No. _____

In the Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

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

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

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

LIST OF PARTIES

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

CORPORATE DISCLOSURE

This Petition is not filed on behalf of a corporation.

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PETITION FOR A WRIT OF CERTIORARI

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

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

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

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

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

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

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

OPINIONS BELOW

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

JURISDICTION

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

15 U.S.C. § 717r(d)(1) of the Natural Gas Act states: "The United States Court of Appeals for the circuit in which a facility subject to section 717b of this title or section 717f of this title is proposed to be constructed, expanded, or operated shall have original and exclusive jurisdiction over any civil action for the review of an order or action of a . . . State administrative agency

acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval . . . required under Federal law . . . ."

STATEMENT OF THE CASE

A. Statutory Background

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

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

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

B. Appeals Process

1. Under The Natural Gas Act

The Natural Gas Act provides:

> The United States Court of Appeals for the circuit in which a facility subject to section 717b of this title or section 717f of this title is proposed to be constructed, expanded, or operated shall have original and exclusive jurisdiction over any civil action for the review of an order or action of a . . . State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval . . . required under Federal law . . . .

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

2. Under State Law

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

C. Procedural History

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

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

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

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

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

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

REASONS FOR ALLOWANCE OF THE WRIT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at 268 (emphasis added).

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

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

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

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

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

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

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

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

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

App. 15.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

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