No. 17-3299
Oral Argument Not Yet Scheduled

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

DELAWARE RIVERKEEPER NETWORK,

and

MAYA VAN ROSSUM, the Delaware Riverkeeper,

Petitioners,

v.

PATRICK MCDONNELL, Acting Secretary of the Pennsylvania Department of Environmental Protection, and COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents,

and

TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC,

Intervenor.

BRIEF OF PETITIONERS

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RULE 26.1 DISCLOSURE STATEMENT

The Delaware Riverkeeper Network is a nonprofit 501(c)(3) membership organization that advocates for the protection of the Delaware River, it 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 16th day of January, 2018.

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JURISDICTIONAL STATEMENT

This matter concerns Petitioners Delaware Riverkeeper Network and Maya van Rossum, the Delaware Riverkeeper's ("DRN") challenge to the issuance of a PAG-10 National Pollutant Discharge Elimination System ("NPDES") general permit under the Clean Water. Act, 33 U.S.C. § 1251 *et seq.* and Pennsylvania's Clean Streams Law, 35 P.S. § 691.1 *et seq.* The Pennsylvania Department of Environmental Protection ("Department") issued the PAG-10 NPDES permit to Transcontinental Pipeline Company, LLC ("Transco") for the Atlantic Sunrise Project ("Project").

On or about April 10, 2017, the Department issued PAG-10 NPDES permit for the Project. *See* Final Approval of PAG-10, DEP00000626-664; JA464 – 502. The Department did not publish notice in the *Pennsylvania Bulletin* concerning the Notice of Intent for the permit. There was no opportunity for public comment or a public hearing. The permit directed that any person aggrieved by the action to file an appeal with the Pennsylvania Environmental Hearing Board. *Id*., DEP00000627; JA465. On or about October 19, 2017, DRN filed the above-captioned action for review of the Department's decision to issue the permit for the Project.

I. The Water Quality Certification Is Not Ripe For Review By This Court Until PADEP's Decision To Issue The Certification Is Subjected To A State Administrative Appeal Process Before The EHB

The PAG-10 NPDES permit in the above-captioned matter is not ripe for review by this Court. It is not a "final" order or "action" of the Department. Rather, the matter must first be heard by the Pennsylvania Environmental Hearing Board ("EHB") before it can become final. Indeed, the Department itself directed any appeal to be heard by the EHB. *See* Final Approval of PAG-10, DEP00000627; JA465. Moreover, failing to require that this matter first proceed before the EHB would require that this Court consider the matter on an incomplete record and would deprive DRN and its members of significant due process rights.

A PAG-10 NPDES permit is an action taken by the Department. Pennsylvania law vests the EHB with the "power and duty to hold hearings and issue adjudications" on orders, permits, licenses, and decisions of the Department. 35 P.S. § 7514(a). State law further provides that "no action of [the Department] adversely affecting a person shall be final as to that person until the person has had the opportunity to appeal the action to the [B]oard . . . ." 35 P.S. § 7514(c).

Section 717r(d)(1) of the Natural Gas Act provides that the United States Courts of Appeals "shall have original and exclusive jurisdiction over any civil action for the review of an order or action of a State administrative agency acting pursuant to Federal law . . . other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451, *et seq*.)." 15 U.S. Code § 717r(d)(1).

1. The Issue Of Ripeness Was Addressed By The First Circuit In *Berkshire Environmental*

The First Circuit squarely addressed the question of ripeness in the *Berkshire Environmental Action Team, Inc. v. Tennessee Gas Pipeline, LLC,* 851 F.3d 105 (1st Cir. 2017). In *Berkshire Environmental*, the First Circuit was faced with the question of whether the Court had jurisdiction to review a Water Quality Certification issued by the Massachusetts Department of Environmental Protection ("MassDEP") prior to the completion of a state administrative appeal process. *Id.* In Massachusetts, administrative agency action is subject to an appeal which includes the "the taking of evidence and *de novo* consideration." *Id.* at 113. The agency action does not become "final" until after an aggrieved party has completed the administrative appeal process, or chosen not to pursue such an appeal within the allotted period. *Id.* at 112 (the "the manner in which Massachusetts has chosen to structure its internal agency decision-making strikes us as hardly unusual . . . ."). The Court in *Berkshire Environmental* found that because the water quality certification had not been subjected to this state administrative appeal process, it was not a "final" agency action, and therefore not yet subject to federal judicial review. *Id*.

In reaching this conclusion, the Court noted that it is "a long-standing and well-settled 'strong presumption ... that judicial review will be available only when agency action becomes final.'" *Id*. at 109 (*quoting Bell v. New Jersey,* 461 U.S. 773, 778 (1983)). "In a literal sense, state agencies repeatedly take 'action' in

connection with applications for water quality certifications . . . we see no reason, though, to think that Congress wanted us to exercise immediate review over such preliminary and numerous steps that state agencies may take in processing an application before they actually act in the more relevant and consequential sense of granting or denying it." *Id.* at 108. "An agency action is 'final' only where it 'represents the culmination of the agency's decision making process and conclusively determines the rights and obligations of the parties with respect to the matters at issue.'" *Id.* at 111 (*quoting Rhode Island v. EPA*, 378 F.3d 19, 23 (1st Cir. 2004)).

The First Circuit also found that an earlier opinion of the U.S. District Court for the Middle District of Pennsylvania in *Tennessee Gas Pipeline Co. v. Delaware Riverkeeper Network*, 921 F. Supp. 2d 381, 392 (M.D. Pa. 2013) was based on the erroneous and now discredited reading of the Second Circuit's decision in *Islander E. Pipeline Co. v. Connecticut Department of Environmental Protection*, 482 F.3d 79 (2d Cir. 2006). *See Berkshire Environmental Action Team, Inc.*, 851 F.3d at 110; *Tennessee Gas Pipeline Co.*, 921 F. Supp. 2d at 392. As it had in the Pennsylvania District Court, in *Berkshire Environmental*, Tennessee Gas Pipeline Company, LLC ("Tennessee Gas") argued that the Second Circuit must have construed Section 717r(d)(1) of the Natural Gas Act to confer subject matter jurisdiction to review "non-final agency action." 851 F.3d at 110. The First Circuit

stated, "[w]e think it a stretch, however, to draw so sweeping an inference from a court's rendering of a decision on the merits where the question of subject matter jurisdiction was not squarely before or even addressed by the court." *Id.* "The Second Circuit in *Islander East* evidenced no awareness that it might be reviewing an incomplete state agency action for which state court review was not yet exhausted." *Id.*

The parallels between the Massachusetts and Pennsylvania regulatory regimes are too similar to ignore. Like Massachusetts, Pennsylvania has an administrative appeal process for challenging an agency action, which involves the taking of evidence and *de novo* consideration. *See Leatherwood, Inc. v. Com., Dept. of Environmental Protection*, 819 A.2d 604, 611 (Pa. Cmwlth. 2003). And, like Massachusetts, the agency action does not become "final" until after an aggrieved party has completed the administrative appeal process, or chosen not to pursue such an appeal within the allotted period. 35 P.S. § 7514(c); 25 Pa. Code § 1021.52. It must be concluded, therefore, that the water quality certification issued by the Department is not final, this Court does not yet have jurisdiction over this matter, and the matter must be heard before the EHB.

Indeed, the EHB has now three times concluded that that it is the appropriate venue to hear appeals of Department issued permits issued pursuant to Commission-jurisdictional pipeline projects. *See Lancaster Against Pipelines v.*

Commonwealth of Pennsylvania, Department of Environmental Protection, EHB Docket No. 2016-075-L (Consolidated with 2016-076-L and 2016-078-L), Slip Op. at 4 (May 10, 2017) (AD022-28); *Delaware Riverkeeper Network v. Commonwealth of Pennsylvania, Department of Environmental Protection*, EHB Docket No. 2015-060-M, Slip Op. at 4 (June 2, 2017) (AD029-36); *Delaware River Keeper Network v. Commonwealth of Pennsylvania, Department of Environmental Protection*, EHB Docket No. 2012-196-M, 2013 WL 604393 (February 1, 2013). In *Lancaster Against Pipelines*, the EHB issued an Opinion and Order in which it found that "there is no doubt whatsoever that the Department's certification of Transco's project was not a final action." *Lancaster Against Pipelines*, EHB Docket No. 2016-075-L, Slip Op. at 5 (AD026). The EHB went on to explain that:

> Pennsylvania law is very clear on this point: "[N]o action of the department [of environmental protection] adversely affecting a person shall be final as to that person until the person has had an opportunity to appeal the action to the [environmental hearing] board…" 35 P.S. § 7514(c). Pennsylvania courts have long held that a Departmental action is not final until an adversely affected party has had an opportunity to appeal the action to this Board. *Fiore v. DER*, 655 A.2d 1081, 1086 (Pa. Cmwlth. 1995); *Morcoal v. DER*, 459 A.2d 1303, 1307 (Pa. Cmwlth. 1983). Pennsylvania's procedures are nearly identical in substance to the Massachusetts procedures that the First Circuit found not to be final until the adversely affected party had an opportunity to take advantage of that state's hearing process. [*Berkshire*, 851 F.3d at 111-14].

Id. The EHB concluded by stating that "[u]nless the Third Circuit holds that no final action is required, or that the one that is required by Pennsylvania law may simply be disregarded, the appeal before us may proceed." *Id*.

2. The Failure To Require This Matter To Be Heard First By The EHB Would Force The Court To Rule On An Incomplete Record And Prejudice DRN

The failure to require this matter to be heard first by the EHB would have significant consequences for both the Court and DRN. First, it would require this Court to issue a ruling on an incomplete record. As noted above, generally, the record on a Department action is developed before the EHB, which conducts an evidentiary hearing and *de novo* review. It is through the evidentiary hearing before the EHB that the record is fully developed. *See Domiano v. Commonwealth, Department of Environmental Resources*, 713 A.2d 713, 717 (Pa. Cmwlth. 1998) (The court should allow the EHB to exercise its primary jurisdiction so that, *inter alia*, "a record can be fully developed . . . ."). As described below, this is important because the Department does not provide public notice for the PAG-10 NPDES permit or an opportunity for a public hearing or comment.

Second, failing to require that this matter be heard before the EHB would specifically deprive DRN of significant due process rights. The Pennsylvania courts have repeatedly found that it is by virtue of an appeal to the EHB, where a record can be fully developed, that "[a] party's due process rights are protected . . .

." *Fiore*, 655 A.2d 1081 (Pa Cmwlth. 1995) (*citing Commonwealth v. Derry Township*, 314 A.2d 868 (Pa. Cmwlth. 1973). For this reason, "no action of [PADEP] adversely affecting a person shall be final as to that person until the person has had the opportunity to appeal the action to the [B]oard . . . ." 35 P.S. § 7514(c). This matter must, therefore, be heard before the EHB so that full and complete record can be developed.

3. Pennsylvania Has A Mechanism For Transferring This Matter To The EHB

Pennsylvania has a mechanism accepted by this Court for transferring a matter to a state tribunal. *See McLaughlin v. Arco Polymers, Inc.*, 721 F.2d 426, 430 (3d Cir. 1983). 42 Pa.C.S.A. § 5103 provides that:

> (a) General rule.--If an appeal or other matter is taken to or brought in a court or magisterial district of this Commonwealth which does not have jurisdiction of the appeal or other matter, the court or magisterial district judge shall not quash such appeal or dismiss the matter, but shall transfer the record thereof to the proper tribunal of this Commonwealth, where the appeal or other matter shall be treated as if originally filed in the transferee tribunal on the date when the appeal or other matter was first filed in a court or magisterial district of this Commonwealth.
>
> *****
>
> (b) Federal cases.--
>
> (1) Subsection (a) shall also apply to any matter transferred or remanded by any United States court for a district embracing any part of this Commonwealth.

> *****
>
> (d) Definition.--As used in this section "tribunal" means a court or magisterial district judge or other judicial officer of this Commonwealth vested with the power to enter an order in a matter, the Board of Claims, the Board of Property, the Office of Administrator for Arbitration Panels for Health Care and any other similar agency.

Under Section 5103, a federal court may transfer a case to a state tribunal when the federal court lacks jurisdiction. *See Elec. Lab Supply Co. v. Cullen*, 782 F. Supp. 1016, 1021 (E.D. Pa. 1991), *affd. sub nom. Elec. Lab. Supply Co. v. Cullen*, 977 F.2d 798 (3d Cir. 1992). The EHB is a tribunal to which this matter can and should be transferred. *See Presock v. Davis*, 1 Pa. D. & C. 4th 218 (Greene 1989).

STATEMENT OF THE ISSUES

1. Whether the PAG-10 NPDES permit is **not** a final order and **not** ripe for review by this Court. (*see* Jurisdictional Statement)

   Suggested Answer: Yes.

2. Whether PADEP's issuance of the PAG-10 NPDES permit failed to comply with the public participation rights as required by the Clean Water Act.

   Suggested Answer: Yes.

STATEMENT OF RELATED CASES

Similar challenges are presently pending before this Court in the matters of *Delaware Riverkeeper Network v. Secretary Pennsylvania Dept. of Environmental Protection*, No. 16-2211; *Lancaster Against Pipelines v. Secretary Pennsylvania*

Dept. of Environmental Protection, No. 16-2212; *Nesbitt v. Secretary Pennsylvania Dept. of Environmental Protection*, No. 16-2218; *Sierra Club v. Secretary Pennsylvania Dept. of Environmental Protection*, No. 16-2400; *Delaware Riverkeeper Network v. Secretary Pennsylvania Dept. of Environmental Protection*, No. 17-1456. Collectively, these cases share some common legal issues with the case at bar.

STATEMENT OF THE CASE

The Project involves the construction and operation of an interstate natural gas pipeline. *See* Final Approval of PAC-10; DEP00000076-77; JA067-068. In Pennsylvania, the Project is a large scale interstate natural gas pipeline that will traverse Columbia, Lycoming, Wyoming, Clinton, Luzerne, Northumberland, Schuylkill, Lebanon, and Lancaster Counties. *See* Application for Water Quality Certification; DEP00000066-128; JA057-119.

Transco filed an application with the Federal Energy Regulatory Commission ("Commission") under Section 7 of the Natural Gas Act ("NGA"), 15 U.S.C. § 717f, seeking a Certificate of Public Convenience and Necessity ("Certificate of Public Convenience") to construct and operate the Project on March 31, 2015. *See* Application for Certificate of Public Convenience, AD001-3. In order to obtain a Certificate of Public Convenience, Transco was required to first obtain a Clean Water Act Section 402 PAG-10 NPDES general permit from

the Department. Environmental Assessment, Atlantic Sunrise Project, AD005-9; *see also* 33 U.S.C. § 1342(a). Subsequently, Transco submitted a Notice of Intent "Application" to the Department for the permit. *See* Notice of Intent for Atlantic Sunrise Project; DEP00000066; JA057 (Transco titling its submission to the Department as a "PAG-10 Permit Application the Atlantic Sunrise Project"). On or about April 10, 2017, the Department issued the PAG-10 NPDES permit. *See* Final Approval of PAG-10; DEP00000626-664; JA464-502.

On or about October 19, 2017, DRN filed the above-captioned action for review of the Department's decision to grant the PAG-10 NPDES Permit for the Project.

STANDING

To have standing to bring this appeal, an organization like Delaware Riverkeeper Network must demonstrate three factors: (1) that one or more of its members have suffered or will suffer an "injury in fact"; (2) that this appeal is germane to the organization's purpose; and (3) that participation of individual members is not necessary for the appeal. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 181 (2000); *Natural Resources Def. Council v. Southwest Marine, Inc.*, 236 F.3d 985, 994 (9th Cir. 2000). "Injury in fact" is shown when a member suffers an injury to his or her interests that is both actual or imminent and concrete and particularized, the injury is fairly

traceable to the actions of the respondent/appellee, and the injury is likely to be redressed by a favorable ruling. *See Friends of the Earth*, 528 U.S. at 180- 81; *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Each of these elements is satisfied here.

DRN has standing as a not-for-profit environmental protection organization whose members, including its executive director, use and enjoy the specific geographic areas affected by construction and operation of the Project, and whose recreational and aesthetic interests will be harmed by the faulty and unlawful water quality certification that PADEP has issued. *See* Maya van Rossum Declaration at ¶¶ 6-20, AD096-103; *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 342-43 (1977). Additionally, the Department's violation of the public participation requirements of the Clean Water Act make it substantially more likely that DRN will suffer the harms described in the supporting affidavit now and in the future, thus demonstrating causation. *See Florida Audubon Soc'y v. Bentsen*, 94 F.3d 658, 669 (D.C. Cir. 1996); *see also* Maya van Rossum Declaration at ¶¶ 18-22; AD103-104. The Delaware Riverkeeper Network's stated purpose is to preserve and protect the Delaware River Basin Watershed; this purpose is directly germane to the appeal of the unlawful certification of the pipeline project. Maya van Rossum Declaration at ¶¶ 3-5; AD09.

Construction and operation of the Project will harm DRN's protected recreational and aesthetic interests in the environment, in particular the degradation and loss of valuable wetlands and habitat, thus constituting injury in fact within the zone of interests of the Clean Water Act. *See* Maya van Rossum Declaration at ¶¶ 6-20; AD096-103; *Laidlaw*, 528 U.S. at 180 81; *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1236 (D.C. Cir. 1996); *Bentsen*, 94 F.3d at 667.

Additionally, because DRN's appeal concerns the question of whether the NPDES General Permit issued to Transco complies with the public participation opportunity requirements of the CWA and is lawful, it is not necessary for any individual member of the Delaware Riverkeeper Network to participate in this proceeding in order to secure effective relief for all of its injured members. *See Warth v. Seldin*, 422 U.S. 490, 515 (1975) ("If . . . the association seeks a declaration, injunction, or some other form of prospective relief, it can be reasonably supposed that the remedy, if granted, will inure to the benefit of those members . . . actually injured"); *see also* Maya van Rossum Declaration at ¶¶ 18-22; AD103-104.

The harms identified above and in the attached Declaration would be redressed by this Court rescinding NPDES permit, or remanding the decision to ensure that the issuance of the NPDES permit complies with the Clean Water Act, Pennsylvania's water quality standards, and the Pennsylvania Code. *See Lujan*, 504

U.S. at 572 n.7 (1992) (discussing relaxed redressability requirement for parties invoking procedural rights); *City of Jersey City v. CONRAIL*, 668 F.3d 741, 745 (D.C. Cir. 2012) (injury from increased risk of environmental harm redressable by remand requiring review where review could inform conditions imposed on underlying action). DRN ultimately seeks to vindicate environmental concerns, and therefore DRN has standing.

STANDARD OF REVIEW

Any review by this Court of the merits of the Department's approval of Transco's PAG-10 NPDES permit request is governed by the Administrative Procedure Act ("APA"). 5 U.S.C. §§ 701 to 706; s*ee also Ohio Valley Envtl. Coalition v. Aracoma Coal Co.*, 556 F.3d 177, 192 (4th Cir. 2009) (claims challenging federal agency action under the Clean Water Act are subject to judicial review under the APA). Under the APA, "a reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be [] arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 376 (1989) (internal quotations omitted); *see also Specter v. Garrett*, 971 F.2d 936, 944 (3rd Cir. 1992). While this standard is deferential, "[d]eference . . . does not mean blind obedience." *Garvey v. Nat'l Transp. Safety Bd.*, 190 F.3d 571, 580 (D.C. Cir. 1999). Where an agency "entirely failed to consider an important aspect of the

problem," or failed to consider factors required by law, the action must be set aside. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

The standard of review requires that the agency reviewed all the relevant factors:

> The task of a court reviewing agency action under the APA's arbitrary and capricious standard is to determine whether the agency has examined the pertinent evidence, considered the relevant factors, and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.

Airport Impact Relief, Inc. v. Wykle, 192 F.3d 197, 202 (1st Cir. 1999) (*quoting Penobscot Air Servs., Ltd. v. Federal Aviation Admin.*, 164 F.3d 713, 719 (1st Cir. 1999) (internal quotations omitted). "The reviewing court must determine whether the decision was based on a consideration of the relevant factors and whether the agency made a clear error of judgment." *Airport Impact Relief*, 192 F.3d at 202 (citing *Oregon Natural Resources Council*, 490 U.S. at 378).

> While this is a highly deferential standard of review, it is not a rubber stamp. The reviewing court must undertake a 'thorough, probing, in-depth review' and a 'searching and careful' inquiry into the record. Only by carefully reviewing the record and satisfying itself that the agency has made a rational decision can the court ensure that agency decisions are founded on a reasoned evaluation of the relevant factors.

Id. at 378 (citations omitted).

The reviewing court must be satisfied that the agency not only employed procedures which conform to the procedural requirements of the APA, but which also conform to the agency's required procedures under the CWA. *See Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 713 (8th Cir.1979). Where important aspects of the problem are left out because standard procedures were short-circuited, the agency's resulting decision is arbitrary and capricious. *Cotton Petroleum Corp. v. Dep't of Interior*, 870 F.2d 1515, 1525-27 (10th Cir. 1989); *see also Big Horn Coal Co v. Temple*, 793 F.2d 1165, 1169 (10th Cir. 1986). Agencies are under an obligation to follow the governing regulations, procedures, and precedents, or provide a rational explanation for their departures. *INS v. Yang*, 519 U.S. 26, 32 (1996) ("if [the agency] announces and follows—by rule or by settled course of adjudication—a general policy by which its exercise of discretion will be governed, an irrational departure from that . . . could constitute action that must be overturned."); *Midwestern Transp., Inc. v. Interstate Commerce Comm'n*, 635 F.2d 771, 777 (10th Cir. 1980) ("[T]he court must require the agency to adhere to its own pronouncements or explain its departure from them . . .").

SUMMARY OF ARGUMENT

The PAG-10 NPDES permit issued to Transco is not ripe for review by this Court, as it is not a "final" order of the Department. *See Berkshire Environmental*, 851 F.3d 105 (1st Cir. 2017); *Lancaster Against Pipelines*, EHB Docket No. 2016-

075-L (Consolidated with 2016-076-L and 2016-078-L) (May 10, 2017). Rather, the matter must first be heard by the Pennsylvania Environmental Hearing Board before it can become final. Failing to require that this matter first proceed before the EHB would require that this Court consider the matter on an incomplete record and would deprive DRN of significant due process rights. Accordingly, this Court must transfer this matter to the EHB pursuant to 42 Pa.C.S.A. § 5103.

To the extent this Court finds that it has jurisdiction, the PAG-10 NPDES general permit issued to Transco is unlawful for several reasons. First, the Clean Water Act ("CWA") imposes at least three separate public participation requirements for NPDES permits, each of which the Department failed to provide here. *See* 33 U.S.C. § 1342(a)(1); 33 U.S.C. § 1342(j), 33 U.S.C. § 1251(e). Specifically, the Department failed to provide any public participation opportunities, thereby stripping all potential opportunities for public notice, review, and comment on Transco's Notice of Intent ("NOI") for coverage under the PAG-10 NPDES general permit. A combination of federal case law, state case law, and agency rulemaking and guidance together dictate that the Department was required to allow for public participation; however, the Department's issuance of coverage locked DRN, and the public, out of providing any input on this permit.

Second, one of the procedural requirements that the Clean Water Act expressly imposes upon the states when issuing a Section 401 water quality

certifications is the need for the states to follow a clear process for providing public notice. The Department expressly conditioned the Section 401 water quality certification for this Project on the future issuance of several substantive state permits, including the PAG-10 NPDES permit, that together show a project applicant has complied with Pennsylvania water quality standards. The conditional Section 401 water quality certificate is not the product of any review of Pennsylvania's water quality standards. Therefore, public notice of the certificate application itself is functionally meaningless. To comply with Section 401(a)(1) the Department was required to provide adequate public notice of the underlying substantive permits that comprise the water quality certification. However, the Department failed to do so, as it is undeniable that there was no public notice for the PAG-10 NPDES permit for the Project. As a result, the Department failed to provide constitutionally sufficient notice and robbed DRN and the public of their opportunity to meaningfully participate in the permitting process.

This lack of public participation is particularly problematic here because, to the extent this Court finds it has jurisdiction, when reviewing any challenge to permits related to Commission-jurisdictional Projects the Court is limited to reviewing the adequacy of the agency's decision based solely on the administrative record that was before the agency at the time it made its decision. Therefore, because the Department completely prevented DRN from providing comments,

such a substantive challenge would be futile as DRN had no opportunity to develop the record. Therefore, the Department's failure to comply with the public participation requirements of the Clean Water Act materially harmed DRN's ability to challenge substantive portions of the PAG-10 NPDES permit.

Furthermore, it should be made clear that DRN is not challenging the Department's formulation of the PAG-10 NPDES general permit itself; rather, DRN specifically challenges the Department's authorization of PAG-10 NPDES permit coverage for Transco's pipeline Project. *See* DRN's Petition for Review, at 1. Indeed, the general permit does not include any provision that explicitly prevents, or even addresses, the public participation requirements of the CWA as discussed here. As such, there is nothing in the PAG-10 NPDES general permit preventing the Department from complying with the public participation requirements of the CWA, and therefore, there is nothing specific to the PAG-10 general permit to contest in that context. Instead, DRN's appeal intentionally focuses on the Department's implementation of its PAG-10 NPDES permit coverage for this Project, and specifically challenges the Department's failure to provide public participation opportunities as required by the Clean Water Act for the NOI for Transco's Project. Had the Department merely followed the requirements of the Clean Water Act and provided the appropriate public

participation opportunities for the NOI, DRN would have no reason to bring this procedural argument regarding the issuance of NPDES coverage.

Ultimately, the Department and Transco can have no answer for a situation where a landowner who has a stream running through his/her back yard would have no notice or opportunity to engage with the Department regarding the PAG-10 NPDES permit **prior** to the Department's authorization of a potential withdrawal from or discharge to that landowner's stream numbering in the millions of gallons. The Department's interpretation of its responsibilities would also leave this Court with no ability to review any authorizations issued by the Department for PAG-10 NPDES general permits pursuant to a Commission-jurisdictional project prior to construction or operation. As DRN has made clear, DRN had no notice of when the NOI was submitted, what was in the NOI, when the Department considered the NOI complete, and therefore whether the NOI met the substantive criteria for coverage under the NPDES permit. *See* van Rossum Affidavit, at ¶ 20; AD103.

As such, the Department's actions here are unlawful and the Court should rescind or remand the issuance of the PAG-10 NPDES permit for the Project until such time that the Department complies with the Clean Water Act's public participation requirements. *See* 33 U.S.C. § 1342(a)(1); 33 U.S.C. § 1342(j), 33 U.S.C. § 1251(e), 33 U.S.C. § 1341(a)(1).

STATUTORY AND REGULATORY FRAMEWORK

I. The Clean Water Act

1. Section 402 of the Clean Water Act

The Clean Water Act, 33 U.S.C. §§ 1251–1387, regulates the integrity of the Nation's waters. Section 402 of that Act requires the permitting of discharges into navigable waters under the NPDES or a federally approved state implemented pollutant discharge elimination system. *See South Fla. Water Mgmt. Dist. v. Miccosukee Tribe*, 541 U.S. 95, 102 (2004). EPA's Clean Water Act regulations expressly authorize the Department to use general permits for certain categories of activities and discharge impacts where prescribed regulatory conditions have been met. *See* 49 C.F.R. § 122.28.

Pennsylvania implements the NPDES program through Chapter 92 of the Pennsylvania Code. *See* 25 Pa. Code § 92a.23. The Department is authorized to issue a "General" NPDES permit, in lieu of issuing individual permits, for clearly and specifically described categories of point source discharges. *See* 25 Pa. Code § 92a.54. On July 11, 2015, the Department published notice in the *Pennsylvania Bulletin* of the availability of NPDES PAG-10 permit. *See* 45 Pa.B. 3775.

Once a general permit, such as the NPDES PAG-10, takes effect, a qualifying discharger can obtain coverage under the permit through a process that includes the submission to the Department of a Notice of Intent ("NOI") certifying

qualification for coverage by demonstrating compliance with a number of substantive requirements. For example,

> At a minimum, the NOI must identify each point source for which coverage under the general permit is requested; demonstrate that each point source meets the eligibility requirements for inclusion in the general permit; demonstrate that the discharge from the point sources, individually or cumulatively, will not cause or contribute to a violation of an applicable water quality standard established under Chapter 93 (relating to water quality standards) and include other information the Department may require.

25 Pa. Code § 92a.23.The NPDES permit therefore includes substantive criteria and terms and conditions to ensure that eligible projects comply with Pennsylvania and Federal law. The Clean Water Act incorporates and requires robust public participation rights pursuant to the NPDES permitting program. The statute itself states that:

> [p]ublic participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, *plan, or program* established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States.

33 U.S.C. § 1251(e) (emphasis added); *see also Costle v. Pacific Legal Found.*, 445 U.S. 198, 216 (1980) (the "general policy of encouraging public participation is applicable to the administration of the NPDES permit program"). Public participation is thus an essential element of the NPDES program: "[t]he public must have a genuine opportunity to speak on the issue of protection of its waters." *Natural Res. Def. Council, Inc. v. EPA*, 859 F.2d 156, 177 (D.C. Cir.

1988) (quoting text available in S. Rep. No. 92-414, p. 72 (1971), *reprinted in*1972 U.S.C.C.A.N. 3668). Particularly with respect to approval of discharges under the NPDES program, the rationale for such public participation is clear:

> policy issues and most technical issues relating to the issuance of NPDES permits should be decided in the most open, accessible forum possible, and at a stage where the [permitting authority] has the greatest flexibility to make appropriate modifications to the permit.

44 Fed. Reg. 32854, 32885 (Jun. 7, 1979). It is well-established that for meaningful public participation, the public must be provided adequate notice to be able to evaluate a request for a government authorization or permit. *See, e.g., Ohio Valley Envtl. Coalition v. U.S. Army Corps of Engineers*, 674 F.Supp.2d 783, 800-02 (S.D. W.Va. 2010) (noting that "[c]ompletion and public notice are inextricably linked" and rejecting public notice and comment process undertaken on incomplete request); *Cook Inletkeeper v. EPA*, 400 F. App'x 239, 241 (9th Cir. 2010) (state administrative agency conceded that their finding "was flawed because of a lack of meaningful opportunity for public comment" on a Clean Water Act authorization). The notice of a request is directly tied to the commencement of public notice, to offer meaningful feedback the public needs a full picture of the project and its effects. *See Ohio Valley Envtl. Coalition,* 674 F.Supp.2d. at 802 (finding that federal agency "unreasonably found the applications were complete and issued public notices that plainly did not contain sufficient information to allow for meaningful public comment"). The CWA therefore requires that the public be

afforded certain public participation opportunities on the issuance of coverage under all NPDES permits, such as the NPDES PAG-10 permit. The intended transparency of process, and engagement with the public, is reflected in a number of separate public participation requirements of the CWA for this type of permit.

First, there is a requirement that requests for coverage under NPDES permits be made public. *See* 33 U.S.C. § 1342(j). Specifically, the CWA requires that "[a] copy of each permit application and each permit issued under [section 402] shall be available to the public." *Id*. Second, the CWA requires that the EPA, or a state, may only issue a NPDES permit "**after** opportunity for public hearing." *See* 33 U.S.C. § 1342(a)(1) (emphasis added); *see also* 33 U.S.C. § 1342(b)(3) (for a state to serve as permitting authority, state law must provide adequate authority to ensure that the public receive notice of each application for a permit and an opportunity for a public hearing before a ruling on each such application). Third, the CWA requires "public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State." 33 U.S.C. § 1251 (e). Because subsection 1251(e) applies to effluent limitations that are set forth in Notices of Intent, the public must be given an opportunity to participate in their development. The Department failed to comply with each of these three public participation requirements when it issued the PAG-10 NPDES permit for Transco's Project.

2. Section 401 of the Clean Water Act

Section 401 of the Clean Water Act prohibits a federal agency from granting a license or permit for an activity that may result in a discharge unless the state has granted a water quality certification or waived certification. 33 U.S.C. § 1341(a) ("No license or permit shall be granted if certification has been denied by the State . . . ."). An applicant seeking a certificate of public convenience and necessity from the Commission for an interstate natural gas pipeline under Section 7 of the NGA, 15 U.S.C. § 717f, must comply with Section 401 of the CWA if the activity may result in a discharge. *See* Section 3(d) of the NGA, 15 U.S.C. § 717b(d) (expressly preserves state rights under several environmental statutes, including the CWA). Additionally, Section 401(a)(1) requires that the Department "shall establish procedures for public notice in the case of all applications for certification by it." 33 U.S.C. § 1341(a)(1).

Here, the Section 401 water quality certification the Department issued required Transco to obtain three underlying Pennsylvania state permits. These substantive state permits include: 1) a Chapter 102 Erosion and Sediment Control General Permit for Earth Disturbance Associated with Oil and Gas Exploration, Production, Processing or Treatment issued pursuant to Pennsylvania's Clean Streams Law and Storm Water Management Act (32 P.S. §§ 680.1 – 680.17), 2) Chapter 105 Water Obstruction and Encroachment Permits for the construction,

operation and maintenance of all water obstructions and encroachments associated with the project pursuant to Pennsylvania's Clean Streams Law, Dam Safety and Encroachments Act (32 P.S. §§ 673.1 – 693.27), and Flood Plain Management Act (32 P.S. §§ 679.101 –679.601), and 3) a National Pollutant Discharge Elimination System ("NPDES") permit for the discharge of water pursuant to Pennsylvania's Clean Streams Law (35 P.S. §§ 691.1 – 691.1001). *Id.* The last of these substantive state permits is at issue here.

ARGUMENT

I. PADEP Has Failed To Comply With The Public Participation Opportunity Requirements For NPDES Permits As Required By The Clean Water Act

As described further below, *see infra*, at 37-51, the Department violated statutory public participation requirements of the Clean Water Act by failing to provide an opportunity for public comment and an opportunity to request a public hearing on the NPDES NOI issued for the Project prior to the Department's authorization of coverage under the PAG-10 NPDES general permit. *See, e.g.*, 33 U.S.C. § 1342(a)(1); 33 U.S.C. § 1342(j); 33 U.S.C. § 1251(e).

On December 29, 2016, Transco submitted its Notice of Intent for coverage under the NPDES general permit. *See* Letter of Transmittal; DEP00000066; JA057 However, the Department provided no public notice that an NOI had been submitted, no public notice that the NOI was complete, no public notice or

opportunity for the receipt of public comment related to the NOI, and no opportunity for a public hearing. *See, e.g.*, Oral Argument Transcript, *Delaware Riverkeeper Network, et al. v. Secretary of the Pennsylvania Department of Environmental Protection*, et al., at 44; AD070 (Counsel for the Department conceding that "there is no comment period" for the NPDES PAG-10 permit, and that there "is not notice in the Pennsylvania Bulletin of receipt" of NPDES PAG-10 permits). These are the facts of the case, and they are undisputed.

Because the Department did not provide public participation opportunities, the dispositive question before the Court is whether the NOI is an "application" subject to the public participation rights as required by the CWA. A combination of federal case law, state case law, and the language contained in the Clean Water Act regulations and EPA agency guidance documents collectively demand that NOIs, such as the one submitted by Transco, be subject to the public participation opportunities of the Clean Water Act.

1. An NOI for a NPDES General Permit Is An "Application" Pursuant To Federal Case Law

There are only three Circuit Courts who have addressed whether general permit NOIs are subject to the public participation requirements of the CWA, and two of those cases support DRN's claims. These three cases are as follows: *Envtl. Def. Ctr. v. E.P.A.*, 344 F.3d 832 (9th Cir. 2003) (hereinafter "*EDC*"); *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486 (2d Cir. 2005) (hereinafter "Waterkeeper");

Texas Ind. Producers & Royalty Owners Assn v. Environmental Protection Agency, 410 F .3d 964 (7th Cir. 2005). The first two listed cases from the Ninth and Second Circuits align with DRN's position. DRN respectfully submits that the reasoning of the third case does not withstand close scrutiny.

In *EDC*, the Ninth Circuit considered requirements under the Clean Water Act for notice and comment upon NOIs issued for municipal sewage systems. *See generally EDC*, 344 F.3d 832. There, the environmental petitioners argued that because "the public receive[d] neither notice nor opportunity for hearing regarding an NOI" that it "fail[ed] to provide for public participation as required by the Clean Water Act. *Id*. at 856 (citing 33 U.S.C. § 1342(j); and 33 U.S.C. § 1342(a)(1)). The EPA argued, similar to the Department and Transco, that NOIs are not permit applications "and therefore are not subject to the public availability and public hearing requirements of the Clean Water Act." *Id*. The Court ultimately agreed with the environmental petitioners and against the EPA. *Id*.

The court reviewed the EPA's decision to not require notice and comment on NOIs under the *Chevron* test. *EDC*, 344 F.3d at 853, 856-857 ("In reviewing a federal administrative agency's interpretation of a statute it administers, we first determine whether Congress has expressed its intent unambiguously on the question before the court . . . [i]f, instead, Congress has left a gap for the administrative agency to fill, we proceed to step two. At step two, we must uphold

the administrative regulation unless it is arbitrary, capricious, or manifestly contrary to the statute") (citations and internal quotations omitted).

The court found that under the first prong of the *Chevron* test congressional intent was clear because "NOIs are functionally equivalent to the permit applications Congress envisioned when it created the Clean Water Act's public availability and public hearing requirements." *EDC*, 344 F.3d at 857. Specifically, the Court concluded, "clear Congressional intent requires that NOIs be subject to the Clean Water Act's public availability and public hearings requirements." *Id*. at 856. The Court further noted that the EPA formally acknowledged that "technical issues relating to the issuance of NPDES permits should be decided in 'the most open, accessible forum possible, and at a stage where the [permitting authority] has the greatest flexibility to make appropriate modifications to the permit.'" *Id*. at 856-857 (citing 44 Fed. Reg. 32,854, 32,885 (June 7, 1979)).

In coming to this conclusion, the Ninth Circuit considered the history and development of the CWA. *Id*. In particular, the Court held that modern NOIs should be deemed the functional equivalent of the permit applications developed before them by examining the CWA's varying modes of public participation over the years. *Id*. at 857-858. This functional analysis addressed both the real world enforcement outcomes of processes affecting public participation and congressional intent regarding the permit application. *Id*.

The Second Circuit has also addressed the issue of public participation requirements for general permits issued pursuant to the CWA in *Waterkeeper*. *See Waterkeeper*, 399 F.3d 486 (2d Cir. 2005). In *Waterkeeper*, the Second Circuit evaluated the regulation of water pollutants contained in the runoff from concentrated animal feeding operations and followed the reasoning in the Ninth Circuit's decision. *See Waterkeeper*, 399 F.3d at 497. Paralleling the Ninth Circuit's functional analysis of NOIs under the general permit system, the court held that nutrient management plans must be subject to public participation requirements of the CWA. *Id*. at 503-504.

Importantly, the Court in *Waterkeeper* went a step further than the Ninth Circuit did in *EDC*, finding that the government's exclusion of public participation not only violated the clear intent of the Clean Water Act, but also substantively damaged EPA and the public's ability to enforce CWA regulations. *Id*. Citing the legislative history of the CWA, the court emphasized the importance of public participation as an enforcement tool, critiquing the government's methods, stating:

> citizens would be limited to enforcing the mere requirement to develop a nutrient management plan, but would be without means to enforce the terms of the nutrient management plans because they lack access to those terms. This is unacceptable.

Id. Instead of protecting public participation merely to fulfill the mandates of the CWA, the Court found that public notice and comment are central to meaningful enforcement. *Id*. at 503. In this sense, the Second Circuit's holding took the

functional analysis of the Ninth Circuit one-step further in recognizing the practical effects of a restrained public voice in stormwater regulation and enforcement.

In contrast to well-reasoned decisions in *EDC* and *Waterkeeper* stands the Seventh Circuit's decision in *Texas Independent Producers*. In that case the petitioners presented a procedural challenge to a general permit's failure to provide the public with access to the NOI, as well as a failure to allow the public to engage in a fair hearing. *Texas Ind. Producers*, 410 F .3d at 967. Like in *EDC*, the Seventh Circuit applied a *Chevron* analysis to determine whether the statute had been properly interpreted. *Id*. at 978. In the first step of the *Chevron* test, determining whether congressional intent regarding public participation in permitting is clear from statutory language, the Court found that because the CWA did not specifically mention NOIs, but rather only "permits" and "permit applications," the intent of Congress remained unclear as to these documents. *Id*.

By deciding that the terms were "at best" ambiguous, the Court essentially collapsed the two-part *Chevron* test into a single analysis, accepting EPA's linguistic distinction between NOIs as opposed to traditional permits. *Id*. The Court could have easily found, as the Ninth Circuit did under its "functional analysis," that Congress was clearly referencing just the type of permitting occurring under the general permit scheme when it required public participation in permits and permit applications. Instead, the Court gave so much deference to the EPA that the

agency's understanding also informed the Court's interpretation of the statute's language in step one. Thus, the Court cut off an essential, deeper inquiry into the legislative history of the CWA and the central role of public participation in CWA enforcement. Such a deeper inquiry would have weighed heavily in favor of the Ninth Circuit and Second Circuit's interpretation. *See also Costle*, 445 U.S. at 216 (citing the "general policy of encouraging public participation is applicable to the administration of the NPDES permit program"). The more detailed analyses in *EDC* and *Waterkeeper* are entitled to greater weight than the cursory analysis in *Texas Independent Producers* .[1]

2. An NOI for a NPDES General Permit Is An "Application" Pursuant To State Case Law

In addition to there being a 2-1 split among federal appeals courts in favor of NOIs being subject to the public participation opportunities of the Clean Water Act, there is a similar 2-1 split in cases decided by state courts. The three primary cases are as follows: *Sierra Club Mackinac Chapter v. Department of Environmental Quality*, 747 N.W.2d 321, 334-35 (Mich. Ct. App. 2008) (hereinafter "*Mackinac*"); *Minn. Ctr. for Envtl. Advocacy v. Minn. Pollution Control Agency*, 660 N.W.2d 427, 435 (Minn. Ct. App. 2003) (hereinafter

[1] The Seventh Circuit in *Texas Independent Producers*, "ignored the larger implications of scaling back public participation in favor of deference to the agency." Jennifer Seidenberg, *Texas Independent Producers & Royalty Owners Ass'n v. Environmental Protection Agency: Redefining the Role of Public Participation in the Clean Water* Act, 33 Ecology L.Q. 699, 711 (2006).

"*Minnesota Center*"); and *Natural Resources Defense Council, Inc. v. N.Y.S. Dep't of Envtl. Conservation*, 34 N.E.3d 782 (NY Ct. App. 2015) (hereinafter "*NRDC*"). Again, the first two cases explicitly support DRN's position, while the third case is distinguishable.

Sierra Club Mackinac Chapter v. Department of Environmental Quality involved a challenge to the public participation opportunities provided in a state-administered NPDES permitting program. *See Mackinac*, 747 N.W.2d at 334-35. (challenging public participation under Michigan's CAFO regulations); *see also* Terence J. Centner, *Courts and the EPA Interpret NPDES General Permit Requirements for CAFOs*, 38 Envtl. L. 1215, 1228-29 (2008) (analyzing *Mackinac*, including the issue of inadequate public participation). The petitioner challenged Michigan's concentrated animal feeding operation's general permitting provisions, claiming that authorization for discharges under the state's general permit did not satisfy the requirements of the Clean Water Act concerning discharge rates and public participation. *Id*. at 323, 334. The court noted that the "Clean Water Act further provides that there be an 'opportunity for public hearing' **before** an NPDES permit issues," and aligned its reasoning with the *Waterkeeper* case. *Id*. at 334 (citing 33 USC 1342(a)(1), 1342(b)(3)) (emphasis original). The court concluded that Michigan's

general permit program "d[id] not provide for the requisite public participation." *Id*. at 335.

In *Minn. Ctr. for Envtl. Advocacy v. Minn. Pollution Control Agency*, the NPDES general permit required that the municipality must develop a Storm Water Pollution Prevention Program ("SWPPP"). *Minn. Ctr. for Envtl. Advocacy*, 660 N.W.2d at 435. The plaintiffs argued that because the individual SWPPP sets forth how permittees will comply with the general permit and because the public does not have an opportunity to be heard on the terms of each SWPPP, the general permit effectively deprived the public of notice and comment. *Id*. at 434. The court found that under the general permit "[t]here is no public notice of the application, nor is there public notice of the SWPPP. There is also no opportunity for public comment or delay of coverage under the general permit." *Id*. at 435. The court concluded – following the reasoning in *EDC* – that "SWPPPs are the state equivalent to the permit applications required by the federal Clean Water Act and are subject to the CWA's public availability and public hearing requirements," and that "[b]ecause there is no opportunity for public hearings on each SWPPP, the general permit procedure violates the public participation requirements of the Clean Water Act." *Id.*; *see also* Danielle J. Diamond, *Illinois' Failure to Regulate Concentrated Animal Feeding Operations in Accordance with the Federal Clean*

Water Act, 11 Drake J. Agric. L. 185, 189, 192–93 (2006) (concluding that Illinois' permitting scheme also violates the CWA's public participation requirements).

In opposition to those two cases is a distinguishable case out of the state of New York. In a narrow holding, the court in *Natural Resources Defense Council, Inc. v. N.Y.S. Dep't of Envtl. Conservation* concluded that the NOIs at issue were not subject to public participation. *NRDC*, 34 N.E.3d 782. There, environmental groups challenged the issuance of state pollutant discharge elimination system general permit for stormwater discharges from small municipal separate storm sewer systems. *Id*. at 783-784. The court held that because the EPA had not yet amended the regulations that were struck down in the *EDC* case to require public participation, stating that New York's "general permitting program for small MS4s must comply with them . . . and DEC need not go beyond the specifications of those regulations." *Id*. at 794.

The court importantly acknowledged the limitation of its holding stating that "we obviously may not engage in *Chevron* analysis to review EPA's interpretation" regarding "whether EPA has permissibly interpreted the Clean Water Act to mean that an NOI is not a 'permit application.'" *Id*. at 793-794. The court further acknowledged the limitation of its holding when it noted that EPA's regulations "do[] not appear facially consistent" with the position that NOIs are not applications, and it is "the task of the federal courts, not this Court, to figure out

whether section 122.34(d)(1) or anything else in EPA's 1999 regulations is inconsistent" with the conclusion that an NOI is not an application. *NRDC*, 34 N.E.3d at fn. 15. In a powerful dissent, Judge Rivera correctly noted that "[t]his inconsistency alone undermines the State's argument that the NOI is something other than a permit or permit application." *Id*. at 813. Lastly, as explained below, considering that the EPA has amended its regulations to require public participation opportunities, the court's holding is largely moot.

3. The Environmental Protection Agency Has Revised Its Rules, Regulations, and Guidance Documents Requiring Public Participation Opportunities With Regard to NOI's Submitted For A General Permit

In light of the relevant federal and state case law, any regulatory scheme that allows discharges from applicants without public input is inconsistent with the public participation requirements delineated by the CWA. In response to these cases, in 2008 the EPA adopted a revised concentrated animal feeding operation rule that remedied the public participation shortcomings of the 2003 Rule relating to a NPDES general permit. *See* 40 C.F.R. § 122.23(h)(1). Specifically, this regulation provides that the "notice of intent submitted by the CAFO" must be made "available for public review and comment." *Id*. It further provides that "[t]he process for submitting public comments and hearing requests, and the hearing process if a request for a hearing is granted, must follow the procedures applicable to draft permits set forth in 40 C.F.R. §§ 124.11 through 124.13," and there must

be a response from the agency "to significant comments received during the comment period." *Id*.

Additionally, in response to the *EDC* case the EPA also issued guidance documents that explicitly directed states to comply with the court's decision by providing opportunities for public participation and hearings on NOIs. *See* Memorandum from James A. Hanlon, Director, Environmental Protection Agency, Office of Wastewater Management, *Implementing the Partial Remand of Stormwater Phase II Regulations Regarding Notices of Intent & General Permitting for Phase II MS4s*, (April 16, 2004), available at: https://www3.epa.gov/npdes/pubs/hanlonphase2apr14signed.pdf. Although the EPA guidance is not binding on this Court, judicial deference to EPA's interpretation is "particularly appropriate" under a cooperative federalism statute such as the Clean Water Act. *Rodriguez v. Perales*, 86 N.Y.2d 361, 367 (1995); *see also Brown v. Wing*, 93 N.Y.2d 517, 524 (1999) (noting that, where a state agency administers a federal statute, it would be appropriate to defer to that agency's interpretation where it comports with that of the responsible federal agency).

II. Transco's NOI for the PAG-10 NPDES General Permit Is An "Application" And Subject To The Public Participation Requirements of the CWA

The NOI that Transco submitted is an application as described in the Clean Water Act and relevant case law, which required the Department to provide a

number of public participation opportunities with regard to its review of Transco's NOI. *See* 33 U.S.C. § 1342(a)(1); 33 U.S.C. § 1342(j), 33 U.S.C. § 1251(e). The NOI at issue here performs the same function as an application, as evinced by the substantive components of the NOI, the Department's review process of the NOI, and Department and Transco's repeated description and characterization of the NOI as an "application." These three factors clearly demonstrate that the NOI that Transco provided to the Department was similar to the NOIs submitted in the *EDC* and *Mackinac* cases, and therefore Transco's NOI should be considered an application for the purposes of the public participation requirements of the Clean Water Act.

The Department and Transco have represented to this Court that the NOI Transco submitted to the Department is not an "application," and therefore not subject to the public participation requirements of the Clean Water Act. *See* Transco Letter to Marcia M. Waldron, Clerk, (November 22, 2017) ("An NOI for coverage under an NPDES General Permit is not subject to the Clean Water Act's public notice requirements, because an NOI is not an application"), AD013-014; *see also* Department Letter to Marcia M. Waldron, Clerk, (November 22, 2017) (stating that the NOI is "not subject to public notice and comment" because it is not an "application"), AD015-19. However, Transco's substantive 251 page submission that included technical information on a wide range of issues, which

was subject to three layers of substantive review and comment by the Department, and described by Transco and the Department as an application renders this argument meritless.

1. Transco's NOI Is Required To Satisfy The Eligibility Parameters As Defined In The PAG-10 NPDES Permit, And The Technical Requirements Of The Pennsylvania Code

The substantive components of Transco's NOI demonstrate that the NOI for the Project was the functional equivalent of an application. Specifically, the NOI was required to meet the eligibility criteria the general permit itself **and** the technical parameters of 25 Pa. Code § 92a.54(e). *See* Standard Operating Procedure for PAG-10 NOIs; DEP00000667; JA505. These substantive requirements mirror what was required to be subject to public participation opportunities pursuant to the Clean Water Act in the federal and state case law described above. *See supra*, at 27-36.

The PAG-10 NPDES general permit requires that, at a minimum, Transco must: 1) identify each point source for which coverage under the general permit is requested; 2) demonstrate that each point source meets the eligibility requirements for inclusion in the general permit; 3) demonstrate that the discharge from the point sources, individually or cumulatively, will not cause or contribute to a violation of an applicable water quality standard established under Chapter 93 (relating to

water quality standards); and 4) include other information the Department may require. *See* 25 Pa. Code 92.a23.

The technical eligibility requirements of Section 92a.54(e) also include a number of substantive components that Transco must demonstrate compliance with in order to obtain coverage under the NPDES PAG-10 general permit. Pursuant to this section,

> the Department will deny coverage under a general permit when one or more of the following conditions exist:
>
> > (1) The discharge, individually or in combination with other similar discharges, is or has the potential to be a contributor of pollution, as defined in the State Act, which is more appropriately controlled under an individual permit.
> >
> > (2) The discharger is not, or will not be, in compliance with any one or more of the conditions of the general permit.
> >
> > (3) The applicant has failed and continues to fail to comply or has shown a lack of ability or intention to comply with a regulation, permit, schedule of compliance or order issued by the Department.
> >
> > (4) A change has occurred in the availability of demonstrated technology or practices for the control or abatement of pollutants applicable to the point source.
> >
> > (5) Categorical point source effluent limitations are promulgated by the EPA for those point sources covered by the general permit.
> >
> > (6) The discharge is not, or will not, result in compliance with an applicable effluent limitation or water quality standard.

> (7) Other point sources at the facility require issuance of an individual permit, and issuance of both an individual and a general permit for the facility would constitute an undue administrative burden on the Department.
>
> (8) The Department determines that the action is necessary for any other reason to ensure compliance with the Federal Act, the State Act or this title.
>
> (9) The discharge would be to a surface water classified as a High Quality Water or an Exceptional Value Water under Chapter 93.

25 Pa. Code § 92a.54(e). In response to these requirements Transco submitted a lengthy permit request that included, but is not limited to: a general permit form, an Unanticipated Discovery of Contamination Plan, a Spill Plan for Oil and Hazardous Materials, an Erosion Control Plan, Restoration Plans, and a Post-Construction Activities Plan, Best Management Practice Plans, Chemical Results For Hydrostatic Test Waters, Test Site Locations, Facility and Discharge Location Information, and a Compliance History Report. *See* Notice of Intent, DEP00000068; JA059. These plans and submissions outline or otherwise provided specific scientific and technical information on various water quality related issues as required by the regulations. For example, the NOI discusses at length pre-construction and post-construction stormwater mitigation techniques and methodologies. *Id*., DEP00000289-295; JA253-259. Additionally, the NOI describes the specific methods to be used to perform sampling and analysis of

water used to hydraulically test pipeline segments to show compliance with the effluent limitations and monitoring requirements. *Id*., DEP00000298-309; JA262-273. These are but two examples of the technical data and information that was submitted and reviewed in Transco's NOI, which ultimately performs the function of a traditional permit application.

2. The Department's Review Of The NOI Parallels The Review Process For Other Types Of Permit Applications

The Department's review process for Transco's NOI is analogous to the way in which the Department reviews other permit applications. *See*, *e.g.*, Standard Operating Procedure for PAG-10 NOIs; DEP00000665-672; JA503-510. The similarities in the review process provide further evidence that the NOI should have been subjection to public participation.

The Department's multi-tiered review process begins when the NOI is submitted to the Department's Permit Chief, who prioritizes the NOI within the "Permit Review Hierarchy" and then assigns the NOI to an Application Manager, who is the lead reviewer of the NOI. *See Id.*, DEP00000667; JA505. The Application Manager then "[r]eview[s] the NOI for administrative completeness and overall technical adequacy," which requires the Application Manager to ensure that there is "[e]vidence that the discharge is eligible for coverage under the PAG-10 general permit . . . based on the eligibility criteria in the General Permit and 25 Pa. Code § 92a.54(a)." *Id*. Furthermore, the Application Manager's evaluation of

these criteria requires a consideration of the NOI on an individual "a case-by-case basis." *Id*. If the Department determines that the eligibility criteria are not me the Application Manager issues an "Application Denial Letter" to the applicant. *Id*. at DEP00000668; JA506 If there is a deficiency that can be corrected within one business day the application manager directly contacts the "applicant . . . by phone" to make the NOI complete. *Id*. When deemed "complete and technically adequate" the Application Manager then proceeds to "develop the permit documents." *Id*. at DEP00000669; JA507. The Application Manager then determines whether there are any "unresolved violations associated with the client that will affect the issuance of the permit." *Id*., at DEP00000670; JA508. During the "Final Review" the Permits Chief "[r]eview[s]" the final permit documents and either signs the "fact sheet" and submits the package to the Program Manager, or otherwise returns the final permit package to the Application Manager for edits and further review. *Id*. The Program Manager then reviews the permit package and signs the cover letter and first page of the final permit, or returns the NOI to the Permits Chief for additional editing and review. *Id*. at DEP00000671; JA509.

This multifaceted permit review process, which requires no less than three layers of review and approval, is precisely the type of review that takes place in the context of other applications for Clean Water Act permits. Indeed, in addition to the steps identified above, the Department also composed a technical comment

review letter, generated by a Department Environmental Engineer, which was submitted to Transco. *See* DEP Bureau of Clean Water PAG-10 NOI Review Comments: Atlantic Sunrise Project, DEP00000674; JA512 (detailing a number of substantive and procedural issues with the NOI). Transco submitted a "response-to-comment" document which also included "updated permit application sections that were changed in response to the comments." Email from Corey Rich to Kumar Dharmendra, March 8, 2017; DEP00000331; JA295; *see also* Communications between DEP and consultant Transco; DEP00000317-625; JA281-463 (detailing the extensive communications between Transco and the Department, as well as the Department's internal decision-making process). The Department's review of NOIs has all the hallmarks of a permit application review process, and should be treated as such for the purposes of the CWA's public participation requirements.

DRN and the public were completely prevented from submitting their own substantive comments and expert reports on the NOI, which may have resulted in additional changes to the permit NOI, or otherwise helped the Department make a more informed decision on the NOI for the PAG-10 NPDES general permit. Indeed, DRN would have commented the technical requirements of 25 Pa. Code § 92a.54(e) for the permit. *See* van Rossum Affidavit, at ¶ 20; AD103. Furthermore, DRN would have contested whether the Project even qualified for a general permit, and instead should have been required to obtain an individual NPDES permit. *Id*.

In this context DRN would have questioned, among other things, why the Department required a 30 mile pipeline looping project – Transco's Leidy Southeast Expansion Project – to obtain an individual NPDES permit, while only requiring a general permit for the 200-mile long greenfield Atlantic Sunrise Project. *Id*. The NOI for the Project is riddled with other such irreconcilable discrepancies, which would have benefited from further public review and comment.

3. Both Department and Transco Itself Have Repeatedly Referenced the NOI Submitted by Transco for This Project As An "Application"

Based on the required contents of the NOI, the Department's review of the NOI, and the ultimate function of the NOI it is of no surprise that both the Department and Transco repeatedly referred to Transco's NOI for this Project as an "application" in both administrative and litigation settings.

For example, on the Department's *Information Sheet: Atlantic Sunrise Project* (August 2017), the Department clearly states that "[t]he Department received 1 PAG-10 permit **application** for the proposed project." *Information Sheet: Atlantic Sunrise Project* (August 2017) (Emphasis added); AD004. This information sheet further clarifies that "[f]ollowing a technical review **of the application** that was received . . . the Department issued an authorization to use the PAG-10 general permit on April 11, 2017 authorizing the discharge of

hydrostatic test water from the proposed project." *Id*. (emphasis added). Additionally, in a letter the Department sent to Transco providing comments on Transco's NOI, the Department explicitly stated that "[t]he PPC Plan has several attachments mostly focused on excavation and construction of the Atlantic Sunrise Pipeline project . . . but [several of] these attachments have not been provided in the **application package**." Department Comment Letter; DEP00000674; JA512.

Even the Department's internal guidance document for the processing of NOIs for PAG-10 NPDES general permits repeatedly refers to the NOIs as "applications." *See, e.g.*, Standard Operating Procedure for PAG-10-NOIs; DEP00000665-673; JA503-511. For example, the guidance document states that "[o]nly certain types of **applications** are subject to the Permit Decision Guarantee (PDG) described in the PDG Policy. New PAG-10 NOIs **ARE** part of the PDG." *Id*.; DEP00000665; JA503; *see also id*.; DEP00000666; JA504 ("Only the following clients are exempt from Chapter 92a permit **application** fees.") (emphasis added); *id*. ("A copy of the check will be made and placed in the **application** file") (emphasis added); *id*. ("Select the proper **application** type") (emphasis added); *id.* ("Enter the date the **application** was received") (emphasis added); *id.*; DEP00000668; JA506 ("Follow the procedures contained in the SOP for Management of Late NPDES Permit Renewal **Applications**") (emphasis added); *id*. ("the **application manager** will contact the **applicant** []or the

applicant's authorized representative") (emphasis added); *id.*; DEP00000669; JA507 ("All phone logs will be retained with the **application** file during and following permit issuance, or otherwise a database or spreadsheet will be used and made accessible") (emphasis added); *id*. ("the application manager will proceed to Step III G (**for new applications**)" with Step III G being for "**new NOIs**") (emphasis added); *id*. ("**Applications/NOIs** will be reviewed in order of priority") (emphasis added); *id*. (a start date corresponding to the date following the determination that the **application** is complete") (emphasis added).

This document also describes the party submitting an NOI under the PAG-10 NPDES general permit as an "applicant." Standard Operating Procedure for PAG-10 NOIs; DEP00000668; JA506 The Department's guidance also identifies the letter the Department sends to a party that denies coverage as a result of deficiencies in an NOI as an "Application Denial Letter." *Id*. Indeed, the Department even specifically states that the Department personnel responsible for the review and coordination of the submission of a PAG-10 NPDES NOI as an "Application Manager." *Id*.; DEP00000667; JA505

Additionally, throughout its briefs in *Delaware Riverkeeper Network, et al. v. Pennsylvania Department of Environmental Protection, et al.*, Third Circuit, Docket No. 16-2211, counsel for the Department repeatedly referred collectively to the Chapter 102, Chapter 105, and NPDES permits as requiring or having

"applications." *See, e.g.*, Department Resp. Br. at 17, 24, 25; AD021, AD022, AD023. Finally, at oral argument counsel for the Department conceded that "[t]he notice of intent **is the application** to use that permit, yes." *See* oral Argument Transcript, *Delaware Riverkeeper Network, et al. v. Secretary of the Pennsylvania Department of Environmental Protection*, et al., at 37; AD063.[2]

Ironically, Transco itself also asserted that the material it submitted to the Department for the NPDES PAG-10 permit was an "application." For example, Transco specifically titled the NOI it submitted to the Department as the "PAG-10 Permit Application the Atlantic Sunrise Project," and further provided the Department what it described as a "Permit Application Fee." Notice of Intent (NOI); DEP00000066; JA507. In addition, in correspondence with the Department over a period of months, Transco repeatedly and without fail described the NOI as the "Transco Atlantic Sunrise PAG-10 NOI Application" *See, e.g.*, Communications between DEP and consultant Transco; DEP00000317; JA281; *see also* Email from Corey Rich to Kumar Dharmendra, March 8, 2017, DEP00000331; JA295 (describing Transco's "response-to-comment" document which included "updated **permit application sections**") (emphasis added). Transco also provided notification letters pursuant to Pennsylvania Acts 14, 67, 68, 127, and 167 to various impacted municipalities which state that "[e]nclosed is the

[2] The Department has not attempted to correct the record to the extent it believes counsel for the Department spoke in error despite numerous opportunities to do so.

General Information Form (GIF) (Attachment A) for the permit application." *See, e.g.*, Transco Notification Letter; DEP00000353; JA317.

Furthermore, Transco has already specifically represented to this Court that with regard to its NPDES PAG-10 permit that "Transco submitted an **application** and that it was under review." Transco Resp. Br. at 55-56 (emphasis added); AD025-26. Transco further stated that "Transco's **application** for an NPDES hydrostatic test water discharge permit was submitted to PADEP and under review." *Id*. at 56 (emphasis added); AD026. Transco further contended that "Petitioners were on notice that Transco **had submitted an application**" for the NPDES PAG-10 permit. *Id*. (emphasis added); AD026.

Therefore, not only is the NOI for a PAG-10 NPDES general permit the functional equivalent of an application as understood by Congress when formulating the public participation requirements of the CWA, but this specific NOI was continuously described as an "application" by both the Department and Transco. To the extent either opposing party attempts to describe the NOI otherwise is nothing more than a disingenuous *ex post facto* rationalization.

III. PADEP has Violated the Section 401(a)(1) Notice Requirements by Failing to Provide Notice for the NPDES Permit for the Project

In addition to violating the public participation opportunities described above, Section 401(a)(1) of the Clean Water Act also requires that the Department "shall establish procedures for public notice in the case of all applications for

certifications." 33 U.S.C. § 1341(a)(1). The Department has violated this requirement. Specifically, the Department violated the CWA because it provided notice of only the conditional Section 401 water quality certificate – and not the underlying substantive state permits, including the PAG-10 NPDES general permit.

Pennsylvania's conditional Section 401 water quality certification itself is not the product of a substantive review of whether the project complies with Pennsylvania's water quality standards. *See Delaware Riverkeeper Network v. Sec'y Pennsylvania Dep't of Envtl. Prot.*, 833 F.3d 360, 370 (3d Cir. 2016). Nor does Pennsylvania's conditional Section 401 water quality certification provide the applicant with the authority to proceed with any type of earth disturbance activity. *Id*. at 388 ("The Natural Gas Act grants FERC exclusive authority to authorize construction"). Instead, Pennsylvania's conditional Section 401 water quality certification merely memorializes a promise that the project applicant must eventually obtain a number of substantive state permits that demonstrate compliance Pennsylvania with state water quality standards. *See* Public Notice of Section 401 Water Quality Certification, Atlantic Sunrise Project; AD010-12. In other words, Pennsylvania's conditional Section 401 water quality certifications themselves are nothing more than empty-vessels that provide no actionable authority to the project applicant. As such, notice of a complete application for

Pennsylvania's conditional Section 401 water quality certificate is functionally worthless, because the review of a project's substantive compliance with Pennsylvania's water quality standards takes place at some later time period pursuant to the Department's review of the underlying state permits. *Id*.

One of these underlying state permits is the PAG-10 NPDES general permit. *Id*. Here, the Department simply did not provide any notice of the PAG-10 NPDES permit. On April 11, 2017, over a year after the Department issued the conditional Section 401 water quality certificate, the Department issued the PAG-10 NPDES permit for the Project. *See* Final Approval of PAG-10; DEP00000626-664; JA464-502. However, the Department did not provide public notice in the Pennsylvania Bulletin, did not provide public notice in public newspapers, and did not provide public notice to any potentially impacted parties. The Department's admitted complete failure to provide any sort of public notice for one of the substantive permits that determines whether Transco complied with Pennsylvania's water quality standards violates the purpose and intent of the notice requirements of Section 401(a)(1) of the CWA.

IV. Lack of Public Notice Materially Hinders This Court's Ability To Hear Substantive Challenges To Any PAG-10 NPDES General Permit For Commission-Jurisdictional Pipeline Projects

The lack of notice is particularly troublesome here, where any substantive challenge to the PAG-10 NPDES permit must be appealed via Section 717 of the

Natural Gas Act.[3] *See* 15 U.S.C. § 717r(d)(1). Such an appeal is strictly limited to the administrative record that was before the agency at the time that it rendered its decision. *See Camp v. Pitts*, 411 U.S. 138, 142 (1973) (holding that "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court"). However, because the Department failed to provide any notice of the NPDES permit, and DRN therefore could not, and did not, submit substantive comments during the pendency of the Department's review of the permit, DRN is now foreclosed from citing or relying on new expert reports or other evidence in this appeal.

It is not surprising that the Department lacks sufficient notice procedures for the NPDES permit because the Department's review and approval process for NPDES permits, or any other state issued permit, was never contemplated to be applied in the context of a record review case in an original jurisdiction appeal to the Third Circuit Court of Appeals. Rather, the permits issued by the Department have traditionally been heard *de novo* by the Pennsylvania Environmental Hearing Board ("EHB"). Indeed, EHB review is an integral part of Pennsylvania environmental permitting and cannot be truncated without affecting the finality of a permit and causing serious Due Process problems. The Department's permitting process is not complete once the Department issues a permit because due process is

[3] Assuming the Court rejects DRN's jurisdictional argument.

provided by the EHB, not the Department. *See* 35 P.S. § 7514(d); *Consol Pa. Coal Co. v. Dept. of Env'tl Prot.*, 2011 WL 4943794, at *3 (Pa. Env. Hrg. Bd., Aug. 26, 2011) (Ex. 5). As stated in the Environmental Hearing Board Act:

> The department may take an action initially without regard to [Commonwealth agency practice and procedure rules], but no action of the department adversely affecting a person shall be final as to that person until the person has had the opportunity to appeal the action to the board . . . If a person has not perfected an appeal in accordance with the regulations of the board, the department's action shall be final as to the person.

35 P.S. § 7514(d); *Consol Pa. Coal Co.*, 2011 WL 4943794, at *3. An aggrieved party can appeal a Department permit, and then the EHB will determine *de novo* whether a particular permit should issue. *Consol Pa. Coal Co.*, 2011 WL 4943794 at *2-3. The EHB's "due process protections extend to all parties" including PADEP. *Id*. at *3. When a person files a timely appeal of a Department permit, that permit is not final until the EHB issues its decision. *Id*. at *2. As a result, EHB review cannot be truncated without affecting the finality of a Department permit or violating the parties' due process rights. As a result, aggrieved parties traditionally do not need to submit comments during the pendency of the Department's review because Petitioners would normally have the opportunity to challenge the permit *de novo* at the EHB after it is issued. However, to the extent this Court finds it has jurisdiction, this opportunity is completely lost.

The problem of notice in the instant matter can be remedied in either of two different ways: 1) the Court could agree that it does not have jurisdiction until after the EHB has reviewed any appeals *de novo*; or 2) the Court could find that the underlying state permits, including the NPDES permit, must be noticed prior to, or simultaneously with, the Section 401 water quality certification in order to comply with the notice requirements of Section 401(a)(1) of the Clean Water Act. It would be an absurdity to find that the CWA requires the Department to establish procedures for public notice of the Section 401 water quality certification but not notice for the substance on which the water quality certification is based and which, in this case, was not issued until well after the water quality certification was issued.

V. DRN's Request for Relief Is Modest In Scope And Effect

Public participation does not mean that the permitting authority **must** hold a public hearing. *See* 33 U.S.C. § 1342(a)(1). Rather, under the NPDES program it is only an **opportunity** for a public hearing that must be given prior to the issuance of a permit. *Id*. Given the focus and objectives of general permits, public input to NOIs might involve notification of the discharger's proposal and an opportunity to comment prior to the authorization of a discharge by the permitting authority. *See, e.g.*, 40 C.F.R. § 124.11–124.13 (delineating requirements for hearings). Interested persons may request a hearing or the regional administrator or state director may

hold a hearing due to public interest or to clarify issues. *Id*. § 124.11, 124.12. The CWA and federal and state regulations delineate criteria to determine when public hearings are required. 33 U.S.C. § 1251(e); *see*, *e.g.*, 40 C.F.R. § 124.11, 124.12 (CAFO regulations). If there is insufficient public interest in the particulars of an NOI, written documentation can provide a meaningful opportunity to be heard, or otherwise no hearing would be necessary. *See Lockett v. EPA*, 319 F.3d 678, 686–87 (5th Cir. 2003) (finding a state procedure allowing public participation without a hearing may be sufficient to meet federal citizen participation requirements). As such, DRN's request for compliance with the various public participation requirements of the CWA will not disrupt the Department's permitting process, which instead will benefit from informed public input.

CONCLUSION

DRN respectfully requests that this Honorable Court transfer this matter to the Pennsylvania Environmental Hearing Board pursuant to 42 Pa.C.S.A. § 5103.

In the alternative, DRN respectfully requests that this Court rescind or remand the PAG-10 NPDES for the Project. DRN also asks that the Court grant such other relief as it finds to be just and appropriate.

s/ Aaron Stemplewicz

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Dated: January 16, 2018

Attorney for Petitioners Delaware Riverkeeper Network and Maya van Rossum, the Delaware Riverkeeper

CERTIFICATE OF COMPLIANCE

1. This Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this Brief contains 12,860 words, excluding the parts of the brief exempted by 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 proportionally spaced typeface using Microsoft Word in 14 Point Times New Roman.

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CERTIFICATE OF BAR ADMISSION

Pursuant to Third Circuit Local Appellate Rule 28.3(d) Petitioners hereby certify that that the undersigned counsel are members of the bar of this Court.

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L.A.R. 31.1 CERTIFICATION

I, Aaron Stemplewicz, pursuant to L.A.R. 31.1. (c), certify that the text of the electronic brief is identical to text in the paper copies. I also certify that a virus detection program has been run on the files and no virus was detected. The virus detection program used was Webroot SecureAnywhere.

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CERTIFICATE OF SERVICE

I, the undersigned, certify that a true and correct copy of the forgoing was served, via the Court's Electronic Filing System, on all counsel for this matter on this date.

s/ Aaron Stemplewicz

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Dated: January 16, 2018

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No. 17-3299
Oral Argument Not Yet Scheduled

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

DELAWARE RIVERKEEPER NETWORK,

and

MAYA VAN ROSSUM, the Delaware Riverkeeper,

Petitioners,

v.

PATRICK MCDONNELL, Acting Secretary of the Pennsylvania Department of Environmental Protection, and COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents,

and

TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC,

Respondents.

ADDENDUM

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P.O. Box 1396
Houston, Texas 77251-1396
713/215-2000

March 31, 2015

Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426

Attention: Kimberly D. Bose, Secretary

Reference: Transcontinental Gas Pipe Line Company, LLC
Atlantic Sunrise Project
Docket No. CP15-____-000

Ladies and Gentlemen:

Pursuant to Section 7(c) of the Natural Gas Act and Part 157 of the regulations of the Federal Energy Regulatory Commission ("Commission"), Transcontinental Gas Pipe Line Company, LLC ("Transco") submits herewith for filing with the Commission an application, in abbreviated form, for a certificate of public convenience and necessity authorizing Transco to construct and operate its Atlantic Sunrise Project.

This application contains three types of information:

- Public,
- Privileged, and
- Critical Energy Infrastructure Information ("CEII").

The Public information consists of the Application (including the Notice and Exhibits C, F, J, K, N, P, Z-1, Z-2, and Z-3 in their entirety), and Volumes 1 through 4 of Exhibit F-1.

The Privileged information consists of the following:

- Exhibits G and G-II (Flow Diagrams),
- Exhibit I (Customer Precedent Agreements),
- Exhibit M (Construction and Ownership Agreement and Operation and Maintenance Agreement),
- Exhibit Z (Lease Agreement) and
- Volume 5 of Exhibit F-1 (list of affected landowners, cultural resource reports, and threatened and endangered species reports).

Transco requests that the list of affected landowners be accorded privileged treatment pursuant to Exemption 6 of the Freedom of Information Act (5 U.S.C.§552(b)(6)), which exempts from release "files the disclosure of which would constitute a clearly unwarranted invasion of privacy," and that it be placed in a non-public file. In accordance with the Commission's regulations at 18 CFR § 380.12(f)(4), Transco requests that the enclosed cultural resource information be accorded privileged treatment and placed in a non-public file. Transco also requests that the enclosed threatened and endangered species information be accorded privileged treatment and placed in a non-public file.

The CEII information consists of Volume 6 of Exhibit F-1 (detailed engineering design drawings). Transco requests that the CEII information be treated as Critical Energy Infrastructure Information pursuant to 18 C.F.R. §§ 388.112, *et seq*.

In addition to electronically submitting the complete application through the Commission's eFiling system, Transco is also submitting paper copies of the filing to the Commission's Staff.

If you have any questions regarding this filing, please contact the undersigned.

Respectfully submitted,

TRANSCONTINENTAL GAS PIPE LINE
COMPANY, LLC

By: William H. Hammons

William Hammons
Regulatory Analyst, Lead

Enclosures

Information Sheet May 2017

pennsylvania
DEPARTMENT OF ENVIRONMENTAL PROTECTION

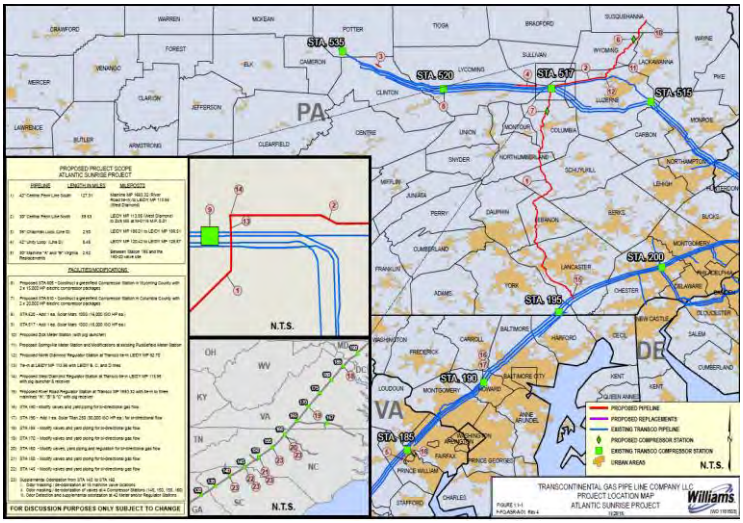
Atlantic Sunrise Pipeline Project

This information sheet serves as a summary overview of the project

Additional information on the review of submitted permit applications will be shared as it becomes available.

The Atlantic Sunrise is a natural gas pipeline proposed by Transcontinental Gas Pipe Line Company, LLC (Transco). The proposed Atlantic Sunrise Pipeline Project is designed to supply natural gas by connecting producing regions in northeastern Pennsylvania to markets in the Mid-Atlantic and southeastern states.

The overall pipeline project is regulated by the Federal Energy Regulatory Commission (FERC). Safety regulations for the pipeline are administered by U.S. Department of Transportation through the Pipeline Hazardous Materials Safety Administration.



WHERE

The proposed project involves the construction, operation and maintenance of: approximately 183 miles of new pipeline referred to as the Central Penn North & Central Penn South Line; two pipeline capacity expansion loops totaling about 12 miles and referred to as the Chapman Loop and Unity Loop; and two new compressor facilities in Pennsylvania. The project also involves upgrades to 2 existing compressor stations. The project crosses three regions of the Pennsylvania Department of Environmental Protection (DEP): 4 counties in the Northeast Region, 4 counties in North- Central Region, and 2 counties in the South-Central Region.

PADEP PERMIT REQUIREMENTS

The project requires several permits from DEP:

- **State Water Quality Certification (WQC):** Prior to obtaining authorization from FERC to construct an interstate natural gas transmission pipeline project, an applicant must provide FERC with a WQC from each state through which the pipeline will be constructed. Unless a state waives its right to issue a WQC, each state must evaluate whether the proposed project will be constructed in a manner that achieves the state's water quality standards. The WQC may be conditioned upon the applicant acquiring permits, authorizations, or approvals required under existing state water quality programs.
- **Chapter 105 – Water Obstruction and Encroachment Permits**: These permits are required as a condition of the WQC for proposed activities located in, along, across or projecting into a watercourse, floodway or body of water, including wetlands.
    - The applicant has submitted Chapter 105 permit applications for each county that will be crossed for a total of 10 Chapter 105 permit applications. Eight of the Chapter 105 permit applications relate to the proposed Central Penn Line and two of the Chapter 105 permit applications relate to the proposed Unity and Chapman Loops.
- **Chapter 102 – Erosion & Sediment Control General Permit (ESCGP-2)**: This permit is required as a condition of the WQC for proposed earth disturbances associated with oil and gas exploration, production, processing or treatment operations or transmission facilities where earth disturbance is five acres or greater.
    - One ESCGP-2 Notice of Intent (NOI) has been submitted, and review is being coordinated with the applicable county conservation districts. ESCGP-2 NOIs were also received in the applicable County Conservation Districts for the Unity and Chapman Loops.

- **NPDES Permit for Hydrostatic Test Water Discharges (PAG-10)**: This general permit is required as a condition of the WQC for proposed discharges of wastewater generated from pressure testing the proposed pipeline.
    - The Department has received 1 PAG-10 permit application for the proposed project.
- **Air Quality Permits**: These permits are needed to ensure that the sources that are constructed are operated in compliance with applicable requirements in the Pennsylvania Air Pollution Control Act, the Federal Clean Air Act and regulations adopted under the Federal Clean Air Act.
    - The North-Central Region has received two air quality permits for upgrades to existing facilities.

CURRENT STATUS

- Following technical review and opportunity for public comment, the Department issued a WQC for the proposed project on April 5, 2016. The WQC is conditioned upon the applicant obtaining certain discharge permits, erosion and sediment control permits, and water obstruction and encroachment permits.
- For the Chapman Loop in Clinton County, the Clinton County Conservation District acknowledged the ESCGP-2 permit on April 29, 2016 and the Department issued the Chapter 105, Water Obstruction and Encroachment permit on April 29, 2016.
- Following a technical review of the application that was received December 29, 2016, the Department issued an authorization to use the PAG-10 general permit on April 11, 2017 authorizing the discharge of hydrostatic test water from the proposed project.
- The North-Central Region has issued one permit for compressor station upgrades and continues to review another. A permit (19-00007B) was issued for an upgrade to Station 517 in Jackson Township, Columbia County on February 1, 2017.
- The Chapter 102 NOI and Chapter 105 application for the Unity Loop in Lycoming County are under technical review by the North-Central Regional Office and Lycoming County Conservation District.
- During the week of May 1, 2017, DEP received updated application material for the Central Penn Line from Transco in response to the technical deficiency letters that were sent on February 24, 2017.

NEXT STEPS

- For the pending air quality permit application (41-00001B) for upgrades at Station 520 in Mifflin Township, Lycoming County, the Department will consider testimony from the April 19, 2017 public hearing, any submitted public comments that were provided in response to the published notice in the *Pennsylvania Bulletin* and will continue its technical review of the permit application.
- The Department will continue to conduct its technical review of the Chapter 105 applications and Chapter 102 NOI for the Central Penn Line. Notice of the applications and NOI will be published in the *Pennsylvania Bulletin* on May 27, 2017 and DEP will accept written comments through Monday, June 26, 2017.
- DEP will hold 4 public hearings to take comments from the public on the Chapter 105 permit applications and Chapter 102 NOI. Each hearing will begin at 6:00 p.m. and end at 9:00 p.m. The dates and locations are as follows:
    - Monday, June 12, 2017 — Tunkhannock Middle School Auditorium, Tunkhannock Middle School, 200 Franklin Avenue, Tunkhannock PA 18657
    - Monday, June 12, 2017 — Max Smith Auditorium, Lancaster Farm and Home Center, 1383 Arcadia Rd, Lancaster, PA 17601
    - Tuesday, June 13, 2017 — Auditorium, Bloomsburg High School, 1200 Railroad Street, Bloomsburg, PA 17815
    - Wednesday, June 14, 2017 — Lutz Hall, Lebanon Valley College, 101 North College Avenue, Annville, PA 17003

MORE INFORMATION

- For more information, and to track updates, visit DEP's Atlantic Sunrise Web Page (dep.pa.gov/pipelines).
- For region-specific questions, send an email to the following respective regional address: Northeast Regional Office: RA-EPWW-NERO@PA.GOV OR North-Central Regional Office: RA-EPWW-NCRO@PA.GOV . Project-wide inquires may be directed to the DEP's Northeast Regional Office.

These facilities are described in more detail below and are also addressed in our cumulative impacts analysis in section 4.13 of this EIS.

Williams Field Services Owego Pipeline and Associated Zick Compressor Station Discharge Piping

Williams Field Services (midstream) would construct the Owego pipeline, about 5.9 miles of 24-inch-diameter gathering pipeline, to tie into the Zick Meter Station and about 742 feet of discharge piping to connect the Zick Compressor Station to the proposed Zick Meter Station. The Owego pipeline and associated discharge piping from the Zick Compressor Station would fall under the jurisdiction of the Pennsylvania Public Utility Commission. Williams Field Services would apply for required federal, state, and local permits for approval to construct and operate the Owego pipeline and associated discharge piping.

Electric Transmission Lines to Proposed Compressor Stations

PPL Electric Utilities would construct two 69-kilovolt (kV) extension electrical transmission lines, with an estimated combined length of about 6.1 miles, to supply power to the proposed Transco Compressor Stations 605 and 610. One line would extend from its existing Stanton-Brookside 69-kV line near the Brookside Substation to serve Compressor Station 605, and the second would extend from the Scott-Rohrsburg section of its existing Columbia-Scott 69-kV line to serve Compressor Station 610. The extension of these electrical transmission lines would fall under the jurisdiction of the Pennsylvania Public Utility Commission. PPL Electric Utilities would apply for required federal, state, and local permits for approval to construct and operate these transmission lines.

Electrical Service Distribution to Existing Compressor Stations

PPL Electric Utilities would install new electrical service distribution at both Compressor Stations 517 and 520 to power the new compressor buildings, power and control room buildings, motor control center, and other ancillary equipment. No new transmission lines would be required because the proposed electrical lines would tap into the existing transmission lines. PPL Electric Utilities would apply for all required federal, state, and local permits for the projects.

Baltimore Gas and Electric (BGE) would install a new distribution electrical service at Compressor Station 190 to power the new compressor building, power and control room building, motor control center, and other ancillary equipment. No new transmission line would be required because the proposed electrical line would tap into an existing transmission line. BGE would apply for all required federal, state, and local permits for the project.

1.5 PERMITS, APPROVALS, AND REGULATORY REVIEWS

As the lead federal agency for the Project, FERC is required to comply with section 7 of the Endangered Species Act of 1973 (ESA), the Migratory Bird Treaty Act (MBTA), the Magnuson-Stevens Fishery Conservation and Management Act of 1976 (MSA), the Rivers and Harbors Act, the CWA, the CAA, and section 106 of the National Historic Preservation Act (NHPA). These and other statutes have been taken into account in the preparation of the EIS.

Table 1.5-1 lists the major federal, state, and local permits, approvals, and consultations identified for the construction and operation of the Project. Table 1.5-1 also provides the dates or anticipated dates when Transco commenced or anticipates commencing formal permit and consultation procedures. Transco would be responsible for obtaining all permits and approvals required to implement the Project prior to construction regardless of whether they appear in this table.

TABLE 1.5-1

Major Permits, Approvals, and Consultations for the Atlantic Sunrise Project

Agency	Permit/Approval/Consultation	Agency Action	Status
Federal			
FERC	Certificate under section 7(c) of the NGA	Determine whether the Project would be in the public interest, and consider issuing a Certificate	Application filed on March 31, 2015
USACE	Department of the Army permit under section 404 of the CWA	Consider issuing a permit for discharges of dredged or fill material into waters of the United States	Application for Pennsylvania facilities submitted April 9, 2015; permit for Virginia facilities received August 24, 2016
	Department of the Army permit under section 10 of the Rivers and Harbors Act	Consider issuing a permit for structures or work in or affecting navigable waters of the United States	Application for Pennsylvania facilities submitted April 9, 2015; permit for Virginia facilities received August 24, 2016
U.S. Fish and Wildlife Service, Pennsylvania, Chesapeake Bay, Asheville, Raleigh, and South Carolina Field Offices	Section 7 ESA consultation, Biological Opinion	Consider FERC's finding of impact on federally listed and proposed threatened and endangered species and their critical habitat, and provide a Biological Opinion if the action is likely to adversely affect federally listed species or their critical habitat	Ongoing
	MBTA and section 3 of Executive Order 13186	Provide comments regarding project effects on listed migratory birds	Ongoing
	Bald and Golden Eagle Protection Act	Provide comments regarding project effects on bald and golden eagles	Ongoing
National Park Service	Consultation regarding crossing of the Appalachian National Scenic Trail	Consider FERC's finding of impact on the Appalachian National Scenic Trail	Not applicable (Project does not cross National Park Service property)
Interstate Agencies			
Susquehanna River Basin Commission	Water Allocation Permit	Issuance of a Water Allocation Permit for withdrawal of surface water and groundwater	Permit issued September 8, 2016
Pennsylvania			
Pennsylvania Department of Environmental Protection (PADEP), Regional Bureaus of Watershed Management	Clean Water Act 401 Water Quality Certification	Issuance of a section 401 permit for discharge to waters of the United States.	Permit issued April 5, 2016
PADEP, Regional Bureaus of Watershed Management	Chapter 105 Application	Issuance of a Chapter 105 permit for wetlands and water obstructions	Chapman Loop – permit issued April 29, 2016; Unity Loop – application submitted August 7, 2015; Central Penn Line (CPL) North and CPL South – applications submitted August 28, 2015

TABLE 1.5-1 (cont'd)

Major Permits, Approvals, and Consultations for the Atlantic Sunrise Project

Agency	Permit/Approval/Consultation	Agency Action	Status
PADEP, Bureau of Land and Water Conservation, Division of Stormwater Management and Sediment Control	Chapter 102 ESCGP-2 Application	Issuance of a Chapter 102 permit	Compressor Station 517 and Chapman Loop – permits issued on October 9,2015 and April 29, 2016, respectively; Compressor Station 520 and Unity Loop – application submitted August 7, 2015; CPL North and CPL South – applications submitted August 28, 2015
PADEP, Bureau of Water Quality Protection	Clean Water Act Section 402 National Pollutant Discharge Elimination System (NPDES) – Hydrostatic Test Water Discharge Permit/Approval	Issuance of a section 402 and hydrostatic test water discharge permit	CPL North, CPL South, Chapman Loop, and Unity Loop – applications anticipated to be submitted third quarter of 2016 Compressor Stations 605 and 610 – applications anticipated to be submitted fourth quarter of 2016
PADEP, Regional Watershed Management	Submerged Land License Agreement	Issuance of Submerged Land License Agreement	Application anticipated to be submitted fourth quarter of 2016
PADEP, Bureau of Air Quality	Air Quality Request for Determination (RFD)	Air quality determination	Compressor Station 605, Springville and Zick Meter Stations – RFD exclusion approved July 17, 2015 Compressor Station 610 – RFD exclusion approved October 1, 2015 West Diamond Regulator Station – RFD exclusion approved February 8, 2016 River Road Regulator Station – RFD exclusion approved January 20, 2016
	Air Quality Plan Approval (minor)	Approval of Air Quality Plan	Compressor Stations 517 and 520 – application submitted in March 2015
Pennsylvania Fish and Boat Commission	Aid to Navigation Plans	Approval of Aid to Navigation Plans	Applications submitted October 4 and October 10, 2016
	Permit for Use of Explosives in Commonwealth Waters	Issuance of Permit for Use of Explosives in Commonwealth Waters	Application submitted October 10, 2016
	Consultation (rare aquatic and amphibian species)	Provide comments to prevent effects on rare aquatic and amphibian species	Clearance received May 31, 2016 and September 2, 2016
Pennsylvania Department of Transportation	Highway Occupancy Permit	Issuance of a Highway Occupancy Permit for installation of utilities that serve the public	Application anticipated to be submitted third quarter of 2016
Pennsylvania Department of Conservation and Natural Resources	Consultation (rare plant species)	Provide comments to prevent effects on rare species	Clearance received May 27, 2016 and August 31, 2016
	State Park Right-of-Way License	Issuance of State Park Right-of-Way License	Application submitted April 30, 2015

TABLE 1.5-1 (cont'd)

Major Permits, Approvals, and Consultations for the Atlantic Sunrise Project

Agency	Permit/Approval/Consultation	Agency Action	Status
Pennsylvania Game Commission	Consultation (rare mammalian and avian species)	Provide comments to prevent effects on rare species	Clearance received June 2, 2016 and September 19, 2016
	State Game Land Right-of-Way License	Issuance of State Game Land Right-of-Way License	License agreements received November 3, 2016
Pennsylvania Historical and Museum Commission, Bureau of Historic Preservation	Section 106, NHPA Consultation	Review and comment on the Project and its effects on historic properties	Consultation initiated in March 2014 and is ongoing
Maryland			
Maryland Department of the Environment	Maryland Joint Permit	Approval of wetland/waterway authorization	Permit received October 13, 2015
	NPDES Hydrostatic Discharge Permit	Issuance of NPDES Hydrostatic Discharge Permit	Application anticipated to be submitted third quarter of 2016
	Rare Species Clearance	Issuance of clearance to prevent effects on rare species	Clearance received May 30, 2014
	Air Permit Change Notice	Issuance of Air Permit Change Notice	Permit received March 17, 2016
Maryland Historical Trust	State Historic Preservation Office (SHPO) Categorical Exclusion	Clearance for SHPO Categorical Exclusion	Clearance received November 12, 2014
Howard County Conservation District	Permit for Stormwater Management Associated with Construction Activity	Issuance of Permit for Stormwater Management Associated with Construction Activity	Permit received December 2, 2015
	Soil Erosion and Sediment Control	Approval of erosion and sediment controls to minimize soil erosion and off-site sedimentation	Application anticipated to be submitted fourth quarter of 2016
Virginia			
Virginia Department of Environmental Quality	Soil Erosion Plans Associated with Construction Activity	Soil Erosion Plans Associated with Construction Activity	Application submitted February 2, 2016
	Virginia Pollutant Discharge Elimination System Hydrostatic Discharge Permit	Issuance of Virginia Pollutant Discharge Elimination System Hydrostatic Discharge Permit	Application anticipated to be submitted fourth quarter of 2016
	CAA Title V 502(b)(10) Notifications	Review of notification of facility changes covered under Title V Permit 502(b)(10)	Determined not applicable
Virginia Department of Conservation and Recreation	Rare Species Clearance	Provide comments to prevent effects on rare species	Consultation initiated April 2014 and is ongoing
Virginia Department of Game and Inland Fisheries	Rare Species Clearance	Provide comments to prevent effects on rare species	Clearance received October 31, 2016
Virginia Department of Historic Resources	Section 106, NHPA Consultation	Review and comment on the Project and its effects on historic properties	Concurrence received November 12, 2014 and December 22, 2015

TABLE 1.5-1 (cont'd)

Major Permits, Approvals, and Consultations for the Atlantic Sunrise Project

Agency	Permit/Approval/Consultation	Agency Action	Status
North Carolina			
North Carolina Department of Environment and Natural Resources (NCDENR), Division of Energy, Land and Mineral Resources	NPDES General Stormwater Construction Notification	Approval of NPDES General Stormwater Construction Notification	Compressor Station 155 – approved April 12, 2016; Compressor Stations 145 and 150 – approved April 21, 2016; Compressor Station 160 – approved June 21, 2016
NCDENR, Division of Air Quality	CAA Title V 502(b)(10) Notifications	Review of notification of facility changes covered under Title V Permit 502(b)(10)	Determined not applicable
North Carolina Wildlife Resources Commission	Rare Species Clearance	Provide comments to prevent effects on rare species	Consultation initiated in April 2014 and is ongoing
North Carolina Department of Cultural Resources	SHPO Categorical Exclusion	SHPO Categorical Exclusion clearance	Clearance received October 23, 2014
South Carolina			
South Carolina Department of Health and Environmental Control	NPDES General Stormwater Construction Notification	Approval of NPDES General Stormwater Construction Notification	Application anticipated to be submitted third quarter of 2016
	NPDES Hydrostatic Discharge Permit	Issuance of NPDES Hydrostatic Discharge Permit	Application anticipated to be submitted fourth quarter of 2016
South Carolina Department of Natural Resource – Natural Heritage Program	Rare Species Clearance	Provide comments to prevent effects on rare species	Consultation initiated in April 2014 and is ongoing
South Carolina Archive and History Center	SHPO Categorical Exclusion	SHPO Categorical Exclusion clearance	Clearance received October 21, 2014

pennsylvania
DEPARTMENT OF ENVIRONMENTAL
PROTECTION

June 27, 2016

Ms. Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E., Room 1A
Washington, D.C. 20426

RE: Transcontinental Gas Pipeline Company
Atlantic Sunrise Project
Comments on May 5, 2016 Draft Environmental Impact Statement
Docket No. CP-15-138-000
OEP/DG2E/Gas2

Dear Secretary Bose:

The Pennsylvania Department of Environmental Protection (PADEP) has reviewed and is providing comments on the Federal Energy Regulatory Commission's (FERC) draft Environmental Impact Statement (EIS) for the Transcontinental Gas Pipeline Company (Transco) Atlantic Sunrise Project issued on May 5, 2016. PADEP's primary concern with the draft EIS is that it does not fully acknowledge the State law requirements that Transco must fulfill to meet its obligations under Section 401 of the Clean Water Act (33 U.S.C. § 1341).

As you know, Transco is required under the Section 401 of the Clean Water Act to obtain a certification from Pennsylvania that discharges from its proposed project within the State will comply with State law requirements necessary to ensure compliance with applicable provisions of the Clean Water Act.[1] Pennsylvania is rich in water resources, which PADEP protects pursuant to State law authority to fulfill both State and Federal law. Specifically, Pennsylvania has a long history of regulating discharges to its waters through the Pennsylvania Clean Streams Law enacted in 1937, and of regulating stream and wetland crossings and encroachments through the Pennsylvania Dam Safety and Encroachments Act, enacted in 1978. PADEP is the agency responsible for ensuring the quality of Pennsylvania's water resources through regulatory permitting programs that implement these statutes.

PADEP issued its State Water Quality Certification for the Atlantic Sunrise Project on April 5, 2016, and published notice of this certification in the *Pennsylvania Bulletin* on April 23, 2016 (46 Pa. B. 2132; copy enclosed). PADEP's State Water Quality Certification for this project is

[1] Specifically, the discharge must achieve applicable State law requirements related to the following sections of the Clean Water Act: the effluent limitations in Section 301 (33 U.S.C. § 1311), the water quality related effluent limitations in Section 302 (33 U.S.C. § 1312), the water quality standards and implementation plans in Section 303 (33 U.S.C. § 1313); the national standards of performance in Section 306 (33 U.S.C § 1316); and the toxic and pretreatment effluent standards in Section 307 (U.S.C. § 1317).

conditioned upon Transco obtaining and complying with State permits necessary to ensure that Pennsylvania's water quality standards are achieved. Specifically, Transco is required to obtain:

- State permits for erosion and sediment control required by State regulations at 25 Pa. Code Chapter 102;
- State permits for water obstruction and encroachments required by State regulations at 25 Pa. Code Chapter 105; and
- State permits for the discharge of hydrostatic test water under State regulations at 25 Pa. Code Chapter 92a.

Table 1.5-1 of the draft EIS acknowledges that Transco has obtained a State Water Quality Certification from PADEP and identifies State law permits that must be obtained from PADEP for this project. FERC includes the State law authorizations as part of its draft EIS to support its conclusion that the Atlantic Sunrise Project will not result in any significant adverse environmental impacts.

While these State law authorizations are identified in the draft EIS, FERC does not expressly require Transco to obtain these State law authorizations prior to construction. For example, Section 5.2 of the draft EIS identifies the "FERC Staff Recommended Mitigation" for inclusion in the FERC Order granting the Certificate of Public Convenience and Necessity for the project. None of FERC's conditions expressly require Transco to obtain the State law authorizations identified by and required under Pennsylvania's State Water Quality Certification prior to the commencement of construction in Pennsylvania. PADEP requests that FERC include in Section 5.2 of the final EIS a condition requiring Transco to obtain these State law authorizations pursuant to Pennsylvania's State Water Quality Certification.

PADEP also requests that FERC clarify the role of Pennsylvania's State law permitting programs in other relevant discussion when it finalizes the EIS. For example, the water obstruction and encroachments permits issued pursuant to 25 Pa. Code Chapter 105 will include wetland mitigation requirements. The draft EIS incorrectly identifies these and other State law permits required under Pennsylvania's State Water Quality Certification as permits issued under Section 401 of the Clean Water Act (*e.g.*, page ES-6 describing mitigation of construction and operation-related impacts on wetlands). That characterization is incorrect.

As noted above, the Section 401 of the Clean Water Act imposes an obligation on Transco to obtain a certification from Pennsylvania that the discharges from the project will protect the quality of Pennsylvania's water resources. In Pennsylvania, that protection is assured through State law permits that PADEP has identified as conditions of the State Water Quality Certification. FERC's short-hand method of describing Pennsylvania's State Water Quality Certification and its State law permits required thereunder as permits issued under Section 401 of the Clean Water Act is misleading and should be corrected to accurately describe these requirements as applicable State law authorizations.

Finally, Section 5.2 of the draft EIS identifies numerous instances in which Transco needs to provide additional information to FERC prior to the end of the draft EIS comment period or prior to construction. PADEP requests that FERC direct Transco to ensure that all pending applications for State permits and authorizations be updated with the current project data and information to ensure actions taken by PADEP are consistent with the project as authorized by FERC, including the State Water Quality Certification. PADEP also requests that FERC require Transco to provide copies of its weekly status reports required under condition 8 concurrently to PADEP.

PADEP appreciates the opportunity to comment on the draft EIS. Should you have any questions or need additional information regarding the comments and recommendations on the draft EIS, please contact Alexandra Chiaruttini, PADEP Chief Counsel by e-mail at achiarutti@pa.gov or by telephone at 717.787.4449.

Sincerely,

Dana K. Aunkst
Deputy Secretary

Enclosure

cc: Alexandra Chiaruttini

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November 9, 2017

VIA ELECTRONIC CASE FILING

Ms. Marcia M. Waldron, Clerk
Office of the Clerk
United States Court of Appeals for the Third Circuit
21400 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106-1790

Re: *Delaware Riverkeeper Network, et al. v. Secretary, Pennsylvania Department of Environmental Protection, et al.*, Case Nos. 16-2211, 16-2212, 16-2218, 16-2400

Dear Ms. Waldron:

I write on behalf of Respondent-Intervenor Transcontinental Gas Pipe Line Company, LLC ("Transco") in response to the Court's substantial questioning during oral argument in the above-referenced matters regarding the Pennsylvania Department of Environmental Protection's ("PADEP's") determination that, following review of Transco's Notice of Intent for coverage, Transco is eligible for coverage under Pennsylvania's NPDES General Permit for hydrostatic test discharges. (This approval authorizes the discharge of water used to test the hydraulic and structural integrity of the pipeline, a process referred to as hydrostatic testing, which occurs at the end of construction.)

Although Transco believes this is an issue to be resolved in the petition docketed at No. 17-3299 (which was not consolidated with the above-referenced matters), Transco would like to provide the following context for Notices of Intent for coverage under the NPDES General Permit:

- A general NPDES permit is "an NPDES permit that is issued for a clearly described category of point source discharges, when those discharges are substantially similar in nature and ***do not have the potential to cause significant adverse environmental impact***." 25 Pa. Code § 92a.2; 25 Pa. Code § 92a.54 (emphasis added).

- A Notice of Intent ("NOI") for coverage under an NPDES General Permit "is not an application." 25 Pa. Code § 92a.2 (definition of "NOI").

- An NOI for coverage under an NPDES General Permit is ***not*** subject to the Clean Water Act's public notice requirements, because an NOI is not an application. *Texas Ind. Producers & Royalty Owners Assn. v. Environmental Protection Agency*, 410 F.3d 964, 977-78 (7th Cir. 2005).

- The opportunity to request a public hearing occurs at the time a General Permit is proposed. *Id.* "Requiring an additional public hearing on each individual NOI … would eviscerate the administrative efficiency inherent in the general permitting concept." *Id.* (quotations omitted).

The opportunity to file a judicial appeal of PADEP's determination that Transco is eligible for coverage under the NPDES General Permit, as petitioner Delaware Riverkeeper Network has done, provides the necessary due process safeguards. 40 C.F.R. § 123.30.

Thank you for your consideration of this matter.

Respectfully,

s/ John F. Stoviak
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cc: All Counsel of Record (via CM/ECF)

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE OF GENERAL COUNSEL

November 22, 2017

TELEPHONE: (570) 826-2519 FAX: (570) 820-4838

Marcia M. Waldron, Clerk
Office of the Clerk
United States Court of Appeals for the Third Circuit
21400 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106-1790

Re: Delaware Riverkeeper Network, et al v. Patrick McDonnell, Secretary, Pennsylvania Department of Environmental Protection, et al. and Transcontinental Gas Pipeline Company, LLC, Intervenor;
Nos. 16-2211, 16-2212, 16-2218, and 16-2400

To the Clerk:

On behalf of Respondents, Patrick McDonnell, Secretary, and the Pennsylvania Department of Environmental Protection ("PADEP") and pursuant to the Court's November 15, 2017 Order, we respectfully support the assertions in the letter that the Intervenor, Transcontinental Gas Pipeline Company, LLC ("Transco"), filed on November 9, 2017.

The state water quality certification ("WQC") that is the subject of the above-referenced consolidated matters contains the following condition:

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

Joint appendix at 6a.

PADEP adopted regulations at Chapter 92a of Title 25 of the Pennsylvania Code to implement the NPDES program under the Clean Water Act. 25 Pa. Code § 92a.1. A person desiring to discharge pollutants to the waters of the Commonwealth must apply for an "individual permit" demonstrating compliance with applicable federal and state law. 25 Pa. Code § 92a.21. Every complete application for an individual NPDES permit shall be subject to public notice and comment. 25 Pa. Code § 92a.82(b). PADEP is also authorized to issue a general permit in lieu of issuing an individual permit "for a clearly and specifically described category of point source discharges," if the point sources meet certain conditions. 25 Pa. Code § 92a.54(a). Public notice of every proposed general permit is published for public comment. 25 Pa. Code § 92a.84(a) and (b). In order to comply with the conditions of the WQC, Transco may **either** submit an application for an individual NPDES permit pursuant to 25 Pa. Code § 92a.21 **or** it may submit a notice of intent for coverage ("NOI") under an existing NPDES general permit pursuant to 25 Pa. Code § 92a.23.

NPDES General Permits are used "to assure adequate environmental safeguards ... without the administrative and resource burdens involved in an individual permit issuance." *Texas Independent Producers and Royalty Owners Association v. EPA*, 410 F.3d 964, 968 (7th Cir. 2005) (internal quotations omitted). An NOI submitted to PADEP for coverage under an NPDES General Permit "is not an application," 25 Pa. Code § 92a.2, and therefore not subject to public notice and comment, unless otherwise required by the terms of the NPDES General Permit for which coverage is sought. In fact, both federal and Pennsylvania regulations provide a framework for NPDES General Permits to authorize activities in certain situations without the submission of an NOI for coverage. 25 Pa. Code § 92a.84(c)(1); 40 CFR § 122.28(b)(2)(v); 40 Pa. Bull. 5771 (Oct. 9, 2010) (discussing Chapter 92a rulemaking and framework where an NOI would not be required for coverage under a general permit).

PADEP issued an NPDES general permit authorizing discharges from hydrostatic testing of tanks and pipelines ("PAG-10"). Prior to issuance, PADEP provided public notice of the draft PAG-10 on March 21, 2015. 45 Pa.B. 1454 (March 21, 2015). On July 11, 2015, PADEP published public notice of the availability of PAG-10. 45 Pa.B. 3775 (July 11, 2015). In the public notice of availability, PADEP noted that it received five public comments. PADEP also issued a comment response document based on public comments received, which is available on PADEP's eLibrary (http://www.elibrary.dep.state.pa.us/dsweb/Get/Document-116167/3800-PM-

BCW0173j%20Comment-Response%20Document.pdf). None of the petitioners submitted comments on the draft PAG-10. Here, PAG-10 and the federal and state regulations do not require public notice of the Department's receipt of each NOI. Rather, notice is published upon approval of coverage only, consistent with 25 Pa. Code § 92a.84(c)(3) and the express terms of PAG-10.

Transco submitted to PADEP an NOI for coverage under PAG-10 in accordance with the conditions of the Transco WQC. PADEP published notice acknowledging Transco's NOI for coverage under PAG-10 on April 22, 2017. 47 Pa.B. 2339 (April 22, 2017). The Delaware Riverkeeper Network ("DRN") filed a petition to review PADEP's April 22, 2017 acknowledgment of coverage on October 19, 2017, which is docketed with this Court at No. 17-3299. The challenge to the April 22, 2017 acknowledgment of coverage is a separate matter which the Court declined to consolidate with this matter. This Court should consider the propriety of PADEP's acknowledgment of coverage under PAG-10, including the alleged failure to provide adequate opportunity for public comment, in the separate matter docketed at No. 17-3299.

PADEP's PAG-10 General Permit process complies with federal law, including Section 401. DRN asserts that the NPDES General Permit for Hydrostatic Discharges is "subject to the notice requirements of Section 401(a)(1)" of the Clean Water Act. *See* DRN Reply Brief at 11. However, by its express terms, Section 401 simply requires states to "establish procedures for public notice in the case of ***all applications for certification***." 33 U.S.C. § 1341(a)(1) (*emphasis added*). An NOI for Coverage under an NPDES General Permit is not an "application for certification" under Section 401. As the Seventh Circuit has observed, requiring public notice and additional public hearing "on each individual NOI ... would eviscerate the administrative efficiency inherent in the general permitting concept, in effect making the general permit scheme no different from the process for obtaining individual permits. This would be inconsistent with Congress' intent to allow for the use of general permits." *Texas Independent Producers and Royalty Owners Association*, 410 F.3d at 978. Review of a state agency action under the Natural Gas Act is focused on whether the state action "is inconsistent with the Federal law governing such permit." 15 U.S.C. § 717r(d)(3). Here, even though PADEP's approval of Transco's NOI for coverage under PAG-10 is not before the court in the instant proceeding, PADEP's action was clearly consistent with federal law. *See Texas Independent Producers and Royalty Owners Association*, 410 F.3d at 978.

On page 10 of DRN's Reply Brief and again in its November 22, 2017 letter to the Court, DRN incorrectly asserts that the Department granted coverage under PAG-10 for Transco's Leidy Southeast Expansion Project ("Leidy Project"). The Department did not grant coverage under PAG-10 for the Leidy Project. Instead the Department issued an **individual NPDES permit** for the discharge of hydrostatic testing water from the Leidy Project (NPDES Permit No. PA0275760). Since Transco filed an application for an individual NPDES permit for the Leidy Project, PADEP published notice and solicited public comment on the application. 45 Pa.B. 3718 (July 11, 2015). PADEP also published notice of permit issuance of the individual NPDES permit for the Leidy Project. 45 Pa.B. 4934 (August 22, 2015). As noted above, an NPDES permit authorization can be acquired either by application for an individual permit or by submitting an NOI for coverage under an existing general NPDES permit.

DRN points to *Environmental Defense Center, Inc. v. U.S. E.P.A.*, 344 F.3d 832 (9th Cir. 2003) ("*EDC*") to support its challenge to PADEP's authorization to use PAG-10. *EDC* is distinguishable from this matter since it concerns a challenge to EPA's "Phase II Rule" as opposed to the general permitting program as a whole. *EDC* found defects in the Phase II Rule because NOIs "are the functional equivalents of permits under the Phase II General Permit option." *Id.* at 857. No analogous challenge has been asserted here. Similarly, DRN's reliance on *Waterkeeper Alliance, Inc. v. U.S. E.P.A.*, 399 F3d 486 (2d Cir. 2005) ("*Waterkeeper*") is misplaced. *Waterkeeper* is distinguishable from this matter since it concerns a challenge to EPA's CAFO Rule. In *Waterkeeper* the court invalidated the CAFO Rule because of inadequate public access to nutrient management plans which were determined to be the functional equivalent of effluent limits. *Id.* at 503. No similar assertion has been made here.

Finally, DRN asserts that because of the lack of public notice, they were not able to timely review Transco's "application," determine if there were any flaws, generate expert analysis, submit a comment letter, or otherwise "meaningfully engage in the permitting process." DRN Brief at 31. However, DRN has now twice admitted (in its motion to consolidate (p. 5) and at oral argument (p. 62)) that its arguments with respect to PADEP's approval of Transco's NOI for coverage are "identical" to its public notice arguments in the Section 401 Certification appeal, that this "encompass[es] all the arguments" DRN would allege, and "it is unnecessary to make any new arguments." 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. *Delaware Riverkeeper Network v. Secretary, Pennsylvania Department of Environmental Protection*, 833 F.3d 360, 378 (3d Cir.

2016). Aside from its allegation that it did not have an opportunity to comment (a point that the Seventh Circuit opinion disputes), DRN fails to assert how it was prejudiced. DRN does not dispute any facts or data in PADEP's approval of Transco's NOI for coverage and admits that it will not raise any substantive arguments in the NPDES appeal aside from its public notice claims. As the Third Circuit has held, DRN must show not only that an error was made, but that it was prejudiced by that error. *Delaware Riverkeeper Network*, 833 F.3d at 387. Here, the Seventh Circuit has held that NOIs for coverage under an NPDES permit are not subject to the CWA's public notice requirements (i.e., there is no error), and DRN fails to allege how it has been harmed, other than by the alleged deficient notice (i.e., DRN has failed to show prejudice).

In conclusion, this Court should dismiss the petitions to review because the (1) DRN's challenge to the Department's authorization to use PAG-10 is properly heard in the matter docketed at No. 17-3299, (2) PADEP's public notice of authorization to use PAG-10 complies with federal and state law, and (3) DRN has not been harmed by the alleged public notice issues associated with the PAG-10 authorization.

Respectfully submitted,

Joseph S. Cigan III
Assistant Counsel

cc: counsel of record via CM/ECF

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

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

DELAWARE RIVERKEEPER NETWORK AND MAYA VAN ROSSUM, DELAWARE RIVERKEEPER; LANCASTER AGAINST PIPELINES; GERALDINE NESBITT; AND SIERRA CLUB
Petitioners,
v.
PARTICK MCDONNELL, SECRETARY OF THE PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION, AND THE COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Respondents,

and

TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC,
Intervenor-Respondent

On Petition for Review of Final Agency Action of the
Pennsylvania Department of Environmental Protection

PROOF BRIEF OF RESPONDENTS

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August 10, 2017

This standard of review under the APA is narrow in that a court may not substitute its own judgment for that of the agency. *Pa. Dep't of Pub. Welfare v. U.S. Dep't of Health and Human Servs.*, 101 F.3d 939, 943 (3d Cir. 1996). A court may find an agency action to be arbitrary or capricious only where the administrative action is irrational or not based on relevant factors. *NVE, Inc. v. Dep't of Health & Human Servs.*, 463 F.3d 182, 190 (3d Cir. 2006).

SUMMARY OF ARGUMENT

Petitioners fail to show that the imposition of conditions requiring acquisition of state water quality permits in the Transco WQC is contrary to law or otherwise arbitrary and capricious. PADEP is expressly authorized by law to impose conditions in its water quality certifications based on state law requirements, including conditions that require the acquisition of state water quality permits. Further, Petitioners fail to show that they have been harmed by the issuance of the conditional water quality certification because the conditions must be satisfied prior to the commencement of construction of the pipeline.

PADEP issued the Transco WQC consistent with its practices and procedures related to water quality certification for interstate natural gas pipeline construction projects regulated by FERC where the applicant submits a stand-alone request for water quality certification, *i.e.*, a request that is not accompanied by applications for the relevant state water quality permits. The water quality certification procedures

Despite the clarity of law on this issue and the straightforwardness of the facts regarding how PADEP addressed its statutory obligations to conduct a full environmental analysis of the Transco Project before authorizing construction of the interstate gas pipeline, the Petitioners attack the conditions in the Transco WQC, characterizing them as "circular" in nature. The opposite is, in fact, the case. Granting a conditional water quality certification first and acting on the relevant state water permit applications second allows a project to proceed in a logical way with all parties having access to necessary information at critical junctures in the process.

A federal agency must include the conditions imposed in a state water quality certification in its authorization of a proposed project. For interstate natural gas pipeline projects regulated by FERC, the state water quality certification provides an important mechanism for states to advise project applicants and FERC of the state law water quality requirements early in the review process. This allows sufficient time for the conditions of the certification to be satisfied before FERC authorizes construction to proceed. PADEP can issue state water quality permits only when the applicant has submitted administratively and technically complete applications that satisfy all applicable requirements for the issuance of such permits, including field-verified surveys of the water resources present in the proposed project area. *See, e.g.*, 25 Pa. Code 105.13(e)(1)(i)(A). An applicant must have full access to the proposed project site to complete such surveys. PADEP's review of additional environmental

information submitted with an applicant's state water quality permit applications does not, as the Petitioners argue, undermine the validity of the water quality certification. In fact, it does the opposite. The conditions ensure that the project will comply with Pennsylvania's water quality standards.

C. This Court Has Disposed of this Issue in *DRN I*

What is most troubling about the Petitioners' argument is that this Court has already considered and disposed of this issue in an earlier pipeline challenge by the Riverkeeper of the WQC for the Transco Leidy Southeast Line Project. *See DRN I*, supra. In that matter, the Riverkeeper asserted that PADEP relied on incorrect wetland classifications in the record at the time of PADEP's issuance of the conditional water quality certification for the project. This Court did not find the conditional nature of PADEP's water quality certification to be problematic when it stated:

> 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**. 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.

United States Court of Appeals

for the

Third Circuit

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

DELAWARE RIVERKEEPER NETWORK; MAYA VAN ROSSUM, the Delaware Riverkeeper; LANCASTER AGAINST PIPELINES; GERALDINE NESBITT; SIERRA CLUB,

Petitioners,

– v. –

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

Respondents,

TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC,

Intervenor.

ON PETITION FOR REVIEW OF AN ORDER OF THE PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION

PROOF BRIEF OF INTERVENOR

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(For Continuation of Appearances See Inside Cover)

C. PADEP Provided the Required Public Notice of Its Approval of Transco's Notice of Intent for Coverage Under Pennsylvania's NPDES General Permit for the Discharge of Hydrostatic Testing Water

The Section 401 Certification is conditioned on Transco obtaining a National Pollutant Discharge Elimination System permit for the discharge of water from the hydrostatic testing of the pipeline.[17] In July 2015, PADEP published notice of the availability of the NPDES General Permit for Discharges from Hydrostatic Testing of Tanks and Pipelines. 45 Pa. Bull. 3775 (July 11, 2015). The notice specifically states that for Notices of Intent for Coverage under the General Permit, "the Department will publish notice in the *Pennsylvania Bulletin* for approvals of coverage only." *Id.* at 3776. This is consistent with PADEP's regulations, which authorize the Department to publish public notice upon approval of coverage only. 25 Pa. Code § 92a.84(c)(3).

Here, PADEP published notice of its approval of Transco's Notice of Intent for Coverage under the NPDES General Permit for the discharge of water from hydrostatic testing on April 22, 2017. 47 Pa. Bull. 2372 (Apr. 22, 2017). PADEP complied with its public notice requirements. Further, Petitioners, as intervenors in the FERC proceeding, were on notice that Transco submitted an application and

[17] Hydrostatic testing refers to the use of water under certain temperatures and pressures to test the hydraulic and structural integrity of natural gas transmission lines.

that it was under review. *See* Transco Weekly Report No. 002, FERC Dkt. CP15-138-000 (Feb. 21, 2017) (specifically noting that Transco's application for an NPDES hydrostatic test water discharge permit was submitted to PADEP and under review); 15 U.S.C. § 717n(d)(2); 18 C.F.R. § 385.2014(b) (FERC's record constitutes part of record on appeal).

PADEP's public notice of its approval of Transco's Notice of Intent for Coverage under the NPDES General Permit does not deprive Petitioners of the opportunity to challenge PADEP's action. Further, Petitioners had the option of challenging PADEP's action, 15 U.S.C. § 717r(d)(1), but they failed to do so. Petitioners cannot now challenge the public notice PADEP provided with respect to the NPDES permit through an appeal of the Section 401 Certification. *See Nat'l Ass'n of Home Builders*, 551 U.S. at 672 n.11; *Delaware Riverkeeper*, 833 F.3d at 386.

Even if the Court were to address Petitioners' argument, however, federal law governing NPDES permits provides that the opportunity for judicial review of an NPDES permit is sufficient to provide for, encourage, and assist public participation in the permitting process. *See* 40 C.F.R. § 123.30. Here, where PADEP complied with the law governing public notice of approvals of coverage under an NPDES permit, and Petitioners were on notice that Transco had submitted an application, Petitioners' challenge must fail.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 16-2211/16-2212/16-2218/16-2400

DELAWARE RIVERKEEPER NETWORK;
DELAWARE RIVERKEEPER; MAYA
VAN ROSSUM,
Petitioners No. 16-2211
vs.
SECRETARY PENNSYLVANIA DEPARTMENT
OF ENVIRONMENTAL PROTECTION;
PENNSYLVANIA DEPARTMENT OF
ENVIRONMENTAL PROTECTION,
Respondents

Transcontinental Gas Pipe Line Company, LLC,
Intervenor

LANCASTER AGAINST PIPELINES,
Petitioner No. 16-2212
vs.
SECRETARY PENNSYLVANIA DEPARTMENT
OF ENVIRONMENTAL PROTECTION;
PENNSYLVANIA DEPARTMENT OF
ENVIRONMENTAL PROTECTION,
Respondents

Transcontinental Gas Pipe Line Company, LLC,
Intervenor

GERALDINE NESBITT,
Petitioner No. 16-2218
vs.
SECRETARY PENNSYLVANIA DEPARTMENT
OF ENVIRONMENTAL PROTECTION, et al.,
Respondents

Transcontinental Gas Pipe Line Company, LLC,
Intervenor

CAPTION CONTINIED:

CAPTION CONTINUES:

SIERRA CLUB,
Petitioner No. 16-2400
vs.
SECRETARY PENNSYLVANIA DEPARTMENT
OF ENVIRONMENTAL PROTECTION, et al.,
Respondents

Transcontinental Gas Pipe Line Company, LLC,
Intervenor

Transcript from the audio recording of the oral argument held on Tuesday, November 7, 2017, at the United States Courthouse, located at 601 Market Street, Philadelphia, Pennsylvania. This transcript was produced by John M. Colasante, a Registered Professional Reporter, Notary Public, and Approved Reporter of the United States District Court.

BEFORE:

THE HONORABLE KENT A. JORDAN
THE HONORABLE THOMAS M. HARDIMAN
THE HONORABLE ANTHONY J. SCIRICA

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THE COURT: We're going to take a break from the Wayne Land and Mineral Group case and begin argument in Delaware Riverkeeper and other petitioners versus the Secretary of Pennsylvania Department of Environmental Protection.

We'll go ahead and call that case and ask counsel to approach.

Mr. Stemplewicz?

MR. FREED: Good morning, Your Honor. My name is Mark Freed. May it please the court -- my name is Mark Freed, and I represent appellants, petitioners, Geraldine Nesbitt and Lancaster Against Pipeline.

THE COURT: Okay.

MR. FREED: Also at counsel table is Mr. Stemplewicz for Delaware Riverkeeper Network and Ms. Csank for Sierra Club.

THE COURT: All right. Thank you.

MR. FREED: I would like to reserve two minutes for rebuttal. I will be taking nine minutes on my primary argument.

THE COURT: Understood. Thanks.

You may proceed.

MR. FREED: I want to primarily discuss two issues. One is the jurisdiction of the court to consider a non-final agency order. And second is the harms that arise from the manner in which DEP sequenced the water quality certification with the environmental permits and the depravation of fundamental property rights that that results in.

THE COURT: Okay. Let's get right into the jurisdictional piece, Mr. Freed. I've got a question for you.

MR. FREED: Okay.

THE COURT: Do you agree or disagree that what we're asking, the question of finality, is a question of federal law?

MR. FREED: The question of finality... Yeah, I would agree with that. I would agree it's a question of federal.

THE COURT: Okay. And we could, if we thought it prudent, we could look to state law for some guidance.

MR. FREED: Correct.

THE COURT: But, ultimately, the question we're deciding is whether under the

Natural Gas Act the agency decision is sufficiently final for review, correct?

MR. FREED: See, that's where I would disagree, Your Honor. I think the question is, under federal jurisprudence, as annunciated by the Supreme Court in Bell versus New Jersey, whether or not it's final.

And what the court said is there's a strong presumption of finality unless the Natural Gas Act or some other act says there's not. So I think the argument's --

THE COURT: I think we're --

MR. FREED: -- been flipped on its head.

THE COURT: I think we're actually talking about two different things.

You're answering the question is there a finality requirement in the federal law. And, you're right, under Bell, the Supreme Court has said there's a strong presumption that there is a finality requirement.

But the question of whether the thing that happened in this case in fact meets that finality requirement, that's a point which is a

question of federal law, to be answered under the Natural Gas Act; is it not?

MR. FREED: And, I think what the court is doing is, it's flipping the presumption. The presumption -- there's a default that finality is required, unless, unless there's something specific in the Natural Gas Act that says it's not.

THE COURT: I apologize. I'm not trying to be difficult. But we're --

MR. FREED: Okay.

THE COURT: -- talking past each other.

MR. FREED: Okay.

THE COURT: It appears to me that there are two different questions. One question is, is finality required by the Natural Gas Act. That's the question that might be answered by Bell, and which you're asserting is answered by Bell, and, that, yes, there has to be a final agency action for there to be a valid petition for review over which we'd have jurisdiction.

MR. FREED: Correct.

THE COURT: That's not what I'm trying to ask you about.

MR. FREED: Okay.

THE COURT: I'm trying to ask you about the facts of this case --

MR. FREED: Okay.

THE COURT: -- that is, whether or not one looks at the facts of this case and it says what happened here is final.

MR. FREED: Okay.

THE COURT: And, I question, when you approach that question --

MR. FREED: Okay.

THE COURT: -- you approach it not saying whatever state law says is final is final, but, as a matter of federal law, is what happened here something that constitutes finality. That's what I'm trying to ask you.

And would you agree that that's the approach, that latter approach, that it's a question of federal law whether or not what happened here meets the threshold of finality?

MR. FREED: Yeah, I would agree with that, Your Honor, but I think you have to look at -- it has to be informed by the state law.

THE COURT: Okay.

MR. FREED: And it has to be informed by a specific reference to the fact that DEP's actions under the Environmental Hearing Board Act are not final until the EHB has had an opportunity. So --

THE COURT: But DEP had nothing else to do, though.

MR. FREED: I'm sorry?

THE COURT: DEP had nothing left to do here.

MR. FREED: Yeah. But the idea that because the Environmental Hearing Board doesn't get paid by DEP, as opposed to Massachusetts, where their administrative law judges get paid by DEP, shouldn't be a difference.

The fact that Pennsylvania decided instead of putting our ALJs in the DEP we're going to create a separate agency that does essentially what they would do if they were in DEP, like they were originally in DER, that's a difference without a distinction.

The bottom line is is that the --

THE COURT: Why is it?

THE COURT: It seems like --

THE COURT: Why is it?

THE COURT: -- a very large distinction.

THE COURT: Yeah. That's an important thing.

THE COURT: Where Pennsylvania separated them and -- I think you're right to say that the question of finality is informed by state law, because how the state conducts its business in this area will give us clues as to whether it's acted in a final way or not.

MR. FREED: And here's what --

THE COURT: And, here, DEP has nothing left to do, and under the state scheme it does not act as an automatic supersedeas. So...

MR. FREED: Here's why -- but the fact that it doesn't act as an automatic supersedeas is significant.

Here's why, in the system that the state has set up, you can't just ignore the fact that EHB, as essentially finishing the process for DEP, has the role. The way -- this isn't like -- we don't have the Administrative Procedures Act. We don't have a situation where generally DEP is

instructed on how to prepare a record.

The record, because we have these two separate but related, interrelated agencies, the record is, of the DEP action, is created at the EHB. And that's how the courts, the state courts have said due process is protected. Without that piece, due process is not protected.

THE COURT: Then how is it that an agency, a PADEP decision is final if somebody chooses not to appeal?

MR. FREED: It's not final. Now, does it have effect?

THE COURT: If they choose not to appeal, and the 30 days expires, is it not final as to that person?

MR. FREED: If they choose not to appeal and they don't go through some other methods. 30 days is only one method. And we've briefed the fact that there can be nunc pro tunc. We've briefed the fact that this court has the ability under state law to transfer it to the EHB. But if all those are waived --

THE COURT: Yeah. It --

MR. FREED: -- then it becomes final.

THE COURT: And it becomes --

MR. FREED: But until that happens, it's not final.

THE COURT: And --

THE COURT: When a district court enters an order, is that a final order?

MR. FREED: A district court of the United States?

THE COURT: Yes.

MR. FREED: It's a final order because it's -- it hasn't been -- it's a different system. The state system is such that when you issue an order -- and I'm not saying that -- in fact, you mention the supersedeas thing. I think it's clear that the order has some import. It takes effect barring a supersedeas. But it doesn't mean that it -- it's a separate question about whether it's --

THE COURT: But it's --

MR. FREED: -- final for this court's review.

THE COURT: But isn't the logical way to look at it is to say that it's final but subject to appellate review in the same way that a district

court order is a final order, but it's subject to appellate review in this court?

MR. FREED: No, because a district --

THE COURT: But what's the difference between the state scheme and, you know --

MR. FREED: You have a record and you've protected due process rights by going through a district court process.

THE COURT: All right. So then it's really not about final agency action as much as it is about constitutional due process.

MR. FREED: Well, that's a major piece of it. It's a constitutional due process issue, but that's all built --

THE COURT: So your argu --

MR. FREED: -- into the state action. I'm sorry, Your Honor.

THE COURT: So your argument then, as I understand it, is that if we were to find the DEP's decision final, it would deprive you of due process because you're not able to make the kind of record that you would like to make.

MR. FREED: I think that's absolutely right. It would also deprive this court of the

ability to have a full record to review, as it would have if it had gone through a district court process.

THE COURT: Does it necessarily, then, follow that what you're saying is that the Pennsylvania system is constitutionally infirm? Because if the decision of the Pennsylvania Department of Environmental Protection is final and takes effect absent a supersedeas, what you're saying is they've got a scheme whereby people are deprived of due process because orders can take effect and things start happening.

MR. FREED: No. That very issue has been addressed by the state courts, and they said as long as the EHB has the opportunity and as long as appellant has the opportunity for a full and fair review by the EHB, even if it's after the fact, due process is not deprived.

The problem here is the way, the way appellees are trying to set up the scheme, they're essentially --

THE COURT: Do they --

MR. FREED: -- trying to say, We're going to take that piece out.

THE COURT: Do they -- do the state courts say that in the absence of EHB review there would be a violation of due process?

MR. FREED: I don't know the -- the question that has been presented is, is the EHB reviewing after the fact a violation of due process. And they said no.

I think, I think the courts would say that there's a deprivation of due process, because at that point you essentially have no administrative review, like you have in Massachusetts.

In Massachusetts, and I know there's a chart and we've addressed the chart in our briefs and we have our own chart, but in Massachusetts, they still have an environmental law judge that reviews the action of the agency, the same that we have in Pennsylvania. There's -- it's really the -- and even the EHB said, who knows the process best of all -- this is an almost identical process. This is the same process.

You need that ability -- without an APA, without a federal system that specifically sets up how a record is going to be made, it's -- I

mean, how does this court know what the record should be? It doesn't.

THE COURT: Don't we have to --

MR. FREED: And there's been no --

THE COURT: Don't we --

MR. FREED: -- opportunity for evidence.

THE COURT: Don't we, don't we need to, as we approach this, ask ourselves the question, what does the Natural Gas Act expect in terms of state processes moving these things forward?

And if we ask ourselves that question, we can be informed by state law, but we're not controlled by state law. Would we, would we be in a posture where we would say, okay, if that's the review that's required, then maybe that's not so good for the environmental interest groups and for the state, because that means they can't possibly meet the one-year deadline set in the Natural Gas Act for review, and this defaults back to the federal government and the state has no part or parcel in it?

MR. FREED: And, Judge Jordan, I

really appreciate you raised that because that's a really fundamental question, which is, the one-year issue for DEP to make a decision versus the finality, are two -- it's conflating two separate issues.

The one-year issue is DEP has one year to act. The same that DEP has certain requirements. We have, in Pennsylvania, we have a money-back guarantee program. They have to act. If you permit a landfill, the landfill can build. It still goes through the Environmental Hearing Board process.

THE COURT: Yeah. What you're suggesting is that the one-year -- that when Congress put that one-year deadline in place, they anticipated and were okay with the idea that the action, the final action in your state would occur much past a year, right? You're saying PADEP passed -- and I apologize if I'm using a lingo that nobody else does.

MR. FREED: No. That's actually --

THE COURT: But that's --

MR. FREED: -- what many people use.

THE COURT: Okay. That PADEP has to

act in a year, but your position also is that that's irrelevant; in other words, that the thing that Congress wants to have happen is a functional irrelevancy, because it has no meaningful due process effect in the system.

MR. FREED: No. It's --

THE COURT: That's a difficult --

MR. FREED: No. No. It does have a due pro -- it's -- okay. Let's -- and I use the analogy, Your Honor, of permitting a landfill.

A landfill gets permitted. The owner of the landfill, immediately upon issuance of the DEP order, can build his landfill while he's going through the Environmental Hearing Board process, absent a supersedeas.

It's the same thing here. There was a final action taken by the DEP that FERC can rely on. Now, FERC -- you know, it's a separate question about how -- and FERC has different policies in different situations about how they're going to deal with issues or orders while it's going through administrative processes.

But, you know, how FERC deals with it, and this was the issue that came up in the 2016

correspondence between FERC and DEP, but the fact that there is now -- DEP has taken an action. FERC now knows that, at a first pass, DEP has said, This is okay, but --

THE COURT: Well, that's interesting, because -- and maybe I should be asking this of your colleague who's here on behalf of Delaware Riverkeepers, but I thought one of the issues in the earlier rounds of battles over other pipelines, like in Delaware Riverkeeper Number I, the 2016 --

MR. FREED: Right, Your Honor.

THE COURT: -- case, there was some pretty strong feeling behind the notion that FERC couldn't do it, people -- it was a bad thing, people were going to start doing things on the basis of a PADEP decision, and that was wrong.

And the argument in response and the decision made by the court was, well, don't worry, because nothing is going to happen until the later permits are issued.

You seem to be saying it's okay, because FERC can start doing things. So --

MR. FREED: Yes.

THE COURT: -- I understand you're

representing different parties, but I sort of --

MR. FREED: No. It's exactly the --

THE COURT: -- had the idea that you were on the same page on this stuff.

MR. FREED: We are.

THE COURT: So am I proceeding in false conflict? Which is it? Is it, Holy smokes, you got to stop all this right now, because FERC might allow the parties to, Transco, to do something? Or is it, Hey, it's all good, even though this might take years, because FERC can start doing something and Transco can start doing something?

MR. FREED: But that's exactly the situation that's been set up. And what I'll say -- and that actually leads into the other issue, which is, what is the harm.

The problem is, in the Leidy cases and the other cases, the only thing the court really considered was what is the harm from construction.

There's no construction until everything is issued, until the environmental permits, the 401, the certificate of public convenience. So what difference does it matter

what order it's in?

And if you only look at those harms, I would say, yeah, I agree that it's a no harm, no foul situation.

The point of our briefs, the point of what we're arguing here is there's other harms. And those harms are the deprivation of due process rights that occur because a taking is happening.

But to answer your question more directly, the way it's set up now is essentially that FERC is now taking -- is allowing DEP to issue a water quality certification before there's even any environmental permits. I mean --

THE COURT: That's --

MR. FREED: -- isn't that even a more absurd result.

THE COURT: That's --

MR. FREED: -- FERC is taking action on an empty document.

THE COURT: Isn't that Delaware Riverkeeper Number I? Isn't that right? The same thing? I mean, the argument of out of sequence decision-making was exactly the argument made by your -- I don't know whether Mr. Stemplewicz was

the one who made the argument --

MR. FREED: Right.

THE COURT: -- that was pressed on that panel. And they said that's not a problem --

MR. FREED: It's not a --

THE COURT: -- it's okay.

MR. FREED: It's not a problem when you're only looking at construction. It's clearly a problem if you're looking at the other harms that arise, particularly since DEP is now saying, We have a viable project that can move forward.

THE COURT: Why is that, why is that any different than the harm in Delaware Riverkeeper Number I? If, in fact, it's the case, and I understand we might have some discussion about that, but if, in fact, it is the case that nothing can happen until all the permits are issued, why aren't we in exactly the same posture in this case as were the petitioners and the parties in Delaware Riverkeeper Number I?

MR. FREED: That's exactly right, because something is happening. People are losing their property. Property is being taken based on an empty document and a certificate of public

convenience that says --

THE COURT: But that's a FERC --

THE COURT: How do you --

THE COURT: That's a collateral attack on FERC.

MR. FREED: No. FERC, FERC looks to -- If 401 means anything, it means that the federal agency has to look to the state agency to determine whether or not the project is viable --

THE COURT: If that's true --

MR. FREED: -- and is going to be protective of environmental concepts.

And the FERC is essentially acting, and this is the whole correspondence --

THE COURT: Mr. Freed, hold on just a minute.

MR. FREED: -- in the 2016 letter.

THE COURT: If your real issue is eminent domain, then don't you have a standing argument you need to address first? How are -- how is your client in a position to assert the rights of people whose property is being taken?

MR. FREED: Lancaster Against Pipeline, as well as DRN, and Sierra Club, all have

members who are losing property by eminent domain.

THE COURT: Yeah, but that doesn't answer the question, which you know exists because it's been briefed, about the zone of interest involved in the case, right? And how do you fit within that zone of interest as an environmental advocacy group?

MR. FREED: Eminent domain, and I think that the only decision to really address this is the Gunpowder decision, out of the DC circuit. It was a two-to-one decision. And I think Judge Jordan in the dissent very clearly I think laid out frankly the rationale that this court should accept that eminent domain is an environmental issue. It is a right protected by the Clean Water Act.

THE COURT: A dissent, though, right?

MR. FREED: It was a dissent, two-to-one decision, by the DC circuit. And the only -- I think as Judge Hardiman said earlier when you were listing all the various circuits that had held one way, we don't have that in this situation.

THE COURT: Okay.

THE COURT: One quick question.

There is a right to appeal to the

commonwealth court after a decision by the Environmental Hearing Board; is there not?

MR. FREED: I think that's -- that's, I think, where the -- I think that's the question of what the Natural Gas Act does and doesn't require, does it cut off the appeal from final agency action or not.

THE COURT: Well --

MR. FREED: I don't think it cuts off the administrative review. I think there's at least an argument, and, again, it's not really before the court, and we haven't delved into it, about whether or not it would cut off an appeal or whether it goes directly to this court.

THE COURT: Well, I think it's important, because the 2005 amendments to the Natural Gas Act say that the purpose of the amendments were to expedite this matter.

MR. FREED: Correct.

THE COURT: And it seems to me that your view may prevent Congress from --

MR. FREED: No.

THE COURT: -- Congress, as well, in this situation from --

MR. FREED: We would concede for the purpose of this argument that it would go directly to this court and not the commonwealth court.

I know that at least one Environmental Hearing Board judge has raised the issue of the 10th Amendment, about whether or not the 10th Amendment would preclude the cut-off of both EHB and the appellate process.

But at this point, I think our primary concern is making sure we're able to establish a record and through that process safeguard the due process rights of the appellants.

THE COURT: Okay. Thanks very much, Mr. Freed.

MR. FREED: Thank you.

THE COURT: Mr. Stemplewicz, your argument, please.

MR. STEMPLEWICZ: Thank you, Your Honor. Aaron Stemplewicz on behalf of the Delaware Riverkeeper Network and the Delaware Riverkeeper.

I think I'm going to start in a place that maybe will help contextualize why it's important that review first be had at the EHB. And I think it goes right to the actual merits of our

claims with regard to public notice and the NPDES permit.

The way in which Pennsylvania has devised its regulations for public notice, and specifically for the NPDES permit, were devised in such a way that never contemplated that a review of a NPDES permit would ever come directly from DEP straight to circuit court.

And we know this because there's no, in the way the regs are set up now, there's no time or place for an aggrieved party, whether it's a landowner who has a stream in their backyard that's being, you know, water is being taken out, or they live in a lakefront community and water is being taken out to be used in hydrostatic testing --

THE COURT: Right. If we were to accept --

MR. STEMPLEWICZ: -- there's no way for them to --

THE COURT: Right.

MR. STEMPLEWICZ: -- build the record.

THE COURT: If we were to accept that's true, would the correct decision be to say, in this instance, then, the action was arbitrary

and capricious, and send it back to PADEP and tell them that you've got to give notice and comment before one of these NPDES permits is done, and then 60 days later we're back here again?

MR. STEMPLEWICZ: Potentially. And our request for relief is quite modest. And that is what we're requesting here is for you to remand, for the court to remand the 401, require notice and comment period sufficient for people to build a record, if they're aggrieved, regarding the NPDES permit. And that way, the NPDES permit can be challenged on its substance, rather than relying on a record on which no one other than DEP had an opportunity to build, which is what we had happen here.

That's why our only argument is a procedural argument. That's the only one we could raise here. Because we don't have any -- we weren't able to submit comments on the substance of the NPDES permit.

And I think the lack of clarity is also clear here with regard to the rights --

THE COURT: Well, hold on just a moment. Let me --

MR. STEMPLEWICZ: Sure.

THE COURT: -- ask you a quick question.

If we were to agree with your colleague, Mr. Freed, that, in fact, there's no jurisdiction yet because there has to be an opportunity to appeal to the EHB, doesn't that undermine your argument about this NPDES permit? Because then you would have, in the context of the EHB hearing, an opportunity to talk about this and you would get all the process you were due. Is that right?

MR. STEMPLEWICZ: I think we would get the -- yeah, we would get the opportunity to build the record at that point.

THE COURT: So then it --

MR. STEMPLEWICZ: The purpose of --

THE COURT: It would -- doesn't it actually just eliminate your argument? Because then you've got your opportunity to -- you've had notice. You've had your opportunity to be heard. You've gotten everything you're entitled to in the way of due process, albeit in the context of an EHB hearing. Is that right?

MR. STEMPLEWICZ: Well, the way in which I would look at it is that the whole purpose of public comment, and this is clear from the entire line of case law discussing what public comment means, is that, and we can look at the Lake Erie Alliance case that we briefed, is that the purpose of public notice is to invite public comment prior to a final decision.

And that's all that we're asking. And if we get that through the EHB process, then we're happy, and then, you know, we're satisfied.

THE COURT: Okay. Thanks very much, Mr. Stemplewicz.

We'll hear from counsel for the Department of Environmental Protection.

MR. CIGAN: Good morning, Your Honors. My name is Joe Cigan, and I represent Patrick McDonnell, Secretary to the Pennsylvania Department of Environmental Protection, and I also represent the Pennsylvania Department of Environmental Protection.

THE COURT: Thanks. And we have limited time. So I'm going to hit you right out of the box.

I want you to respond to Mr. Freed's assertion about how the system works; that is, the assertion that there is no meaningful record developed before PADEP issues its decision, that the way the state has established its program, EHB review is essential to even have an administrative record of the sort one usually associates with an agency final action.

MR. CIGAN: Yes, Your Honor. It's the department's position that there is a robust record that is currently before the court. The record that the department certified for this court's review is in excess of 23,000 pages.

THE COURT: And how do you respond to the cases cited by the petitioners that say, from the state courts, that say, Don't worry about feeling like you're not getting your due before the department, because you get due process because of the EHB running a de novo hearing and taking evidence and building a record?

MR. CIGAN: Well, the department relies upon its public notice and public comment process, and the application -- in this case, it was not an application for a permit. It was a

request for a state determination that the project complies with water quality standards.

THE COURT: Right. I'm not -- I apologize. Let me try to make this clear.

MR. CIGAN: Sure.

THE COURT: I understand their argument to be, the state itself, through its courts, has said that this is all one process. You don't get due process until you've gotten a full Environmental Hearing Board hearing after a PADEP action, because that's the way you're going to get an opportunity to be fully heard and develop your record.

That's their -- I'm probably doing less than justice to Mr. Freed's and his colleague's position, but I understand that to be what they're saying.

I'm trying to get you to respond to that. If that's really what the state courts have said, why would we say, Yeah, EHB review unnecessary, go ahead, cut it off at PADEP.

MR. CIGAN: Well, Your Honor, I'm sorry I'm not responding to your point directly, but I don't think the petitioner characterization

is fair as to the review process that's been set up.

THE COURT: Is that what the state courts say?

MR. CIGAN: Well, what the Environmental Hearing Board Act says is that if no one challenges the department's action, it would become final.

THE COURT: Sure. But have they accurately characterized the state courts' decisions about how essential EHB review is to petitioners getting due process?

MR. CIGAN: No, I don't think that is the fair characterization. I think it's the opportunity to challenge that gives them due process, that the record -- when the Environmental Hearing Board reviews a final action of the agency, it's reviewing that decision-making process.

It is, you know, materially different than Massachusetts, say, where the internal agency review process does not come to completion until there's been opportunity for administrative review.

THE COURT: All right. And with respect to the argument that's being made by the

Riverkeeper's counsel, if we were to agree with you that PADEP certification or decision-making is sufficient to constitute final agency action, how can the action of the department be viewed as something other than arbitrary and capricious when it is contingent upon the filing or issuance of a permit as to which the department itself acknowledges there is no opportunity to be heard, there is no notice and no opportunity to be heard because the NPDES permit is issued in final form without any notice?

MR. CIGAN: Well, Your Honor, I don't think that it's a fair characterization. The petitioners do have a due process right. In fact, they are currently challenging that NPDES permit acknowledgment before this court --

THE COURT: Well, stop for a second. Let's assume -- let's imagine a case where there were no other permits that were in play. Okay?

MR. CIGAN: Yes.

THE COURT: It was just -- there was a water quality certification under 401 and the sole contingency put on it by the department was issuance of a NPDES permit.

MR. CIGAN: Yes.

THE COURT: Then, by law, under Pennsylvania's handling of this, that NPDES permit could issue with no notice and in a final form and the water quality certification would cease to be contingent and nobody with an interest would have had an opportunity to be heard and to argue until they petitioned or if they petitioned to this court. Is that right?

MR. CIGAN: Well, it --

THE COURT: Well, just stick with me and handle the hypothetical, if I've, if I've made it understandable.

MR. CIGAN: I don't think it's correct because of the nature of the NPDES permit that we're talking about. This was a registration under an existing NPDES permit. The department created a permit for certain -- has the authority, and this has been vetted through its federal delegation of the program, to issue the general permit that encompasses certain activities. And the agency would receive a request to operate. And there was opportunity for notice of a comment on that particular permit.

THE COURT: There is no -- I mean, I can pull it out and read it to you. There's a -- I've read it. It looks like the department, the state, has taken the position that unlike the 105, the Chapter 105 permit, or like the Chapter 102 permit where there is some notice and is some opportunity to be heard before a permit is issued, the NPDES permit, there is no notice and it's issued in final form. Is that accurate or not?

MR. CIGAN: There is an authorization to issue work under this permit and there was no advanced public notice and comment on the request to use that permit.

THE COURT: Yeah, but not just --

MR. CIGAN: That is -- that is accurate.

THE COURT: -- in this instance. That's the way the department says We handle these NPDES permits, correct?

MR. CIGAN: No, that's not an accurate statement. We could have received an application for an individual NPDES permit that would have, under state law, would have gone through a notice and comment opportunity.

Since the application was made to use a general existing permit, it was, it was processed in accordance with state law.

THE COURT: I'll just, I'll just read you from the Pennsylvania Bulletin, document number 15-1273. PAG-10, General Permit Notice of Intents -- and I take that to mean a reference to NPDES permits, right?

MR. CIGAN: The notice of intent is the application to use that permit, yes.

THE COURT: Right. But the permit is a NPDES permit, right?

MR. CIGAN: Yes, Your Honor.

THE COURT: Okay. For those, quote, the department will publish notice in the Pennsylvania Bulletin for approvals of coverage only.

In other words, I take it -- well, when I read that, I understand it, and I don't claim to be an expert in this Pennsylvania law the way you are, Mr. Cigan, that what the department is saying there and publishing to the world is you're going to find out about this when we publish the approval.

MR. CIGAN: It is -- that was an accurate reading, Your Honor, and the department does not publish notice of a receipt to use that, that comment.

THE COURT: Okay. So take my hypothetical, then. Imagine a water quality certification, a single contingency, a NPDES permit. That water quality certification ceases to be contingent when the department issues, not after notice, not after an opportunity to be heard, but just when it announces we've approved it, the NPDES permit. Right?

MR. CIGAN: I'm sorry, Your Honor. I'm not sure I followed your question.

THE COURT: A single contingency, a NPDES permit. If you've --

MR. CIGAN: Yes.

THE COURT: -- got that circumstance --

MR. CIGAN: Yes.

THE COURT: -- you will have a circumstance where a water quality certification will have issued and nobody will have received notice or opportunity to be heard because the one

contingency is the type of permit as to which the department has chosen to give no notice or opportunity to be heard. It chooses to say We will announce the approval, the final, not a notice and an opportunity to discuss before we approve.

MR. CIGAN: Thank you for the clarification, Your Honor. I understand where you're going.

I don't think that is a fair characterization because the condition in this water quality certification required the acquisition of a NPDES permit.

That could have been through an application for an individual permit or application for an NOI under an existing permit.

The issuance of either an authorization under an existing permit, a general permit, which is the PAG-10, which is what petitioners are objecting to, or an individual permit that would go through full-blown notice and process, are a separate federal action, as this court has determined in Leidy case, and subject to this court's jurisdiction, as is there is currently a challenge to the PAG-10.

And in response --

THE COURT: I'm not, I'm not trying to deal with jurisdiction. I'm just trying to get at one thing. And maybe we've gone as far as we can. And I appreciate my colleagues' patience with me. I'm not trying to take us down a rabbit hole. I'm trying to understand the way the system works.

The one thing I'm trying to get at is not jurisdiction. It is the due process concern that's been raised, and, therefore, whether the action of the department is arbitrary and capricious in this --

MR. CIGAN: Yes.

THE COURT: -- instance by having a contingency which can be satisfied with no notice or comment.

MR. CIGAN: And, Your Honor, may I respond to that briefly?

THE COURT: Please.

MR. CIGAN: Is that at the time the water quality certification was issued conditionally requiring an NPDES permit for the discharge of hydrostatic test water, if the recipient of the water quality certification files

an application for an NPDES permit, there will be opportunity for notice and comment.

If they file for an application for use under an existing permit, there will not be opportunity for notice and comment on the receipt of the request, but at the time of issuance. However, it's not clear --

THE COURT: Explain that.

MR. CIGAN: -- whether which process will be chosen at the time the water quality certification is issued.

THE COURT: Okay. Then what you're saying is, when the WQS, WQC is issued, there may or may not be due process, and depending upon whether you go for an individual permit or whether the application is made under a general permit.

MR. CIGAN: Well, the department position is that there would be due process available under both circumstances, because the processing of the general permit is in accordance with state law. However, it would be --

THE COURT: All right. But that already occurred, though, right? Isn't that --

MR. CIGAN: The --

THE COURT: -- isn't that the rub here, that under the general permit, as I understand it, and correct me if I'm wrong, when somebody seeks to go under the general permit, the due process has already occurred in the establishment of that general permit. So, really, what's left to be done is whether the applicant qualifies for permission under that general permit.

MR. CIGAN: I think that's a fair characterization of state law, Your Honor.

THE COURT: Okay. So you're saying there is due process when the general permit is established, and once that general permit is established, the only process that somebody is due is to challenge the legitimacy of the decision to give the new applicant the right to act as a member or participant under that general --

MR. CIGAN: As to whether it qualifies.

THE COURT: Whether you qualify under the general permit.

THE COURT: And how do they ever know about that?

MR. CIGAN: I think that's a fair

statement, Your Honor.

THE COURT: How do they ever know about that?

MR. CIGAN: I'm --

THE COURT: How do they ever know about that? How do they find out about that if the only announcement you make is, We issued this, it's done, we approved it?

MR. CIGAN: They are aware that there's a potential when we issue a water quality certification requiring the acquisition of an NPDES permit --

THE COURT: That's the notice?

MR. CIGAN: -- and that those general permits are available.

THE COURT: The notice is, you know this -- you know something might happen, something might be coming? You think that's notice?

MR. CIGAN: Well, the -- there is notice of the final action and there is notice of the permit and there is notice under the water quality certification that an NPDES permit would be required for such activities.

THE COURT: And what action can they

take if after the decision is made that this party can act under the general permit, then what's the remedy for a party that's convinced that that decision was in error?

MR. CIGAN: Well, in this case, the petitioners have pursued a challenge before this court of -- that authorization was issued by the agency this past April.

THE COURT: And if that was the notice, what is the comment available to them? Should people -- are you suggesting that announcing This is contingent on an NPDES is the notice that it might happen, and, therefore, a comment period has begun and people should start making comments? Is that the department's position?

MR. CIGAN: That is not the department's position. There is no --

THE COURT: Then what's the -- there's no comment period, right?

MR. CIGAN: There is no comment period. There is no notice in the Pennsylvania Bulletin of receipt for a request and notice of intent to use an existing general permit.

THE COURT: Okay. So where's the due

process?

MR. CIGAN: The due process is as set forth in the regulatory scheme, in the Commonwealth's regulations authorizing the use of these NPDES permits. There's three methods that -- with certain general permits, there is an opportunity for notice and comment upon application to use.

And when the original permit was issued, which I believe Your Honor referenced, it was clear that this particular permit for the discharge of hydrostatic test water would not be -- there would not be public notice of receipt of an application to use.

THE COURT: We're imposing on your time here, but let me ask you a final question.

If you had a choice -- assume for the sake of discussion that we thought -- if we call PADEP's action final for purposes of the Natural Gas Act, then they've got a problem, at least insofar as the NPDES certification goes, because there doesn't appear to be a notice of comment period before things are final. And that would be troubling, perhaps even arbitrary and capricious.

That's one possible outcome.

Another possible outcome is, we look and we say, Well, it's not final. There's an EHB hearing that's available. And that cures whatever problem exists with the NPDES permitting. But it does mean that we don't have jurisdiction in this particular case, and we wouldn't until an EHB hearing was held.

Now, neither of those is obviously ideal from the department's standpoint. You're not advocating for either of those. But if you were choosing the lesser of two evils from the department's perspective, which would it be?

MR. CIGAN: Well, from the department's perspective, the decision to issue the water quality certification is a final action. It's a culmination of our --

THE COURT: I completely understand your position, I think. I'm positing for you two outcomes, neither of which are ideal from your perspective, neither of which you want. Right? And if I haven't made them clear, those two alternatives, I'll pose them again.

But I'm trying to ask you, from the

department's perspective, which is the lesser of two evils: To be told your actions were -- your action is final, but because your action is final, the conditioning of it on the issuance of a permit as to which there is no notice and comment means that your action is arbitrary and capricious, take this case back? Or this action is not final, we don't have jurisdiction yet, because there needs to be an EHB hearing, which, among other things, will cure the problem of not having notice and comment for the NPDES permit?

From the department's perspective, if you can answer it, which is the lesser of two evils between those two choices?

MR. CIGAN: Well, Your Honor, I'm not sure if I could pick the choice on behalf of the agency, being presented with this hypothetical, but the second alternative I think would be more advantageous.

But I think the critical point that I make is that the water quality certification, which is the subject of today's proceedings, did not specify in its condition whether the project proponent was required to either register under a

general permit or get an individual permit.

And if the applicant applied for an individual permit for discharge of hydrostatic test water and that could have occurred, the appropriate time for the petitioners to challenge the sufficiency of the department's decision on an NPDES authorization would be separate, as is -- and we're prepared to meet that challenge that's currently pending before the court of the department's authorization, the issuance of authorization to act under the general permit.

THE COURT: So your position is, take up your challenge to the NPDES permit later, even though the issuance of it may mean that the water quality certification is final?

MR. CIGAN: I would argue that they're separate actions. And I think the court has treated them as such, as in the Leidy decision, DRN I. That was a challenge to the water quality certification.

And in the Orion court, it specifically addressed the issuance of state permits which were conditions of the water quality certification, which the court viewed as the agency

acting pursuant to federal law.

THE COURT: Okay. Thank you.

Okay. Thanks very much, Mr. Cigan.

MR. CIGAN: Thank you.

MR. STOVIAK: Good morning, Your Honors. John Stoviak for the intervenor, Transcontinental Gas Pipe Line.

If I may just add, if you look at page 56 of our brief, it addresses, I think, the question Judge Jordan has been asking, where we wrote on page 56 that even if the court were to address petitioners' argument about this NPDES, federal law governing NPDES permits provides that the opportunity for judicial review of an NPDES permit is sufficient to provide for, encourage, and assist public participation in the permitting process.

THE COURT: So your position is, the process they're due, they get by petitioning us and saying, Stop everything?

MR. STOVIAK: Well, that's not what I'm saying. That's what the federal regulations say, 40 C.F.R, Section 123.30. And this is a federal issue. And those regulations say it is

sufficient. And I agree with that.

In addition, they were on notice about the general permit process and had the opportunity to comment on that after the water quality certificate was issued.

THE COURT: Well, let me ask you a question, then, Mr. Stoviak.

Doesn't that prove too much? Because, then, no notice or comment would ever -- like if your due process rights are fully satisfied by being able to petition to this court, I guess in theory you're saying they could issue a water quality certification with no record. They could just say, Yeah, you're good to go. And then your argument would be, your opportunity to fight that, environmental groups, is to petition the court of appeals and take your argument to them.

MR. STOVIAK: No, I'm not saying that you should issue a water quality certificate without any record. In fact, here, you have a record that has the application, notice of the application, comments from petitioners, a technical deficiency letter from the DEP, and our 43-page response. So you have a very full 23,000-page

record on the water quality certificate.

THE COURT: I'm not asking about this record. I'm asking you about the assertion, the legal assertion you've made that the federal regulations say that due process is fully certified by being able to petition a court of appeals. That's the argument you're making, right?

MR. STOVIAK: For NPDES with a general permit, yes.

THE COURT: Is that, is that what the federal regulation says?

MR. STOVIAK: Yes.

THE COURT: Uh-huh.

MR. STOVIAK: That's what it says.

THE COURT: So it's only, it's only as to that?

MR. STOVIAK: Yes. That was referring to the NPDES permit, the regulation I just cited to you.

THE COURT: Okay.

MR. STOVIAK: I think in terms of the jurisdictional issue, it sounds as if the court understands, but there's really three things you need to look at. The Natural Gas Act, which

establishes exclusive original jurisdiction for courts of appeal, stop the sequential appeals, the delays that are associated with those appeals.

Secondly, if you look at Chief Judge Smith's opinion, precedential opinion, in DRN II, or Delaware Riverkeeper II, involving the Orion, where he points out that the DEP permits for water quality certificate have all the hallmarks of a final action.

THE COURT: Answer, please, Mr. Freed's assertion, and, of course, it's in the briefing, you've briefed it, but I'm interested to hear your response to what he's presented here today, that the program that the state has set up anticipates the need for an EHB review. It's not like an appeal. It's a de novo process. It is the creation of the record. It is the completion of the record by the taking of new evidence, taking of new testimony, and the filling out of a complete record.

And before you do that, you don't have what people understand to be a full record, and the state courts have observed that and agreed with that view. That's several questions in one. But

that's what I understand their position to be.

MR. STOVIAK: Well, number one, the Natural Gas Act, and the EP '05 Act amendments, the Energy Policy Act of 2005 amendments, prevail and trump that, in essence, in the sense that that's a -- this is a federal question, and that's federal law, that you appeal to the courts of appeals.

THE COURT: So are you saying it doesn't have to be final action?

MR. STOVIAK: It is, it is a final action.

THE COURT: Yeah. But their assertion is it's not.

MR. STOVIAK: It is.

THE COURT: That's their point. That's the point I'm trying to get you to engage on. They're saying the state courts themselves have said this isn't really a final action until there's been an EHB review, because it's de novo, and they're taking new evidence, and the record is not complete, it's not final until after the EHB review.

MR. STOVIAK: That's not what state courts tell you. And if you apply the hallmarks of

a federal, a final action, the action of the Pennsylvania Department of Environmental Protection is concluded. The EHB is a separate, quasi-judicial independent agency. They hear evidence if there is an appeal.

Whether there's an appeal or not, as Mr. Freed conceded, and I've been there, if you have a landfill permit, you can start building your landfill once you have a permit, absent somebody going out and getting a supersedeas.

You're not -- you can continue to build the project. You can proceed with the pipeline once you have the water quality certificate and FERC certificate of public convenience and necessity and the notices to proceed from FERC.

That's a final action. You can start construction. You can start building those things. That is the hallmark of it, that you have legal rights. And the process is concluded as to the agency, the Department of Environmental Protection.

So that's why it's a final action, and why you don't even have to get to the debate of whether or not finality is required under the

Natural Gas Act, although it is an interesting point, but it's not in the words of the Natural Gas Act in 717 r(d)(i) about finality and --

THE COURT: But we get to the -- you claim we get to the same point even if we find finality is required.

MR. STOVIAK: Even if you find finality is required, this is a final action. And it's fundamentally different than what happened in Massachusetts.

In Massachusetts, the appeal goes internally within the agency, not like here where it goes externally to the environmental hearing board. Secondly, you cannot, you cannot start proceeding under the permit in Massachusetts until that agency review finishes through that appeal process. Here, you can. Those are fundamental differences that indicate that this is a final action here.

The other thing that you need to just, if I may, just for a second, consider, and this was referenced a little bit, this is a federal question. This is the Natural Gas Act. And you have the Clean Water Act that allows states to

review and do a water quality certificate where they review federally approved state water quality standards and the federal requirements of the Clean Water Act. They have to do that in a reasonable period of time, not to exceed one year.

The Environmental Hearing Board, by its own admissions in its practice and procedure manual, takes a year and a half to two years to complete the hearing process.

THE COURT: Understood.

MR. STOVIAK: So you would inevitably have, in that scenario, a waiver every time, because the process goes on forever.

THE COURT: Okay.

MR. STOVIAK: Thank you.

THE COURT: Thanks very much, Mr. Stoviak.

Your rebuttal?

MR. FREED: Thank you, Your Honor.

Just very briefly, I think what the notice argument highlights, what my arguments about due process highlight, is that by reading the finality the way DEP and Transco wants us to read the finality, it throws a monkey wrench into the

whole Pennsylvania process that's been set up. It undermines the entire process. It undermines due process and it has significant consequences.

There's been a lot of talk about the fact, well, there is a record, there is not a record, there is a... My question is, if DEP is establishing a record without an EHB process, what standards are they using? There are no standards. The only standard for establishing a record in these situations is to go through the EHB process.

I know the court is probably aware, this has been discussed, I think even Mr. Stoviak said, that once the water quality certification is issued, and once the certificate of public convenience is issued, there is nothing left for DEP to do.

That's obviously not correct, because as a condition of the water quality certification, DEP still has to issue those permits. And only after those permits are issued can -- should construction take place. And --

THE COURT: And you can challenge those permits at that time, those downstream permits, right?

MR. FREED: You can challenge the permits at that time, but, again, getting to what the harm that we're talking about is, by that point --

THE COURT: Harm accrues before that happens.

MR. FREED: Harm accrues well before that happens.

THE COURT: And the harm, as I understand your position, is that the eminent domain process begins and --

MR. FREED: It begins. It ends.

THE COURT: -- the pipeline begins to be constructed. Right?

MR. FREED: Well, there are -- you said the pipeline does -- the pipeline does not begin to be constructed.

THE COURT: But the taking has occurred.

MR. FREED: The taking takes place. Tree felling takes place. A lot of activities are taking place at that point.

And that's why I think it was important to have the court at least consider the

idea that there are other harms besides pure construction.

THE COURT: And if they can't satisfy the downstream permitting requirements, you've got a bunch of people who had, at least, a taking occur that never should have occurred, because the pipeline would have been --

MR. FREED: Right. And although --

THE COURT: -- not consummated, right?

MR. FREED: And I'll go one step further, which is, in our situation, even where the permits are issued after the fact, and have been challenged, you know, it makes the challenge a nullity, because the property is gone. There's no ability to actually seek redress by --

THE COURT: Right.

MR. FREED: -- a challenge of those permits.

THE COURT: Right. But that taking really is a function of the National Gas Act, right? I mean, that's -- the National Gas Act, Congress has put all that in motion by enacting that, right?

MR. FREED: Because they -- under the

Natural Gas Act, there's an assumption, and a valid assumption, which is why FERC assumed that when DEP issues a water quality certification, they're saying you have a viable project.

And that's why DEP had to write a letter to them in 2016 saying, Whoa, whoa, whoa. You're putting too much stock in our water quality certification. And FERC's like, No, we're not. This is exactly what 401 says a water quality certification is.

THE COURT: Okay. Thanks.

MR. FREED: Thank you, Your Honor.

THE COURT: Mr. Stemplewicz. You've got one minute, and I suggest you use it responding specifically to the citation to the federal regulation made by Mr. Stoviak.

MR. STEMPLEWICZ: Yes. And I would say that what this required here is that Section 401(a)(1), in the public notice requirements of that section, are satisfied. And, here, we simply do not have that. And --

THE COURT: I'm trying to get you to respond to Mr. Stoviak's assertion that this NPDES permit specifically, this kind of permit, is the

kind of permit that, as a matter of federal regulation, the federal law says, You get your process by being able to petition to the Court of Appeals. That's how he's characterized it. So what's your response?

MR. STEMPLEWICZ: That you have -- an aggrieved party would have no -- if that were true, an aggrieved party simply would have no ability to challenge the substance of whether or not an applicant satisfied the criteria of a NPDES permit. They would have no opportunity to develop a record and challenge that if that were true.

And that's exactly -- so several references have been made to a separate appeal that we brought challenging the specific NPDES permit. And I would like to submit to this court that the only challenge that we can bring in that matter is a challenge to the procedure. Because we never had the opportunity to see the content of that application and provide --

THE COURT: But doesn't this court have the power to say that that procedure was defective --

MR. STEMPLEWICZ: Yes. And that's --

THE COURT: -- constitutionally or otherwise?

MR. STEMPLEWICZ: Yes. And --

THE COURT: So that sounds like a pretty --

MR. STEMPLEWICZ: It's the same argument we're making here. Essentially, it's --

THE COURT: It sounds like a pretty vigorous remedy, then, if you win that case.

MR. STEMPLEWICZ: Well, and it's the same exact -- we would make the same exact argument we made here, which is that there was no opportunity for public comment, notice, no ability to build a record in that case. We would be precluded from making any argument regarding the substance.

And that's why it's so important that the EHB have jurisdiction, so that we can have our due process, so that we can challenge --

THE COURT: It sounds like a really strong argument for us deciding that issue in that case, not this one.

MR. STEMPLEWICZ: So I would disagree, because I also think that this -- that the Third

Circuit has also been very clear that PADEP has not published any procedures for issuing water quality certificates. And that's (indecipherable).

THE COURT: Does it have to? I mean --

MR. STEMPLEWICZ: And --

THE COURT: You want, you want, you want it to publi -- you say the publication is what matters, not the conferral of due process. And I'm not sure I understand that argument.

MR. STEMPLEWICZ: Well, I think, I think they're both important, because 401(a)(1) requires that the state shall establish procedures for public notice. And, you know --

THE COURT: It doesn't say publish. I mean, you're saying "shall establish" means "publish."

MR. STEMPLEWICZ: Yeah. And I would --

THE COURT: Set up a published regulatory standard.

MR. STEMPLEWICZ: And I would -- I guess that begs the question how do you -- how would one establish procedures if they don't

publish procedures. If there's no published procedures, how can you -- how can they have been established to satisfy Section 401(a)(1)?

THE COURT: Okay. Thanks, Mr. Stemplewicz.

We thank both sides for their argument and the briefing. We appreciate the quality of it. And we will take the case under advisement.

(Argument concluded.)

CERTIFICATION

I, JOHN M. COLASANTE, a Fellow of the Academy of Professional Reporters, an Approved Reporter of the United States District Court and the Court of Common Pleas, hereby certify that I have truly and accurately transcribed this recording to the best of my ability.

I further certify that I am neither attorney nor counsel for, not related to nor employed by any of the parties to this action; and further, that I am not a relative or employee of any attorney or counsel employed in this action, nor am I financially interested in this case.

JOHN M. COLASANTE
Registered Professional Reporter
and PA Notary Public

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

DELAWARE RIVERKEEPER NETWORK, *et al.*	)	
Petitioners,	)	
v.	)	
SECRETARY, PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION, *et al.*	)	Case Nos. 16-2211, 16-2212, 16-2218 & 16-2400
Respondents.	)	

CERTIFICATION OF ACCURACY

On behalf of all parties to the above-captioned proceedings, undersigned Liaison Counsel hereby certifies that, to the best of his knowledge, information and belief, the attached is a true and accurate transcript of the oral argument held before this Court on November 7, 2017.

CURTIN & HEEFNER LLP

By: *s/ Mark L. Freed*

Date: November 21, 2017

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CERTIFICATE OF SERVICE

I certify that on this day I filed the foregoing Transcript using the Court's CM/ECF system. All participants in this case are registered to receive service with that system and will receive a copy of this document upon its filing.

CURTIN & HEEFNER LLP

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Date: November 21, 2017

DECLARATION OF MAYA K. VAN ROSSUM

Pursuant to 28 U.S.C. § 1746, I, Maya K. van Rossum, hereby declare:

1. I reside at 716 South Roberts Road, Bryn Mawr, Delaware County, Pennsylvania, 19010. My residence is within the Delaware River Basin. In addition I own a part time residence at 6 Lebanon Road, Glen Spey, NJ. This part time home is located within the Delaware River Basin.

2. I earned my J.D. from Pace University School of Law, and then earned an LL.M. in Corporate Finance from Widener University School of Law. While at Pace University, I secured a certificate for pursuing a special program focused on environmental law and participated in the Environmental Law Clinic that pursued legal work addressing River issues. In 1992 I worked as the staff attorney in the Environmental Law Clinic at Widener University School of Law where I engaged in advocacy and litigation on behalf of the Delaware Riverkeeper Network while providing support to Law Clinic students similarly engaged. In 1994, I came to work for the Delaware Riverkeeper Network ("DRN") as the organization's Executive Director. In 1996, I was appointed Delaware Riverkeeper and leader of the Delaware Riverkeeper Network. I am also a member of the Delaware Riverkeeper Network.

3. DRN was established in 1988. It is a nonprofit 501(c)(3) membership organization. DRN advocates for the protection of the Delaware River, its tributary streams, and the habitats and communities of the Delaware River watershed. The mission of DRN is to champion the rights of communities to a Delaware River and tributary streams that are free flowing, clean, healthy and abundance with a diversity of life.

4. The DRN office is located at 925 Canal Street, Suite 3701, Bristol, PA 19007. Currently there are 20 staff members and numerous volunteers. The volunteer network is fluid, constantly changing, and project-specific. The exact number changes on a year-to-year basis. Thousands of individuals have done work for us in the past, undertaking water quality monitoring, stream clean ups, habitat restoration projects, and/or getting actively engage in defending the Delaware River, its watershed, habitats and ecosystems through, for example, letter writing, participation in the public process, organizing activities and events, sharing information, and educating others to become involved.

5. DRN's professional staff and volunteers work throughout the entire Delaware River Watershed, including the four watershed states of Pennsylvania, New Jersey, Delaware, and New York. DRN is also involved at the national level and in other states in the U.S. to the extent involvement advances our mission and goals as an organization. DRN and its volunteers maintain a breadth of knowledge about the

environment, as well as expertise specific to rivers and watersheds. DRN provides effective environmental advocacy, volunteer monitoring programs, stream restoration projects, technical analyses, and public education. In addition, DRN takes steps necessary to ensure the enforcement of environmental laws, including pursuing legal actions as needed and appropriate.

6. Our membership provides irreplaceable participation in, and support for, DRN advocacy, restoration, scientific monitoring and data collection, education and litigation initiatives. Membership is demonstrated in a number of different ways, including but not limited to: making donations, participating in events, signing letters targeted to decision-makers, participating in DRN public information sessions, helping distribute DRN information including alerts and fact sheets, responding to DRN calls for action on projects and issues, volunteering as a water quality monitor, assisting with DRN restoration projects or actively communicating with DRN about our work and issues of concern in the Watershed, signing up and/or donating financial support. DRN basic membership is free of charge.

7. DRN has more than 19,000 members, the vast majority of whom live, work and/or recreate within the Delaware River Basin. We represent the recreational, educational, and aesthetic interests of our members who enjoy many outdoor activities in the Delaware River Basin, including camping, boating, swimming,

fishing, birdwatching, hunting and hiking. Additionally, we represent the economic interests of many of our members who own businesses that rely on a clean river ecosystem, such as ecotourism activities, fishing, or boating. Furthermore, DRN also represents the health interests of those who use the Delaware River watershed's resources for drinking, cooking, farming, swimming, or gardening. And we support the protection and restoration of the Delaware River, its tributaries and watershed, and the creation and honoring of constitutional environmental rights throughout our watershed states and the nation for the benefit of present and future generations.

8. DRN has members who use and enjoy the areas to be crossed by the Atlantic Sunrise pipeline project ("Project"). These members will be harmed by the impacts to wetlands as a result of their permanent conversion from forested wetlands to emergent wetlands. This impacts resulting from this conversion include, but are not limited to: increased groundwater discharges from wetlands, increased erosion and sedimentation, decreased pollution prevention, decreased wildlife species composition of both animals and plants, and decreased landscape aesthetics. Members will be harmed by the detrimental effects on aesthetic and recreational uses of wetlands, forests, and parks, including, but not limited to birding, hunting, fishing, camping, nature walks and hiking. DRN members will be harmed by the pollution and ecological damage that will be inflicted on our watershed's stream,

creek and river resources resulting from the stream excavation, and the construction, operation and maintenance activities in associated floodplain, riparian area, forest, wetland and groundwater resources. Injuries will take the form of diminished aesthetic beauty of these natural systems; diminished recreational enjoyment due to the temporary and permanent ecological damage that will be inflicted; the permanent loss of ecological resources they value personally, professional and aesthetically; damaged family values and enjoyment of healthy natural spaces; and the enduring fear of accident, incident, injury and/or explosion that will accompany every visit to an ecological system that becomes home so the proposed Project. DRN members will be damaged by injuries to their health and their sense of well-being and safety that result from the presence of the proposed Project cutting through properties they own as well as public parks they enjoy and have contributed financially (either through direct donations or through tax dollar contributions) to help preserve. DRN members will be harmed by the reduced incentives for communities to take steps to protect natural areas from construction resulting from the recognition that pipeline eminent domain is a likely outcome should the Project seek to expand. DRN members will suffer from declining property values resulting from pipeline construction, operation and maintenance as well as from economic harms to their communities resulting from economic harms to businesses adversely impacted by the pipeline construction, operation and

maintenance. DRN members will be damaged by the adverse impacts that will result from increased climate instability resulting from methane and other greenhouse gas emissions resulting from Project construction, operation and maintenance.

9. Many DRN members are concerned with the proliferating numbers of pipelines that have crossed, or are planned to cross portions of the Delaware River Watershed and the resulting impact the construction, operation and/or maintenance activities have on the streams, rivers, wetlands, forests and ecological systems of the four states of the Delaware River watershed.

10. DRN members have communicated their concerns to me and my staff regarding the harms to their aesthetic and recreational interests, to their property values, to the quality of their lives, to their businesses and/or the economies that will have suffered from the construction, operation and maintenance of the Project, impacts they have seen inflicted as the result of other pipeline projects construction in the region. DRN represents our members' interests that will be negatively affected by the Project in bringing this action.

10. As the Delaware Riverkeeper and as a member of DRN, I personally have enjoyed areas that will be crossed by the Project. I have personally visited the streams, wetlands, and adjacent forested areas by myself, with my family, with friends, and with colleagues, for recreational, personal and professional reasons

and have plans to return to these areas for recreational purposes, including among other things, kayaking, hiking, nature walks, wildlife observation and enjoyment as well as for professional purposes. I enjoy my visits to these areas whether in my professional, personal capacity or as a parent. I often include my family in my enjoyment of the areas of the watershed, and find them beautiful and unique natural areas important to share with my children for their personal and educational growth. The areas impacted by the Project that I have personally visited and plan on visiting again include, but are not limited to: Ricketts Glen State Park, Knoebels Amusement Resort and Knoebels Grove Campground in Elysburg, the Appalachian Trail, and a number of state gamelands in an around the project area.

11. In my capacity as the Delaware Riverkeeper, a mother, and a person who enjoys the out of doors, I will be personally and professionally harmed by the damage that will be inflicted by the construction activities of the Project, and will be adversely affected by the future operational impacts of the Project, including the permanent conversion of exceptional value wetlands from forested wetlands to emergent wetlands, the permanent loss of forest, particularly in our public parks and forests, and the damaged instream and riparian habitats that will result from the construction, operation and maintenance of the Project. I would have negative experiences while revisiting (by boat or foot) the many streams and public parks and gamelands that will be harmed by the project.

12. I fully expect my personal, professional, recreational, and family trips to the many natural systems included in the Project area will continue in the near and far future as they include some of the most special places in our region. My personal, recreational, family and professional activities in the past and future have, and will continue, to be composed of hiking, camping, boating, and otherwise enjoying the River waters, the forests, the wildlife and the natural scenic beauty of these areas.

13. My use and enjoyment of the natural beauty of these areas and my joy in sharing it with my children and other family will be negatively affected by pipeline installation activities, including the permanent clearing of mature forest trees, resulting from construction of the Project that will cause wetlands conversions, long-term deforestation, increased water and sediment discharges from wetlands, degraded wildlife habitat, reductions in nutrient storage and soil stabilization, and other harms to the watershed. These activities will negatively affect the way I interact with these natural areas on an aesthetic, recreational, professional, and family level.

14. The permanent tree-clearing and conversion of wetlands, the cutting down of otherwise healthy forest areas resulting in loss, and degradation in the footprint and well beyond, and damage in streams and their riparian areas, that are proposed to occur as part of the construction of the Project and has already occurred on other projects in our watershed, such as the Tennessee Gas Pipeline Company's

Northeast Upgrade Project and the Millennium Pipeline projects, and harmed my aesthetic and recreational interests from seeing the deforested wetland areas, the cut and degraded forests, the damaged streams and loss of natural riparian buffer, that once stood there will devastate my personal enjoyment of the views of the many natural areas that will be hit by this Project.

15. I have witnessed firsthand the harms to wetlands and protected waterways that have resulted from erosion and sedimentation as a direct result of mature tree clearing and soil compaction leading to greater stormwater runoff that is associated with construction, including pipeline construction activities, and expect to be harmed by those same activities for the proposed Project.

16. I have witnessed and experienced the during and after construction impacts to healthy forests and stream ecosystems using the very same methods that will be used by this Project, and been emotionally and aesthetically damaged while visiting such impacted areas and know the same damaging experience will accompany my future visits both by myself and with friends, family and colleagues, that the Project will inflict. I have spoken with DRN members who have witnessed this kind of damage and have expressed the level of harm they anticipate if the Project were constructed as proposed.

17. The tree clearing, grading, and pipeline construction for the Project and the continued maintenance of the right-of-way, including within wetlands, will harm

my aesthetic and recreational interests as well as those of DRN members who use and enjoy the areas affected by the Project. I and DRN members are harmed by the loss of the ecological services provided by these mature forested areas, a loss that will lead to erosion and sedimentation pollution of pristine streams and wetlands as well as to degradation of fish and wildlife habitat.

18. As an organization the DRN monitors pipeline projects across the basin. Normal protocol for staying up to date on recent activities and projects involves DRN reviewing, among other things, the Pennsylvania Bulletin and the Federal Register.

19. DRN did not receive any public notice that the NPDES permit for the Project was submitted to the Pennsylvania Department of Environmental Protection ("PADEP") from the Pennsylvania Bulletin or from any other source.

20. Had DRN been provided with public notice that the NPDES permit application had been submitted, was considered complete, and was under review by PADEP, DRN would have reviewed the application and generated a comment letter regarding the substantive portions of the application related to Pennsylvania water quality standards. Specifically, DRN would have commented on the technical requirements of the permit, the methods of stormwater controls. Also, DRN would have questioned why Transco was required to get an individual NPDES permit for

the Leidy Project, which was much smaller than the Atlantic Sunrise Project, and only required to get a general permit for this project.

21. Because DRN did not receive any notice that such an application had been submitted, DRN did not become aware of the NPDES application until after it had been issued by PADEP, and the comment period had closed. As such, DRN was prevented from meaningfully engaging in the permitting process for a significant part of the Clean Water Act water quality certification for the Project.

22. As a result of this failure the NPDES permit that was ultimately approved contains deficiencies that would otherwise have been addressed.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 12th day of January, 2018.

Maya K. van Rossum,
the Delaware Riverkeeper