APPENDIX

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APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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

[Filed September 4, 2018]

DELAWARE RIVERKEEPER NETWORK; DELAWARE RIVERKEEPER MAYA VAN ROSSUM,
Petitioners No. 16-2211

LANCASTER AGAINST PIPELINES,
Petitioner No. 16-2212

GERALDINE NESBITT,
Petitioner No. 16-2218

SIERRA CLUB,
Petitioner No. 16-2400

v.

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

Transcontinental Gas Pipe Line)
Company, LLC,)
Intervenor Respondent)
_____)

On Petition for Review of an Order
of the Pennsylvania Department of
Environmental Protection
(FERC No. CP-15-138-000)

Argued November 7, 2017

Before: JORDAN, HARDIMAN, and SCIRICA,
Circuit Judges

(Filed: September 4, 2018)

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OPINION OF THE COURT

HARDIMAN, *Circuit Judge*.

These consolidated petitions for review concern the Atlantic Sunrise Project, an expansion of the natural-gas distribution network owned by Intervenor Transcontinental Gas Pipe Line Company (Transco). At issue is a decision of the Pennsylvania Department of Environmental Protection (PADEP or the Department) granting Atlantic Sunrise a Water Quality Certification under Section 401 of the Clean Water Act, 33 U.S.C. § 1341(a)(1).

In addition to their challenge to the merits of PADEP's decision to grant the Water Quality Certification, Petitioners raise an important

jurisdictional question we left open in *Delaware Riverkeeper Network v. Secretary of Pennsylvania Department of Environmental Protection* (*Riverkeeper II*), 870 F.3d 171, 178 (3d Cir. 2017): whether our exclusive jurisdiction under the judicial review provisions of the Natural Gas Act, 15 U.S.C. § 717r(d), requires finality and how such a requirement would interact with Pennsylvania's administrative scheme.

For the reasons that follow, we hold that we have jurisdiction over the petitions and that Petitioners' challenges fail on the merits.

I

A

We begin with a brief overview of the regulatory 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 (FERC). 15 U.S.C. § 717f(c)(1)(A). And since many other federal laws and regulations apply to pipeline projects, FERC often requires a showing of compliance with those other mandates as part of its permitting process. *See id.* § 717f(e) (authorizing FERC to grant Certificates subject to "reasonable terms and conditions"). FERC did so here, preventing Transco from starting construction on Atlantic Sunrise until it demonstrates "that it has received all applicable authorizations required under federal law." *Transcontinental Gas Pipe Line Co, LLC* (*Transco*), 158 F.E.R.C. ¶ 61125, at App. C ¶ 10 (2017).

One such authorization is a discharge permit under Section 404 of the Clean Water Act. 33 U.S.C.

§ 1344(a). Because obtaining a Section 404 permit is a federal requirement and the construction and operation of Atlantic Sunrise "may result in a[] discharge into . . . navigable waters," Transco must also comply with Section 401 of the Clean Water Act. *Id.* § 1341(a)(1). Section 401 requires permit applicants 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. *Id.* Because of these statutory requirements, Transco had to obtain a Water Quality Certification from PADEP before FERC would approve the pipeline project.

B

In an attempt to satisfy the obligations just described, in the spring of 2015 Transco applied both to FERC for a Certificate of Public Convenience and Necessity and to PADEP for a Water Quality Certification. Shortly thereafter, PADEP published notice in the *Pennsylvania Bulletin* (Pennsylvania's answer to the *Federal Register*) of its intent to grant Transco a Water Quality Certification. After a public comment period, the Department certified in April 2016 that Atlantic Sunrise would comply with Pennsylvania's water-quality standards if it satisfied certain conditions. Three of those conditions are relevant here, requiring Transco to obtain the following from PADEP:

1. a permit under the National Pollutant Discharge Elimination System, 25 PA. CODE §§ 92a.1–.104, covering the discharge of water during hydrostatic pipeline testing;

2. a permit under Chapter 102 of PADEP's own regulations, 25 PA. CODE §§ 102.1–.51, covering erosion and sediment disturbance associated with pipeline construction; and

3. a permit under Chapter 105 of the Department's regulations, 25 PA. CODE §§ 105.1–.449, covering obstructions of and encroachments on Pennsylvania waters.

In response to PADEP's notice, Petitioners immediately filed two parallel challenges to the approved Water Quality Certification. First, they sought relief directly from this Court under the exclusive review provision of the Natural Gas Act, 15 U.S.C. § 717r(d)(1). Second, three of the petitioners also appealed PADEP's decision to the Pennsylvania Environmental Hearing Board (EHB or the Board).[1] The Board has stayed its proceedings pending our jurisdictional ruling, so we turn to that issue now.

II

Under the Natural Gas Act, the courts of appeals have "original and exclusive jurisdiction over any civil action for the review" of a state administrative agency's "action" taken "pursuant to Federal law to issue . . . any . . . concurrence" that federal law requires for the construction of a natural-gas transportation facility. 15 U.S.C. § 717r(d)(1) (cross-referencing 15 U.S.C. § 717f). We have previously held that when PADEP issues a

[1] *See Lancaster Against Pipelines v. Commonwealth*, No. 2016-075-L (Pa. Envtl. Hrg. Bd.); *Nesbitt v. Commonwealth*, No. 2016-076-L (Pa. Envtl. Hrg. Bd.); *Sierra Club v. Commonwealth*, No. 2016-078-L (Pa. Envtl. Hrg. Bd.).

Water Quality Certification, it does so "pursuant to federal law," *Del. Riverkeeper Network v. Sec'y Pa. Dept. of Envtl. Prot.* (*Riverkeeper I*), 833 F.3d 360, 370–72 (3d Cir. 2016), and the parties do not dispute that federal law requires the Department to concur before construction on Atlantic Sunrise can move forward.

Nevertheless, Petitioners contend that we lack jurisdiction to review their claims. Relying on the First Circuit's decision in *Berkshire Environmental Action Team, Inc. v. Tennessee Gas Pipeline Co., LLC*, 851 F.3d 105 (1st Cir. 2017), they argue (1) that the Natural Gas Act permits this Court to hear suits challenging only a state agency's *final* action, and (2) that PADEP's Water Quality Certification is non-final until the EHB rules on Petitioners' administrative appeal. We address both issues in turn.

A

Like the petitions here, *Berkshire Environmental* involved the Natural Gas Act, the Clean Water Act, and a state's administrative procedures. In that case, FERC granted a pipeline company a Certificate of Public Convenience and Necessity subject to essentially the same condition imposed here—the company would have to demonstrate it had received all of its federal permits in order to build its pipeline. *Berkshire Environmental*, 851 F.3d at 107. The company subsequently applied for and received a Water Quality Certification from the Massachusetts Department of Environmental Protection (MassDEP) after a notice-and-comment procedure. *Id.* at 107–08. Under Massachusetts law, aggrieved parties then had 21 days to "appeal" that initial decision by demanding a hearing before MassDEP. *Id.* at 108, 112–13.

Like Transco here, the pipeline company argued that MassDEP had no authority to hear such an appeal in light of the First Circuit's original and exclusive jurisdiction under the Natural Gas Act. *Id.* at 108. And like Petitioners here, the challengers in *Berkshire Environmental* asked for a declaration that the Water Quality Certification would become final and reviewable by the Court of Appeals only at the conclusion of their state administrative appeals. *Id.* The First Circuit agreed with the challengers on the jurisdictional question, holding that the Natural Gas Act permits review of only an agency's final decisions. *Id.* at 111.

Our sister court's reasoning is straightforward and persuasive: Although "[i]n a literal sense, state agencies repeatedly take 'action' in connection with applications for water quality certifications," Congress did not intend for us to "exercise immediate review over [the many] . . . preliminary . . . 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. To be sure, the Natural Gas Act's reference to state "action" does not expressly restrict our review to an agency's ultimate decisions, but there is a "well-settled 'strong presumption that judicial review will be available only when agency action becomes final.' To say that silence on the subject implies no requirement of finality would be to recognize this 'strong presumption' only when it is of little benefit." *Id.* at 109 (quoting *Bell v. New Jersey*, 461 U.S. 773, 778 (1983)) (citations and alterations omitted). We therefore join the First Circuit in holding that the Natural Gas Act provides jurisdiction to review only "final agency action

of a type that is customarily subject to judicial review." *Id.* at 111.

In resisting that conclusion, PADEP and Transco rely almost entirely on *Tennessee Gas Pipeline Co. LLC v. Delaware Riverkeeper Network*, 921 F. Supp. 2d 381 (M.D. Pa. 2013), which held that the Natural Gas Act gives this Court "an unqualified right of review" over even non-final Water Quality Certifications. *Id.* at 391. We reject that proposition. *Tennessee Gas* failed to acknowledge our longstanding presumption that Congress intends judicial review over only final administrative action. Instead, it framed the issue as whether to graft onto the Natural Gas Act a finality requirement that the district court regarded as "originating in state law." *Id.* To be sure, deciding on a PADEP decision's finality requires reference to the Pennsylvania procedures that produced it. But it remains the case that the finality requirement itself, along with the presumption that Congress intended us to apply it, are creatures of federal, not state, law.

We are likewise unpersuaded by *Tennessee Gas*'s analysis of the Second Circuit's decisions in *Islander East Pipeline Co., LLC v. Connecticut Department of Environmental Protection*, 482 F.3d 79 (2d Cir. 2006), and *Islander East Pipeline Co., LLC v. McCarthy*, 525 F.3d 141 (2d Cir. 2008). In both *Islander* cases, the Second Circuit confronted a situation much like this one and proceeded without analysis, "as if there were no hurdles in appealing directly from the determination of a state administrative body." *Tennessee Gas*, 921 F. Supp. 2d at 393. Implicit in that course of action, the district court concluded, was a "determination that it is not necessary for a state

administrative quasi-judicial body to first review the . . . issuance . . . of permits by a state administrative agency before judicial review . . . may be sought." *Id.* *Tennessee Gas* incorrectly treated the *Islander* cases, in which "jurisdiction [was] . . . assumed by the parties, and assumed without discussion by the court," as authority on the question presented here. *Goldman v. Citigroup Glob. Mkts. Inc.*, 834 F.3d 242, 251 (3d Cir. 2016). Such "drive-by jurisdictional ruling[s]" would have carried no precedential weight even had they been decided by *this* Court. *Id.*

B

We turn next to whether the Department's decision is a conclusive agency action, such that a "civil action for [its] review" is committed to our exclusive jurisdiction under the Natural Gas Act. This is not the first time we have considered the finality of a PADEP Water Quality Certification issued for a federally-regulated pipeline. In *Riverkeeper II*, we held that such an approval was final and reviewable because the time to appeal to the EHB had already passed. 870 F.3d at 177. Noting the pendency of the petitions now before us—in which most of the Petitioners had already taken parallel protective appeals to the EHB—*Riverkeeper II* expressly declined to consider whether the availability of further state administrative review would render the Department's decision non-final. *Id.* at 178. We answer that question now.

The standard for whether agency action is final is a familiar one: "Final agency action 'must mark the consummation of the agency's decisionmaking process,' 'must not be of a merely tentative or interlocutory nature,' and 'must be one by which rights or obligations

have been determined, or from which legal consequences will flow.'" *Id.* at 176 (quoting *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)) (internal quotation marks omitted); *accord Berkshire Environmental*, 851 F.3d at 111.[2] Although the decisionmaking process we are reviewing is defined by Pennsylvania law, we nevertheless apply a federal finality standard to determine whether Congress has made the results of that process reviewable under the Natural Gas Act.

We begin by surveying Pennsylvania's procedures for obtaining and appealing a Water Quality Certification. First, the applicant submits a request to PADEP. PENNSYLVANIA DEPT. OF ENVTL. PROT. BUREAU OF WATER QUALITY PROTECTION, NO. 362-2000-001, PERMITTING POLICY AND PROCEDURE MANUAL [hereinafter PERMITTING MANUAL] § 400 at 6. The Department places a notice in the *Pennsylvania Bulletin*, beginning a 30-day comment period. *Id.* PADEP then makes its decision, and "[t]he issuance or denial of [the] Water Quality Certification[] . . .is published in the Pennsylvania Bulletin as a final action of the Department." *Id.* Aggrieved parties have 30 days from the date of publication to file an appeal to the EHB. 25 PA. CODE § 1021.52(a)(1), 2(i).

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[2] We recognize that many (if not most) decisions addressing administrative finality arise in the context of the Administrative Procedure Act, *see* 5 U.S.C. § 704, rather than agency-specific review provisions like the one we consider here. Nevertheless, we think that the case law evaluating finality under the APA is instructive, and see no reason why finality under the Natural Gas Act should be evaluated any differently. We will therefore follow *Riverkeeper II*'s approach of measuring finality in this context against "the traditional hallmarks of final agency action." 870 F.3d at 178.

The EHB is wholly separate from PADEP. The Board is an "independent quasi-judicial agency," 35 PA. STAT. ANN. § 7513(a), and its members—full-time administrative law judges—are appointed by the Governor of Pennsylvania without any involvement by either PADEP or the state's Secretary of Environmental Protection, *id.* § 7513(b). Final orders of the EHB may be appealed to the Commonwealth Court. 42 PA. CONS. STAT. § 763(a)(1).

Two features of the Board's review deserve special mention. First, an appeal to the EHB does not prevent PADEP's decision from taking immediate legal effect. The statute creating the Board expressly provides that "[n]o appeal shall act as an automatic supersedeas," 35 PA. STAT. ANN. § 7514(d)(1), and the EHB itself regards it as "axiomatic that the mere pendency of litigation before the Board . . . has no effect on the validity or viability of the Department action being appealed . . . . An appeal to the Board does not operate as a stay," *M&M Stone Co. v. Commw. of Pa., Dept. of Envtl. Prot.*, EHB Docket No. 2007-098-L, 2009 WL 3159149, at *3 (Pa. Envtl. Hrg. Bd. Sept. 7, 2009) (citations omitted). Second, the EHB's review of PADEP decisions is conducted largely de novo, with parties entitled to introduce new evidence and otherwise alter the case they made to the Department. While Pennsylvania law refers to proceedings before the EHB as an "appeal," the Commonwealth Court has explained that the Board is not an "appellate" tribunal in the ordinary sense of that term. The Board does not have "a limited scope of review attempting to determine if [PADEP]'s action can be supported by the evidence received . . . [by PADEP]. Rather, the [Board's] duty is to determine if [PADEP]'s action can be sustained or supported by the evidence

taken *by the* [*Board*]." *Leatherwood, Inc. v. Commw., Dept. of Envtl. Prot.*, 819 A.2d 604, 611 (Pa. Commw. Ct. 2003) (emphasis added) (citation omitted).

Once again relying heavily on *Berkshire Environmental*, Petitioners claim we may not review PADEP's issuance of a Water Quality Certification until the Board adjudicates their appeal. After holding that its jurisdiction under the Natural Gas Act covered only final action, the First Circuit concluded that the Massachusetts Water Quality Certification then under its review was non-final so long as the petitioners could still appeal within MassDEP. Citing similarities between the Massachusetts and Pennsylvania procedures, Petitioners ask us to reach the same conclusion here. We disagree, primarily because there are important distinctions between the Massachusetts and Pennsylvania schemes.

Two aspects of Pennsylvania's system for issuing Water Quality Certifications distinguish PADEP's decision from the non-final one in *Berkshire Environmental*. First, the Department's decision here was immediately effective, notwithstanding Petitioners' appeals to the EHB. The Department's decision was neither "tentative [n]or interlocutory" and was one "from which legal consequences . . . flow[ed]." *Riverkeeper II*, 870 F.3d at 176 (quoting *Bennett*, 520 U.S. at 177–78) (internal quotation marks omitted). 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. *See* 310 MASS. CODE REGS. 9.09(1)(e); *see also Berkshire Envtl.*, 851 F.3d at 108 (noting that the Water Quality

Certification expressly forbade any work under its auspices until "the expiration of the Appeal Period . . . and any appeal proceedings"). 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.

Second, unlike in Massachusetts, Pennsylvania law does not "make[] clear that [Transco]'s application seeking a . . . water quality certification initiated a single, unitary proceeding" taking place within one agency and yielding one final decision. *Berkshire Envtl.*, 851 F.3d at 112. Quite the opposite. The Department and the Board are entirely independent agencies. Each conducts a separate proceeding, under separate rules, overseen by separately appointed officers. *Compare* 25 PA. CODE. Part I (Department of Environmental Protection), *with* 25 PA. CODE. Part IX (Environmental Hearing Board). Both in formal terms, *see* PERMITTING MANUAL, *supra*, § 400 at 6 (noting that publication in the *Pennsylvania Bulletin* marks a "final action of the Department"), and in the immediate practical effect discussed above, PADEP's issuance of a Water Quality Certification is that agency's final action, leaving nothing for the Department to do other than await the conclusion of any proceedings before the Board.[3]

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[3] Petitioners emphasize another parallel between EHB review in Pennsylvania and an adjudicatory hearing in Massachusetts: both conduct de novo review without deference to the appealed decision.

Whether state law permits further review by the same agency that makes the initial decision or provides for an appeal to a structurally-separate body is probative of whether that decision is final. Finality, at bottom, is "concerned with whether the *initial decisionmaker* has arrived at a definitive position on the issue," and PADEP has said its piece regardless of whether Pennsylvania law gives a different agency the last word. *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 193 (1985) (emphasis added). In that respect, finality is "conceptually distinct" from the related issue of exhaustion of administrative remedies. *Id.* at 192–93. Here, Petitioners confine themselves to challenging the finality of PADEP's decision, and do not argue that we lack jurisdiction because of a failure to exhaust an appeal to the EHB.

Petitioners do not rest exclusively on the comparison between this case and *Berkshire Environmental*. Nevertheless, we find their other arguments no more persuasive.

And to be sure, the First Circuit relied in part on the fact that "the adjudicatory hearing [was] a review of [the pipeline company]'s application, rather than a review of a prior agency decision." *Berkshire Envtl.*, 851 F.3d at 112. But the court in *Berkshire Environmental* did not rely on the fact of de novo review for its own sake in finding the agency's initial decision non-final. Rather, it concluded that the decision was non-final because several features of Massachusetts's administrative scheme—de novo review among them—combined to produce a "review" process that "continue[d] more or less as though no decision ha[d] been rendered at all." *See id.* The same cannot be said of review by the EHB in Pennsylvania, which takes place after a decision that has immediate legal effect.

Petitioners are incorrect that the Department's decision is non-final for purposes of this Court's review because a Pennsylvania statute provides that "no action of [PADEP] shall be final as to [a] person until the person has had the opportunity to appeal the action to the [EHB]" or the time to appeal has expired. 35 Pa. Stat. Ann. § 7514(c). Despite this language, Pennsylvania cannot declare when and how an agency action taken pursuant to federal law is sufficiently final to be reviewed in federal court. State law's use of the word "final" to characterize an agency's decision is irrelevant in that context, except so far as that language is relevant to the substantive effect of the order in question and the practical character of the procedures surrounding it. Here, those underlying realities indicate that PADEP has taken final action.

Nor does due process require that Petitioners have an opportunity to present evidence at a hearing before the EHB. "There are instances in which due process requires that an agency afford an adversarial mode of procedure and an evidentiary hearing," but this "is not such an instance." *See Nat'l Labor Relations Bd. v. ARA Servs., Inc.*, 717 F.2d 57, 67 (3d Cir. 1983). The essence of due process is notice and an opportunity to be heard, and with respect to decisions like the one under review here, the public comment period provided Petitioners "with meaningful hearing rights sufficient under the circumstances to protect [their] interests." *See Bank of N. Shore v. Fed. Deposit Ins. Corp.*, 743 F.2d 1178, 1184 (7th Cir. 1984). Due process does not entitle Petitioners to a de novo evidentiary hearing; the opportunity to comment and to petition this Court for review is enough.

Notwithstanding the availability of an appeal to the EHB, PADEP's issuance of a Water Quality Certification was final in precisely the most important ways that the permit in *Berkshire Environmental* was not. The Department's action presents all the "traditional hallmarks of final agency action," *Riverkeeper II*, 870 F.3d at 178, and we have exclusive jurisdiction to hear any "civil action for the review" of such a decision. We now turn to Petitioners' challenges to the merits of the Department's decision.

III

Petitioners make four separate arguments on the substance of their claims.[4] First, they claim PADEP failed to provide the public notice the Clean Water Act requires prior to issuing a Water Quality Certification. Second, they contend the Department acted arbitrarily and capriciously by issuing a Water Quality Certification that was immediately effective despite being conditioned on Transco obtaining additional permits in the future. Third, pointing out that PADEP's approval was necessary for Transco to begin eminent domain proceedings under the Natural Gas Act, Petitioners argue that the Department's decision deprived them of due process and violated the Fifth Amendment's Takings Clause. Finally, Petitioners assert that the Department's action violated its obligation to safeguard the Commonwealth's natural resources under Article I, Section 27 of the Pennsylvania Constitution. We address these arguments *seriatim*.

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[4] Not every petitioner joins in every argument. For the sake of simplicity we refer generically to "Petitioners."

A

The Clean Water Act obliges state agencies to comply with a number of procedural requirements before issuing a Water Quality Certification. As relevant here, Section 401 requires PADEP to "establish procedures for public notice in the case of all applications for certification." 33 U.S.C. § 1341(a)(1). No party disputes that the Department has a longstanding written policy, published in its Permitting Manual, that when it "receives a request for Water Quality Certification, a notice is published in the *Pennsylvania Bulletin* for a 30-day comment period." PERMITTING MANUAL, *supra*, § 400 at 6. And no party disputes that the Department followed that policy here. Nevertheless, Petitioners claim it was insufficient to satisfy Section 401. We disagree.

First, Petitioners cite several cases in which "[c]ourts have found that Section 401(a)(1)'s notice requirements are met where the state codifies the notice requirements by statute or regulation." Riverkeeper Br. 25–26. But none of those decisions—and nothing in the text of the Clean Water Act—requires a State to establish its notice procedures by way of *regulation*. The fact that formal rulemaking is sufficient to satisfy the requirement of established notice procedures does not mean it is necessary.

Second, Petitioners claim this Court has already "held" that PADEP has "failed to 'establish' procedures for public notice" under Section 401. Riverkeeper Br. 26–27. Petitioners' only support for that claim is a single clause in our decision in *Riverkeeper I*: "PADEP has not published any procedures for issuing Water Quality Certifications." 833 F.3d at 385. Reading that

clause in context, however, makes clear that it does not refer to PADEP's procedures for providing public notice of Section 401 applications. Indeed, PADEP's *notice* procedures were not at issue in that case. Rather, we considered PADEP's procedures for *processing* such applications—what information the agency would gather and evaluate before issuing a Water Quality Certification. *Id.* at 385–86. Contrary to Petitioners' suggestion, we have never held anything with respect to PADEP's notice procedures.

Third, Petitioners suggest that "PADEP itself has implicitly conceded" its failure to establish adequate notice procedures by publishing a draft of new procedures for considering Section 401 Certifications, including notice procedures. Riverkeeper Br. 27–28. We are unpersuaded. The Department has not conceded that its existing notice procedures are legally inadequate by moving to promulgate a single set of rules governing the entire Water Quality Certification process.

Finally, Petitioners contend that Section 401 required PADEP to immediately give full notice not only of Transco's application for a Water Quality Certification, but also of the three substantive permits on which the Department proposed to condition its approval. That argument also fails. Notice need only be adequate to allow interested parties to participate meaningfully in the process that is actually pending, and PADEP's process for granting Water Quality Certifications does not involve immediate consideration of any substantive permits. This Court approved that arrangement just two years ago, holding that when the Department conditions a Certification on the later

acquisition of other permits, the agency may issue the Certification without engaging in the substantive review that will eventually be required to grant the permits. *Riverkeeper I*, 833 F.3d at 387–88. Since PADEP is not required to conduct that review at this stage, it would make little sense to require it to provide notice of the same.

B

Petitioners also assert that the Department's decision to issue a Water Quality Certification now, conditioned on Transco obtaining substantive permits later, was arbitrary, capricious, or otherwise not in accordance with law. Petitioners make two versions of that argument. First, they claim PADEP's decision was arbitrary because it certified Atlantic Sunrise's water quality compliance based on a pledge that Transco would demonstrate substantive compliance in a future permit application rather than in the application for the Water Quality Certification itself. Without that present demonstration of compliance, Petitioners argue, PADEP's decision that Atlantic Sunrise would comply with Pennsylvania water quality standards could not have been based on anything but guesswork. Second, Petitioners say the Department failed to follow its own procedures, which they claim require the agency to consider applications for Water Quality Certifications simultaneously with any applicable substantive permits.

Both of those arguments—which at bottom focus on the timing rather than the substance of the Department's decision—are foreclosed by our decision in *Riverkeeper I*. In that case, we held that PADEP's preferred procedure for considering Certifications along

with other permits was not arbitrary or capricious because—since no construction can begin before the Department grants the substantive permits, and all interested parties will have a full opportunity to weigh in when PADEP considers applications for those permits—the petitioners could not show they had been harmed by the Department's sequencing choice. *Riverkeeper I*, 833 F.3d at 386–87. The same analysis applies with equal force here. Petitioners attempt to distinguish this case by arguing that they have been harmed by the Department's choice not to provide notice of the substantive permits upon which it conditioned the Water Quality Certification. But as we discussed herein, Petitioners will suffer no harm from PADEP's decision to provide notice of those permits at the time it actually considers them.

C

Petitioners next argue that PADEP's issuance of a conditional Water Quality Certification violates the Takings Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment. Under the Natural Gas Act, any natural gas company holding a Certificate of Public Convenience and Necessity may acquire a pipeline right-of-way through eminent domain. 15 U.S.C. § 717f(h). The Certificate of Public Convenience and Necessity establishes the legal right to take property; in a condemnation proceeding under the Natural Gas Act, the "only open issue [is] the compensation the landowner defendant will receive in return for the easement." *Columbia Gas Transmission, LLC v. 1.01 Acres, More or Less in Penn Twp., York Cty., Pa., Located on Tax ID #440002800150000000 Owned By Brown*, 768 F.3d 300, 304 (3d Cir. 2014).

Petitioners assert that PADEP violated the Fifth and Fourteenth Amendments when it issued a conditional Water Quality Certification—a condition precedent for initiating eminent domain proceedings under Transco's Certificate of Public Convenience and Necessity—based on a relatively restricted administrative process.

Regardless of its underlying merits, and setting aside questions about whether the Clean Water Act could ever provide a vehicle to raise a takings argument, *see Gunpowder Riverkeeper v. FERC*, 807 F.3d 267, 274–75 (D.C. Cir. 2015) (concluding that "an injury arising specifically by reason of eminent domain" falls outside the zone of interests protected by the statute), that claim cannot succeed because Petitioners have presented it in the wrong forum. Their argument does not challenge PADEP's judgment that Transco will comply with Pennsylvania's water-quality standards. Nor does it ask this Court to review the Department's reasoning, its procedures, or the facts on which it based its decision. Rather, Petitioners' eminent-domain argument is in substance a challenge to FERC's order granting a Certificate of Public Convenience and Necessity. And that order may only be challenged by a request for rehearing before FERC itself, or by a petition for review by an appropriate federal circuit court. *See* 15 U.S.C. § 717r(a)–(b); *Williams Nat. Gas Co. v. City of Okla. City*, 890 F.2d 255, 264 (10th Cir. 1989). Petitioners respond, in essence, that those avenues are inadequate because if Petitioners took advantage of them, Transco would resist and Petitioners might lose. That argument refutes itself.

D

Petitioners' final argument—that PADEP failed to comply with its obligations under the Pennsylvania Constitution—also fails. Article I, Section 27 of the Pennsylvania Constitution establishes a common right to the Commonwealth's natural resources and obligates its government to hold those resources in trust. Petitioners argue that PADEP failed to live up to that obligation when it issued a Water Quality Certification conditioned on Transco later obtaining certain substantive permits.

Transco responds that a state constitutional claim is not cognizable in this proceeding, arguing that by vesting jurisdiction in this Court to review PADEP's Certification decision, the Natural Gas Act provides for only a narrow scope of review that does not permit us to hear state-law claims. Transco points to § 717r(d)(3) of the Act, which states that if the reviewing court of appeals finds that an agency's action was "inconsistent with the Federal law governing such permit *and* would prevent the construction, expansion or operation of the facility . . . , the Court shall remand the proceeding to the agency." 15 U.S.C. § 717r(d)(3) (emphasis added). In Transco's view, the statute's requirement that we remand to the agency when certain conditions are met implies that remand is the only remedy available to us, and then only under the conditions just quoted. Therefore, Transco asserts, we may not reach the merits of Petitioners' claim under the Pennsylvania Constitution. We cannot agree.

The provision of the Natural Gas Act that actually grants us jurisdiction, 15 U.S.C. § 717r(d)(1), is quite capacious. It empowers us to hear "any civil action"

seeking "review" of federal permits required by interstate pipelines. And ordinarily, when such agency action is "made reviewable by statute," 5 U.S.C. § 704, the Administrative Procedure Act authorizes a broad scope of review, without limiting courts to considering only federal law, *see id.* § 706. Nothing in § 717r(d)(3) says differently; it simply requires reviewing courts to apply a particular remedy when certain conditions are met. It says nothing about other circumstances, and we will not imply from the statute's silence that Congress intended to restrict the language of its text. Congress does not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns. Inc.*, 531 U.S. 457, 468 (2001).[5]

Nevertheless, Petitioners' claim under the Pennsylvania Constitution cannot succeed on the merits. Petitioners essentially complain that PADEP could not have met its obligation to safeguard Pennsylvania's natural resources because it granted a Water Quality Certification before collecting the environmental impact data that would be required to issue the substantive permits on which it was conditioned. That fails for the same reason that we rejected Petitioners' argument that PADEP's decision to grant a Water Quality Certification conditioned on obtaining other permits was arbitrary and capricious. *See supra* III.B. Because Transco will have to obtain those substantive permits to begin construction—and

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[5] The United States Court of Appeals for the Fourth Circuit has recently reached the same conclusion. *Sierra Club v. U.S. Dep't of the Interior*, — F.3d —, 2018 WL 3717067, at *25 (4th Cir. Aug. 6, 2018) (holding that when an agency's action would not "prevent the construction" of a pipeline, § 717r(d)(3) did not apply and "the APA's default rule" governed)

PADEP will have to consider Article I, Section 27 in deciding whether to grant or deny them—Petitioners cannot show that they have been harmed by the Department's decision to issue a conditional Water Quality Certification.

* * *

For the reasons stated, we will deny the petitions for review.

APPENDIX B

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

EHB Docket No. 2015-060-M

[Filed June 2, 2017]

THE DELAWARE RIVERKEEPER NETWORK AND MAYA K VAN ROSSUM, THE DELAWARE RIVERKEEPER	)
v.	)
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC	)

Issued June 2, 2017

OPINION AND ORDER ON
THE TERMINATION OF THE
ABOVE-CAPTIONED APPEAL

By Richard P. Mather, Sr., Judge

Synopsis

The Board agrees to terminate Appellant's appeal in the above-captioned matter in light of the Appellant's March 24, 2017 letter and following a conference call with the Parties on May 16, 2017. The Board nonetheless notes that it did not decide to terminate

the appeal for lack of jurisdiction. The Board believes that it would have jurisdiction over this appeal.

O P I N I O N

The above captioned appeal was filed by the Delaware Riverkeeper Network and Maya K. Van Rossum, the Delaware Riverkeeper ("Appellant") on May 5, 2015 in response to the Department's grant of two 401 Water Quality Certifications – Permits No. EA 40-013 and EA 45-002 – to Transcontinental Gas Pipe Line Company, LLC ("Permittee") on April 6, 2015.

On May 21, 2015, the Parties submitted a joint request for a stay in this appeal, pending the Third Circuit Court of Appeals' review of its jurisdiction over a petition for review filed by the Delaware Riverkeeper Network. This petition for review concerns the same Department decision as challenged here, which relates to Transco's Leidy Southeast Expansion Project.[1] The Board granted the request for an approximately two-month stay, at which point the Parties were required to submit a status report on or before July 28, 2015. As there were no new developments, the Board continued to issue orders extending the stay and requiring joint status reports. Status reports were due

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[1] *See Delaware Riverkeeper Network v. Quigley*, No. 15-2122 (3d. Cir., filed May 5, 2015). On May 8, 2015, the Court of Appeals for the Third Circuit issued an order requiring the parties to address the Court's authority over the petition within fourteen days of the order. The parties in this matter requested that the appeal pending before the Board be stayed for a reasonable duration so as to give the Court of Appeals time to consider the submissions in response to its order.

on October 1, 2015, November 6, 2015, February 5, 2016, April 1, 2016, June 3, 2016, and August 1, 2016.

On August 8, 2016, the Court of Appeals for the Third Circuit issued its opinion in *Delaware Riverkeeper Network v. Quigley*, in which it held that state action taken pursuant to the Clean Water Act in permitting an interstate natural gas facility pursuant to the Natural Gas Act "is subject to review exclusively in the Court of Appeals." Slip op. at 17-18. Permittee filed a letter with the Board on August 8, 2016 requesting that the Board dismiss the appeal for lack of jurisdiction, given the Court of Appeals' ruling. The Board issued an order on August 11, 2016 staying the appeal and ordering the Appellant to file a status report on or before September 12, 2016 indicating whether they have an objection to Permittee's request to dismiss the appeal.

On September 15, 2016, the Appellant filed a status report that alerted the Board to the Delaware Riverkeeper Network's request for a re-examination of a number of issues ruled upon in the Third Circuit's decision. If granted, this request, while unrelated to jurisdictional issues, would delay the Third Circuit's issuance of a mandate and could potentially modify the Third Circuit's August 8, 2016 Opinion. The Appellant therefore requested that the Board extend its stay of this appeal. On October 31, 2016, the Board granted this request and stayed the matter until the Third Circuit issued a mandate in *Delaware Riverkeeper Network v. Quigley*.

On March 24, 2017, the Appellant submitted a letter alerting the Board to the Third Circuit's issuance of an amended opinion on the same date. While the

Third Circuit Court of Appeal's adopted several changes requested by the Delaware Riverkeeper, none of those changes impacted the Court's holding on jurisdiction. In light of this, the Appellant had no objection to the termination of its appeal before the Board. However, in a footnote, Appellant also drew the Board's attention to a recent ruling out of the First Circuit in which the Court dismissed a petition for review under Section 19(d)(1) of the Natural Gas Act, 15 U.S.C. § 717r(d)(1). The Court determined that it lacked subject matter jurisdiction over a Section 401 Water Quality Certificate because aggrieved parties had the right to appeal the Certificate to the state department of environmental protection before it could be appropriately reviewed by the First Circuit of Appeals.[2]

Prior to the Board addressing Appellant's March 24, 2017 letter, Judge Labuskes issued an Opinion and Order in *Lancaster Against Pipelines, Geraldine Nesbitt and Sierra Club v. DEP*, EHB Docket No. 2016-075-L (Opinion and Order, May 10, 2017). In this Opinion, Judge Labuskes determined that the Board has jurisdiction over appeals of Water Quality Certifications pursuant to Section 401 of the Clean Water Act. In light of this related matter, the Board scheduled a conference call with all parties in the instant appeal on May 16, 2017 to confirm that Appellant had no objection to the termination of its appeal before the Board. During the call, the Appellant confirmed that it did not object to the termination its appeal, and neither the Department nor Permittee were opposed. Therefore, the Board will close

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[2] *See Berkshire Environmental Action Team, Inc. v. Tennessee Gas Pipeline Company, LLC*, 851 F.3d 105 (1st Cir. 2017).

and discontinue this docketed appeal. The Board nonetheless feels that a brief discussion of its jurisdiction over such appeals is useful because the issue may arise in later appeals and was correctly decided by Judge Labuskes in the pending related appeal.

Discussion

In *Lancaster Against Pipelines, Geraldine Nesbitt and Sierra Club v. DEP*, Permittee Transcontinental Gas Pipeline Company, LLC ("Permittee" or "Transco") requested that the Board dismiss the appeal regarding the Department's issuance of a Section 401 Water Quality Certificate following the ruling by the Third Circuit in *Delaware Riverkeeper Network v. Secretary, Pennsylvania Department of Environmental Protection* 833 F.3d 360 (3d Cir. 2016). Transco argued that the Board could not review the Department's issuance of the 401 Certification because the Third Circuit has exclusive jurisdiction over that section. The Department notified the Board that it would "abide by" the Third Circuit's ruling. The Appellants, however, have asked the Third Circuit to dismiss their petitions for review for lack of jurisdiction because the Board has not yet acted on the appeals before it, thereby rendering the petitions before the Third Circuit not yet ripe for review. Appellants further argued that the Board does have jurisdiction and should issue a stay in *Lancaster Against Pipelines v. DEP* until the Third Circuit rules on whether it has jurisdiction in the pending parallel proceedings. The Board agreed with the Appellants and determined that it had jurisdiction under the Natural Gas Act, 15 U.S.C. §§ 717-717z.

Although the Natural Gas Act makes the regulation of natural gas pipelines a federal function, it leaves

open a limited role for states that have primacy to implement the Clean Water Act. *Lancaster Against Pipelines, Geraldine Nesbitt and Sierra Club v. DEP*, EHB Docket No. 2016-075-L, slip op. at 3 (Opinion and Order, May 10, 2017). Pennsylvania is such a state. In these instances, the state retains the right to determine whether the project complies with federal and state water quality standards. *Id*. If the project is in compliance, then the state will issue a 401 Certification. *Id*.

The jurisdictional issue involved here arises from Section 19(d)(1) of the Natural Gas Act:

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

15 U.S.C. § 717r(d)(1). As Judge Labuskes stated, "the Third Circuit's opinion in the *Delaware Riverkeeper* case is not particularly helpful" in resolving the jurisdictional issue of concern to the Board. The jurisdictional issue before the Third Circuit was both broader and more general: whether the Department's issuance of a 401 Certification was the act of a state

administrative agency acting "pursuant to Federal law." *Delaware Riverkeeper*, 833 F.3d at 370. This is not the jurisdictional issue that is of concern to the Board. Rather, the Board is faced with whether a final state action is required before the Court of Appeals may act upon a petition for review under Section 19(d)(1). If a final state action is required under Section 19(d)(1), then the follow-up question is whether a final state action has occurred in a given matter.

The question of whether a final "state administrative agency" action is required under Section 19(d)(1) is a question of federal law that is already pending before the Third Circuit. Both the First and Ninth Circuits have ruled that it is required. *See Berkshire Env. Action Team, Inc. v. Tenn. Gas Pipeline, LLC*, 851 F.3d 105 (1st Cir. 2017); *Columbia Riverkeeper v. U.S. Coast Guard*, 761 F.3d 1084 (9th Cir. 2014). The Middle District of Pennsylvania has ruled that it is not required. *Contra Tennessee Gas Pipeline LLC v. Del. Riverkeeper Network*, 921 F. Supp. 381 (M.D. Pa. 2013). The Board particularly finds the First Circuit Court of Appeals' position to be highly persuasive. The First Circuit's position was that there was ample reason to continue to have the strong presumption that judicial review is available only upon a state agency action becoming final. *Berkshire Env. Action Team*, 851 F.3d at 111 (citing *Bell v. New Jersey*, 461 U.S. 773, 778 (1973)).

Whether a state agency action is final is a question of state law. 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." *Lancaster Against Pipelines*, EHB Docket No. 2016-075-L, slip op. at 5 (Opinion and Order, May 10, 2017), citing *Fiore v. DER*, 655 A.2d 1081, 1086 (Pa. Cmwlth. 1995); *Morcoal v. DER*, 459 A.2d 1303, 1307 (Pa. Cmwlth. 1983).

This is very much like the Massachusetts procedures that the First Circuit found were not final until the adversely affected party had the opportunity to go through the state's hearing process. *Berkshire*, 851 F.3d at 111-14. Unless the Third Circuit holds that a final action is not required, or that Pennsylvania's may be disregarded, the Board finds that it has jurisdiction over appeals such as that found in *Lancaster Against Pipelines* and the matter here. Therefore, while we will close and terminate this appeal because Appellant have no objection, we maintain that we have jurisdiction over it.[3]

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[3] Aside from the statutory construction issue arising under Section 19(d)(1) regarding the need for a *final* state agency action, I believe there is a more fundamental concern with Section 19(d)(1) that arises under the Tenth Amendment of the United States Constitution. U.S. CONST. amend. X. There is no question that Congress has the authority to preempt state regulatory authority regarding interstate pipelines subject to regulation by the Federal Energy Regulatory Commission under the Natural Gas Act. 15

U.S.C. §§ 717-717z. Section 19(d)(1) does not, however, preempt state regulatory authority, but rather expressly recognizes a limited state role for a "state administrative agency acting pursuant to federal law . . ." Section 19(d)(1) does more than simply authorize a limited state role, however. It commandeers state agency officials and compels them to violate longstanding state administrative law. Section 19(d)(1) purports to rewrite state laws by directing state agency officials to litigate the state agency's decisions before the United States Court of Appeals for the circuit in which the facility is located. It is a fundamental principle of law that Pennsylvania state agencies are entities established by Pennsylvania state law, and that they have only the authority given to them by the Pennsylvania General Assembly. *Small v. Horn*, 722 A.2d 664, 669 (Pa. 1998). Congress's attempt to commandeer the Department and its officials and to compel them to defend their actions in federal court rewrites longstanding state administrative law. 35 P.S. § 7514. I believe that this attempt violates the Tenth Amendment and its anti-commandeering principle. *See New York v. United States*, 505 U.S. 144 (1992) and *Printz v. United States*, 521 U.S. 898 (1997). 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. If the Third Circuit Court of Appeals decides that a final state action is required under Section 19(d)(1) then the clear conflict with longstanding Pennsylvania state law involving appeals of Department actions to the Environmental Hearing Board will be addressed. However, the Pennsylvania General Assembly has also directed that appeals from decisions of the Pennsylvania Environmental Hearing Board go to the Pennsylvania Commonwealth Court. 42 Pa. C.S.A. § 763. Therefore, such a decision from the Third Circuit confirming the necessity of a final state action could nonetheless still implicate constitutional issues of commandeering by circumventing state laws directing such appeals to the Commonwealth Court. *See generally* Josh Blackman, *Article: State Judicial Sovereignty*, 2016 U. Ill. L. Rev. 2033 (2016) (Discussing the constitutionality of exclusive federal jurisdiction as it relates both to Article III of the Constitution and the anti-commandeering principle of the Tenth Amendment).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

EHB Docket No. 2015-060-M

[Filed June 2, 2017]

THE DELAWARE RIVERKEEPER NETWORK AND MAYA K VAN ROSSUM, THE DELAWARE RIVERKEEPER	)
v.	)
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC	)

O R D E R

AND NOW, this 2nd day of June, 2017, in consideration of the Permittee's request to terminate the appeal, the above-captioned matter will be marked closed and discontinued in the docket.

ENVIRONMENTAL HEARING BOARD

s/ Richard P. Mather, Sr.
RICHARD P. MATHER, SR.
Judge

DATED: June 2, 2017
c: DEP, General Law Division:
Attention: Maria Tolentino
(via electronic mail)

For the Commonwealth of PA, DEP:
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(*via electronic filing system*)

For Appellant:
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For Permittee:
Pamela S. Goodwin, Esquire
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APPENDIX C

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

EHB Docket No. 2016-075-L
(Consolidated with 2016-076-L and 2016-078-L)

[Filed May 10, 2017]

LANCASTER AGAINST PIPELINES GERALDINE NESBITT AND SIERRA CLUB	)
v.	)
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC, Permittee	)

Issued May 10, 2017

OPINION AND ORDER ON
REQUEST TO DISMISS

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Environmental Hearing Board has jurisdiction in an appeal from the Department of Environmental Protection's issuance of a Water Quality Certification pursuant to Section 401 of the Clean Water Act.

O P I N I O N

On April 5, 2016, the Pennsylvania Department of Environmental Protection (the "Department") issued a Water Quality Certification pursuant to Section 401 of the Clean Water Act, 33 U.S.C. § 1341(a), to Transcontinental Gas Pipe Line Company, LLC ("Transco"). The Department certified among other things that the construction, operation, and maintenance of Transco's Atlantic Sunrise Pipeline Project complies with the Commonwealth's water quality standards, provided that Transco obtained and complied with some yet-to-be-issued state permits. Lancaster Against Pipelines, Geraldine Nesbitt, and the Sierra Club filed these consolidated appeals from the Department's issuance of the 401 certification. The Appellants also filed petitions with the Court of Appeals for the Third Circuit seeking review of the same Department action. *Lancaster Against Pipelines v. Quigley*, No. 16-2212; *Nesbitt v. Quigley*, No. 16-2218; and *Sierra Club v. Quigley*, No. 16-2400. Soon thereafter, the parties asked for and received a series of stays in both our appeals and the Third Circuit cases. The parties told us that they wished to await the Third Circuit Court of Appeal's decision in a case said to involve similar issues, *Delaware Riverkeeper Network v. Secretary, Pennsylvania Department of Environmental Protection*, 833 F.3d 360 (3d Cir. 2016).

On August 8, 2016, Transco by letter informed us that the Third Circuit had issued its Opinion in the *Delaware Riverkeeper* case. Transco requested that we dismiss the appeal. However, a petition for rehearing was thereafter filed in the *Delaware Riverkeeper* case, so the parties once again agreed to a continuing stay

pending the ruling on that petition. The parties asked us to issue an Order providing that, within fourteen days of the Third Circuit's mandate in the *Delaware Riverkeeper* case, the parties could file written responses addressing this Board's authority to proceed in this matter. We agreed and issued an appropriate Order on September 13, 2016.

On March 13, 2017, the parties notified us that the Third Circuit had issued its mandate in the *Delaware Riverkeeper* case. They indicated that they would be filing their respective jurisdictional statements as contemplated in our Order, which they have now done. Transco has renewed its "request" that the Board dismiss these consolidated appeals for lack of jurisdiction. It argues that this Board cannot review the Department's issuance of the 401 certification because the Third Circuit has exclusive jurisdiction to review that action. The Department sent us a short letter indicating that it was willing to "abide by" the Third Circuit's ruling in *Delaware Riverkeeper*. The Appellants tell us that they have asked the Third Circuit to dismiss their own petitions for review for lack of jurisdiction, arguing that the petitions are not ripe for review because this Board has not yet acted on their appeals before us. They tell the Court that, because the Board has not yet acted on the appeal of the 401 certification, there is no final state action for the Court to review. Similarly, the Appellants argue before us that we do indeed have jurisdiction, and that at a minimum we should issue another stay until the Third Circuit rules on its jurisdiction in the parallel proceedings pending there.

Although a challenge to our jurisdiction must ordinarily take the form of a motion, 25 Pa. Code §§ 1021.91 and 1021.94, we are willing to view Transco's request for dismissal together with the parties' jurisdictional statements as the functional equivalent of a motion. Transco's request is denied and the Appellant's request for a stay is granted because, in our view, until the Third Circuit holds otherwise, this Board does have jurisdiction to review the Department's action.

Ordinarily there would be no question that we have jurisdiction to review the Department's issuance of a 401 certification. *See Solebury Twp. v. DEP*, 928 A.2d 990 (Pa. 2007). The question arises here, however, because the certification at issue involves an interstate natural gas pipeline subject to regulation by the Federal Energy Regulatory Commission (FERC) under the Natural Gas Act, 15 U.S.C. §§ 717-717z. The Natural Gas Act for the most part makes the regulation of natural gas pipelines a federal function, but it carves out a limited role for states such as Pennsylvania that have primacy to implement the Clean Water Act. The state retains the right to determine whether the project complies with federal and state water quality standards. If it does, the state issues a 401 certification. The jurisdictional issue arises because Section 19(d)(1) of 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 Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval (hereinafter collectively referred to as "permit") required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.).

15 U.S.C. § 717r(d)(1).

We do not believe the Third Circuit's Opinion in the *Delaware Riverkeeper* case is particularly helpful. The only jurisdictional issue before the Court was whether the Department's issuance of a 401 certification was the act of a state administrative agency acting "pursuant to Federal law." *Delaware Riverkeeper*, 833 F.3d at 391. The Court held that it was, and it proceeded to address the merits. The Court was not faced with and did not address whether the state's action needed to be final and whether the Department's issuance of the certification was final. The precise question presented in our case is not whether the Department was acting pursuant to federal law; it is whether a final action is required before the Court of Appeals can act upon a petition for review, and whether a final action has taken place in this case.

There is little point in us opining on the first question. Whether a final action is required is a question of federal law that is pending before the Court in the Appellants' petitions for review in the proceedings parallel to this one. The First Circuit Court of Appeals in what we believe to be a highly persuasive decision that respects the state's administrative

process recently held that a final agency decision *is* required. *Berkshire Env. Action Team, Inc. v. Tenn. Gas Pipeline, LLC*, 851 F.3d 105 (1st Cir. 2017). *See also, Columbia Riverkeeper v. U.S. Coast Guard*, 761 F.3d 1084 (9th Cir. 2014) (final action required). *Contra, Tennessee Gas Pipeline LLC v. Del. Riverkeeper Network*, 921 F.Supp. 381 (M.D. Pa. 2013) (final agency action not required). The First Circuit said that there was ample reason to stick with the strong presumption that judicial review is only available when an agency action becomes final. *Id*., 851 F.3d at 111 (citing *Bell v. New Jersey*, 461 U.S. 773, 778 (1973)).

As to the second question, there is no doubt whatsoever that the Department's certification of Transco's project was not a final action. 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. Unless 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.

Accordingly, dismissal would be premature. We, therefore, issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

EHB Docket No. 2016-075-L
(Consolidated with 2016-076-L and 2016-078-L)

[Filed May 10, 2017]

LANCASTER AGAINST PIPELINES	)
GERALDINE NESBITT AND SIERRA CLUB	)
	)
v.	)
	)
COMMONWEALTH OF PENNSYLVANIA,	)
DEPARTMENT OF ENVIRONMENTAL	)
PROTECTION and TRANSCONTINENTAL	)
GAS PIPE LINE COMPANY, LLC, Permittee	)
	)

O R D E R

AND NOW, this 10th day of May, 2017, upon consideration of the parties' responses regarding this Board's jurisdiction over the above-captioned appeal pursuant to the Board's Order of March 21, 2017, it is hereby ordered that:

1. This matter is stayed until the Third Circuit rules upon its jurisdiction over the matters docketed at *Sierra Club v. Secretary, Pennsylvania Department of Environmental Protection, et al.*, No. 16-2400, *Nesbitt v. Secretary, Pennsylvania Department of Environmental Protection, et al.,* No. 16-2218, and *Lancaster Against Pipelines v. Secretary, Pennsylvania Department of Environmental*

Protection, et al., No. 16-2212 ("the pending Third Circuit matters").

2. The parties shall promptly notify the Board upon the Third Circuit's decision on jurisdiction in the pending Third Circuit matters, or file a collective status report by **July 17, 2017**, whichever comes first.

ENVIRONMENTAL HEARING BOARD

s/ Bernard A. Labuskes, Jr.
BERNARD A. LABUSKES, JR.
Judge

DATED: May 10, 2017
c: DEP, General Law Division:
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(*via electronic mail*)

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For Permittee:
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Pamela S. Goodwin, Esquire
Andrew T. Bockis, Esquire
(*via electronic filing system*)

APPENDIX D

PENNSYLVANIA BULLETIN, VOL. 46, NO. 17, APRIL 23, 2016

Water Quality Certification under Section, 401 of the Federal Clean Water Act for the Atlantic Sunrise Pipeline Project

Natural Gas Pipeline Project and Related Mitigation; FERC Docket No. CP15-138-000; PADEP File No. WQ02-001

Northeast Region: Waterways & Wetlands Program, 2 Public Square, Wilkes-Barre, PA 18711, Joseph Buczynski, Program Manager 570-826-2511

On April 5, 2016, the DEP issued Section 401 Water Quality Certification to Transcontinental Gas Pipe Line Company, LLC for the Atlantic Sunrise Pipeline Project. The Pennsylvania Department of Environmental Protection (Department) certifies that the construction, operation and maintenance of the Project complies with the applicable provisions of sections 301—303, 306 and 307 of the Federal Clean Water Act (33 U.S.C.A. §§ 1311—1313, 1316 and 1317). The Department further certifies that the construction, operation and maintenance of the projects complies with Commonwealth water quality standards and that the construction, operation and maintenance of the projects does not violate applicable Commonwealth water quality standards provided that the construction, operation and maintenance of the projects complies

with the conditions for this certification, including the criteria and conditions of the following permits:

1. *Discharge Permit*—Transcontinental Gas Pipe Line Company, LLC shall obtain and comply with a Department 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).

2. *Erosion and Sediment Control Permit*—Transcontinental Gas Pipe Line Company, LLC shall obtain and comply with the Department's 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) and all applicable implementing regulations (25 Pa. Code Chapter 102).

3. *Water Obstruction and Encroachment Permits*—Transcontinental Gas Pipe Line Company, LLC shall obtain and comply with a Department 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 all applicable implementing regulations (25 Pa. Code Chapter 105).

4. *Water Quality Monitoring*—The Department retains the right to specify additional studies or monitoring to ensure that the receiving water quality is not adversely impacted by any operational and construction process that may be employed by Transcontinental Gas Pipe Line Company, LLC.

5. *Operation*—For each Project under this certification, Transcontinental Gas Pipe Line Company, LLC shall at all times properly operate and maintain all Project facilities and systems of treatment and control (and related appurtenances) which are installed to achieve compliance with the terms and conditions of this Certification and all required permits. Proper operation and maintenance includes adequate laboratory controls, appropriate quality assurance procedures, and the operation of backup or auxiliary facilities or similar systems installed by Transcontinental Gas Pipe Line Company, LLC.

6. *Inspection*—The Projects, including all relevant records, are subject to inspection at reasonable hours and intervals by an authorized representative of the Department to determine compliance with this Certification, including all required permits required, and Pennsylvania's Water Quality Standards. A copy of this Certification shall be available for inspection by the Department during such inspections of the Projects.

7. *Transfer of Projects*—If Transcontinental Gas Pipe Line Company, LLC intends to transfer any legal or equitable interest in the Projects which is affected by this Certification, Transcontinental Gas Pipe Line Company, LLC shall serve a copy of this Certification upon the prospective transferee of the legal and

equitable interest at least thirty (30) days prior to the contemplated transfer and shall simultaneously inform the Department Regional Office of such intent. Notice to the Department shall include a transfer agreement signed by the existing and new owner containing a specific date for transfer of Certification responsibility, coverage, and liability between them.

8. *Correspondence*—All correspondence with and submittals to the Department concerning this Certification shall be addressed to the Department of Environmental Protection, Northeast Regional Office, Waterways and Wetlands Program, 2 Public Square, Wilkes-Barre, PA 18701-1915.

9. *Reservation of Rights*—The Department may suspend or revoke this Certification if it determines that Transcontinental Gas Pipe Line Company, LLC has not complied with the terms and conditions of this Certification. The Department may require additional measures to achieve compliance with applicable law, subject to Transcontinental Gas Pipe Line Company, LLC's applicable procedural and substantive rights.

10. *Other Laws*—Nothing in this Certification shall be construed to preclude the institution of any legal action or relieve Transcontinental Gas Pipe Line Company, LLC from any responsibilities, liabilities, or penalties established pursuant to any applicable federal or state law or regulation.

11. *Severability*—The provisions of this Certification are severable and should any provision of this Certification be declared invalid or unenforceable, the remainder of the Certification shall not be affected thereby.

Any person aggrieved by this action may appeal, pursuant to Section 4 of the Environmental Hearing Board Act, 35 P.S. § 7614, and the Administrative Agency Law, 2 Pa.C.S. Chapter 5A, to the Environmental Hearing Board, Second Floor Rachel Carson State Office Building, 400 Market Street, PO Box 8457, Harrisburg, PA 17105-8457, 717-787-3483. TDD users may contact the Board through the Pennsylvania AT&T Relay Service, 800-654-5984. Appeals must be filed with the Environmental Hearing Board within 30 days of receipt of written notice of this action unless the appropriate statute provides a different time period. Copies of the appeal form and the Board's rules of practice and procedure may be obtained from the Board. The appeal form and the Board's rules of practice and procedure are also available in braille or on audiotape from the Secretary to the Board at 717-787-3483. This paragraph does not, in and of itself, create any right of appeal beyond that permitted by applicable statutes and decisional law.

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

Important legal rights are at stake, however, so you should show this document to a lawyer at once. If you cannot afford a lawyer, you may qualify for free pro bono representation. Call the secretary to the board (717-787-3483) for more information.

DAM SAFETY

Central Office: Bureau of Waterways Engineering and Wetlands, Rachel Carson State Office Building, Floor 3, 400 Market Street, P.O. Box 8460, Harrisburg, PA 17105-8460

D51-012. East Park Reservoir Dam, Aramark Tower, 2nd Floor, 1101 Market Street, Philadelphia, PA 19103. Permit issued to modify, operate, and maintain East Park Reservoir Dam within Schuylkill River Watershed, for the purpose of meeting the Commonwealth's regulations (Philadelphia, PA Quadrangle Latitude: 35.985833; Longitude: -75.188333) in Philadelphia City, Philadelphia County.

EROSION AND SEDIMENT CONTROL

The following Erosion and Sediment Control permits have been issued.

Persons aggrieved by an action may appeal that action to the Environmental Hearing Board (Board) under section 4 of the Environmental Hearing Board Act and 2 Pa.C.S. §§ 501—508 and 701—704. The appeal should be sent to the Environmental Hearing Board, Second Floor, Rachel Carson State Office Building, 400 Market Street, PO Box 8457, Harrisburg, PA 17105-8457, (717) 787-3483. TDD users may contact the Board through the Pennsylvania AT&T Relay Service, (800) 654-5984. Appeals must be filed with the Board within 30 days of publication of this notice in the *Pennsylvania Bulletin* unless the appropriate statute provides a different time period. Copies of the appeal form and the Board's rules of practice and procedure may be obtained from the Board. The appeal form and the Board's rules of

practice and procedure are also available in Braille or on audiotape from the Secretary to the Board at (717) 787-3483. This paragraph does not, in and of itself, create a right of appeal beyond that permitted by applicable statutes and decisional law.

For individuals who wish to challenge an action, the appeal must reach the Board within 30 days. A lawyer is not needed to file an appeal with the Board.

Important legal rights are at stake, however, so individuals should show this notice to a lawyer at once. Persons who cannot afford a lawyer may qualify for free pro bono representation. Call the Secretary to the Board at (717) 787-3483 for more information.

Southwest Region: Waterways & Wetlands Program Manager, 400 Waterfront Drive, Pittsburgh, PA 15222-4745.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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

[Filed October 11, 2018]

DELAWARE RIVERKEEPER NETWORK; DELAWARE RIVERKEEPER MAYA VAN ROSSUM,
Petitioners, No. 16-2211

LANCASTER AGAINST PIPELINES,
Petitioner, No. 16-2212

GERALDINE NESBITT,
Petitioner, No. 16-2218

SIERRA CLUB,
Petitioner, No. 16-2400

v.

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

TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC,

Intervenor Respondent)
_____)

SUR PETITION FOR REHEARING

Present: SMITH, *Chief Judge*, MCKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE, SHWARTZ, KRAUSE, RESTREPO, BIBAS, and SCIRICA,[1] *Circuit Judges*.

The petition for rehearing filed by petitioners in Nos. 16-2211, 16-2212 and 16-2400 having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ *Thomas M. Hardiman*
Circuit Judge

Dated: October 11, 2018
CJG/cc: All Counsel of Record

[1] Judge Scirica's vote is limited to panel rehearing.