IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

CONSTITUTION PIPELINE COMPANY, LLC Plaintiff, v. NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION; BASIL SEGGOS, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION; JOHN FERGUSON, CHIEF PERMIT ADMINISTRATOR, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION Defendants.	)	CIVIL ACTION Case No. 1:16-CV-0568 Electronically Filed (NAM/DJS)

MEMORANDUM OF LAW IN SUPPORT OF PROPOSED INTERVENORS' PROPOSED MOTION TO DISMISS

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Date: August 15, 2016

RULE 7.1 DISCLOSURE STATEMENT

The Delaware Riverkeeper Network is a nonprofit 501(c)(3) membership organization that advocates for the Protection of the Delaware River, its tributaries, and the communities of its watershed. The Delaware Riverkeeper Network does not have any parent corporation, nor does it issue stock.

Respectfully submitted this 15th day of August 2016,

By: */s Corinne Bell*

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Federal Statutes

New York Code

PRELIMINARY STATEMENT

The Delaware Riverkeeper Network and the Delaware Riverkeeper, Maya van Rossum, ("DRN" or "Proposed-Intervenors"), respectfully submit this Memorandum of Law in support of its Proposed Motion to Dismiss in the above captioned action. Plaintiff Constitution Pipeline Company, LLC ("Constitution") seeks, *inter alia*: (1) a declaration that state water quality permits are preempted by federal law; (2) a declaration that Constitution is exempt from New York's State Pollutant Discharge Elimination System ("SPDES") General Permit; (3) a declaration that Constitution is not required to obtain state permits; and (4) to enjoin New York Department of Environmental Conservation ("NYSDEC") from seeking to enforce compliance with state permit requirements. Plaintiff's lawsuit relates to its failed attempt to obtain the necessary approvals to build the Constitution pipeline project ("Project") through parts of New York and Pennsylvania. Proposed-Intervenors now move to dismiss the complaint under the provisions of Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6), on the grounds that this Court lacks subject matter jurisdiction, and the complaint fails to state a cause of action upon which relief can be granted.

STATEMENT OF FACTS

DRN adopts the Statement of Facts as provided in NYSDEC's Memorandum of Law in Support of its Motion to Dismiss, Desnoyers Affidavit, and the appended exhibits. *See* NYSDEC's Mot. to Dis. at 8-16.

Additionally, DRN states that it is a 501(c)(3) organization that was established in 1988 that advocates for the protection of the Delaware River, its tributary streams, and the habitats and communities of the Delaware River watershed. *See* van Rossum Declaration at ¶ 3. It has more than 15,000 members, the vast majority of whom live, work and/or recreate within the Delaware

River Basin, including the state of New York. *Id*. at 7. DRN represents the recreational, educational, and aesthetic interests of its members who enjoy many outdoor activities in the Delaware River Basin, including camping, boating, swimming, fishing, birdwatching, hunting and hiking. *Id*. DRN's staff and volunteers work throughout the entire Delaware River Watershed, including New York. *Id*. at 5. DRN provides effective environmental advocacy, volunteer monitoring programs, stream restoration projects, and public education. *Id*. In addition, DRN goes to court when necessary to ensure the enforcement of environmental laws, and specifically has litigated many issues related to pipeline projects in both federal and state courts. *Id*.

Furthermore, DRN was recently a party to a case that examined, and soundly rejected, the exact arguments that Plaintiff raises in the Amended Complaint. *See Tennessee Gas Pipeline Co. LLC v. Delaware Riverkeeper Network, et al.*, 921 F.Supp. 2d 381 (M.D. Pa. 2013). In *Tennessee Gas*, the Pennsylvania Department of Environmental Protection issued several permits related to section 401 of the Clean Water Act that governed the construction of a natural gas pipeline project and compliance with state water quality standards. Similar to the permits at issue in the instant matter, these state issued permits related to freshwater wetlands issues, erosion and sediment discharges, and other water related impacts. *Id*. at 381-382. A pipeline company argued that the state issued permits were preempted by the Natural Gas Act. However, the court made clear that these types of permits were not preempted by the Natural Gas Act, and that the state had the right to protect and enforce its water quality standards. *Id*. at 385. DRN has an institutional interest in preserving the ability of each state in the Delaware River Basin to protect and enforce its water quality standards through section 401 water quality certifications.

APPLICABLE RULE 12 STANDARDS

DRN adopts the Rule 12 standards as provided in NYSDEC's Memorandum of Law in Support of its Motion to Dismiss. *See* NYSDEC's Mot. to Dis. at 16-17.

ARGUMENT

I. Plaintiff's Claims are not Ripe for Review Because they are Contingent Upon Future Litigation and Further Administrative Review of the Proposed Project

DRN adopts the arguments made by NYSDEC with regard to standing, *see* NYSDEC's Mot. to Dis. at 26-29, and in addition, assert that Plaintiff's claims are not ripe for review because the harms asserted are speculatively premised on Plaintiff succeeding in a separate legal action, and then later obtaining a favorable administrative decision on remand from NYSDEC for the proposed Project. The necessity of such a string of contingent events renders Plaintiff's Amended Complaint not ripe for review.

Ripeness is an available ground to dismiss the claims provided in the Complaint, because it affects this Court's jurisdiction. *See Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 577-78 (1999). Prudential ripeness is a "flexible doctrine of judicial prudence, and constitutes an important exception to the usual rule that where jurisdiction exists a federal court must exercise it." *Simmonds v. INS*, 326 F.3d 351, 357 (2d Cir. 2003). It serves as "a tool that court may use to enhance the accuracy of their decisions and to avoid becoming embroiled in adjudications that may later turn out to be unnecessary." *Id*. As such, "[a] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998). The "basic rationale" of the ripeness doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148, 87 (1967) (overruled on other grounds).

The prudential ripeness inquiry involves a two pronged analysis requiring courts to "evaluate both the fitness of the issues for judicial determination and the hardship to the parties of withholding court consideration." *Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 347 (2d Cir. 2005) (quoting *Abbott Labs.*, 387 U.S. at 149). "The fitness analysis is concerned with whether the issues sought to be adjudicated are contingent on future events or may never occur." *Simmonds*, 326 F.3d at 359 (quotations and citation omitted). In assessing the possible hardship element," the Court considers "whether the challenged action creates a direct and immediate dilemma for the parties . . ." outside the "mere possibility of future injury" without the prospect of causing "present detriment." *Id.* at 360 (quotation and citations omitted); *see, e.g., Golden v. Zwickler*, 394 U.S. at 108; s*ee also Karlen v. New York University*, 464 F.Supp. 704, 708 (S.D.N.Y.1979); *M & M Transp. Co. v. U.S. Indus., Inc.*, 416 F.Supp. 865, 870 (S.D.N.Y.1976); *Bettis v. Patterson-Ballagh Corp.*, 16 F.Supp. 455, 461-62 (S.D. Cal. 1936) ("A person merely apprehending or fearing the assertion of rights against him by another cannot bring him into court and compel him to litigate").

Plaintiff entirely relies on the Declaratory Judgment Act for its claims for relief. Specifically, Plaintiff states that it:

> seeks from this Court equitable relief in the form of a declaration pursuant to 28 U.S.C. §§ 2201 and 2202 that the State Permits are preempted under the NGA and that they cannot be used as a barrier to construction of the Interstate Project, and that Constitution is exempt from NYSDEC's State Pollution Discharge Elimination System Permit under the CWA.

Am. Compl. ¶ 17. In a ripeness analysis pursuant to the Declaratory Judgement Act, a court must assess how likely it is that the contingent event upon which the controversy rests will occur. *See Associated Indem. Corp. v. Fairchild Industries*, 961 F.2d 32, 35-36 (2d Cir. 1992); *Am. Express Bank Ltd. v. Banco Espanol De Credito, S.A.*, 597 F.Supp.2d 394, 405

(S.D.N.Y. 2009). Unless the contingency is "practically likely" to occur, the controversy lacks "sufficient immediacy and reality" to warrant declaratory relief. *In re Prudential Lines, Inc.*, 158 F.3d 65, 70 (2d Cir. 1998).

Courts in this Circuit have regularly held that where the availability of relief is contingent on the outcome of separate litigation, the action is not ripe for review. *See Certain Underwriters at Lloyd's, London v. St. Joe Minerals Corp.*, 90 F.3d 671, 675-76 (2d Cir. 1996) (holding that an action seeking a declaration regarding the apportionment of liability among insurers was unripe where the underlying state court action against the insured was still pending and where liability was uncertain); *see also Bellefonte Reinsurance Co. v. Aetna Cas. & Sur. Co.*, 590 F.Supp. 187, 191-92 (S.D.N.Y. 1984) (dismissing reinsurers' declaratory judgment action where direct insurance liability remained pending in separate action); *Am. Ex., S.A.*, 597 F.Supp.2d 394 (holding that plaintiff's claim for declaratory relief was completely dependent on the outcome of a separate action pending in Pakistan, and therefore was not ripe); *M & M Transp. Co.*, 416 F. Supp. 865 (S.D.N.Y. 1976) (dispute over who was entitled to an anticipated tax refund not justiciable because the Internal Revenue Service had not yet determined whether a refund was due); *U.S. Dept. of Treasury v. Official Committee of Unsecured Creditors of Motors Liquidation Co.*, 475 B.R. 347, 366 (S.D.N.Y. 2012) (where there was "no way to predict" the outcome of underlying litigation the claim was not ripe for review); and *Goldman v. McMahan, Brafman, Morgan & Co.*, 1987 WL 12820, at *21 (S.D.N.Y. June 18, 1987) (holding claims not ripe where plaintiffs "may have to pay [additional taxes, costs, and penalties] in the future if the IRS, when it completes its audit of MBM, decides to disallow certain tax savings already enjoyed by plaintiffs related to the alleged bogus trading losses.") (emphasis original).

Put another way, "the 'central question' to be answered is 'whether changes in the circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaningful relief.'" *Christian v. Bureau of Prisons*, 2005 WL 2033381, at *3 (S.D.N.Y. August 23, 2005) (quoting *West v. Sec'y of the Dep't of Transp.*, 206 F.3d 920, 925 n. 4 (9th Cir. 2000)). Thus, "[c]laims based merely upon assumed potential invasions of rights are not enough to warrant judicial intervention." *Dow Jones & Co., Inc. v. Harrods*, 237 F. Supp.2d 394, 406 (S.D.N.Y. 2002) (internal quotation and citation omitted); *see also Richards v. Select Ins. Co., Inc.*, 40 F.Supp. 163, 169 (S.D.N.Y. 1999) (holding that a declaratory judgment action is "premature if standing to maintain such an action depends on a future event that is beyond the control of the parties and that may never occur"); and *Harbinger Capital Partners Master Fund I v. Wachovia Capital Markets, LLC*, 347 Fed.Appx. 711, 713 (2d Cir. 2009) (affirming dismissal of RICO claim on basis that bankruptcy proceedings were still pending, and, therefore, the Second Circuit could not determine whether those proceedings would mitigate any of plaintiff's damages).

Plaintiff's claims rely exclusively on successfully litigating a case in the Second Circuit Court of Appeals against NYSDEC. Currently, Plaintiff is not able to construct its proposed Project because NYSDEC determined, *inter alia*, that Plaintiff failed to provide the information necessary to obtain a section 401 water quality certification. *See* Am. Compl. at ¶ 8. This certification is a necessary condition for construction to move forward for the Project, as determined by the Federal Energy Regulatory Commission. *See* NYSDEC's Mot. to Dis. at 20-21. Plaintiff has brought suit in the Second Circuit Court of Appeals challenging NYSDEC's decision to deny the certification. *See* Am. Compl. at ¶ 2. The Second Circuit must uphold the NYSDEC's denial of the section 401 certification unless the court finds the agency's actions to

be "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law'." *See Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 375-76, n. 21 (1989) (quoting and interpreting 5 U.S.C. § 706). Arbitrary and capricious review is "highly deferential," and courts have emphasized that its review is "'most deferential'" when it involves "an agency's area of special expertise." *See, e.g.*, *Sw. Pa. Growth All. v. Browner*, 121 F.3d 106, 117 (3d Cir. 1997) (quoting *New York v. EPA*, 852 F.2d 574, 580 (D.C. Cir. 1988)); *see also Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 192 (4th Cir. 2009) ("Review under this standard is highly deferential, with a presumption in favor of finding the agency action valid."). As such, Plaintiff must overcome an extremely high standard to prevail. This litigation remains pending, and, of course, if Plaintiff fails to have NYSDEC's decision reversed, the issues presented here would be entirely moot.

Furthermore, even if Plaintiff is successful in that litigation, which is highly uncertain, the matter would be remanded to NYSDEC for further review. At that time Plaintiff would then again have to re-navigate NYSDEC's administrative approval process and obtain the section 401 certification. Such an approval would also be subject to potential appeals by aggrieved parties who oppose the Project. In other words, Plaintiff **may** be harmed **if** Plaintiff is successful in its Second Circuit appeal, and **if** it is **also** successful in later securing the required approval on remand. As such, Plaintiff's Amended Complaint should be dismissed because the harms asserted are highly speculative, and entirely contingent on future litigation and a favorable administrative decision regarding an already once-denied certification. While the existence of pending litigation that would moot the claims in the instant case "does not necessarily defeat jurisdiction," *American Mach. & Metals, Inc. v. De Bothezat Impeller Co.*, 166 F.2d 535, 536 (2d Cir.1948), the circumstances and wall of case law weighs heavily, if not entirely, in favor of a

dismissal for this reason. As described by the Fifth Circuit Court of Appeals, "[i]t is not the function of a United States District Court to sit in judgment of these nice and intriguing questions which today may readily be imagined, but may never in fact come to pass." *American Fidelity & Casualty Co. v. Pennsylvania Threshermen & Farmers' Mut. Casualty Ins. Co.*, 280 F.2d 453, 461 (5th Cir. 1960).

II. Section 717r(d)(1) of the Natural Gas Act Requires that Any Civil Action Relating to an Order or Action of a State Administrative Agency Acting Pursuant to Federal Law be Heard in the Appropriate Circuit Court of Appeals

Even if this matter is ripe, it should still be dismissed because federal district courts are not the appropriate courts to hear this type of case. The state permits at issue here are explicitly required by the New York Department of Environmental Conservation for the issuance of federal Clean Water Act ("CWA") section 401 water quality certificates. Section 717r(d)(1) of the Natural Gas Act ("NGA") demands that any challenge to a section 401 water quality certificate and its underlying supporting state permits, be heard in the appropriate Circuit Court of Appeals. As such, this Court lacks subject matter jurisdiction over this matter, as the proper court would be the Second Circuit Court of Appeals.

The NGA requires a natural-gas company, such as Constitution, to obtain a certificate of public convenience and necessity from the Federal Energy Regulatory Commission ("FERC") prior to undertaking the construction or operation of any facility for the transportation of natural gas in interstate commerce. *See* 15 U.S.C. § 717f(c)(1)(A). Constitution submitted an application to FERC for a certificate of public convenience and necessity to construct and operate its pipeline project and was granted approval on December 2, 2014. *See* Am. Compl. at ¶ 4. The Certificate Order **required** Constitution to obtain all federal authorizations prior to commencing construction of any Project facilities. *See* NYSDEC's Mot. to Dis. at 19. One of the federal

authorizations that Constitution is required to obtain is a CWA section 401 water quality certification. Under Section 401 of the CWA, any applicant for a federal permit or license – such as a certificate of public convenience and necessity from FERC – to construct or operate a facility that may result in a "discharge" to navigable waters must provide the federal permitting agency with "a certification from the State in which the discharge originates . . . that any such discharge will comply with" applicable state water quality standards. 33 U.S.C. § 1341(a)(l).

The CWA is "notable in effecting a federal-state partnership to ensure water quality . . . around the country, **so that state standards approved by the federal government become the federal standard for that state**." *Islander E. Pipeline Co., LLC v. McCarthy*, 525 F.3d 141, 143 (2d Cir. 2008) (emphasis added); *see* 33 U.S.C. § 1313(c)(3); and *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992) ("The Clean Water Act anticipates a partnership between the States and the Federal Government . . . provid[ing] for two sets of water quality measures [including state water quality standards] . . .").

The law that governs the issuance of section 401 water quality certificates in New York is 6 NYCRR § 608.9. Specifically, this provision states:

> Any applicant for a Federal license or permit to conduct any activity, including but not limited to the construction or operation of facilities that may result in a discharge into navigable waters . . . must apply for and obtain a water quality certificate from the Department. The applicant must demonstrate compliance with sections 301-303, 306 and 307 of the Federal Water Pollution Control Act, as implemented by the following provisions:
>
> (1) effluent limitations and water quality-related effluent limitations set forth in section 754.1 of this Title;
>
> (2) water quality standards and thermal discharge criteria set forth in Parts 701, 702, 703 and 704 of this Title;
>
> (3) standards of performance for new sources set forth in section 754.1 of this Title;

(4) effluent limitations, effluent prohibitions and pretreatment standards set forth in section 754.1 of this Title;

(5) prohibited discharges set forth in section 751.2 of this Title; and

(6) State statutes, regulations and criteria otherwise applicable to such activities.

6 NYCRR § 608.9. The state water quality requirements under New York law are set forth in Environmental Conservation Law, Article 15, Article 17, Article 24, and in NYSDEC's implementing regulations. *See* NYSDEC Mot. to Dis. at 6-7. The way in which NYSDEC enforces its water quality standards is by requiring project applicants to obtain the very permits that Plaintiff is now challenging. Indeed, the permits challenged here are a stream disturbance permit under Article 15, a stormwater discharge permit under Article 17, and a wetlands permit under Article 24. Indeed, as NYSDEC described, the challenged state permits are "inextricably intertwined" with the section 401 water quality certification. *See* NYSDEC's Mot. to Dis. at 20. As such, the state issued permits are inseparable parts of the CWA section 401 water quality certificate regulatory regime. For example, each of the challenged state permits falls, at a minimum, within the catchall provision of § 608.9, which requires "compliance" with all "[s]tate statutes, regulations, and criteria otherwise applicable to such activities." 6 NYCRR § 608.9(6). There can be no doubt that the standards governed by these permits are "applicable" to the pipeline construction activities proposed by Plaintiff, as the Federal Energy Regulatory Commission explicitly required the permits to be obtained. *See* NYSDEC's Mot. to Dis. at 20. Nowhere in the Amended Complaint does Constitution allege that these permits are not applicable to pipeline construction activity; rather, Plaintiff's sole argument is limited to the flawed assertion that these permits are somehow preempted, despite the fact that the permits were required by a separate federal law and are administered by a state agency pursuant to

federal law. *See Keating v. Federal Energy Regulatory Commission*, 927 F.2d 616, 622 (D.C. Cir. 1991) ("Congress intended that the states would retain the power to block, for environmental reasons, local water projects that might otherwise win federal approval"). Even FERC explicitly stated that these permits were necessarily part of the section 401 certification. *See* Desnoyers Aff., Ex. E: Reh. Order ¶ 63, p. 24. For example, FERC required confirmation that "NYSDEC has completed its review of the project under the Clean Water Act and issued the requisite permits." *Id*.

As NYSDEC noted, *see* NYSDEC's Mot. to Dis. at 4, 19, the Natural Gas Act establishes original and exclusive jurisdiction in the Courts of Appeals over actions seeking review of state agency permits or approvals required under federal law for interstate natural gas transmission projects:

> The United States Court of Appeals for the circuit in which a **facility subject to section 717b of this title or section 717f of this title** is proposed to be constructed, expanded, or operated shall have original and exclusive jurisdiction over any civil action for the review of an order or action of a Federal agency (other than the Commission) or **State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval (hereinafter collectively referred to as "permit") required under Federal law**, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.).

15 U.S.C. § 717r(d)(l) (emphasis added). This provision squarely applies here. The proposed Project includes construction of a new interstate natural gas pipeline ("facilities subject to section 717f" of the Natural Gas Act), and the permits challenged in the Amended Complaint are decisions of the New York State Department of Environmental Conservation (a "State administrative agency") issued pursuant to a CWA section 401 water quality certification ("acting pursuant to Federal Law"). Because the NGA vests exclusive jurisdiction for appeals of

this type exclusively in the appropriate Circuit Court of Appeals, this Court lacks subject matter jurisdiction to hear and decide this matter.

Counsel now representing Constitution acknowledged, in separate litigation before the Third Circuit Court of Appeals, that the CWA clearly authorizes states like New York to impose conditions such as state issued permits on section 401 water quality certifications. *See* Exhibit A (Brief of Intervenor, at 1-14, 34-35). In *Delaware Riverkeeper Network, v. Pennsylvania Department of Environmental Protection*, the petitioners sought to overturn the approval of state issued water quality permits related to a section 401 water quality certification for a FERC jurisdictional natural gas pipeline. Counsel for Plaintiffs represented to the Third Circuit that, pursuant to Section 717r of the Natural Gas Act, the appropriate court for the appeal of the state issued permits was the Third Circuit Court of Appeals. *Id*. at 14. Counsel specifically argued that "section 401 certification[s] . . . **issued using state water quality standards**, constitute[] a federal approval under Section 401 of the Clean Water Act." *See Id*. Counsel further argued that "Federal law clearly authorizes [the state] to impose conditions in a section 401 certification," and that only "[a]bsent the specific conditions in the Section 401 Certification requiring [the pipeline company] to obtain the [state] permits, . . . would [the state permits] be preempted by the NGA." *Id*. at 35-36. The fact that the same counsel now argues for a different pipeline company, in different court, the exact opposite argument that it previously so vigorously pursued, exposes the inherent fragility of their claims. This is especially true considering the clarity of New York law, which indisputably requires these state permits to be obtained in order to ensure state water quality standards are met, as required by section 401 of the Clean Water Act.

Furthermore, on August 8, 2016, the Third Circuit Court of Appeals issued its opinion in *Delaware Riverkeeper Network, v. Pennsylvania Department of Environmental Protection*, finding the "Natural Gas Act provides this Court with jurisdiction to review **state authorizations issued pursuant to the Clean Water Act** . . ." *Del. Riverkeeper Network v. Pa. Dep't of Envtl. Protection*, Nos. 15-2122, *et al*. (3d Cir. Aug. 8, 2016), slip op. at 19 (attached as Exhibit B). Specifically at issue in that matter were a number of state issued permits from New Jersey and Pennsylvania that related to Section 401 water quality certifications. The court found that, with regard to New Jersey, the Freshwater wetlands and Flood Hazard Area permits issued by the New Jersey Department of Environmental Protection were each "rooted in [New Jersey's] exercise of authority that it assumed pursuant to Sections 401 and 404 of the Clean Water Act," and therefore that section 717r of the Natural Gas Act governed their appeal. *Id*. at 18. The court similarly found that Pennsylvania's state-issued permits were "inextricably intertwined with the Water Quality Certification," and that therefore the Third Circuit was the appropriate court for review. *Id*. at 48. As such, it is clear that Plaintiff's claims here are entirely before the wrong court, and should be dismissed with prejudice.

CONCLUSION

For the foregoing reasons, Proposed-Intervenors respectfully request that their Motion to Dismiss be granted.

Respectfully submitted,

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Dated: August 15, 2016

Exhibit A

In The
United States Court of Appeals
for the
Third Circuit

Case No. 15-2122

DELAWARE RIVERKEEPER NETWORK;
MAYA VAN ROSSUM, the Delaware Riverkeeper

Petitioners,

v.

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

Respondents,

and,

TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC,
Intervenor.

On petition for review of an Order of the Pennsylvania Department of Environmental Protection

BRIEF OF INTERVENOR

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United States Court of Appeals for the Third Circuit

Corporate Disclosure Statement and Statement of Financial Interest

No. 15-2122

DELAWARE RIVERKEEPER NETWORK;
MAYA VAN ROSSUM, the Delaware Riverkeeper,

Petitioners

V.

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

Respondents

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

The purpose of collecting the information in the Corporate Disclosure and Financial Interest Statements is to provide the judges with information about any conflicts of interest which would prevent them from hearing the case.

The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Transcontinental Gas Pipe Line Company, LLC (Name of Party) makes the following disclosure:

1) For non-governmental corporate parties please list all parent corporations: Williams Partners Operating LLC

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

Williams Partners, L.P. (WPZ)

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

The Williams Companies, Inc. (owns the general partnership interest in WPZ and approximately 64% of the publicly traded limited partnership interest in WPZ)

Publicly traded Leidy Southeast Expansion customer companies or publicly traded parent companies of such customers:

- Anadarko Petroleum Company (publicly traded parent of customer Anardarko Energy Services Company)
- WGL Holdings Inc. (publicly traded parent of customers Capitol Energy Ventures Corp. and Washington Gas Light Company)
- Mitsui & Co. (publicly traded parent of customer MMGS Inc.)
- Piedmont Natural Gas Company, Inc. (publicly traded customer company)
- SCANA Corporation (publicly traded parent of customers Public Service Company of North Carolina, Inc. and South Carolina Electric & Gas Company)

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

Not applicable.

/s/ John F. Stoviak
(Signature of Counsel or Party)

Dated: September 10, 2015

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

GLOSSARY

Army Corps	United States Army Corps of Engineers
Certificate Order	*Transcontinental Gas Pipe Line Company, LLC*, 149 FERC ¶ 61, 258, at ¶¶ 1, 4-5 (Dec. 18, 2014)
Chapter 105 permits	Water Obstruction and Encroachment Permits issued pursuant to Title 25, Chapter 105 of the Pennsylvania Code
Commonwealth	Commonwealth of Pennsylvania
CTDEP	Connecticut Department of Environmental Protection
CWA	Clean Water Act
EHB	Pennsylvania Environmental Hearing Board
FERC	Federal Energy Regulatory Commission
NGA	Natural Gas Act
NYPSC	New York Public Service Commission
PADEP	Respondent Pennsylvania Department of Environmental Protection
Project	Intervenor Transcontinental Gas Pipe Line Company, LLC's Leidy Southeast Project
Riverkeeper	Petitioners Delaware Riverkeeper Network and Maya Van Rossum, the Delaware Riverkeeper
Section 401 Certification	Water Quality Certification issued pursuant to Section 401 of the Clean Water Act for the Leidy Southeast Project, Permit Nos. EA 40-013 and EA 45-002
Transco	Intervenor Transcontinental Gas Pipe Line Company, LLC

STATEMENT OF JURISDICTION

This Court has original and exclusive jurisdiction over the petition under the applicable judicial review provisions of the Natural Gas Act, 15 U.S.C. § 717r(d)(1).

I. Background

Petitioners seek review of a certification under Section 401 of the Clean Water Act, 33 U.S.C. § 1341, issued by the Pennsylvania Department of Environmental Protection ("PADEP") that the Leidy Southeast Project ("Project"), currently under construction by Transcontinental Gas Pipe Line Company, LLC ("Transco"), meets Pennsylvania's water quality standards.

The Project is a $600 million dollar interstate natural gas transmission project in Pennsylvania and New Jersey which is designed to provide 525,000 dekatherms of additional natural gas transportation capacity to various delivery points on Transco's Mainline natural gas transmission system. *Transcontinental Gas Pipe Line Company, LLC*, 149 FERC ¶ 61, 258, at ¶¶ 1, 4-7 (Dec. 18, 2014) ("Certificate Order"). The Project involves the construction of approximately 29.97 miles of new 42-inch-diameter interstate natural gas pipeline loops and associated facilities in Pennsylvania and New Jersey. *Id.* ¶¶ 4-5. The Federal Energy Regulatory Commission ("FERC") has the exclusive authority to approve interstate natural gas transmission projects. Transco submitted an application to

FERC for a certificate of public convenience and necessity to construct and operate the Project on September 28, 2013. *Id.* ¶ 1. FERC issued a certificate of public convenience and necessity (the Certificate Order) to Transco authorizing the construction of the Project on December 18, 2014. *Id.* at 1. Among other Project benefits, FERC noted that "the largest subscriber to the Leidy Project, affirmed its need for the project to meet the growing requirements of over 1 million end-user customers." *Id.* ¶ 16. FERC concluded that "[b]ased on the benefits the project will provide and the minimal adverse effects the project will have . . . we find on balance . . . that the public convenience and necessity requires approval of Transco's Leidy Project proposal, as conditioned in this order." *Id.* ¶ 17.

The Certificate Order requires Transco to obtain all federal authorizations prior to commencing construction of any Project facilities. Certificate Order at 53, ¶ 9. Here, among the federal authorizations required is a Section 404 permit under the Federal Water Pollution Prevention and Control Act (commonly known as the Clean Water Act) from the United States Army Corps of Engineers ("Army Corps"). A Section 404 permit authorizes the discharge of dredged or fill material into navigable waters. 33 U.S.C. § 1344(a).

Under Section 401 of the Clean Water Act, any applicant for a federal Section 404 permit to construct or operate a facility that may result in a discharge to navigable waters must provide the federal permitting agency with "a

certification from the State in which the discharge originates . . . that any such discharge will comply with" applicable state water quality standards. 33 U.S.C. § 1341(a)(1).[1] The Clean Water Act is "notable in effecting a federal-state partnership to ensure water quality . . . around the country, so that state standards approved by the federal government become the federal standard for that state." *Islander E. Pipeline Co. v. McCarthy*, 525 F.3d 141, 143 (2d Cir. 2008); *see* 33 U.S.C. § 1313(c)(3); *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992).

PADEP issued a Section 401 water quality certification for the Pennsylvania portion of the Project on April 6, 2015. That Certification is the action that is the subject of Petitioners Delaware Riverkeeper Network and Maya Van Rossum's (collectively, "Riverkeeper") petition for review. As directed by this Court, Transco first addresses this Court's jurisdiction to review the challenge to the Section 401 Certification, and then the substance of the challenge.

[1] According to Section 401 of the Clean Water Act, a state water quality certification must precede any federal "license or permit to conduct any activity . . . which may result in any discharge into the navigable waters . . . ." 33 U.S.C. § 1341(a)(1).

II. Under the Natural Gas Act, the Court Has Original and Exclusive Jurisdiction Over Riverkeeper's Petition for Review

A. The Natural Gas Act's Judicial Review Procedures Apply Here

The Natural Gas Act establishes original and exclusive jurisdiction in the Courts of Appeals over actions seeking review of state agency permits or approvals required under federal law for interstate natural gas transmission projects:

> ***The United States Court of Appeals*** for the circuit in which a facility subject to section 717b of this title or section 717f of this title is proposed to be constructed, expanded, or operated ***shall have original and exclusive jurisdiction over any civil action for the review of an order or action of a*** Federal agency (other than the Commission) or ***State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval*** (hereinafter collectively referred to as "permit") ***required under Federal law***, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.).

15 U.S.C. § 717r(d)(1) (emphasis added). This provision squarely applies here since the Project includes construction of new interstate natural gas pipeline loops (facilities subject to section 717f of the Natural Gas Act), and the petition challenges the decision of a state administrative agency (PADEP) to issue an approval (the Section 401 Certification) pursuant to federal law (the Clean Water Act).

The seminal cases that have discussed the application of Section 717r(d)(1) – *Islander E. Pipeline Co. v. Conn. Dep't of Envtl. Prot.*, 482 F.3d 79 (2d Cir.

2006), *Islander E. Pipeline Co. v. McCarthy*, 525 F.3d 141 (2d Cir. 2008), and *AES Sparrows Point LNG v. Wilson*, 589 F.3d 721 (4th Cir. 2009) – all involved direct federal appellate court review of a state's Section 401 Certification, precisely the same approval under review in this matter. *See Tenn. Gas Pipeline Co. v. Del. Riverkeeper Network*, 921 F. Supp. 2d 381, 392 (M.D. Pa. 2013) (discussing the *Islander* cases and *AES Sparrows*).

Thus, this Court has clear, original, exclusive authority to review PADEP's Section 401 Certification.

B. The Natural Gas Act Does Not Require Exhaustion of State Administrative Remedies Before Seeking Judicial Review

The Pennsylvania Environmental Hearing Board ("EHB") is typically authorized to hear administrative appeals protesting the issuance of PADEP permits, and no appeal to a state court is permitted until the administrative process, which can take as long as two years, has concluded. 35 P.S. § 7514(c); *see also NE Hub Partners, L.P. v. CNG Transmission Corp.*, 239 F.3d 333, 339 (3d Cir. 2001). However, for projects regulated by FERC under 15 U.S.C. § 717f, the Natural Gas Act expressly preempts state review procedures and grants original, exclusive jurisdiction for the review of a state order or action in the Courts of Appeals, and therefore does not require the exhaustion of state administrative remedies. 15 U.S.C. § 717r(d)(1); *Tenn. Gas Pipeline Co.*, 921 F. Supp. 2d at 391

n.17 (rejecting argument that PADEP's issued permits were not final actions because appeals had been filed to the EHB).

In *Tennessee Gas Pipeline Co. v. Delaware Riverkeeper Network*, 921 F. Supp. 2d 381 (M.D. Pa. 2013), the United States District Court for the Middle District of Pennsylvania held that the rehearing and review procedures of section 717r of the Natural Gas Act precluded the Pennsylvania Environmental Hearing Board from hearing Riverkeeper's appeal of permits, including a Section 401 Certification, issued by PADEP in connection with another interstate natural gas pipeline project. *Id.* at 388. In so holding, the court rejected an argument that exhaustion of administrative remedies was required in order to present a "final" agency decision for appellate review. The court ruled that "Section 717r(d)(1) provides for federal judicial review of 'an order or action' by a state administrative agency. It does not mandate that judicial review wait until a *final* agency decision has been rendered . . . ." *Id.* at 391 (emphasis in original); *see also Islander E. Pipeline Co.*, 482 F.3d at 88 n.7 (Section 717r(d)(1) "does not expressly require that state administrative remedies be exhausted before the commencement of an action under its terms . . . "). The court explained that if Congress had intended to require final agency action, it could have done so, and that "[w]here a federal statute provides for an unqualified right of review, it is impermissible to imply either an additional administrative requirement originating in state law (i.e. a

finality requirement) or to recognize an exhaustion requirement by implication." *Tenn. Gas Pipeline Co.*, 921 F. Supp. 2d at 391. The court also noted the legislative history is reflective of Congress' intent "to cut out all [state] review after the original agency made its permitting decision." *Id.* at 391-92 (citing, *inter alia*, the statement of Mark Robinson, Director, Office of Energy Projects, FERC, observing that, prior to the enactment of the Energy Policy Act of 2005 and its amendments to the rehearing and review procedures of the Natural Gas Act, applicants were subject to "a series of sequential *administrative . . . 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") (emphasis in original).

III. The Natural Gas Act Preempts State Regulation and Review Procedures

A. The Natural Gas Act Preempts State Administrative Review

There is no room for the Environmental Hearing Board to review PADEP's 401 Certification in this matter under the Natural Gas Act. It is true that the Natural Gas Act provides that "***[e]xcept as specifically provided in this chapter***" (referring to the Natural Gas Act), "nothing in this chapter affects the rights of States under . . . the Federal Water Pollution Control Act." 15 U.S.C. § 717b(d) (emphasis added). However, direct appeals to federal appellate courts are

specifically provided for in Section 717r(d)(1) of the Natural Gas Act.[2] Congress amended the Natural Gas Act in 2005 "to provide an expedited direct cause of action in the federal appellate courts to challenge a state administrative agency's . . . action . . . with respect to a permit application required under federal law in order to proceed with a natural gas facility project . . . ." *Islander E. Pipeline Co.*, 482 F.3d at 83-84. Any suggestion to the contrary is not based in the plain language of the law.

Cases that do not involve the judicial review procedures set forth in the NGA are irrelevant in determining the proper forum for a challenge to a 401 certification issued in connection with an interstate pipeline project governed by the NGA. Counsel is not aware of a single case holding that review of state water quality certifications issued under Section 401 of the Clean Water Act in connection with an NGA-governed natural gas pipeline may occur in a state forum.

Courts have found that the Natural Gas Act's preemptive force reaches state review processes for challenged permits. In *NE Hub Partners, L.P. v. CNG Transmission Corp.*, 239 F.3d 333 (3d Cir. 2001), this Court found that "preemption may operate to spare a party from [the] very process" of litigating

[2] The judicial review provisions set forth in Section 717r(d)(1) do not apply to permits, licenses, concurrences, or approvals required under the Coastal Zone Management Act of 1972. The Section 401 Certification was issued pursuant to the Clean Water Act, not the Coastal Zone Management Act, and thus Section 717r(d)(1) governs here.

before the Environmental Hearing Board. *Id.* at 342. When preemption claims are raised, "the need to participate in a state regulatory process in conflict with federal policy has been recognized as a hardship." *Id.* at 346. This Court also stated that:

> While it is true that the [PADEP] permits are valid pending the E.H.B. outcome, it is not a regulation but the regulatory process that afflicts NE Hub. If the process is preempted it is quite immaterial that the effectiveness of the permits challenged has not been stayed.

Id. Although the Court did not reach the merits of the preemption issue, it stated: "[I]f it is evident that the result of a process must lead to . . . preemption, it would defy logic to hold that the process itself cannot be preempted and that a complaint seeking that result would not raise a ripe issue." *Id.* at 347 n.14, 348.[3]

Similarly, in *National Fuel Gas Supply Corp. v. Public Service Commission of the State of New York*, 894 F.2d 571 (2d Cir. 1990), the Second Circuit concluded that New York's Public Service Commission's ("NYPSC's") proposed site-specific environmental review was field preempted, stating that the review "is undeniably a regulation of a facility used in the interstate transportation of natural gas." *Id.* at 576. The court noted that the NYPSC's review procedure "would

[3] The Third Circuit remanded the case to the Middle District to reach a conclusion on whether the appeal process before the Environmental Hearing Board is actually preempted. *Id.* at 349. However, the parties to the case reached a settlement before the Middle District ruled on the remand. Notably, James Seif, the Secretary of PADEP at the time of the litigation, "settled with NE Hub . . . stipulating that Pa.D.E.P. lacked authority to regulate the Facility" and the district court dismissed him as a party to the lawsuit. *Id.* at 340.

certainly delay and might well, by the imposition of additional requirements or prohibitions, prevent the construction of federally approved interstate gas facilities." *Id.* at 576-77. In the court's view, subjecting the pipeline company to the state review process itself was the issue: "Even if a transporter were ultimately successful before the [NY]PSC, the practical effect would be to undermine the FERC approval by imposing the costs and delays inherent in litigation that must be undertaken without any guidelines as to limits on the exercise of state authority." *Id.* at 578. Further, even assuming that "a small residue of valid [NY]PSC authority may exist," the court noted that FERC "expressly considered various data regarding the environmental effects of National Fuel's project before issuing a certificate of public convenience and necessity." *Id.* at 578 & n.3, 579. In other words, conflict preemption would act to bar the PSC's review procedure, even if field preemption did not.

This Court's decision in *NE Hub* strongly suggests that it would take a position similar to that of the Second Circuit in *National Fuel* – namely, that collateral attacks via state environmental review processes are field preempted by the Natural Gas Act and conflict preempted to the extent they contradict FERC's orders. *See also Williams Nat. Gas Co. v. Oklahoma City*, 890 F.2d 255, 261-62 (10th Cir. 1989) (finding "exclusive" the judicial review of FERC decisions vested

with the Circuit Courts of Appeals by the NGA and prohibiting collateral attacks of the same in state court).[4]

B. The Natural Gas Act Preempts State and Local Regulation of Interstate Natural Gas Pipelines

The Natural Gas Act long has been recognized as a comprehensive scheme of federal regulation of "all wholesales of natural gas in interstate commerce . . . ." *N. Nat. Gas Co. v. Kan. Corp. Comm'n*, 372 U.S. 84, 91 (1963) (internal quotations omitted). The Natural Gas Act "occupies the field with respect to the siting, construction, and operation of a natural gas facility." *Dominion Transmission, Inc. v. Town of Myersville Town Council*, 982 F. Supp. 2d 570, 579 n.10 (D. Md. 2013).[5] Pursuant to the Supremacy Clause of the United States

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[4] In any event, as explained in the preceding subsection, the Natural Gas Act does not contemplate exhaustion of state remedies before review of agency decisions are taken in the federal Courts of Appeals.

[5] *See Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 244 (D.C. Cir. 2013) ("FERC's certificate preempts all local requirements that regulate in the same field as the NGA . . . ."); *AES Sparrows Point LNG, LLC v. Smith*, 527 F.3d 120, 126-27 (4th Cir. 2008) (recognizing that local law, although addressing coastal management, was nevertheless preempted by the NGA because the NGA entrusts FERC with exclusive authority over siting, construction, expansion, or operation of a natural gas facility and because the local law was not approved by [National Oceanic and Atmospheric Administration] pursuant to the procedures prescribed by the [Coastal Zone Management Act]); *Nat'l Fuel Gas Supply Corp.*, 894 F.2d at 577 (finding it "apparent" that "Congress has occupied the field of regulation regarding interstate gas transmission" and concluding that a state statute requiring site-specific environmental review was preempted); *N. Nat. Gas Co. v. Munns*, 254 F. Supp. 2d 1103, 1111-12 (S.D. Iowa 2003) (finding NGA occupies field and therefore preempts local soil regulations); *Algonquin LNG v. Loqa*, 79 F.

Constitution, the United States Supreme Court has ruled that by enacting the Natural Gas Act, "Congress occupied the field of matters relating to wholesale sales and transportation of natural gas in interstate commerce." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300, 305, 308 (1988) (concluding that a state securities law that would control the rates and facilities of natural gas companies was preempted because it regulated in a field the Natural Gas Act has occupied to the exclusion of state law and attempted to regulate matters within FERC's exclusive jurisdiction); *see also Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1600 (2015) (citing *Schneidewind* for the proposition that "'the control of . . . facilities of natural gas companies'" is one of the areas "'over which FERC has comprehensive authority'") (quoting *Schneidewind*, 485 U.S. at 308).

Following the Supreme Court's decision in *Schneidewind*, numerous Courts of Appeals and District Courts have found the Natural Gas Act to be field or conflict preemptive, or both.[6] Field preemption applies when a "federal regulatory

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Supp. 2d 49, 52 (D.R.I. 2000) ("In short, Congress clearly has manifested an intent to occupy the field and has preempted local zoning ordinances and building codes to the extent that they purport to regulate matters addressed by federal law.").

[6] *See, e.g., Pub. Utils. Comm'n of Cal. v. FERC*, 900 F.2d 269, 274 (D.C. Cir. 1990) (observing that "[c]ases are legion affirming the exclusive character of FERC jurisdiction where it applies, both under the NGA . . . and under the analogous provisions of the Federal Power Act," and citing numerous U.S. Supreme Court decisions by way of example); *Mich. Consol. Gas Co. v. Panhandle E. Pipe Line Co.*, 887 F.2d 1295, 1299 (6th Cir. 1989) (stating that in

scheme is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *NE Hub Partners*, 239 F.3d at 348 (citation omitted). Conflict preemption applies "where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.*

The NGA preempts state and local permits but preserves approvals issued by state administrative agencies under federal law. *See Islander E. Pipeline Co.*, 482 F.3d at 84. If the Section 401 Certification were viewed purely as a state approval, then it would be preempted by the NGA. *See Tenn. Gas Pipeline Co.*, 921 F.

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enacting the NGA, "Congress delegated to the Federal Power Commission (now the FERC) 'exclusive jurisdiction over the transportation and sale of gas in interstate commerce for resale'" (quoting *Schneidewind*, 485 U.S. at 300-01)); *N. Nat. Gas Co. v. Iowa Utils. Bd.*, 377 F.3d 817 (8th Cir. 2004) (relying on *Schneidewind* and ruling that Iowa's attempt to regulate the environmental effects of the construction and maintenance of a FERC-approved interstate natural gas pipeline was field preempted); *Pub. Serv. Comm'n of W. Va. v. Fed. Power Comm'n*, 437 F.2d 1234, 1238-39 (4th Cir. 1971) ("The right to acquire and the right to operate an interstate pipeline . . . cannot be made dependent upon approval by a state regulatory commission."); *Colo. Interstate Gas Co. v. Wright*, 707 F. Supp. 2d 1169, 1176, 1179 (D. Kan. 2010) (finding Kansas gas storage statutes and regulations field preempted by the NGA); *Islander E. Pipeline Co. v. Blumenthal*, 478 F. Supp. 2d 289, 295 (D. Conn. 2007) (finding permit requirement conflict preempted by the NGA); *Tenn. Gas Pipeline Co. v. Mass. Bay Transp. Auth.*, 2 F. Supp. 2d 106, 111 (D. Mass. 1998) (explaining that "the NGA occupies the field with respect to the regulation of natural gas rates and facilities," (internal quotations omitted) and that "[t]here is no question that the pipeline itself is a 'facility' used in the transportation of natural gas").

Supp. 2d at 386-87, 388 n.9 (collecting preemption cases). The more supported view is that a Section 401 certification, although issued using state water quality standards, constitutes a federal approval under Section 401 of the Clean Water Act. *See id.* at 387. As a result, PADEP's decision to issue the 401 certification to Transco constitutes an action by a "State administrative agency acting pursuant to Federal law." This falls squarely within the ambit of the NGA's judicial review provisions. 15 U.S.C. § 717r(d)(1). Thus, any challenge to PADEP's 401 certification must be heard in the Court of Appeals.

IV. Sovereign Immunity Does Not Bar This Action

A. The Commonwealth of Pennsylvania Has Waived Sovereign Immunity by Participating in the Natural Gas Act's and Clean Water Act's Regulatory Scheme

State sovereign immunity is no bar to this action because the Commonwealth of Pennsylvania ("Commonwealth") has waived its Eleventh Amendment immunity from suit by participating in the regulatory scheme provided by the Natural Gas Act and the Clean Water Act. The Second Circuit's decision in *Islander East* analyzed this same waiver argument asserted by the State of Connecticut in that case. The Connecticut Department of Environmental Protection ("CTDEP") denied a pipeline company's request for a 401 Certification related to a FERC-regulated pipeline project. *Islander E. Pipeline Co.*, 482 F.3d at 86. As an agency of the state, CTDEP waived *the state's* Eleventh Amendment

immunity by actively participating as a regulator. *Id.* at 90 ("Respondent does not dispute that by accepting a role as deputized regulator under the CWA, *a state* agrees to waive its immunity from suit under section 19(d) of the NGA.") (emphasis added). CTDEP argued that Connecticut did not knowingly waive immunity by its participation in the NGA and Clean Water Act ("CWA") regulatory scheme, but the court found that "once Congress enacted section 19(d) [of the NGA], *Connecticut* was on notice that its continued participation in the NGA and CWA regulatory scheme would constitute a waiver of its Eleventh Amendment immunity." *Id.* at 91 (emphasis added). Thus, "by going forward with its federally deputized role even after the [Energy Policy Act of 2005's] enactment, *Connecticut* has now knowingly waived its immunity from section 19(d) suit in order to receive the benefits of participating in the NGA and CWA regulatory scheme." *Id.* (emphasis added).

The present situation is analogous. By actively participating as a regulator in the Natural Gas Act's and Clean Water Act's regulatory scheme through PADEP, the Commonwealth has waived its Eleventh Amendment immunity for purposes of this action.

Tellingly, in this action, PADEP contends that an order issued by the Pennsylvania Environmental Hearing Board would be reviewable in this Court. *See* Respondents' Memorandum of Law dated May 22, 2015, Document No.

003111971432, at 18. Since PADEP concedes that an EHB order could be reviewed in federal court, then it must also concede that its own permitting decision is reviewable in federal court given that the EHB is a Commonwealth agency just like PADEP.

B. Even Absent the Commonwealth's Waiver, Proceeding Against Secretary Quigley Is Proper Under the Supreme Court's Longstanding *Ex Parte Young* Doctrine

Even if the Commonwealth had not waived Eleventh Amendment immunity by participating as a regulator in the regulatory scheme provided by the Natural Gas Act and Clean Water Act, this action would be proper under the well-established *Ex parte Young* doctrine. *See Ex parte Young*, 209 U.S. 123 (1908). The *Ex parte Young* doctrine allows suits challenging a state official's actions and holds "that the Eleventh Amendment does not prevent federal courts from granting prospective injunctive relief to prevent a continuing violation of federal law." *Green v. Mansour*, 474 U.S. 64, 68 (1985). "In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (internal quotations omitted). As this Court has explained, "the [Supreme] Court has thus enunciated a standard for determining whether relief is prospective or

retrospective: it is retrospective, and hence barred by the Eleventh Amendment, if it is 'measurable in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials.'" *Clark v. Cohen*, 794 F.2d 79, 88 (3d Cir. 1986) (quoting *Edelman v. Jordan*, 415 U.S. 651, 668 (1974)).

Riverkeeper's petition names Secretary Quigley in his official capacity as Secretary of the Pennsylvania Department of Environmental Protection and does not seek monetary relief. Federal appellate court review of an agency permit decision under the Natural Gas Act is to determine whether the decision "is inconsistent with the Federal law governing such permit . . . ." 15 U.S.C. § 717r(d)(3). The Riverkeeper's petition seeks prospective relief—a ruling that would impact the Section 401 Certification's forward-looking effects. Here, a determination that PADEP's 401 Certification is inconsistent with Federal law would deprive PADEP's decision of future effect—a clearly prospective result. *See Verizon*, 535 U.S. at 646.

Further, this Court's remand authority under 15 U.S.C. § 717r(d)(3) encompasses prospective relief: on remand, the agency must "take appropriate action" to implement the Court's ruling, and the Court "shall set a reasonable schedule and deadline for the agency to act." 15 U.S.C. § 717r(d)(3).

Here, as in *Verizon*, Riverkeeper seeks a determination regarding "the *future*, ineffectiveness" of PADEP's action in issuing the Section 401 Certification to

Transco. 535 U.S. at 646 (emphasis in original). Because "no past liability of the State, or of any of its commissioners, is at issue," and because the ruling "does not impose *upon the State* 'a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials,'" the action clearly seeks prospective relief. *Id.* (quoting *Edelman*, 415 U.S. at 668) (emphasis in original); *see also id.* at 645 ("The prayer for injunctive relief—that state officials be restrained from enforcing an order in contravention of controlling federal law—clearly satisfies our 'straightforward inquiry.'").

This suit is precisely the type of action permitted by *Ex parte Young*. Thus, even if the Commonwealth had not waived immunity, Riverkeeper may proceed against Secretary Quigley pursuant to the *Ex parte Young* doctrine.

STATEMENT OF THE ISSUES

1. Whether PADEP acted arbitrarily and capriciously or abused its discretion in issuing the Section 401 Certification.

2. Whether Riverkeeper's arguments concerning site-specific information pertaining to wetlands and water resource classifications related to Water Obstruction and Encroachment Permits issued pursuant to 25 Pa. Code Chapter 105, which have not been appealed to this Court and which were issued on a separate and subsequent administrative record not under review here, are relevant to Riverkeeper's petition for review of the Section 401 Certification.

3. Whether Riverkeeper has any basis to challenge PADEP's public notice of the issuance of the Section 401 Certification given that Riverkeeper timely filed both its petition for review before this Court and a companion appeal before the Pennsylvania Environmental Hearing Board.

STATEMENT OF RELATED CASES AND PROCEEDINGS

1. *The Delaware Riverkeeper Network and Maya K Van Rossum, The Delaware Riverkeeper v. Commonwealth of Pennsylvania, Department of Environmental Protection and Transcontinental Gas Pipe Line Company, LLC*, Pennsylvania Environmental Hearing Board, EHB Docket No. 2015-060-M. The case has been stayed until October 1, 2015, at which time the parties must file a joint status report.

2. *New Jersey Conservation Foundation; Stony Brook-Millstone Watershed Association; and Friends of Princeton Open Space v. The New Jersey Department of Environmental Protection; and Transcontinental Gas Pipe Line Co.*, United States Court of Appeals for the Third Circuit, Docket No. 15-2158.

3. *In Re Flood Hazard Area Individual Permits No. 13-0012.1 FHA 140001; 13-0012.2 FHA 140001; Freshwater Wetlands Individual Permits Nos. 130012.1 FWW 140001; 130012.2 FWW 140001; Water Quality Certificates; Letters of Interpretation*, New Jersey Superior Court, Appellate Division, Docket No. A-004320-14. The case has been stayed until November 2, 2015.

4. "Motion for *Ad Interim* Relief for a Stay of the Permits, or, in the Alternative, for an Order Suspending the Permits" filed by New Jersey Conservation Foundation, Stony Brook-Millstone Watershed Association, and Friends of Princeton Open Space on May 27, 2015 before the Commissioner of the

New Jersey Department of Environmental Protection. The motion remains pending before the Commissioner.

5. Requests for Rehearing of the FERC Certificate Order issued on December 18, 2014 were filed by, among others, the Delaware Riverkeeper Network and the Princeton Ridge Coalition with the FERC (Docket No. CP13-551-001). On February 18, 2015, FERC issued an order granting rehearing to allow it additional time to consider issues raised in the various rehearing requests. The rehearing is still pending.

6. "Motion for a Stay Pending Rehearing" filed by the Delaware Riverkeeper Network with the FERC (Docket No. CP13-551-001) on February 12, 2015 in connection with the issuance of the FERC Order to Transco. FERC denied the request for a stay on March 12, 2015.

7. *In Re The Delaware Riverkeeper Network*, United States Court of Appeals for the D.C. Circuit, Docket No. 15-1052. Delaware Riverkeeper Network filed a petition for review under the All Writs Act of FERC's issuance of the FERC Order and March 9, 2015 Notice to Proceed to Transco in connection with the Project. The D.C. Circuit issued a stay of the FERC Order on March 11, 2015. On March 19, 2015, the court dissolved the stay and dismissed the petition for relief.

STATEMENT OF THE CASE

On December 18, 2014, the FERC issued the Certificate Order authorizing the Project. The Certificate Order requires Transco to obtain all applicable federal authorizations prior to commencing construction of any Project facilities. Among the federal authorizations required is a Section 404 permit under the Clean Water Act from the Army Corps. A Section 404 permit authorizes the discharge of dredged or fill material into navigable waters. 33 U.S.C. § 1344(a).

Under Section 401 of the Clean Water Act, any applicant for a federal Section 404 permit to construct or operate a facility that may result in a discharge to navigable waters must provide the federal permitting agency with "a certification from the State in which the discharge originates . . . that any such discharge will comply with" applicable state water quality standards. 33 U.S.C. § 1341(a)(1). Transco applied to PADEP for a Section 401 Certification on June 5, 2014. (JA0119.)

PADEP granted Transco's request for a Section 401 Certification on April 6, 2015. (JA0436.) The Army Corps issued the Section 404 Permit on June 22, 2015. That permit has not been appealed. On May 5, 2015, Riverkeeper petitioned this Court for review of PADEP's decision to issue the Section 401 Certification to Transco. (JA0444-54.)

STATEMENT OF FACTS

I. The Leidy Southeast Expansion Project

The Project involves the construction and operation of approximately 29.97 miles of new pipeline loop, consisting of four pipeline loop segments, the Dorrance Loop, Franklin Loop, Pleasant Run Loop, and Skillman Loop, and the addition of a total of 71,900 horsepower at four compressor stations, located in Pennsylvania and New Jersey.[7] Certificate Order ¶¶ 4-5. All but 1.05 miles of the total 29.97 miles of the pipeline loops will be installed either entirely within or parallel to existing pipeline and utility rights-of-way. Certificate Order ¶ 14. The Project represents a *$607 million investment* in approximately 29.97 miles of new pipeline infrastructure and associated compression by Transco. Certificate Order ¶ 7. The Project will expand Transco's existing pipeline system capacity to enable Transco to provide firm transportation service for an additional 525,000 dekatherms per day of clean-burning natural gas and is fully subscribed by Project shippers. *Id.* ¶¶ 4, 6. This amount of natural gas is sufficient to power the furnaces of approximately 3 million homes each year. *See* American Gas Ass'n, *https://www.aga.org/sites/default/files/natural_gas_facts.pdf* (last visited May 14, 2015); "How To Measure Natural Gas?",

[7] "Looping" means building a new pipeline alongside and adjacent to one or more pre-existing pipelines.

http://www.crmu.net/PDF%20files/Natural%20Gas%20pdfs/How%20to%20Measure%20Natural%20Gas.pdf (last visited May 14, 2015). The additional transportation capacity created by the Project will reach delivery points that will be accessible to customers in the mid-Atlantic and Southeast United States. The Project also will help meet the current and future demand for natural gas, provide access to new sources of domestic natural gas supply and support the overall reliability of the energy infrastructure.

II. The FERC Review Process

On September 28, 2013, Transco submitted an application to FERC for a certificate of public convenience and necessity to construct and operate the Project. Certificate Order ¶ 1. After months of careful consideration and evaluation of a comprehensive 217-page Environmental Assessment, prepared by FERC with assistance from the Army Corps and the United States Department of Transportation, Pipeline and Hazardous Materials Safety Administration, FERC determined that it is in the public interest for Transco to construct and operate the Project. FERC concluded that "[b]ased on the benefits the project will provide and the minimal adverse effects the project will have . . . we find on balance . . . that the public convenience and necessity requires approval of Transco's Leidy Project proposal," and issued a certificate of public convenience and necessity to Transco

authorizing the construction of the Project on December 18, 2014. Certificate Order at 1, ¶ 17.

The Certificate Order requires Transco to obtain all applicable federal authorizations prior to commencing construction of any Project facilities. Certificate Order at 53, ¶ 9.

III. Authorizations Required Under the Clean Water Act

Among the federal authorizations required for the Project is a Section 404 permit under the federal Clean Water Act from the Army Corps. A Section 404 permit authorizes the discharge of dredged or fill material into navigable waters. 33 U.S.C. § 1344(a).

Under Section 401 of the Clean Water Act, any applicant for a federal Section 404 permit to construct or operate a facility that may result in a discharge to navigable waters must provide the federal permitting agency with "a certification from the State in which the discharge originates . . . that any such discharge will comply with" applicable state water quality standards. 33 U.S.C. § 1341(a)(1). According to Section 401 of the Clean Water Act, a state water quality certification must precede any federal "license or permit to conduct any activity . . . which may result in any discharge into the navigable waters . . . ." 33 U.S.C. § 1341(a)(1).

The Section 404 permit triggered the requirement to obtain a Section 401 Certification, not the Certificate Order issued by FERC, since the Certificate Order is not a license or a permit that authorizes activity that could result in a discharge into the navigable waters of the United States.

IV. PADEP's Issuance of the Section 401 Certification to Transco

On June 5, 2014, Transco applied to PADEP for a Section 401 Certification. (JA0119.) PADEP issued notice of receipt of the application for the Section 401 Certification on July 19, 2014. (JA0376-78.) On February 9, 2015, PADEP issued a technical deficiency letter to Transco citing four deficiencies with Transco's Section 401 Certification application. (JA0379-380.) On February 24, 2015, Transco responded to PADEP's technical deficiency letter with written responses to each of the four deficiencies together with supporting materials. (JA0381-423.)

PADEP granted Transco's request for a Section 401 Certification on April 6, 2015. (JA0436.) Thereafter, the Army Corps issued the Section 404 Permit on June 22, 2015.

STANDARD OF REVIEW

Under the Administrative Procedure Act and related case law, this Court must uphold PADEP's Section 401 Certification unless the Court finds the agency's actions to be "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law'." *See Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 375-76, n. 21 (1989) (quoting and interpreting 5 U.S.C. § 706). Arbitrary and capricious review is "highly deferential," and this Court has emphasized that its review is "'most deferential'" when it involves "an agency's area of special expertise." *See, e.g., Sw. Pa. Growth All. v. Browner*, 121 F.3d 106, 117 (3d Cir. 1997) (quoting *New York v. EPA*, 852 F.2d 574, 580 (D.C. Cir. 1988)); *see also Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 192 (4th Cir. 2009) ("Review under this standard is highly deferential, with a presumption in favor of finding the agency action valid.").

This Court has explained that it will find an agency decision to be arbitrary and capricious only where:

> [T]he agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Mirjan v. Attorney Gen. of U.S., 494 F. App'x 248, 250 (3d Cir. 2012) (internal quotations and citation omitted); *see also NVE, Inc. v. Dep't of Health & Human Servs.*, 436 F.3d 182, 190 (3d Cir. 2006) ("Reversal is appropriate only where the administrative action is irrational or not based on relevant factors."). This Court has cautioned that it may not "substitute its judgment for that of the agency," and may "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Gardner v. Grandolsky*, 585 F.3d 786, 790 (3d Cir. 2009); *see also Ethyl Corp. v. Envtl. Prot. Agency*, 541 F.2d 1, 36 (D.C. Cir. 1976) (explaining that "scrutiny of the evidence is intended to educate the court" and "is not designed to enable the court to become a superagency that can supplant the agency's expert decision-maker").

SUMMARY OF THE ARGUMENT

Although Riverkeeper's petition seeks review of PADEP's decision to issue a Section 401 Certification to Transco for the Project, its brief focuses on two state permits that are *not the subject of this appeal*, and which had not yet been issued when the petition for review was filed. Specifically, Riverkeeper's arguments are focused on challenging PADEP's review of Transco's applications for Water Obstruction and Encroachment Permits under Chapter 105 of Title 25 of the Pennsylvania Code ("Chapter 105 permits"). These arguments are misplaced because its petition seeks review of the Section 401 Certification issued to Transco, not the Chapter 105 permits. Although the Section 401 Certification requires Transco to obtain the Chapter 105 permits, the Chapter 105 permits are distinct permits and were issued on July 17, 2015, following separate review proceedings and based on a separate administrative record, which is not before this Court. Riverkeeper's arguments relating to PADEP's review of the Chapter 105 permits have no bearing whatsoever on whether PADEP abused its discretion in issuing the Section 401 Certification to Transco, and cannot be evaluated properly on the record before the Court, which pertains only to the Section 401 Certification, and does not include the record of decision for the Chapter 105 permits.

Riverkeeper contends, without citing to any pertinent statute, regulation or court decision, that PADEP needed to have conducted its Chapter 105 review and

issued the Chapter 105 permits prior to issuing the Section 401 Certification. Instead, it relies upon a treatise and deposition testimony in unrelated matters, all of which predate the NGA, and are not binding on PADEP. (Riverkeeper's Br. at 24-26, 32-34.) This argument finds no basis or support in the Clean Water Act. Indeed, the plain terms of the Clean Water Act support the conditioning of section 401 certifications.

In the alternative, Riverkeeper argues that even accepting that Respondents followed the correct procedures, reviewed the proposed information, and considered the correct criteria, the Section 401 Certification is still unlawful because it authorizes construction and operational activities prohibited by Pennsylvania's water quality standards. (Riverkeeper's Br. at 48-51.) This is simply untrue. The Section 401 Certification certifies that the Project will meet state water quality standards, but does not authorize construction, which only FERC can do under the conditions of the Certificate Order. Furthermore, the Section 401 Certification is conditioned on Transco's receipt of the Chapter 105 permits. Even if Riverkeeper's technical comments regarding PADEP's review of Transco's Chapter 105 permit applications were meritorious—which they are not—that would not render PADEP's issuance of the *Section 401 Certification* arbitrary and capricious or an abuse of discretion. Instead, it would mean only that a condition of the Section 401 Certification had not been properly met.

Finally, Riverkeeper's argument that PADEP has failed to establish procedures for public notice of section 401 certifications—and failed to provide proper notice in connection with the Section 401 Certification here—also lacks merit and is inapplicable. (Riverkeeper's Br. at 58-60.) PADEP has longstanding written procedures for section 401 water quality certifications, which include public notice procedures in connection with both the receipt of applications for a section 401 certification and the issuance or denial of the requested section 401 certification. PADEP followed those procedures here. More importantly, to the extent Riverkeeper claims that the notice of issuance of the Section 401 Certification incorrectly identified the proper forum for aggrieved parties to seek relief, Riverkeeper was not prejudiced since it timely sought relief before both the Pennsylvania Environmental Hearing Board and this Court. Although Riverkeeper does not have standing to assert that other unknown, additional parties were prejudiced by PADEP's notice of issuance, no other appeals related to the issuance of the Section 401 Certification were filed with the Environmental Hearing Board, and thus no other persons could have been prejudiced by the notice of issuance here.

ARGUMENT

Riverkeeper's arguments fail to take issue with the decision that is the subject of this appeal; namely, the Section 401 Certification issued by PADEP to Transco. Instead, Riverkeeper's argument focuses on challenges to Transco's application for two state permits, the Chapter 105 permits, which *PADEP issued more than three months after the Section 401 Certification*, and more than two months after Riverkeeper filed its Petition for Review in this matter. Although Riverkeeper's arguments concerning the Chapter 105 permits lack merit, those permits and the record underlying their issuance are not before the Court in this proceeding. As of the filing of this brief, Riverkeeper has not appealed PADEP's issuance of the Chapter 105 permits to this Court.

Riverkeeper raises four principal arguments on appeal: (1) PADEP purportedly followed impermissible procedure when issuing the Section 401 Certification; (2) the Section 401 Certification purportedly authorizes construction and operational activity that is prohibited by Pennsylvania's water quality standards; (3) PADEP purportedly failed to properly classify wetland water resources and review associated underlying data related to the Chapter 105 permits; and (4) PADEP purportedly failed to follow proper procedures for providing public notice of the issuance of the Section 401 Certification. None of

these arguments demonstrate that PADEP acted arbitrarily and capriciously or abused its discretion in issuing the Section 401 Certification to Transco.

I. PADEP Did Not Act Arbitrarily and Capriciously or Abuse Its Discretion in Issuing the Section 401 Certification

A. PADEP's Decision to Issue the Section 401 Certification Before Issuing the Chapter 105 Permits Was Not Arbitrary and Capricious or an Abuse of Discretion

Riverkeeper argues that PADEP was required to issue the Chapter 105 permits prior to, or simultaneous with, the Section 401 Certification, but fails to acknowledge that the Section 401 Certification is conditioned upon Transco's receipt of the Chapter 105 permits. As Riverkeeper correctly points out, state agencies have the right under the Clean Water Act to impose "any other appropriate requirement of State law" in a section 401 certification. 33 U.S.C. § 1341(d); (Riverkeeper's Br. at 3-4). The Section 401 Certification is conditioned on Transco's obtaining the Chapter 105 permits, which ensures that the Project will meet state water quality standards before construction may begin in Pennsylvania. From a practical perspective, it matters very little when the Chapter 105 permits are issued since the Section 401 Certification does not authorize construction to begin until its conditions are met. Notably, Transco received the Chapter 105 permits on July 17, 2015, but to date, Riverkeeper has not filed an appeal of those permits.

Riverkeeper's argument that PADEP can never issue a section 401 certification in advance of a Chapter 105 permit is unsupported by the regulations and by case law and is contradicted by PADEP practice in this matter and others. Riverkeeper bases its argument on a treatise and a pair of depositions that predate the current Natural Gas Act by two years.[8] Riverkeeper also cites 25 Pa. Code § 105.15(b) as demanding an "integrated review process with Chapter 105," but this provision does not by its terms require PADEP to issue Chapter 105 permits prior to or simultaneous with issuing section 401 certifications, and is satisfied by the conditioning of the section 401 certification on receipt of the Chapter 105 permits. 25 Pa. Code § 105.15(b); (Riverkeeper's Br. at 24).

Riverkeeper fails to cite a single binding or precedential case to support its argument that a section 401 certification can never be issued before a Chapter 105 permit. The decisions Riverkeeper cites from the United States Court of Appeals for the Ninth Circuit, *Northern Plains Resource Council, Inc. v. Surface Transportation Board*, 668 F.3d 1067 (9th Cir. 2011) and *Half Moon Bay*

[8] Not only has Riverkeeper based its arguments on materials concerning other permits (the Chapter 105 permits) that are irrelevant to the issue before this Court—whether PADEP acted arbitrarily and capriciously and/or abused its discretion is issuing the Section 401 Certification—but it also has improperly included materials in an Addendum that are not proper for such inclusion; namely, deposition transcripts from other cases and excerpts from a treatise edited by Andrew T. Bockis of Saul Ewing LLP, a colleague of Transco's counsel. *See* PENNSYLVANIA ENVIRONMENTAL LAW AND PRACTICE (Andrew T. Bockis & Scott A. Gould eds., PBI Press 8th ed. 2015).

Fishermans' Marketing Association v. Carlucci, 857 F.2d 505 (9th Cir. 1988), involved reviewing agencies' regulatory obligations under the National Environmental Policy Act, and have no bearing on PADEP's review of Transco's Section 401 Certification application under the Clean Water Act.

Absent the specific conditions in the Section 401 Certification requiring Transco to obtain the Chapter 105 permits, the Chapter 105 permits would be preempted by the NGA, since they are state permits. *See supra* Statement of Jurisdiction, Section III.B., at 11-14; *Tenn. Gas Pipeline Co. v. Del. Riverkeeper Network*, 921 F. Supp. 2d 381, 388 n. 9 (M.D. Pa. 2013) (concluding that the Chapter 102 permit, a Pennsylvania erosion and sediment control permit issued in that case, would be preempted but for its integral relationship with the 401 certification issued there).[9]

A section 401 certification, when issued, certifies to a federal licensing or permitting agency that a federally-regulated activity that may result in a discharge to navigable waters will comply with a state's water quality standards. Here, PADEP's Section 401 Certification is conditioned on Transco applying for and obtaining the Chapter 105 permits. Federal law clearly authorizes PADEP to

[9] Under the procedure adhered to by PADEP in that case, the state permits were issued simultaneous with the section 401 certification, rather than as a condition of the 401 certification. Following the *Tennessee Gas Pipeline* decision, PADEP has issued section 401 certifications in advance of the Chapter 105 and 102 permits, conditioned upon receipt of these other permits.

impose conditions in a section 401 certification, a point Riverkeeper does not dispute. (Riverkeeper's Br. at 3-4); 33 U.S.C. § 1341(d). Transco cannot commence construction until it receives, among other things, the Chapter 105 permits. Thus, the crux of Riverkeeper's argument comes down to whether it is appropriate for PADEP to issue the Chapter 105 permits ***after*** the section 401 certification.

Riverkeeper strenuously argues that PADEP must issue the Chapter 105 permits either before, or contemporaneously with, the section 401 certification. This is where Riverkeeper's argument must fail. The Chapter 105 permits are state permits. Thus, it is Riverkeeper's contention that Transco must apply for an otherwise preempted state permit in order to obtain a section 401 certification in the first instance. To be clear, it is PADEP's Section 401 Certification that triggers the obligation for Transco to obtain a Chapter 105 permit. Requiring a FERC-regulated transmission project to go through Pennsylvania's state permitting procedures prior to obtaining a section 401 certification would turn the preemptive nature of the Natural Gas Act on its head.

In cases governed by the NGA, Riverkeeper's notion would elevate the otherwise preempted Chapter 105 permit from a condition of a federal authorization to an independently required permit. As noted, this view contradicts the preemptive nature of the NGA and its stated purpose of expeditiously bringing

clean-burning natural gas to market unfettered by the "death by a thousand cuts" associated with obtaining ancillary state and local permits. *Islander E. Pipeline Co. v. Conn. Dep't of Envtl. Prot.*, 482 F.3d 79, 85 (2d Cir. 2006) (quoting statement of Mark Robinson, Director, Office of Energy Projects, FERC, Natural Gas Symposium: Symposium Before the S. Comm. on Energy & Natural Res., 109th Cong. 41 (2005)); *Tenn. Gas Pipeline Co.*, 921 F. Supp. 2d at 391-92 (same).

By issuing the Section 401 Certification in the timely manner that it did here (i.e., within a reasonable time, but not to exceed one-year period required under the CWA), PADEP enabled the Army Corps to timely issue the Section 404 permit.

Even so, under the conditions of the Section 401 Certification, construction in Pennsylvania could not proceed until PADEP issued the Chapter 105 permits, which occurred on July 17, 2015, well after Riverkeeper appealed the Section 401 Certification, and FERC issued its notice to proceed with construction, which occurred on July 23, 2015. To the extent Riverkeeper seeks to challenge PADEP's decision-making associated with implementation of 25 Pa. Code Chapter 105 and the issuance of the Chapter 105 permits, it must do so in a separate challenge to those permits. Any issue associated with those permits and the regulations that guide them are not before the Court in this proceeding.

B. The Section 401 Certification Does Not Authorize Construction Activity for the Project

Riverkeeper argues that even if PADEP followed the correct procedures, reviewed the proposed information, and considered the correct criteria, the Section 401 Certification is still unlawful because it authorizes construction and operational activities prohibited by Pennsylvania's water quality standards. This argument, like Riverkeeper's arguments relating to PADEP's decision to issue the Section 401 Certification before issuing the Chapter 105 permits, fails to appreciate the significance of the fact that the Section 401 Certification is conditioned upon Transco obtaining the Chapter 105 permits. The review PADEP performs in connection with applications for Chapter 105 permits ensures that Pennsylvania's water quality standards will be met before Chapter 105 permits are issued. Conditioning the Section 401 Certification on obtaining the Chapter 105 permits therefore ensures that construction and operation of the Project will comply with state water quality standards.

As discussed above, to the extent Riverkeeper believes PADEP acted arbitrarily and capriciously or abused its discretion in issuing the Chapter 105 permits, Riverkeeper must challenge that decision in a separate proceeding since, notwithstanding Riverkeeper's effort to supplement the record with comments and reports it filed in opposition to the original Chapter 105 permit applications, the record underlying PADEP's issuance of the Chapter 105 permits is not before the

Court in this proceeding. Riverkeeper cannot demonstrate on the record before the Court here—the record underlying the Section 401 Certification—that PADEP acted arbitrarily and capriciously or abused its discretion in issuing the Section 401 Certification. If Riverkeeper contends that PADEP acted arbitrarily and capriciously or abused its discretion in issuing the Chapter 105 permits, and if that contention were meritorious—which it is not—even that would not render PADEP's issuance of the Section 401 Certification arbitrary and capricious or an abuse of discretion. Instead, it would mean only that a condition of the Section 401 Certification had not been adequately met.

Furthermore, not only does the Section 401 Certification contain conditions that ensure Pennsylvania's water quality standards are met, it also does not—and cannot—authorize construction to begin, which only FERC can do under the conditions of the Certificate Order. Certificate Order at 54, ¶ 15; *Gunpowder Riverkeeper v. FERC*, No. 14–1062, 2015 WL 4450952, at *1 (D.C. Cir. July 21, 2015) (certificate of public convenience and necessity authorized construction to begin "only after receiving all required permits, and only after obtaining further authorization from the Commission"). In this case, the final permits needed to begin construction in Pennsylvania were the state permits issued on July 17, 2015. On July 20, 2015, Transco sought permission from FERC to proceed with construction in Pennsylvania. FERC authorized construction in Pennsylvania to

commence on July 23, 2015. Thus, Riverkeeper's argument that the Section 401 Certification authorizes construction that is prohibited by Pennsylvania's water quality standards lacks merit.

II. Site-Specific Information Pertaining to Wetlands and Water Resource Classifications Related to Transco's Water Obstruction and Encroachment Permits Issued Under 25 Pa. Code Chapter 105, and on a Separate Administrative Record Not Under Review Here, Has No Bearing on the Section 401 Certification at Issue in This Proceeding

Riverkeeper argues that the wetland data Transco submitted in conjunction with Transco's Chapter 105 permit applications, which was subsequently withdrawn and resubmitted, was insufficient for PADEP to make its Section 401 Certification determination. As previously discussed, any objection Riverkeeper may have to the sufficiency of this data must be asserted as a challenge to the subsequently issued Chapter 105 permits and is not relevant to this appeal. *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 672 n. 11 (2007) (rejecting contention that separate agency action was reviewable in conjunction with challenged agency action because the "separate agency action [ ] is outside the scope of this lawsuit").

Likewise, the collection of comment letters and expert reports Riverkeeper seeks to rely upon in this matter were submitted by Riverkeeper to comment on Transco's initial Chapter 105 permit applications. There is nothing in PADEP's 401 Certification agency record addressing Riverkeeper's comment letters and

expert reports because those letters and reports relate to Transco's Chapter 105 permit applications. That is why PADEP did not include them in the agency record for the Section 401 Certification filed with this Court on June 19, 2015. The Chapter 105 permit applications are separate filings with their own administrative record. Transco's Chapter 105 permit applications were still under review when PADEP issued the Section 401 Certification.

In fact, four of the comment letters and two of the expert reports submitted by Riverkeeper to PADEP ***pre-date*** Transco's application for the Section 401 Certification. One of Riverkeeper's comment letters pre-dates Transco's application for the Section 401 Certification by almost six months. Further, ***all*** of the issues raised in Riverkeeper's brief are derived from issues that Riverkeeper raised in comment letters and other submissions to PADEP regarding Transco's Chapter 105 permit applications (Riverkeeper's Br. at 14-15),[10] not Transco's application for the Section 401 Certification. Riverkeeper's letters and reports are not relevant in this matter since they are outside the agency record and do not relate to Transco's application for a section 401 certification.

Riverkeeper's arguments pertaining to PADEP's review of the Chapter 105 permits have no bearing on whether PADEP acted arbitrarily and capriciously or abused its discretion in issuing the Section 401 Certification to Transco.

[10] These letters and reports are set forth in the Joint Appendix at JA0001 through JA0118, JA0253 through JA0375, and JA0424 through JA0434.

III. Riverkeeper Received Adequate Notice of PADEP's Issuance of the Section 401 Certification and Lacks Standing to Assert That Other Unknown Parties Were Prejudiced by the Notice of Issuance Published by PADEP

Riverkeeper argues that PADEP has failed to establish procedures for public notice regarding issuance of section 401 certifications, and that in this case PADEP failed to provide proper notice of the Section 401 Certification issued to Transco. Riverkeeper's contentions are controverted by the law and the facts. In addition, no parties have been prejudiced by PADEP's notice of issuance here since Riverkeeper was the only party to appeal the Section 401 Certification to the EHB, and Riverkeeper contemporaneously filed its petition for review in this Court.

Section 401 of the Clean Water Act requires states to "establish procedures for public notice in the case of all applications for certification." 33 U.S.C. § 1341 (a)(1). PADEP satisfied this requirement by developing a policy in October 1997 regarding its procedure for reviewing applications for section 401 certifications. *See* PADEP Permitting Policy and Procedure Manual, PADEP Document No. 362-2000-001, Section 400.2 Procedure for 401 Water Quality Certification (October 1, 1997), http://www.elibrary.dep.state.pa.us/dsweb/View/Collection-8333. This policy remains in effect. 44 Pa. Bull. 6372 (October 4, 2014) (listing PADEP's Permitting Policy and Policy Procedure Manual, PADEP Document No. 362-2000-001, among a current listing of PADEP's technical guidance documents).

In accordance with its policy and procedure for section 401 water quality certifications, when PADEP receives a request for a 401 certification, "a notice is published in the *Pennsylvania Bulletin* for a 30-day comment period." Procedure for 401 Water Quality Certification § 400.2 (B)(1). Here, PADEP published notice of Transco's request for its Section 401 Certification on July 19, 2014. 44 Pa. Bull. 4596; (JA0376-78).

Also in accordance with its policy and procedure for section 401 water quality certifications, when PADEP issues or denies a section 401 certification, its decision "is published in the *Pennsylvania Bulletin* as a final action of the Department." Procedure for 401 Water Quality Certification § 400.2 (B)(4). Here, PADEP published notice of its approval of the Section 401 Certification on April 18, 2015. 45 Pa. Bull. 2003; (JA0441-43).

Riverkeeper objects to PADEP's failure to include in its April 18, 2015 notification that aggrieved parties must file an appeal with this Court instead of the EHB. Riverkeeper partially quotes the standard boiler plate language contained in PADEP's notice:

> Any person aggrieved by this action may appeal, pursuant to Section 4 of the Environmental Hearing Board Act, 35 P. S. Section 7514, and the Administrative Agency Law, 2 Pa.C.S. Chapter 5A, to the Environmental Hearing Board . . . Appeals must be filed with the Environmental Hearing Board within 30 days of receipt of written notice of this action unless the appropriate statute provides a different time period . . . If

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

(Riverkeeper's Br. at 59.) Riverkeeper omits from its quotation a sentence which provides: "This paragraph does not, in and of itself, create any right of appeal beyond that permitted by applicable statutes and decisional law." (JA0443.) Given that Riverkeeper was a party to the *Tennessee Gas Pipeline Co. LLC v. Delaware Riverkeeper Network* case that it cites extensively in its brief, and given that Riverkeeper appealed PADEP's issuance of the Section 401 Certification to this Court, and advocated in its brief on jurisdiction, as well as the merits, that this Court has exclusive jurisdiction, it was well aware of applicable statutes and decisional law and was not prejudiced by PADEP's failure to specifically direct it to bring a federal court challenge. *See Fed. Labor Relations Auth. v. U.S. Dep't of Navy*, 966 F.2d 747, 775 (3d Cir. 1992) (Rosenn, J., dissenting) ("Failure of an agency to publish its policy is no defense to one who knew of the policy. Even a failure to publish at all is not sufficient to justify a refusal to defer to an agency's interpretation of its rule when the complaining party has failed to make an initial showing that he was adversely affected by the lack of publication.") (internal citations and quotations omitted); ("[T]he party who claims deficient notice bears the burden of proving that any such deficiency was prejudicial. . . . If a party fails to carry that burden, the agency's decision must be upheld.").

Riverkeeper's determination "[i]n an abundance of caution" to file an administrative appeal simultaneously with the EHB was of its own volition. (Riverkeeper's Br. at 60, n. 4.) By agreement of the parties, the EHB appeal has been stayed from the outset pending this Court's decision. Thus, litigation fees and organizational resources have been nominal and voluntarily incurred.

Additionally, Riverkeeper's assertion that "[i]t is also unknown whether any additional parties were deterred from filing an appeal as a result of the uncertainty and confusion resulting from Respondents' unlawful instructions for initiating an appeal" is demonstrably false and an argument Riverkeeper lacks standing to make on behalf of "unknown . . . additional parties." (Riverkeeper's Br. at 60); *see Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000). No other appeals were filed either with this Court or the EHB. Had an aggrieved party wishing to lodge a challenge been misled by the instruction contained in the notice accompanying the Section 401 Certification, it either would have taken an appeal to the EHB—as Riverkeeper did in *Tennessee Gas Pipeline Co. LLC v. Delaware Riverkeeper Network*—or filed a petition for review in this Court, or pursued both avenues of appeal, as Riverkeeper did here.

CONCLUSION

For each of the foregoing reasons, Respondents' issuance of the Section 401 Certification to Transco for the Project complied fully with the Clean Water Act. Transco respectfully requests that this Court affirm Respondents' order issuing the Section 401 Certification and deny Riverkeeper's petition for review in its entirety.

Respectfully submitted this 10th day of September, 2015.

By: *s/ John F. Stoviak*

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CERTIFICATE OF ADMISSION TO THE BAR

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELATE PROCEDURE 32(A)

1. This brief complies with Fed. R. App. P. 32(a) because it contains 10,301 words, excluding those portions of the brief exempt pursuant to Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because this brief has been prepared in a proportionally spaced typeface in 14-point Times New Roman font.

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE OF APPELLATE PROCEDURE 31.1(C)

This brief complies with the electronic filing requirements of L.A.R. 31.1(c) because:

1. The text of the electronic brief filed with the Court is identical to the text of the paper copies of the brief filed with the Court; and
2. The PDF file containing this brief electronically filed with the Court via the electronic filing system was scanned for viruses using Vipre Virus Protection, version 3.1 and no virus was detected.

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CERTIFICATE OF FILING AND SERVICE

I, Robyn Cocho, hereby certify pursuant to Fed. R. App. P. 25(d) that, on September 10, 2015 the foregoing Brief of Intervenor was filed through the CM/ECF system and served electronically on the individuals listed below:

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/s/ Robyn Cocho
Robyn Cocho

Exhibit B

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15-2122

DELAWARE RIVERKEEPER NETWORK;
MAYA VAN ROSSUM, the Delaware Riverkeeper,
Petitioners

v.

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

TRANSCONTINENTAL GAS PIPE LINE CORP,
Intervenor Respondent

No. 15-2158

NEW JERSEY CONSERVATION FOUNDATION;
STONY BROOK MILLSTONE WATERSHED
ASSOCIATION; FRIENDS OF PRINCETON
OPEN SPACE,
Petitioners

v.

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL
PROTECTION; TRANSCONTINENTAL GAS
PIPE LINE CORP,
Respondents

On Petition for Review of an Order of the
Federal Energy Regulatory Commission
(Agency Nos. FERC CP13-551-00; EA40-013 & EA45-002)
(Agency Nos. 0000-13-0012.1FHA140001,
0000-13-0012.1FWW140001, 0000-13-0012.2FHA140001
& 0000-13-0012.2FWW140001)

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Before: GREENAWAY, JR., SCIRICA
and ROTH, Circuit Judges
(Opinion filed: August 8, 2016)

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O P I N I O N

ROTH, Circuit Judge:

In this appeal, we are called upon to review water quality-related permitting actions by New Jersey and Pennsylvania for a project by Transcontinental Gas Pipe Line Company, LLC (Transco), which operates the Transcontinental pipeline, a 10,000-mile pipeline that extends from South Texas to New York City. Transco sought federal approval to expand a portion of the pipeline, called the Leidy Line, which connects gas wells in Central Pennsylvania with the main pipeline. Pursuant to the Clean Water Act, the Pennsylvania and New Jersey Departments of Environmental Protection (PADEP and NJDEP, respectively) reviewed Transco's proposal for potential water quality impacts and issued permits for construction. The New Jersey Conservation Foundation, Stony Brook-Millstone Watershed Association, and Friends of Princeton Open Space

(collectively, the Foundation) petitioned this Court for review of NJDEP's decision to issue these permits. In a separate petition to this Court, the Delaware Riverkeeper Network and Maya van Rossum (collectively, the Riverkeeper) challenged PADEP's issuance of a Water Quality Certification required under Section 401 of the Clean Water Act. The petitions were consolidated for review.

For the reasons that follow, we conclude this Court has jurisdiction to hear these petitions, and NJDEP and PADEP did not act arbitrarily or capriciously in issuing the permits. Therefore, we will deny the petitions.

I. Statutory Background

Under the Natural Gas Act of 1938,[1] the Federal Energy Regulatory Commission (FERC) has exclusive authority to regulate sales and transportation of natural gas in interstate commerce. Section 7 of the Natural Gas Act grants FERC the power to authorize the construction and operation of interstate transportation facilities.[2] Specifically, no company or person may construct or extend any facilities for the transportation in interstate commerce of natural gas without obtaining a "certificate of public convenience and necessity" from FERC.[3] FERC determines whether a project serves "public convenience and necessity" by reviewing a number of factors, such as the project's impact on competition for the transportation of natural gas, the possibility of overbuilding or subsidization by existing

[1] 15 U.S.C. §§ 717-717z.
[2] *Id*. § 717f.
[3] *Id.*

customers, avoidance of unnecessary disruptions to the environment, the applicant's responsibility for unsubscribed capacity, and the avoidance of unnecessary exercise of eminent domain.[4] The issuance of a "certificate of public convenience and necessity" is conditioned on receipt of state and other federal authorizations required for the proposed project.[5]

Other federal authorizations may be required because interstate sales and transmission of natural gas are further regulated through federal environmental laws, including the National Environmental Policy Act (NEPA)[6] and the Clean Water Act.[7] To comply with NEPA, before issuing a certificate of public convenience or necessity, FERC must examine the potential environmental impact of a proposed pipeline project and issue an Environmental Assessment or, if necessary, an Environmental Impact Statement.[8]

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[4] *Transcontinental Gas Pipeline Co., LLC*, 149 FERC ¶ 61,258, 62,676 (2014); *see* Certification of New Interstate Natural Gas Pipeline Facilities, 88 FERC ¶ 61,227 (1999); 90 FERC ¶ 61,128 and 92 FERC ¶ 61,094 (2000) (clarifying policy).

[5] *See Islander East Pipeline Co., Algonquin Gas Transmission Co.*, 102 FERC ¶ 61,054 (2003) ("The Commission routinely issues certificates for natural gas pipeline projects subject to the federal permitting requirements of the . . . [Clean Water Act].").

[6] 42 U.S.C. §§ 4321-4370h.

[7] 33 U.S.C. §§ 1251-1388.

[8] 42 U.S.C. § 4332; *see* 15 U.S.C. §§ 717b-1(a), 717n(b)(1); 40 C.F.R. §§ 1501.1-.8 (implementing NEPA regulations); 18

Although the Natural Gas Act preempts state environmental regulation of interstate natural gas facilities, the Natural Gas Act allows states to participate in environmental regulation of these facilities under three federal statutes: the Clean Air Act, the Coastal Zone Management Act, and the Clean Water Act.[9] As relevant here, the Clean Water Act regulates through a combination of state and federal mechanisms: the U.S. Environmental Protection Agency (EPA) limits the discharge of pollutants into water bodies,[10] and states establish water quality standards, subject to EPA approval, that must at a minimum comply with EPA's limits.[11]

This combination of state and federal mechanisms is apparent when a proposed activity involves discharge of dredged or fill material into the navigable waters of the United States and thus triggers the permitting requirements of Section 404 of the Clean Water Act.[12] Section 404 permits typically are issued by the U.S. Army Corps of Engineers; however, a state may assume the authority to administer these permits. Whether or not the state assumes this authority, a Section 404 permit may be issued only if the state where the discharge will occur issues a Water Quality Certification, governed by Section 401 of the Clean Water Act.[13] A Water

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C.F.R. §§ 380.1-.16 (implementing NEPA regulations for FERC actions).

[9] 15 U.S.C. § 717b(d).

[10] *See* 33 U.S.C. § 1311.

[11] *See id.* § 1313.

[12] *Id.* § 1344.

[13] *Id.* § 1341.

Quality Certification confirms that a given facility will comply with federal discharge limitations and state water quality standards.[14] Unlike the Section 404 permit, the Water Quality Certification is by default a state permit, and the issuance and review of a Water Quality Certification is typically left to the states.[15]

New Jersey has assumed authority to issue Section 404 permits and delegated administration of the permitting program to NJDEP, which exercises this authority pursuant to the New Jersey Freshwater Wetlands Protection Act.[16] Therefore, for activities that result in discharge of dredged or fill material into New Jersey waters, NJDEP reviews applications for Water Quality Certifications and Section 404 permits. In contrast, Pennsylvania has not assumed Section 404 permitting authority. For activities affecting Pennsylvania waters, Section 404 permits are issued by the U.S. Army Corps of Engineers, and Water Quality Certifications are issued by PADEP.

II. Administrative Background

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[14] *Id*. § 1341(a)(1), (d).

[15] *See, e.g.*, *Lake Erie All. for Prot. of Coastal Corridor v. U.S. Army Corps of Eng'rs*, 526 F. Supp. 1063, 1074 (W.D. Pa. 1981) *aff'd*, 707 F.2d 1392 (3d Cir. 1983); *Roosevelt Campobello Int'l Park Comm'n v. U.S. EPA*, 684 F.2d 1041, 1056 (1st Cir. 1982).

[16] N.J. Stat. Ann. § 13:9B-1-30; 33 N.J. Reg. 3045(a); N.J. Admin. Code § 7:7A-2.1(c); Memorandum of Agreement between the New Jersey Department of Environmental Protection and Energy and the United States Environmental Protection Agency (1993).

In September 2013, Transco submitted an application to FERC for a certificate of public convenience and necessity for the Leidy Southeast Expansion Project. The Project consists of two major types of improvements to existing natural gas pipelines: the construction of four new pipeline "loops" and the upgrade of turbines at four compressor stations. "Loops" are sections of pipe connected to the main pipeline system that reduce the loss of gas pressure and increase the flow efficiency of the system. Compressor stations serve a similar function, using gas- and electric-powered turbines to increase the pressure and rate of flow at given points along the pipeline's route. In its application, Transco proposed installing, within or parallel to existing Transco pipelines, approximately thirty miles of loops. The Skillman Loop and the Pleasant Run Loop, totaling 13.23 miles, would be located in New Jersey; the Franklin Loop and Dorrance Loop, totaling 16.74 miles, would be located in Pennsylvania.

FERC completed the requisite Environmental Assessment in August 2014, and issued the certificate of public convenience and necessity on December 18, 2014. The certificate was conditioned on, *inter alia*, Transco's receipt of "all applicable authorizations under federal law"[17] enumerated in the Environmental Assessment, some of which were to be obtained from New Jersey and some from Pennsylvania.

A. New Jersey

[17] *Transcontinental Gas Pipe Line Co., LLC*, 149 FERC ¶ 61,258, 62,687 (2014).

FERC required Transco to obtain the following authorizations for each loop from NJDEP: a Freshwater Wetlands Individual Permit, a Flood Hazard Area Individual Permit, a Water Quality Certification, and a Letter of Interpretation. Transco first obtained Letters of Interpretation, in which NJDEP sets forth the boundaries of freshwater wetlands and state-regulated transition areas.[18] Transco then applied for the remaining permits. In December 2014, NJDEP deemed those applications "administratively complete," a status that triggered a public notice and comment process. Two months later, NJDEP held a public hearing in Princeton, New Jersey. In light of comments from NJDEP staff and the public, Transco submitted revised plans. A few days later, NJDEP asked Transco to address additional comments, and Transco provided responses.

In April, NJDEP issued, for each loop, a Freshwater Wetlands Individual Permit, a Flood Hazard Area Individual Permit, and a Water Quality Certification. In addition, NJDEP released Staff Summary Reports, which set forth the findings and analysis underlying its permitting decisions. Transco began construction on May 6, 2015. Two days later, the Foundation petitioned this Court for review of NJDEP's decision to issue the permits.

Later in May, while the Foundation's petition was pending, Transco submitted a request to NJDEP for a minor modification to the Freshwater Wetlands Individual Permit for the Skillman Loop, to change the excavation method for a wetland in Princeton, New Jersey. NJDEP approved the request on June 4, 2015, which the Foundation challenged in

[18] N.J. Admin. Code § 7:7A-3.1 (2008).

its opening brief. Later in June, the Foundation filed an emergency motion for a stay of construction. A week later, we denied the motion. At this time, the New Jersey portion of the project is substantially complete.[19]

B. Pennsylvania

FERC required Transco to obtain from PADEP a Water Quality Certification and a Water Obstruction and Encroachment Permit. The latter, issued under Chapter 105 of PADEP's regulations, are referred to as "Chapter 105 Permits." FERC further required Transco to obtain a Section 404 permit from the U.S. Army Corps of Engineers. Each certificate or permit covered both loops in Pennsylvania.

Transco applied to PADEP for the Water Quality Certification in June 2014. In the following month, PADEP published notice in the Pennsylvania Bulletin that it intended to issue a Water Quality Certification so long as Transco obtained certain other state permits, including a Chapter 105 Permit. In April 2015, PADEP issued a Water Quality Certification for the project. Shortly thereafter, the Riverkeeper filed a petition in this Court specifically challenging the Water Quality Certification. Three months later, PADEP issued a Chapter 105 permit. After receiving all of its required permits, Transco sought permission from FERC to proceed with construction. FERC granted this

[19] Transco submitted the Declaration of John B. Todd, who serves as project manager; Todd indicated that construction along both Skillman and Pleasant Run Loops is between 93 to 100% complete in regulated and non-regulated areas.

request in July 2015, during the pendency of the instant matter.

III. Threshold Challenges

At the outset, we consider challenges by NJDEP and PADEP regarding this Court's jurisdiction, the justiciability of the petitions, and whether sovereign immunity shields state agency actions. Specifically, NJDEP and PADEP allege that we lack subject matter jurisdiction to review the petitions and that, even if we had jurisdiction, the petitions are barred by the Eleventh Amendment. NJDEP further argues that because construction in New Jersey is substantially complete, the petition is moot.

A. Subject Matter Jurisdiction

The Riverkeeper and the Foundation, in petitioning this Court for review, invoke a provision of the Natural Gas Act that confers original jurisdiction on Courts of Appeals over certain state and federal permitting actions for interstate natural gas pipelines. Both PADEP and NJDEP contest whether that provision applies. Our jurisdiction ultimately depends on whether PADEP and NJDEP acted "pursuant to Federal law" in issuing permits to Transco.

We begin with the statute. In 2005, Congress amended the Natural Gas Act to subject certain state and federal permitting decisions for interstate natural gas pipeline projects to review by the federal Courts of Appeals.[20]

[20] Energy Policy Act of 2005, Pub. L. No. 109-58, Sec. 313, 119 Stat. 594, 689-90.

Specifically, under Section 19(d) of the Natural Gas Act, the Courts of Appeals have jurisdiction to review actions undertaken (1) by a State administrative agency; (2) pursuant to federal law; (3) to issue, condition, or deny a permit, license, concurrence, or approval; (4) required for an interstate natural gas facility permitted under the Natural Gas Act; (5) that is located in the jurisdiction of the circuit Court of review.[21] The parties do not dispute that all elements are met except whether NJDEP and PADEP acted "pursuant to Federal law" in issuing Water Quality Certifications, permits, and Letters of Interpretation.

NJDEP and PADEP contend that their decisions to issue Water Quality Certifications are not covered by the provision that grants jurisdiction to this Court and, consequently, we lack jurisdiction to hear these petitions. NJDEP further contests our jurisdiction to review those authorizations that "exclusively involv[e] issues of State law," including the Flood Hazard Area Individual Permits, the Letters of Interpretation, and those portions of the Freshwater Wetlands Individual Permits that address state-regulated issues such as transition areas or state threatened and endangered species. For the following reasons, we hold that we have jurisdiction over these petitions.

B. Jurisdiction over Water Quality Certifications

1. Permits Issued by PADEP

[21] 15 U.S.C. § 717r(d)(1) (2005). This amended section is also referred to as "Section 19(d)" based on where it appears in the Natural Gas Act.

PADEP argues that this Court does not have jurisdiction over Water Quality Certifications because our jurisdiction under the Natural Gas Act extends only to state agency action taken *pursuant* to federal law, whereas a Water Quality Certification is *required by* federal law. This argument does not pass muster. Although the Clean Water Act makes clear that states have the right to promulgate water quality standards as they see fit, subject to EPA oversight, the issuance of a Water Quality Certification is not purely a matter of state law.[22] A state issues a Water Quality Certification for an interstate natural gas facility to certify compliance with state water quality standards, promulgated under federal supervision, as well as with federally-established Clean Water Act requirements.[23] Specifically, a Water Quality Certification confirms compliance with Sections 301, 306, and 307 of the Clean Water Act, all of which involve federal standards.[24] Thus, a Water Quality Certification is not merely required by federal law: it cannot *exist* without federal law, and is an integral element in the regulatory scheme established by the Clean Water Act. To say otherwise would be to ignore the EPA's supervisory role in the setting of state water quality standards, the fact that Water Quality Certifications must verify compliance with federal standards, and the role of the federal government in regulating water quality as envisioned by drafters of the Clean Water Act.[25]

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[22] *See* 33 U.S.C. § 1251(b).
[23] *Id.* § 1341(a)(1).
[24] *Id.* §§ 1311, 1316, & 1317.
[25] *See id.* § 1251(a) (presenting the Clean Water Act's goals as a matter of "national policy").

The conclusion that a Water Quality Certification is issued pursuant to federal law is bolstered by the Natural Gas Act's provisions that allow states to regulate or subject state action to federal judicial review. The Natural Gas Act preempts state environmental regulation of interstate natural gas facilities, except for state action taken under those statutes specifically mentioned in the Act: the Coastal Zone Management Act, the Clean Air Act, and the Clean Water Act.[26] 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 statutes. In another provision, Section 19(d), the Natural Gas Act grants jurisdiction to the Courts of Appeals to review state agency action taken pursuant to federal law except for the Coastal Zone Management Act.[27] Applying the statutory construction canon, the express mention of one thing excludes all others, the express exception of the Coastal Zone Management Act from review by the Court of Appeals indicates that Congress intended state actions taken pursuant to the two non-excepted statutes, the Clean Water Act and the Clean Air Act, to be subject to review by the Courts of Appeals. 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.[28] Thus, a state

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[26] 15 U.S.C. § 717b(d).

[27] *Id.* § 717r(d)(1).

[28] *See Islander East Pipeline Co. v. Conn. Dep't Envt'l Prot.*, 482 F.3d 79, 85 (2d Cir. 2006) (discussing the legislative history of the judicial review provision); *see also The Energy Policy Act of 2005: Hearing Before the H. Subcomm. on Energy and Air Quality of the Comm. on Energy and*

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.

2. Permits Issued by NJDEP

NJDEP argues we have no jurisdiction over the Freshwater Wetlands Individual Permits or the Water Quality Certifications, and even if we had jurisdiction over those two authorizations, we cannot reach issues regarding aspects of the Freshwater Wetlands Individual Permits that concern transition areas and threatened and endangered species, the Letters of Interpretation, or the Flood Hazard Area Individual Permits. We consider each authorization in turn, and conclude that each is rooted in NJDEP's exercise of authority that it assumed pursuant to Sections 401 and 404 of the Clean Water Act.

Commerce, 109th Cong. 420 (2005) (statement of Donald F. Santa, Jr., President, Interstate Natural Gas Association of America) (observing that "[a]lthough state regulatory action [is] preempted" by the Natural Gas Act, "state action pursuant to federally delegated authority" is not, and prior to passage of the Natural Gas Act's amendments, review of state permitting decisions could "frustrate pipeline projects already found by FERC to meet the public convenience and necessity." (internal quotation marks omitted)).

First, with respect to NJDEP's argument that we lack jurisdiction over the Freshwater Wetlands Individual Permits and the Water Quality Certifications, New Jersey's Freshwater Wetlands Protection Act provides for the state's administration of Section 404 permits, and its implementing regulations make clear a permit issued under the Act, called the Freshwater Wetlands Individual Permit, "constitutes" the Water Quality Certification.[29] Given that the Natural Gas Act provides this Court with jurisdiction to review state authorizations issued pursuant to the Clean Water Act, this Court has jurisdiction over the Freshwater Wetlands Individual Permits and the Water Quality Certifications.

Next, NJDEP argues that those portions of the Freshwater Wetlands Individual Permit that address state threatened and endangered species are governed by state law rather than the Clean Water Act, and thus are not subject to our review. A Freshwater Wetlands Individual Permit may be issued only if the regulated activity "[w]ill not destroy, jeopardize[,] or adversely modify a present or documented habitat for threatened or endangered species . . . ."[30] In issuing the permits, NJDEP imposed conditions on the proposed activity for the protection of state threatened and endangered species. Given that the Freshwater Wetlands Individual Permit constitutes both the Section 404 permit and the Water Quality Certification, and that, under Section 401 of the Clean Water Act, "any other appropriate requirement of state law set forth in [the] certification" will be treated as a condition on the federal permit affected by the certification—

[29] N.J. Admin. Code § 7:7A-2.1(d).
[30] *Id.* § 7:7A-7.2(b)(3).

in this case, the Section 404 permit[31]—the conditions that protect threatened and endangered species are part of the Freshwater Wetlands Individual Permit, and we have jurisdiction to review these conditions.

Under similar reasoning, we have jurisdiction over the Flood Hazard Area Individual Permits. The Freshwater Wetlands Protection Act requires compliance with the Flood Hazard Act.[32] Accordingly, Transco applied for and obtained Flood Hazard Area Individual Permits, which enumerate conditions on activities in flood hazard areas to protect water quality. The Flood Hazard Area Individual Permit is, in effect, a set of conditions on the Freshwater Wetlands Individual Permit. Given that we have jurisdiction over the Freshwater Wetlands Individual Permit, we have jurisdiction over the Flood Hazard Area Individual Permit as conditions set forth in the Water Quality Certification.

Likewise, the Letters of Interpretation are part and parcel of the Freshwater Wetlands Individual Permits, and thus subject to this Court's review. New Jersey regulations require an applicant for a Freshwater Wetlands Individual Permit to submit the Letter of Interpretation as part of the application package if a Letter has been issued, or "[i]f the applicant applies for [a Freshwater Wetlands Individual Permit] without first obtaining [a Letter of Interpretation], the permit application must include all information that would be necessary for the Department to issue [a Letter of Interpretation] for the site . . . . The Department will then

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[31] 33 U.S.C. § 1341(d).

[32] N.J. Admin. Code § 7:7A-2.1; *see, e.g.*, *id.* §§ 7:7A-4.3(b)(8), (9), 7.2(b)(10).

review the submitted wetland delineation as part of the permit review process."[33] In other words, a Freshwater Wetlands Individual Permit application must include either an issued Letter of Interpretation or all the materials required for NJDEP to issue such a Letter. Therefore, the Letters of Interpretation are integral to the Freshwater Wetlands Individual Permit application and the review process of the permit, and thus subject to our review.

B. Mootness

We next consider NJDEP and Transco's argument that the petition for review is moot because construction is complete and Transco has been conducting mitigation and restoration. Thus, any procedural remedy would be ineffectual. The Foundation argues the petition is not moot because we can provide relief in the form of additional analysis of environmental impact and measures to address those effects.

Mootness raises both constitutional and prudential concerns.[34] Under Article III, "[i]t is a basic principle . . . that a justiciable case or controversy must remain extant at all stages of review . . . ."[35] Prudentially, a court may decline to exercise discretion to grant declaratory and injunctive relief if

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[33] *Id*. § 7:7A-3.1(h).

[34] *Marcavage v. Nat'l Park Serv.*, 666 F.3d 856, 862 n.1 (3d Cir. 2012) (citing *Int'l Bhd. of Boilermakers v. Kelly*, 815 F.2d 912, 915 (3d Cir. 1987)).

[35] *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1335 (2013) (quoting *United States v. Juvenile Male*, 564 U.S. 932, 936 (2011)).

a controversy is "so attenuated" that considerations of prudence and comity counsel withholding relief.[36] The central question in a mootness analysis is "whether changes in circumstances that prevailed at the beginning of the litigation have forestalled any occasion for meaningful relief."[37] A case becomes moot "only when it is impossible for a court to grant any effectual relief whatever to the prevailing party."[38] When a court can fashion "some form of meaningful relief" or "impose at least one of the remedies enumerated by the appellant," even if it only partially redresses the grievances of the prevailing party, the case is not moot.[39] The Foundation challenges NJDEP's conclusions regarding the proposed pipeline's environmental impact and the amount of mitigation required.

This case is not moot because NJDEP may monitor mitigation outcomes following completion of mitigation. Specifically, pursuant to New Jersey regulation and as set forth in the Freshwater Wetlands Individual Permits and the Flood Hazard Area Individual Permits, Transco must submit annual reports to NJDEP for three years after completing mitigation, and NJDEP may monitor the progress of remedial actions. If mitigation has not met the requirements in the

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[36] *Int'l Bhd. of Boilermakers*, 815 F.2d at 915-16 n.3.

[37] *Jersey Cent. Power & Light Co. v. New Jersey*, 772 F.2d 35, 39 (3d Cir. 1985) (citing *Mills v. Green*, 159 U.S. 651, 653 (1985)).

[38] *Decker*, 133 S. Ct. at 1335 (quoting *Knox v. Serv. Emps. Int'l*, 132 S. Ct. 2277, 2287 (2012)).

[39] *In re Cont'l Airlines*, 91 F.3d 553, 558 (3d Cir. 1996); *Isidor Paiewonsky Assocs. v. Sharp Props., Inc.*, 998 F.2d 145, 152 (3d Cir. 1993).

regulations, NJDEP may direct Transco to perform additional mitigation or other remedial action.[40] Therefore, there remains possible effectual relief because further environmental analysis might lead NJDEP to require additional mitigation from Transco. Thus, we conclude that this petition is not moot.[41]

C. Sovereign Immunity

NJDEP and PADEP contend that any challenge brought under Section 19(d) is barred by the Eleventh Amendment. With respect to the Water Quality Certifications and Section 404 permits, NJDEP and PADEP argue that their mere participation in the Clean Water Act permitting process does not waive their sovereign immunity provided by the Eleventh Amendment. NJDEP further argues that when it assumed authority to administer Section 404, it explicitly

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[40] N.J. Admin. Code § 7.7A-15:16(c)-(f); *see* N.J. Admin. Code § 7:13-10.2(u)(5); N.J. JA 18-19, 35-37 ("The permittee shall monitor forested and/or shrub scrub wetland mitigation projects for 5 full growing seasons and emergent wetland or State open water mitigation projects for 3 full growing seasons beginning the year after the mitigation project has been completed . . . The permittee shall monitor the riparian project for at least 3 years beginning the year after the riparian zone compensation project has been completed.") (Freshwater Wetlands Individual Permits and Flood Hazard Area Individual Permits, Pleasant Run Loop and Skillman Loop).

[41] *See Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31, 43 (D.C. Cir. 2015) (citing *Church of Scientology of Cal. v. U.S.*, 506 U.S. 9, 12-13 (1992)).

reserved its sovereign immunity for Section 404 actions through a Memorandum of Agreement with the EPA. Therefore, according to NJDEP, sovereign immunity bars this Court from reviewing the Freshwater Wetlands Individual Permits, Flood Hazard Area Individual Permits, and Letters of Interpretation. These arguments are unavailing. As discussed below, we hold that New Jersey and Pennsylvania's voluntary participation in the regulatory schemes of the Natural Gas Act and the Clean Water Act constitutes a waiver of sovereign immunity, given the clear language in those statutes subjecting their actions to federal review.

1. Overview

The Eleventh Amendment of the United States Constitution states that federal courts may not hear "any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State . . . ." [42] Courts have interpreted the amendment as applying to suits against states by their own citizens as well,[43] and have extended the immunity to state agencies.[44] The immunity from suit is not absolute; Congress has limited power to abrogate the states' immunity.[45]

A state may waive its immunity by engaging in conduct that demonstrates the state's consent to suit in federal

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[42] U.S. Const. Amend. XI.
[43] *See Hans v. Louisiana*, 134 U.S. 1 (1890).
[44] *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984).
[45] *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

court.[46] A state may consent to suit in federal court by accepting a gift or gratuity from Congress when waiver of sovereign immunity is a condition of acceptance.[47] When Congress makes a gift to a state that Congress is not obligated to make and which the state cannot claim as a matter of right, Congress may attach conditions to this gift, including a waiver of sovereign immunity.[48] These "gifts" need not only be monetary awards; a congressional grant of regulatory authority that a state may not otherwise possess is also a gift. We addressed the theory of "gratuity waiver" as applied to a grant of regulatory authority in *MCI Telecommunications Corporation v. Bell Atlantic Pennsylvania*, where Pennsylvania's Public Utility Commission argued that a section of the Telecommunications Act of 1996,[49] which provides for federal court review of state-approved interconnection agreements, violated the agency's Eleventh Amendment immunity.[50] We held that Congress had made

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[46] *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985); *Clark v. Barnard*, 108 U.S. 436, 447 (1883).

[47] *See College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686-87 (1999) (holding that while states may not constructively waive immunity to Lanham Act claims based on term in Trademark Remedy Clarification Act, waiver may be a proper condition on authority granted by Congress that the state would not otherwise have).

[48] *Id.*; *see Petty v. Tenn.-Mo. Bridge Comm'n*, 359 U.S. 275 (1959); *see also South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (holding that Congress may attach conditions to the receipt of federal funds).

[49] Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.).

[50] 271 F.3d 491 (3d Cir. 2001).

federal judicial review a necessary condition of state participation in regulation of telecommunications. A state's participation in the regulatory scheme constituted acceptance of the gift, and, thus, a waiver of Eleventh Amendment immunity.[51] Nevertheless, mere acquiescence is insufficient to abrogate sovereign immunity. A state's gratuity waiver must be knowing and voluntary.[52] In other words, Congress must make its intention to condition acceptance of a gratuity on the waiver of Eleventh Amendment immunity "unmistakably clear."[53]

2. Sovereign Immunity and Section 19(d)

Here, the application of the gratuity waiver doctrine is consistent with precedent of our sister courts and supported by the language of Section 19(d) of the Natural Gas Act. In *Islander East Pipeline Company v. Connecticut Department of Environmental Protection*,[54] the Second Circuit recognized that the Natural Gas Act strips states of any authority to regulate a particular field—in this case, interstate natural gas transmission facilities—save certain "rights of the states" granted under those three enumerated statutes, one of which is the Clean Water Act.[55] Consistent with this doctrine, a state participates in Clean Water Act regulation of interstate natural gas facilities by congressional permission, rather than

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[51] *MCI*, 271 F.3d at 510.
[52] *College Sav. Bank*, 527 U.S. at 675 (citing *Beers v. Arkansas*, 61 U.S. 527, 529 (1857)).
[53] *MCI*, 271 F.3d at 506.
[54] 482 F.3d 79 (2d Cir. 2006).
[55] *Islander*, 482 F.3d at 90.

through inherent state authority.[56] A state may refuse the grant of authority: under the Clean Water Act, a state's non-participation in water quality regulation returns authority to the EPA. A state also may decline to exercise its authority to issue an applicant a Water Quality Certification, and in so doing waive the requirement for a Water Quality Certification, and the proposed activity proceeds without a Water Quality Certification.[57] In the context of an interstate natural gas facility, a state's refusal to issue a Water Quality Certification would waive the need for the facility to obtain a Certification in order to satisfy conditions of FERC's certificate of public convenience and necessity. In effect, such a refusal would return the state's delegated authority to enforce Section 401 of the Clean Water Act to FERC with respect to the project.[58] Therefore, state participation in the regulatory schemes of the Clean Water Act and under the framework of the Natural Gas Act constitutes a gratuity waiver.

We agree with the *Islander* court that the principle of gratuity waiver applies to the regulatory scheme established by the Natural Gas Act. Section 19(d) grants the Courts of Appeals jurisdiction to review "state agency action." This language is unambiguous. New Jersey and Pennsylvania's participation in the regulatory scheme of the Clean Water Act with respect to interstate natural gas facilities, pursuant to the

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[56] *Id.*

[57] 33 U.S.C. § 1341(a)(1).

[58] *See* 15 U.S.C. § 717b(d) (providing that the NGA does not affect the rights of states under the Clean Water Act); *id.* § 717f(e) (allowing FERC to attach reasonable conditions to a certificate of public convenience and necessity).

Natural Gas Act and after the amendment of Section 19(d), constitutes a waiver of their immunity from suits brought under the Natural Gas Act. In effect, Section 19(d) creates a small carve out from sovereign immunity. Under this limited carve out, federal judicial review is proper over those state actions regarding interstate natural gas facilities pursuant to the Clean Water Act and the Clean Air Act.

For these reasons, we have jurisdiction over the petitions. We therefore turn to the merits of these petitions.

IV. Merits Challenges

A. Standard of Review

The standard of review of state action pursuant to the Clean Water Act for an interstate natural gas facility is a matter of first impression for this Court. Consistent with our precedent in *MCI*, which dealt with a similar regulatory arrangement, we review *de novo* state agency interpretation of federal law, and review under the arbitrary and capricious standard state action taken pursuant to federal law.[59] Agency action is arbitrary and capricious when the agency fails to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[60] When we review an agency action under this standard, the Administrative Procedure Act (APA) directs us to take

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[59] *MCI*, 271 F.3d at 516; *see Islander*, 482 F.3d at 93-94.

[60] *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted).

account of "the rule of prejudicial error."[61] In other words, we apply a "harmless error" analysis to any administrative action we review;[62] mistakes that have no bearing on the substantive decision of an agency do not prejudice a party.[63] The party challenging the agency determination bears the burden of demonstrating prejudice.[64] Where an agency errs in fact finding, we remand only if the agency relied on the erroneous finding in its decision.[65]

B. New Jersey

The Foundation alleges four general problems with NJDEP's issuance of the Freshwater Wetlands Individual Permits, the Flood Hazard Area Individual Permits, the Water Quality Certifications, and the Letters of Interpretation: (1) NJDEP deprived the Foundation of sufficient opportunity to comment, (2) NJDEP issued the Freshwater Wetlands Individual Permits based on unsupported conclusions, (3) NJDEP erred in determining that Transco met the requirements for the Flood Hazard Area Individual Permits and hardship exceptions for those permits, and (4) NJDEP misconstrued regulation in granting a minor modification for the Freshwater Wetlands Individual Permit of the Skillman

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[61] 5 U.S.C. § 706.

[62] *Shinseki v. Sanders*, 556 U.S. 396, 406 (2009) (comparing a similarly worded provision applying to appeals of Veterans Affairs claims decisions).

[63] *See Mass. Trs. of E. Gas & Fuel Assocs. v. United States*, 377 U.S. 235, 248 (1964).

[64] *Sanders*, 556 U.S. at 409.

[65] *See Communist Party of U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1, 67 (1961).

Loop. We address each in turn and conclude that NJDEP did not act arbitrarily or capriciously with respect to the first three alleged errors. We hold that the fourth challenge is not properly before this Court.

1. Opportunity for Public Comment

State regulations require NJDEP, after determining an application to be administratively complete, to publish a notice of the application in the DEP Bulletin, make the application available at its offices in Trenton, and, in some circumstances, hold a public hearing.[66] The public may comment on the application within 30 days of the notice.[67] The Department "shall consider all written public comments submitted within this time" and "may, in its discretion, consider comments submitted after this date[,]" although state regulations do not define "consider."[68] The Foundation alleges that NJDEP committed two errors that deprived the Foundation of the opportunity to comment on Transco's application. First, the Foundation argues that NJDEP prematurely determined that Transco's application was "administratively complete," a designation that triggers the public notice and comment process, even though Transco had failed to include a required element of the application. Second, the Foundation argues that NJDEP failed to provide proper notice to the public of Transco's application because NJDEP's initial notice of Transco's application in the DEP bulletin cited only Hunterdon County as the project location

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[66] N.J. Admin. Code §§ 7:7A-12.1, .3, & .4.
[67] *Id*. § 7:7A-12.3(d).
[68] *Id*.; *see In re Freshwater Wetlands Gen. Permits*, 860 A.2d 450, 461-462 (N.J. Super. Ct. App. Div. 2004).

and omitted three other affected counties—Somerset, Princeton, and Mercer.

Although the Foundation argues that it was deprived of an opportunity to comment on the revisions because Transco submitted the revised analysis after the close of the public comment period, the Foundation reviewed the revised analysis and submitted additional written comments from its members and two drilling experts and had a face-to-face meeting with NJDEP to express its continued concern with the proposal. The record shows that NJDEP asked Transco to respond to the concerns raised. A party challenging the sufficiency of the public comment process bears the burden of showing it was prejudiced by the lack of opportunity to comment.[69] The fact that NJDEP ultimately did not adopt the Foundation's view does not mean that the Foundation lacked the opportunity to put forth that view.[70]

Similarly, petitioners were not harmed by the omission of three counties from the initial notice because Princeton Ridge Coalition and Stony Brook-Millstone Watershed Association—both located in the initially omitted counties—were aware of the proposal well before the offending initial notice was published. As early as 2013, both had met with NJDEP and Transco regarding the proposed project and provided written comments. Therefore, the Foundation has

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[69] *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 237 (D.C. Cir. 2008).

[70] *Friends of the Atglen-Susquehanna Trail, Inc. v. Surface Transp. Bd.*, 252 F.3d 246, 265 (3d Cir. 2001) (noting the agency was required to consider the comments but was "not required to follow the comments").

failed to demonstrate that it was deprived of the opportunity to comment. For that reason, NJDEP's actions were not arbitrary or capricious.

2. Agency Analysis on Environmental Impact of Proposal

New Jersey regulations require NJDEP to analyze the environmental impact of the proposed activity, such as the activity's potential effect on water quality, the aquatic ecosystem, and threatened and endangered animals. The Foundation alleges NJDEP acted in an arbitrary and capricious manner because NJDEP (1) failed to adequately analyze alternatives to the proposed activity that would be less environmentally-adverse or result in the minimum feasible impairment of the aquatic ecosystem, (2) defined the project purpose in such a narrow manner as to exclude potential alternatives to the proposed activity, (3) improperly concluded that the proposed activity in connection with the Skillman Loop will not harm threatened or endangered species or their habitats, and (4) improperly determined that the proposal is in the public interest.

a. Consideration of Alternatives

New Jersey regulations require NJDEP to issue a Freshwater Wetlands Individual Permit only if certain prerequisites are met. As relevant to this petition, New Jersey regulation requires NJDEP to consider practicable alternatives to the proposed activity that "would have a less adverse impact on the aquatic ecosystem or would not involve a freshwater wetland or State open water" and "would not have other significant adverse environmental consequences . .

. .”[71] Where Transco rejected alternatives on the basis of constraints such as inadequate zoning, infrastructure, or parcel size, NJDEP must consider whether Transco made reasonable attempts to remove or accommodate those constraints.[72] In addition, when a regulated activity would take place in wetlands or waters deemed of “exceptional resource value” or related to trout production, NJDEP must consider whether there is a compelling public need for the activity and whether denial of the permit would impose extraordinary hardship on the applicant.[73]

The Foundation claims that NJDEP insufficiently considered alternatives, including those that would have resulted in the minimum feasible environmental alteration or impairment of the aquatic ecosystem. The Foundation also alleges that NJDEP failed to rebut the presumption that the proposed activity has a practicable alternative—such as in size, scope, configuration, density, or design—that would avoid impact or have a lesser impact, a required analysis because the project is a “non-water dependent activity.”[74]

The record shows NJDEP considered potential alternatives, such as replacing the existing pipeline with a larger one rather than constructing a new loop, increasing operating pressure within the existing loop, and building various alternative routes. NJDEP weighed the options, adopted some, and rejected others as impractical. Specifically, NJDEP required Transco to reduce the size of the construction workspace in regulated areas, substitute less

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[71] N.J. Admin. Code § 7:7A-7.2(b).
[72] *Id*. § 7:7A-7.4(c).
[73] *Id*. § 7:7A-7.5.
[74] *Id*. § 7:7A-7.4.

environmentally-adverse crossing techniques for six wetlands, and use specific drilling methods at three locations to reduce impacts. NJDEP provided explanation for those alternatives not adopted. For example, the use of horizontal direct drilling and direct pipe drilling at certain locations would be more costly and carried the risk of equipment failure, damage to the pipe, and inadvertent release of drilling fluid into the soil. Similarly, alternative routes were impracticable because they might interfere with an existing water line or cause greater land or wetland disturbance.

Additionally, NJDEP considered whether the proposed activity would affect wetlands or waters categorized as "exceptional resource value" or related to trout production. NJDEP noted that wetlands in the Pleasant Run Loop were neither of exceptional resource value nor trout-producing, and that, although certain wetlands in the Skillman Loop were of exceptional resource value, compelling public need for the project outweighed the impact on wetlands and waters.

NJDEP not only considered but also acted upon alternatives, in direct contrast to the Foundation's allegations. Adoption of alternatives reduced open water and wetland disturbance by 38 percent for the Pleasant Run Loop and 48 percent for the Skillman Loop, according to an NJDEP analysis. For the Skillman Loop, NJDEP consideration of alternatives led to the selection of the shortest proposed route, of which 86 percent is collocated within Transco's existing pipeline right-of-way. NJDEP also required those portions not collocated to be constructed with a specific drilling technique to reduce wetland disturbance. Therefore, NJDEP's actions were not arbitrary or capricious.

b. Definition of Project Purpose

Next, the Foundation charges NJDEP defined the project purpose in such way as to preclude alternatives, by including a durational limitation as part of the purpose. The limitation rendered impracticable those construction methods that are less environmentally-adverse but more time-consuming.[75] The Foundation's challenge relies on language regarding project purpose in New Jersey regulations on practicable alternatives. Regulations define "practicable alternative" as "other choices available and capable of being carried out after taking into consideration cost, existing technology, and logistics in light of *overall project purposes* . . . ."[76] However, neither New Jersey regulations nor case law defines the term "project purpose." For the present project, NJDEP stated that the project purpose was "to construct the pipeline and . . . to begin service through the proposed pipeline by . . . December 31, 2015."[77] A "short construction window" for the project was recommended by the U.S. Army Corps of Engineers to reduce disturbance to waterbodies, and FERC discussed temporal limitations on construction in its order granting the certificate of public convenience and necessity.[78] Given this concern, NJDEP considered the

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[75] Pet. Br. 46.

[76] N.J. Admin. Code § 7:7A-1.4 (emphasis added).

[77] *See* N.J. JA 1302 (NJDEP Staff Summary Report, Pleasant Run Loop).

[78] *E.g., Transcontinental Gas Pipe Line Co. LLC*, 149 FERC ¶ 61,258, 62,686 (2014) ("Back Brook . . . will be crossed within a 48 hour period . . . which will maintain water flow during construction and avoid in-stream construction impacts.").

duration of disturbance of water bodies in choosing a drilling method, in addition to other factors, such as the number of trees that would need to be cleared to provide space for worksites. Therefore, NJDEP's incorporation of a temporal term into the project purpose was not arbitrary and capricious.

c. Conclusions Regarding Threatened or Endangered Species in the Skillman Loop

The Foundation alleges that NJDEP ignored reports by the Princeton Ridge Coalition that the project would adversely affect the Red-shouldered Hawk and Barred Owl and that it failed to impose conditions in the Freshwater Wetlands Individual Permit for the Skillman Loop to address these impacts. A Freshwater Wetlands Individual Permit may be issued only if NJDEP determines that the regulated activity "[w]ill not destroy, jeopardize[,] or adversely modify a present or documented habitat for threatened or endangered species; and shall not jeopardize the continued existence of a local population of a threatened or endangered species . . . ."[79] NJDEP stated in its Staff Summary Reports, "[t]he project right-of-way is documented and suitable habitat for . . . Barred Owl, Red-shouldered Hawk, Wood Turtle, Indiana Bat, and Northern Long-eared Bat."[80] In the Freshwater Wetlands Individual Permit for the Skillman Loop, NJDEP imposed conditions to protect most of the enumerated species but not the Barred Owl or Red-shouldered Hawk. Nevertheless, NJDEP stated in its Staff Summary Report that "[p]rovided the conditions of the permits are followed . . . no

[79] N.J. Admin. Code § 7:7A-7.2(b)(3).

[80] N.J. JA 1426 (Freshwater Wetlands Individual Permit, Skillman Loop).

adverse impacts are anticipated upon threatened/endangered species." To explain why it did not impose conditions to protect the species, NJDEP filed with this Court affidavits from a staff member who explained her review of Transco's application and the Foundation's reports, and her consideration of factors such as limited sightings of the species, small sizes of the wetlands, and fragmentation of habitat because of open areas and neighboring homes. Based on these considerations, NJDEP determined it would not impose conditions on the permit regarding the Barred Owl or Red-shouldered Hawk. The Foundation argues that NJDEP's submission constitutes an attempt to supplement the administrative record after the fact. The administrative record is supposed to reflect the information available to the decision maker at the time the challenged decisions were made, as well as the rationale for why the agency acted as it did, but "since the bare record may not disclose the factors that were considered or the [agency's] construction of the evidence," it is sometimes appropriate to look to further explanation from agency officials to ascertain this rationale.[81] Here, the affidavits explain staff review conducted *prior to* issuance of the permit. Therefore, the submissions do not constitute *post hoc* rationalization of agency action. The Foundation has not demonstrated that NJDEP failed to consider potential adverse impacts in issuing the Freshwater Wetlands Individual Permit for the Skillman Loop.

d. Public Interest Analysis

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[81] *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971) (*abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977); *see Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 50.

To issue a Freshwater Wetlands Individual Permit, NJDEP must determine the proposal is "in the public interest" on the basis of seven factors.[82] The Foundation argues NJDEP failed to consider five of the seven factors:

> [1] The public interest in preservation of natural resources and the interest of the property owners in reasonable economic development . . .;
>
> [2] The extent and permanence of the beneficial or detrimental effects which the proposed regulated activity may have on the public and private uses for which the property is suited;
>
> [3] The quality and resource value classification pursuant to N.J.A.C. 7:7A-2.5 of the wetland which may be affected and the amount of freshwater wetlands to be disturbed;
>
> [4] The economic value, both public and private, of the proposed regulated activity to the general area; and
>
> [5] The functions and values provided by the freshwater wetlands and probable individual and cumulative impacts of the regulated activity on public health and fish and wildlife . . . .[83]

NJDEP did not fail to consider these factors. Regarding the first factor, the record shows consideration of

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[82] N.J. Admin. Code § 7:7A-7.2(b)(12).
[83] *Id*.

impact on landowners, surrounding communities, and the environment. For example, NJDEP sought to minimize any adverse economic impact by requiring the use of existing rights-of-way and areas adjacent and the installation and modification of compressors within existing compressor station facilities. As for the second factor, NJDEP considered the extent of any detrimental effects and required Transco to implement best management practices during construction and restoration to limit disturbance to the immediate construction and restoration period and avoid permanent detrimental effects.

Likewise, regarding the third factor, NJDEP reviewed submissions, inspected sites to verify wetland and water boundary lines, and made wetlands resource value classifications as set forth in the Letters of Interpretation. In determining whether the proposal is in the public interest, NJDEP considered that wetlands in the Pleasant Run Loop were not of exceptional resource value, and that certain wetlands in the Skillman Loop were of exceptional resource value. Similarly, with respect to the proposed activity's public and private economic value, NJDEP found that the project would provide public and private economic value by expanding Transco's pipeline system capacity and serving end-users. Finally, the record shows NJDEP considered the functions and values provided by the freshwater wetlands and probable impact of the activity on public health and fish and wildlife. NJDEP examined the wetlands' fishery resources, resource value classification, and its role as habitat for endangered and threatened species. The Department also considered the scale and duration of disturbance of the wetlands, and whether the proposed activity would discharge toxic effluent or degrade ground or surface water.

The record rebuts the Foundation's charge that NJDEP reached its public interest determination without considering the appropriate factors. We therefore hold that NJDEP did not act arbitrarily or capriciously in issuing the Freshwater Wetlands Individual Permits.

3. Flood Hazard Area Individual Permits

The Foundation claims that NJDEP erred by (1) impermissibly issuing the Flood Hazard Area Individual Permit for the Skillman Loop because the Flood Hazard Area Control Act also prohibits the issuance of permits for activities that would adversely affect state threatened or endangered species and their habitats; and (2) improperly determining that Transco met the requirements of a hardship exception for the permits.

Regarding the first allegation, the Flood Hazard Area Control Act, similar to the Freshwater Wetlands Protection Act, requires NJDEP to determine that any proposed activity will not adversely affect threatened or endangered species or their habitats before issuing a Flood Hazard Area Individual Permit.[84] The Foundation alleges that NJDEP failed to consider the expert reports, which concluded that the clearing of forest canopy over riparian zones for construction would increase fragmentation of mature forest and thus damage the habitat of the Red-Shouldered Hawk and the Barred Owl. The record shows that NJDEP considered the expert reports because, after the Foundation submitted its expert reports, in a March 11, 2015, letter, NJDEP directed Transco to address

[84] N.J. Admin. Code § 7:13-10.6(d).

the Department's concern of "significant adverse impacts" on habitat areas of threatened or endangered species and to consider alternative construction methods. In a March 17, 2015, letter, Transco addressed NJDEP's concern by developing "a unique construction approach" that allowed Transco to cut "25 feet off of a typical 75 foot [worksite] corridor through environmentally sensitive areas" so that fewer trees would be removed and the impact of construction on the forest would be "half of what is typically required." That NJDEP directed Transco to revise its application and address the Department's concerns demonstrates NJDEP considered potential adverse environmental impact on habitats. Therefore, the grant of a Flood Hazard Area Individual Permit for the Skillman Loop was not arbitrary or capricious.

As to the second allegation, the Foundation argues that NJDEP incorrectly determined that Transco met the requirements of a hardship exception for the Flood Hazard Area Individual Permits. Transco had requested hardship exceptions in its applications because the Skillman Loop would affect 13.2 acres of riparian zone vegetation, and Pleasant Run Loop 7.54 acres, both exceeding regulatory limits.[85] A hardship exception requires the applicant to demonstrate:

> (1) Due to an extraordinary situation of the applicant or site condition, compliance with this chapter would result in exceptional and/or undue hardship for the applicant; (2) The

[85] N.J. Admin. Code § 7:13-10.2, Table C, Maximum Allowable Disturbance to Riparian Vegetation.

> proposed activities will not adversely affect the use of contiguous or nearby property; (3) The proposed activities will not pose a threat to the environment or to public health, safety, or welfare; and (4) The hardship was not created through the action or inaction of the applicant or its agents.[86]

In addition, one or more of the following requirements must be met:

> 1. The Department determines that there is no feasible and prudent alternative to the proposed project, including not pursuing the project, which would avoid or substantially reduce the anticipated adverse effects of the project, and that granting the hardship exception would not compromise the reasonable requirements of public health, safety and welfare, or the environment;
>
> 2. The Department determines that the cost of compliance with the requirements of this chapter is unreasonably high in relation to the environmental benefits that would be achieved by compliance; and/or
>
> 3. The Department and applicant agree to one or more alternative requirements that, in the judgment of the Department, provide equal or

[86] *Id*. § 7:13-9.8(b).

> better protection to public health, safety and welfare and the environment.[87]

Further, because the proposed construction would cross regulated waters, NJDEP must find that the construction of an open trench through the riparian zone is necessary to install the pipeline.[88]

NJDEP's grant of hardship exceptions was not arbitrary or capricious. Although neither New Jersey regulations nor case law defines the term "hardship" as used here, state regulations indicate that the nature of the hardship may be economic, related to impact from floods, or otherwise subject to NJDEP's determination.[89] NJDEP determined that Transco addressed all the requirements, namely, that (1) there was not a feasible and prudent alternative; (2) the method of construction was necessary for safety; (3) granting the exception would not compromise reasonable requirements of public health, safety and welfare, or the environment; and (4) requiring compliance would impose a hardship on Transco, which Transco did not create through action or inaction. Given these determinations, we hold that the Department did not act arbitrarily or capriciously in granting the hardship exceptions to the Flood Hazard Area Individual Permits.

4. Grant of Minor Modification to the Freshwater Wetlands Individual Permit for the Skillman Loop

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[87] *Id*. § 7:13-9.8(a), 10.2(s).
[88] *Id*. § 7:13-10.2(k)(1)(i).
[89] *See id*. § 7:13-9.8.

The Foundation challenges NJDEP's grant of a minor modification for Transco's Freshwater Wetlands Individual Permit for the Skillman Loop as contrary to New Jersey regulation. After hard rock and boulders under wetlands in the Princeton Ridge damaged drilling equipment, Transco sought a minor modification to the permit to use a different drilling method than the method NJDEP had originally permitted. By regulation, a modification of the Freshwater Wetlands Individual Permit is "minor" if it involves

> [a] change in materials, construction techniques, or the minor relocation of an activity on a site, *if the change is required by another permitting agency*. However, this change is not a minor modification if the change would result in additional wetland, State open water or transition area impacts over those of the original permit or waiver.[90]

In granting the minor modification, NJDEP concluded FERC was the requisite "permitting agency" that required the change, because in approving the particular route of the Skillman Loop, FERC implicitly required the change in drilling technique to maintain the route. NJDEP also concluded the change in drilling method would not result in additional disturbance.

This challenge is not properly before us. At the time of the filing of the petition, the challenged agency action must

[90] *Id*. § 7:7A-14.3(c)(4) (emphasis added).

be ripe for review.[91] The Foundation petitioned for review on May 8, 2015, but the minor modification was not applied for until May 29, 2015, and granted on June 4, 2015.

Based on the foregoing, we hold NJDEP did not deprive the Foundation of sufficient opportunity to comment and did not act arbitrarily or capriciously in issuing permits and other authorizations. We further hold the challenge of the minor modification for the Freshwater Wetlands Individual Permit of the Skillman Loop is not properly before this Court.

C. Pennsylvania

The Riverkeeper raises two challenges to PADEP's issuance of a Water Quality Certification: (1) PADEP failed to review an environmental assessment prepared by Transco before issuing the Water Quality Certification, as required by state regulations; and (2) the materials that PADEP did review were substantively insufficient. The Riverkeeper has not demonstrated prejudice from these alleged errors.

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[91] *See TeleSTAR, Inc. v. FCC*, 888 F.2d 132, 133 (D.C. Cir. 1989) (agency action that was not final at the time of filing of petition may only be reviewed upon the filing of another petition); *W. Union Tel. Co. v. FCC*, 773 F.2d 375, 378 (D.C. Cir. 1985) (court lacked jurisdiction over a challenge to a now-final agency action that was filed before action became final); *Pennzoil Co. v. FERC*, 645 F.2d 394, 398 (5th Cir. 1981) (requirement that an agency's action be ripe for judicial review before merits of any review petition will be addressed is one which applies to action of other agencies as well as that of FERC).

1. Sequence of Agency Action

The Riverkeeper's first challenge involves whether PADEP was required to engage in an environmental review prior to issuing a Water Quality Certification, or whether PADEP may, as it did here, postpone environmental review until after a Water Quality Certification has been issued. Although PADEP has not published any procedures for issuing Water Quality Certifications, applicants for the Chapter 105 permits who are required to obtain Water Quality Certifications must "prepare and submit" an environmental assessment for PADEP's review.[92] The Riverkeeper infers from this requirement that PADEP must review an environmental assessment prepared as part of an application for a Water Quality Certification before issuing a Certification. Based on this inference, and because PADEP did not do so, the Riverkeeper alleges that PADEP erred by failing to review an environmental assessment prior to issuing a Water Quality Certification to Transco. PADEP argues that for complex projects that require a large number of state and federal permits to ensure compliance with state water quality standards—such as interstate natural gas pipelines—this sequence is not mandatory and would cause unnecessary delay if strictly followed.[93]

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[92] 25 Pa. Code § 105.15(b) (2011).

[93] *See Clean Water Act Section 401 State Water Quality Certification: A Water Quality Protection Tool for States and Tribes*, EPA Office of Wetlands, Oceans and Watersheds, 25 (April 2010) (stating that states are not required to implement Water Quality Certification procedures).

The Riverkeeper has failed to demonstrate that it suffered harm from the sequence of PADEP's permitting actions. According to FERC's certificate, Transco could not begin construction until it obtained all applicable authorizations required under federal law. One of these federal authorizations, the Water Quality Certification, was conditioned on the issuance of, *inter alia*, a Chapter 105 Permit. Prior to issuing a Chapter 105 Permit, PADEP was required to review an environmental assessment prepared by Transco. Thus, construction could not begin until after PADEP had reviewed an environmental assessment, regardless of whether this review occurred before the Water Quality Certification was issued. Because environmental review was required before construction could begin, the Riverkeeper was not harmed by the timing of the required review, and PADEP did not act arbitrarily or capriciously.

The Riverkeeper alleges that as a result of PADEP's failure to review the environmental assessment prior to issuing the Water Quality Certification, FERC prematurely authorized tree clearing activities. According to the Riverkeeper, in delaying review of the environmental assessment, PADEP postponed substantive determinations until after the issuance of the Water Quality Certification, which allowed trees to be felled in contravention of Pennsylvania water quality standards. The record does not support the Riverkeeper's view of the timeline of events. In fact, FERC authorized tree clearing several weeks before PADEP issued the Water Quality Certification. Therefore, the Water Quality Certification could not have led to tree clearing because such clearing was approved without a Certification.

Moreover, the Riverkeeper is incorrect in assuming that tree-clearing is implicated by PADEP's substantive water quality determinations: the Army Corps of Engineers stated that the tree-clearing activity for which Transco sought authorization would not trigger the need for permits under the Clean Water Act. FERC designated the tree-clearing activity as "pre-construction activity," while FERC's certificate requires a Water Quality Certification only for "construction activity." This suggests that FERC allows tree-clearing activity to be authorized without Transco obtaining any Clean Water Act permits. Thus, there is no nexus between the tree clearing activity and the Water Quality Certification, and the Riverkeeper's challenge fails.

2. Sufficiency of Factfinding

The Riverkeeper alleges that PADEP relied on an incomplete environmental assessment from Transco and failed to correct the assessment's deficiencies prior to issuing the Water Quality Certification. PADEP and Transco counter that the majority of the Riverkeeper's arguments relate not to the issuance of the Water Quality Certification, but the issuance of the Chapter 105 Permit. We find this argument unavailing. Because the Chapter 105 Permit was a condition of the Water Quality Certification, it is inextricably intertwined with the Water Quality Certification.[94] Nevertheless, because the Riverkeeper does not challenge the Chapter 105 Permit specifically and argues only that the Water Quality Certification itself was improperly issued, we

[94] *See Tenn. Gas Pipeline Co. LLC. v. Delaware Riverkeeper Network*, 921 F. Supp. 2d 381, 387-88 (M.D. PA. 2013).

will address the Riverkeeper's challenges only as they pertain to the issuance of the Water Quality Certification.

The Riverkeeper alleges two problems with PADEP's environmental review: (1) PADEP relied on incorrect wetlands classifications without gathering data necessary to correct these classifications; and (2) construction activity was improperly authorized because the faulty wetlands classifications led PADEP to ignore construction impacts on exceptional value wetlands. We will consider these arguments in turn.

a. Wetlands Classifications

Under Pennsylvania regulations, classifying a wetland as "exceptional value"[95] triggers a number of regulatory protections, including a more stringent permitting process that disallows construction where construction will have an "adverse impact" on these wetlands.[96] The Riverkeeper contends that Transco improperly classified wetlands in the application it submitted to PADEP for a Water Quality Certification, because Transco (1) used incorrect

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[95] "Exceptional value" wetlands are those that serve as habitat for a threatened or endangered species, or are hydrologically connected to, or lie within one half mile of, such a wetland; are located in or along the floodplain of a wild trout stream or a national wild or scenic river, or such a tributary; are located along an existing drinking water supply; or are located in an area designated as a "natural" or "wild" area within a state forest or park or a designated federal wilderness or natural landmark. 25 Pa. Code § 105.17(1).

[96] *See id*. § 105.18a(a).

classification terms, and (2) miscategorized wetlands that are of "exceptional value" as belonging to a lesser protected category. As evidence, the Riverkeeper cites to a table in an environmental assessment prepared by Transco that identified affected Pennsylvania wetlands and their state classifications. This table identifies wetlands as "ordinary," "intermediate," "exceptional," and "other." As the Riverkeeper correctly points out, these terms are not used by PADEP, which classifies wetlands either as "exceptional value" or "other."[97] The Riverkeeper argues that Transco's incorrect classifications frustrated PADEP's ability to determine the correct classification for the affected wetlands and adhere to state water quality standards. In addition, the Riverkeeper alleges that at least eleven wetlands affected are "exceptional value" wetlands but were marked as "ordinary" or "intermediate" in Transco's table. According to the Riverkeeper, PADEP's failure to address these problems is evidence that it has acted arbitrarily and capriciously.[98]

To prevail in its petition, the Riverkeeper must show not only that an error was made but that the error in question prejudiced the Riverkeeper in some way.[99] In this instance, the Riverkeeper can only claim to have suffered prejudice from Transco's classifications if PADEP actually relied on those classifications; otherwise, the error, if any, was harmless. The prejudice the Riverkeeper alleges is simple: PADEP would not have issued the Water Quality

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[97] *Id.* § 105.17.

[98] *See Pa. Trout v. Dep't Envt'l Prot.*, 863 A.2d 93, 98 (Pa. 2004) (discussing requirements for wetlands classifications).

[99] *See supra* Section IV.A.

Certification if Transco had properly classified wetlands in its environmental assessment.

The Riverkeeper's argument falls short. PADEP is not required to review a project's effect on wetlands prior to issuing a Water Quality Certification. In this case, a review was required before PADEP could issue the Chapter 105 Permit, and Transco had to obtain the Chapter 105 Permit as a condition of the Water Quality Certification.[100] Thus, while Transco may have submitted miscategorized information for the Water Quality Certification, that submission was of no consequence since a full review of the appropriate wetland categories was conducted before the Chapter 105 Permit was issued. PADEP had ample time and opportunity to request that Transco remedy any shortcoming in analysis during these review processes, and the Riverkeeper also had the opportunity to submit its comments on the Chapter 105 Permit as well as other state permits not at issue. No additional review was required before PADEP could issue the Water Quality Certification. There is nothing in the record to indicate that PADEP relied on Transco's miscategorized submission in issuing the Certification. Therefore, we hold that any error in Transco's initial classification of wetlands did not prejudice the Riverkeeper.

Because the Riverkeeper has not demonstrated that PADEP relied on these classifications, we need not address the Riverkeeper's argument that PADEP failed to collect and

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[100] *See* 25 Pa. Code § 105.14(b)(13) (requiring determination of impact on wetlands for Chapter 105 permits); *cf. id.* § 92a.21(d)(3) (allowing PADEP to require an applicant for an NPDES permit to provide information on a project's wetlands impact).

analyze the necessary data to make appropriate wetlands classifications following their receipt of Transco's environmental assessment.

b. Authorization of Construction Activity

The Riverkeeper also alleges that PADEP erred in authorizing construction activity that violates state water quality standards. This challenge is broader than the Riverkeeper's challenge regarding FERC's authorization of tree-clearing: rather than arguing that a sequencing error resulted in some particular activity, the Riverkeeper here alleges that any construction that would follow the issuance of a Water Quality Certification violates Pennsylvania water quality standards. The Riverkeeper contends that this is true because any construction impact on an exceptional value wetland is "adverse." According to the Riverkeeper, because construction could not begin without the issuance of the Water Quality Certification, and construction would adversely affect what the Riverkeeper alleges are exceptional value wetlands, PADEP's decision to issue a Water Quality Certification authorized construction activity that violated Pennsylvania water quality standards. However, PADEP itself has no power to "authorize" construction of interstate natural gas facilities because the only government entity that may do so is FERC.[101] While FERC would not allow construction to occur without a Water Quality Certification, the Certification is only relevant because it is required by FERC's certificate of public convenience and necessity. The Natural Gas Act grants FERC exclusive authority to authorize

[101] *See Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 302-04 (citing 15 U.S.C. § 717f(c)).

construction by issuing a certificate of public convenience and necessity, as FERC did here.[102] Any interested party may file a petition with FERC for a hearing on the issuance of a certificate, and we note that the Riverkeeper did participate in such a hearing.[103] In contrast, PADEP's role in the permitting process is to certify that any construction that occurs is in accordance with Pennsylvania water quality standards. PADEP did so here by requiring Transco to obtain various state permits and submit to the review processes associated with these permits.

Because the Riverkeeper has not shown that it was prejudiced by PADEP's permitting actions, we see no reason to disturb PADEP's decision to issue the Water Quality Certification.

VI. Conclusion

For the foregoing reasons, we conclude NJDEP and PADEP did not act arbitrarily or capriciously in issuing permits and related authorizations to Transco. We decline to address the challenge of NJDEP's grant of a minor modification to the Freshwater Wetlands Individual Permit of the Skillman Loop. Accordingly, we will deny the petitions.

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[102] 15 U.S.C. § 717f(c).
[103] *See* 15 U.S.C. § 717n(e); 18 C.F.R. § 156.10.