressly included in the Certificate Order and are a valid exercise of Pennsylvania's CWA authority.

The fact that the EHB is a creature of state law does not eliminate its role in the implementation of the CWA. Section 401 of the CWA authorizes a state to condition a water quality certification on compliance with appropriate requirements of *state* law—and these conditions ultimately become conditions of the federal license or permit. *See* 33 U.S.C. § 1341(d); *see also PUD No. 1 of Jefferson Cty. v. Wash. Dept. of Ecology*, 511 U.S. 700, 711–12 (1994). Review of a PADEP permit by EHB is necessarily a part of Pennsylvania's overall administrative system, and Transco's WQC requires compliance with the "[PA]DEP water quality

permitting programs, criteria and conditions established pursuant to Pennsylvania law[.]" *See* Pl.'s Compl., R.1 Ex. C (Appx204). Transco's emphasis on the origin of the EHB's authority—state or federal—is misplaced. EHB undoubtedly has a role in the implementation of Pennsylvania's authority under the CWA.

The only EHB decision cited by Transco in support of its position has been expressly reversed by Pennsylvania's Commonwealth Court. *See West Rockhill Twp. v. Pa. Dep't of Env't Prot.*, EHB Docket No. 2019-039-L, 2019 WL 4896944 (Pa. Env. Hrg. Bd. Sept. 25, 2019), *rev'd on appeal* 258 A.3d 1161 (2021) *and Cole v. Pa. Dep't of Env't Prot.*, EHB Docket No. 2019-046-L (Pa. Env. Hrg. Bd. Oct. 9, 2019), *rev'd on appeal* 257 A.3d 805 (2021). In addition, the out-of-circuit and out-of-state cases cited by Transco are inapposite.

First, in *Protecting Air for Waterville v. Butler*, the Ohio Environmental Review Appeals Commission ("ERAC") dismissed appellants' administrative appeal on the basis that the Ohio Environmental Protection Agency's permits were "final" and thus appealable only to the Courts of Appeals, without explicitly evaluating the statutory term "civil action." *See* Case Nos. ERAC 16-6884 & 16-6885,

at ¶¶ 21–37, 2017 WL 5504540, at *3–6 (Ohio Env't Rev. Appeals Comm'n Nov. 9, 2017). Instead, the ERAC merely compared its own review to that of Ohio's courts of common pleas. *See id.* at ¶ 33, *5. This Court's previous interpretation of § 717r(d)(1) should govern this Court's analysis, rather than that of the ERAC. *See Bordentown*, 903 F.3d at 268.

Notably, Pennsylvania's own Commonwealth Court's analysis of Pennsylvania's system reached a different conclusion than that of the ERAC—"[p]roceedings before the EHB, an administrative agency independent of DEP, are administrative proceedings, not civil actions" and, therefore, do not "fall within the exclusive jurisdiction of the Third Circuit under Section 717r(d)(1)." *Cole*, 257 A.3d at 815. A Pennsylvania court's interpretation of Pennsylvania's administrative system is far more illuminating for an understanding of the nature of an EHB appeal than an out-of-state analysis of an out-of-state process.

Second, in *Rockies Express Pipeline LLC v. Indiana State Natural Resources Commission*, an unreported decision from the U.S. District Court for the Southern District of Indiana, the state administrative actions at issue (including the authorization from the Indiana Department of Natural Resources *and* the administrative review of the

Indiana State Natural Resources Commission) were *not* pursuant to the CWA, and thus were preempted by the NGA. *See* No. 1:08-cv-1651, 2010 WL 3882513, at *4 (S.D. Ind. Sept. 28, 2010). Here, the permits issued by PADEP are undoubtedly issued pursuant to the Commonwealth's authority under the CWA, an authority that is reserved by NGA's savings clause. *See* 15 U.S.C. § 717b(d)(3).

Transco has pointed to no statutory language, case law, or other authority indicating that the NGA's explicit preservation of state administrative authority under the CWA excludes the EHB's authority to entertain appeals of PADEP permits. The District Court was correct in concluding that Transco failed to establish a likelihood of success on the merits of its preemption claim, and this Court should accordingly affirm its denial of Transco's motion for preliminary injunction.

E. The District Court correctly concluded that Transco's alleged injuries did not constitute irreparable harm.

Contrary to the implication of Transco's argument, the District Court was not required to adopt Transco's view that the EHB process was preempted before reaching the question of whether Transco's participation in the EHB appeal constituted irreparable harm. *See* Transco Br. at 41. On appeal before this Court, Transco continues to rely

on its merits argument as a prerequisite to its irreparable harm argument. Because Transco has not demonstrated that the EHB Appeal is preempted, under its own formulation of irreparable harm, it necessarily fails to demonstrate that it will be irreparably harmed by participation.

Boldly and bafflingly, Transco asserts that a hardship for the purposes of a ripeness inquiry directly translates to irreparable harm for the purposes of preliminary injunction. As EHB Appellants noted before the District Court, if a preliminary injunction was warranted to remedy mere "hardships" alleged by aggrieved plaintiffs, then one would be warranted in nearly every meritorious case.

Further, Transco incorrectly asserts that the District Court already agreed that if Transco was correct about the EHB proceedings being preempted, then it would have shown irreparable harm. Transco Br. at 43. Instead, the District Court was articulating the legal definition of irreparable harm before analyzing Transco's arguments. *See* Mem. Op. at 17 (Appx22).

Even absent the question of whether the EHB Appeal is preempted, in this Circuit, the "expense of litigation, however, as burdensome as it

may be, does not constitute irreparable harm." *Lusardi v. Xerox Corp.*, 747 F.2d 174, 178 (3d Cir. 1984) (citing *Renegotiation Bd. v. Bannecraft Clothing Co.*, 415 U.S. 1, 24 (1974)). Although Transco attempts to distinguish its employees' "diverted time and energy" from litigation costs, litigation expenses are, by their nature, a diversion of resources. Even if Transco cannot recover these costs, they are still excluded from the category of "irreparable harm."

Finally, Transco's claim that the EHB Appeal might result in a delay of the Project is both highly speculative and unsupported by the facts presented in the District Court. *See Cont'l Grp., Inc. v. Amoco Chem. Corp.*, 614 F.2d 351, 358–59 (3d Cir. 1980) (explaining that *risk* of irreparable harm is not sufficient to support a preliminary injunction, which "may not be used simply to eliminate a possibility of a remote future injury, or a future invasion of rights" (quoting *Holiday Inns of Am., Inc. v. B & B Corp.*, 409 F.2d 614, 618 (3d Cir. 1969))); *see also Adams v. Freedom Forge Corp.*, 204 F.3d 475, 487 (3d Cir. 2000) ("A preliminary injunction may not be based on facts *not* presented at a hearing, or not presented through affidavits, deposition testimony, or other documents, about the particular situations of the moving parties.").

In support of its argument that "any delay in placing the Project into service would irreparably harm Transco," Transco continues to cite to an outdated declaration submitted in support of its opposition to a motion to stay the FERC Certificate in another court proceeding. *See* Pl.'s Mot., R.8-2 Ex. C (Appx251–262). That declaration discusses Transco's need to complete tree felling prior to March 31, 2023, in order to avoid construction delays. *See id*. at ¶¶ 15–18. Since that declaration was filed, tree felling was completed ahead of schedule and Transco received a notice to proceed with full construction of the REAE Project. *See* Notice to Proceed, Doc. Accession No. 20230323-3094, *Transcon. Gas Pipe Line Co., LLC*, FERC Docket No. CP21-94-000 (Mar. 23, 2023). And in fact, contrary to its own specters of delay, the day before the filing of this brief Transco requested authorization to place the majority of its facilities in service. *See* Request for Authorization to Place Facilities in Service and Provide Firm Transportation Service on an Interim Basis, Doc. Accession No. 20230919-5118, *Transcon. Gas Pipe Line Co., LLC*, FERC Docket No. CP21-94-000 (Sept. 19, 2023). In light of this filing, Transco has by its own hand contradicted any argument that the EHB Appeal risks

delaying the Project. Accordingly, the District Court correctly declined to find irreparable harm on the basis of a possible delay in construction.

F. Although it is not necessary to reach the balance of harm and public interest factors of the preliminary injunction inquiry, Transco fails to establish those factors.

Transco's failure to establish the first two "gateway factors" necessary to support a preliminary injunction resulted in the District Court properly declining to evaluate the remaining factors. (Appx 24). *See Greater Phila. Chamber of Com.*, 949 F.3d at 133 ("Generally, the moving party must establish the first two factors and only if these 'gateway factors' are established does the district court consider the remaining two factors." (citing *Reilly*, 858 F.3d at 179)). On appeal, Transco fails yet again to cross this gateway, as explained above. However, should this Court feel the need to consider the balance of the harms and public interest factors, it should conclude that neither support a reversal of the District Court's order.

Transco claims that EHB Appellants will not be harmed by a preliminary injunction because the law prohibits the EHB Appeal anyway. Again, Transco's position requires this Court to first accept its

argument on the merits. For the reasons detailed above, enforcement of the NGA does not require a stay of the EHB Appeal.

Merits issue aside, if EHB Appellants were forced to forego their right to an administrative hearing before the EHB, they would be harmed because they would be deprived of their forum of choice. Pursuing an appeal before the EHB requires a different strategy and approach that cannot simply be transferred to a Third Circuit appeal. The EHB holds an evidentiary hearing, which involves discovery as well as expert testimony, whereas an appeal before the Third Circuit is based solely on the administrative record. *Compare Del. Riverkeeper III*, 903 F.3d at 72–73 (describing the broad scope of an EHB hearing) *with Del. Riverkeeper I*, 833 F.3d at 377 (using the "arbitrary and capricious" standard to review PADEP action).

Nor does FERC's or PADEP's prior consideration of the Project's environmental effects alleviate the harm that would be inflicted on EHB Appellants. The gravamen of EHB Appellants' appeal is that PADEP inadequately considered the Project's impacts on the Commonwealth's water resources, and the FERC Certificate relies in part on PADEP's

decisions.[9] *See* Certificate Order at P (C)(3), Appx. B, ¶ 13 (Appx235, Appx243). One purpose of the EHB is to provide a forum for a fulsome review of PADEP's process and consideration of the project, including information beyond the administrative record. *Del. Riverkeeper III*, 903 F.3d at 72–73. EHB Appellants would suffer a serious harm by being deprived of this forum.

Far from "preserving the status quo," a preliminary injunction in this case would allow the harms EHB Appellants seek to prevent to occur, while tying their hands and preventing them from obtaining EHB review of the PADEP Permits. *See Acierno*, 40 F.3d at 653 ("A party seeking a mandatory preliminary injunction that will alter the status quo bears a particularly heavy burden in demonstrating its necessity." (quoting *Punnett v. Carter*, 621 F.2d 578, 582 (3d Cir. 1980))).

The harms that will accrue to EHB Appellants cannot be remedied by costs or damages, as further construction of the Project (and improper remediation associated with the Project) risks permanent and

[9] In addition, Delaware Riverkeeper Network and Maya K. van Rossum, the Delaware Riverkeeper, sought rehearing of the FERC Certificate and subsequently filed an appeal in the U.S. Court of Appeals for the D.C. Circuit. *See Del. Riverkeeper Network v. FERC*, No. 23-1077 (D.C. Cir. filed Mar. 20, 2023).

irreparable environmental harm. *See Amoco Prod. Co. v. Village of Gambell, AK*, 480 U.S. 531, 545 (1987) ("Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable."). Accordingly, a grant of preliminary relief will result in an even greater harm to the nonmoving parties—EHB Appellants.

In addition, the public interest weighs in favor of adjudicating EHB Appellants' claims before the EHB. An injunction will prevent the normal operation of the appeals process which will deprive EHB Appellants, and the public, of an opportunity to remedy the deficiencies in the permits at issue prior to the conclusion of the Project's construction.

Broad arguments that the "public interest" requires that Transco's view of the law is enforced are insufficiently specific to support a preliminary injunction. "If the interest in the enforcement of [the law] were the equivalent of the public interest factor in deciding whether or not to grant a preliminary injunction, it would be no more than a makeweight for the court's consideration of the moving party's probability of eventual success on the merits." *Continental Grp., Inc.*, 614 F.2d at 358. By reflexively repeating its own view of the law, Transco

does not meet its burden of establishing the "public interest" prong. Again, EHB Appellants vehemently oppose Transco's argument that Congress's intent in the NGA was to eliminate state administrative review of state-issued permits.[10]

Regarding FERC's finding that the Project is required by the public convenience and necessity, that finding was, again, conditioned on compliance with the conditions set forth in the 401 WQC. *See* Certificate Order at P (C)(3), Appx. B, ¶ 13 (Appx235, Appx243). If the permits issued by PADEP fail to meet the regulatory standards of Pennsylvania's water quality protection laws, then revocation or modification of the permits by the EHB would be required to ensure compliance with the conditions of the Certificate. Furthermore, the permits at issue in the

[10] Transco continues on appeal to rely on *Tennessee Gas Pipeline Co. LLC v. Del. Riverkeeper Network*, 921 F. Supp. 2d 381, 391 (M.D. Pa. 2013), for the proposition that the EHB Appeal should be enjoined due to a lack of jurisdiction. As recognized by the District Court, that proposition was rejected by this Court in *Delaware Riverkeeper III*, 903 F.3d at 71 (quoting *Goldman v. Citigroup Glob. Mkts. Inc.*, 834 F.3d 242, 251 (3d Cir. 2016)), and the role of state administrative review in natural gas pipeline permitting was further clarified in *Bordentown*, 903 F.3d at 268 (holding that hearings before administrative bodies are not impacted by § 717r(d)(1)).

EHB Appeal were not issued until *after* FERC approved the Project, so FERC's conclusions can not be based on the REAE Permits.

VI. CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's denial of Transco's Motion for Preliminary Injunction.

Dated: September 20, 2023

Respectfully submitted,

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COMBINED CERTIFICATIONS

A. Bar Membership

I hereby certify that I, Kacy C. Manahan, am a member of the Bar of this Court.

B. Type-Volume

I hereby certify that this brief complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B)(i) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 9,068 words. I also certify that this document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirement of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in 14-point Century Schoolbook.

C. Service

I hereby certify that on September 20, 2023, I electronically filed the foregoing Brief for Appellees Delaware Riverkeeper Network, Maya K. van Rossum, the Delaware Riverkeeper, and Citizens for Pennsylvania's Future with the Clerk of the Court by using the appellate

CM/ECF System and served copies of the foregoing via the Court's CM/ECF system on all ECF-registered counsel.

D. Identical Compliance of Briefs

I hereby certify that the text of the electronic brief that is being filed with this Court is identical to the text in the paper copies submitted to the Court.

E. Virus Check

I hereby certify that this filing was scanned for viruses by Bitdefender Total Security on September 20, 2023, and that no virus was detected.

Dated: September 20, 2023

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