

IN THE
Supreme Court of the United States

PENNEAST PIPELINE COMPANY, LLC,
Petitioner,

v.

STATE OF NEW JERSEY; NEW JERSEY
DEPARTMENT OF ENVIRONMENTAL
PROTECTION; NEW JERSEY STATE AGRICULTURE
DEVELOPMENT COMMITTEE; DELAWARE &
RARITAN CANAL COMMISSION; NEW JERSEY
WATER SUPPLY AUTHORITY; NEW JERSEY
DEPARTMENT OF TRANSPORTATION; NEW
JERSEY DEPARTMENT OF THE TREASURY; NEW
JERSEY MOTOR VEHICLE COMMISSION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF AMICUS CURIAE
MARCELLUS SHALE COALITION AND
PENNSYLVANIA INDEPENDENT OIL & GAS
ASSOCIATION IN SUPPORT OF PETITIONER

KEVIN JON MOODY
PENNSYLVANIA INDEPENDENT
OIL & GAS ASSOCIATION
212 Locust Street,
Suite 300
Harrisburg, Pennsylvania 17101
(717) 234-8525

TERRY R. BOSSERT
Counsel of Record
GENERAL COUNSEL
MARCELLUS SHALE COALITION
300 North Second Street,
Suite 1102
Harrisburg, Pennsylvania 17101
(717) 603-0714
tbossert@marcelluscoalition.org

*Counsel for Amici Curiae Marcellus Shale Coalition and
Pennsylvania Independent Oil & Gas Association*

TABLE OF CONTENTS

	<i>Page</i>
TABLE OF CONTENTS.....	i
TABLE OF CITED AUTHORITIES	ii
INTEREST OF <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT.....	2
ARGUMENT.....	3
The Third Circuit’s Decision Will Have a Significant Negative Impact on the Upstream Sector of the Natural Gas Industry	3
The Third Circuit’s Decision Would Make It Virtually Impossible to Build an Interstate Pipeline Through Pennsylvania	6
A Plain Reading of the Statute Indicates That Congress Could Not Have Intended the Result Reached by the Third Circuit.....	8
CONCLUSION	10

TABLE OF CITED AUTHORITIES

	<i>Page</i>
CASES:	
<i>Columbia Gas Transmission, LLC v. 12 Acres of Land, More or Less, No. 19-cv-01444 (D. Md. Aug. 22, 2019)</i>	3
<i>Commissioners v. Brown, 380 U.S. 563 (1965)</i>	9
<i>In re PennEast Pipeline Co. LLC, 938 F.3d 96 (3d Cir. 2019)</i>	2, 3
<i>Leaf v. Pennsylvania Co., 112 A. 243 (PA 1920)</i>	7
<i>PPL Montana v. Montana, 565 U.S. 576 (2012)</i>	7
<i>United States v. Turkette, 452 U.S. 576 (1981)</i>	9
STATUTES AND OTHER AUTHORITIES:	
U.S. Const. Amend. XI.....	3
15 U.S.C. § 717f(h)	8
58 Pa. C.S. § 2302(b).....	5

Cited Authorities

	<i>Page</i>
Dr. Robert Bruno & Michael Cornfield, <i>Study of Construction Employment in Marcellus Shale Related Oil and Gas Industry 2008-2014</i> University of Illinois, August 2014, https://ler.illinois.edu/wp-content/uploads/2015/01/Marcellusjobsstudy_FINAL.pdf	5
<i>Shale Gas Development Beneath Publicly-Owned Streambeds</i> , https://www.dcnr.pa.gov/Business/StreambedGasLeasing/Pages/default.aspx	7, 8
U.S. Bureau of Labor Statistics, Monthly Labor Review: <i>The Marcellus Shale gas boom in Pennsylvania: employment and wage trends</i>	6
U.S. Crude Oil and Natural Gas Proved Reserves, Year-end 2018, https://www.eia.gov/naturalgas/crudeoilreserves	4
USGS How Much Gas is in the Marcellus, Shale at https://www.usgs.gov/faqs/how-much-gas-marcellus-shale?qt-news_science_products=0#qt-news_science_products	4

INTEREST OF *AMICI CURIAE*¹

The Marcellus Shale Coalition (“MSC”) represents approximately 150 producers, midstream and pipeline companies, and local supply -chain companies that promote the safe and responsible development of natural gas from the Marcellus and Utica geological formations located in the Commonwealth. In 2019, the Commonwealth accounted for 20% of the nation’s natural gas production and produced more natural gas than any state except Texas, due predominately to the advent of “unconventional” development from tight shale formations like the Marcellus and Utica. MSC members produce more than 95% of the unconventional natural gas in the Commonwealth.

The Pennsylvania Independent Oil & Gas Association (“PIOGA”) is the largest and oldest association representing oil and natural gas interests in Pennsylvania. PIOGA’ s nearly 500 members - many of which are family -owned small businesses - include oil and natural gas producers, marketers, oil and gas field service companies, engineering companies, legal and accounting firms, and royalty owners. PIOGA producer members develop Pennsylvania crude oil and natural gas reserves from conventional and unconventional formations located under private and public lands.

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have received proper notice of *amicus*’s intent to file and all parties have consented to the filing of this brief.

The natural gas industry is often referred to as having three sectors: “Upstream” - the exploration and production (E&P) companies that drill the wells and produce the gas; “Midstream” - the companies that build the pipelines that gather and transport the gas to market; and, “Downstream” - the end users of the gas, such as electric power generating plants or LNG facilities. The MSC and PIOGA both have members in all three sectors. However, this brief will address the impacts on the upstream sector of the industry since other entities, including the Petitioner, will be addressing the direct impact of the Third Circuit’s decision on the other sectors. It is axiomatic that companies that drill for and produce natural gas must rely on pipelines to get that gas to market. The Third Circuit’s decision, therefore, threatens the ability of the E&P companies to market their product. Mindful of the Court’s admonition in Rule 37, we will not repeat the legal arguments made by Petitioner but do join in those arguments.

SUMMARY OF ARGUMENT

The decision of the United States Court of Appeals for the Third Circuit at *In re PennEast Pipeline Co. LLC*, 938 F.3d 96 (3d Cir 2019), if upheld, will have major negative impacts on the natural gas industry. Those negative impacts will occur not only to the portion of the industry constructing interstate pipelines but will also extend to the “upstream” companies that drill the wells and produce the natural gas. Without adequate pipelines to get their product to market E&P companies will need to curtail drilling new wells causing a negative impact on jobs and even on Commonwealth revenues.

The vast and varied interests claimed by states in real estate, both possessory and non-possessory, make it virtually impossible to route an interstate pipeline through a state such as Pennsylvania if the state can prevent a FERC certificate holder from using eminent domain, if necessary, to acquire state lands along the route approved by FERC.

A plain reading of the statute indicates that Congress could not have intended the Natural Gas Act to work in the manner decided by the Third Circuit.

ARGUMENT

The Third Circuit's Decision Will Have a Significant Negative Impact on the Upstream Sector of the Natural Gas Industry

The decision of the United States Court of Appeals for the Third Circuit at *In re PennEast Pipeline Co. LLC*, 938 F.3d 96 (3d Cir 2019) will have major negative impacts on the natural gas industry and the related economy. The Third Circuit opinion itself provides the strongest argument as to why this Honorable Court should grant the Petition for Writ of Certiorari. The Court recognized “that our holding may disrupt how the natural gas industry, which has used the NGA to construct interstate pipelines over State-owned land for the past eighty years, operates.” *In re PennEast* at 113. There can be no doubt that the decision below will greatly disrupt the construction of pipelines, as the court predicted. Indeed, another state bordering Pennsylvania has asserted the same Eleventh Amendment grounds to block an interstate pipeline. See, *Columbia Gas Transmission, LLC v. .12 Acres of Land, More or Less*, No. 19-cv-01444 (D. Md. Aug. 22, 2019).

The disruption, however, will not be limited to pipeline construction. The disruption will extend to the “upstream” sector of the industry as well. Without adequate pipeline capacity E&P companies lack any practical means to transport their product to market². Of more import, most states do not produce natural gas in significant quantities and, therefore, interstate pipelines are necessary to transport gas from the producing states to the consumers in other states. The natural gas industry in Pennsylvania produces almost 20% of the nation’s total gas production and interstate pipelines are essential to getting that gas to market throughout the country. The U.S. Energy Information Agency estimates that over 100 trillion cubic feet of proven gas reserves exist in Pennsylvania and the U.S. Geologic Survey estimates another 84 trillion cubic feet of undiscovered but technologically recoverable natural gas remains in the Marcellus formation.³ Stranding these valuable natural resources due to a lack of interstate pipelines would be extremely wasteful and will harm the MSC and PIOGA companies that seek to produce that gas and bring it to market. In addition, the collateral

2. The Petroleum and Hazardous Materials Safety Administration has stated that pipelines are the safest means of transportation for natural gas. PHMSA estimates that it would require 750 tanker trucks per day moving out every two minutes twenty-four hours a day seven days a week to replace a modest pipeline. Moving this volume by railroad would require 225 tank cars at 28,00 gallons each. FAQ 6, <https://www.phmsa.dot.gov/faqs/general-pipeline-faqs>

3. See, U.S. Crude Oil and Natural Gas Proved Reserves, Year-end 2018 at <https://www.eia.gov/naturalgas/crudeoilreserves/> (Figure 3); USGS How Much Gas is in the Marcellus Shale at https://www.usgs.gov/faqs/how-much-gas-marcellus-shale?qt-news_science_products=0#qt-news_science_products.

impact on jobs and even Commonwealth revenues would be significant.

The Commonwealth of Pennsylvania collects a fee for every shale gas well that is “spud” (i.e. drilled) in the state and continues to collect a fee on that well for a period of 15 years. See, 58 Pa.C.S. §2302(b). Through 2018, according to the Pennsylvania Public Utility Commission which collects the fee, the Commonwealth has collected \$1.4 billion in revenue and has distributed that revenue to state funds and to local governments.⁴ A decline in the drilling of new wells due to inadequate interstate pipeline capacity will necessarily lead to lesser revenues to the Commonwealth.

In addition, numerous economic studies have demonstrated that the natural gas industry supports a wide range of supporting industries and trades. For example, a study that examined construction jobs related to the shale gas industry found that numerous trades, including boilermakers, operating engineers, electricians, pipefitters, ironworkers, plumbers, laborers, insulators, painters, plasterers, masons, carpenters, sheet metal workers, and teamsters all benefited from a healthy gas industry. Dr. Robert Bruno & Michael Cornfield, *Study of Construction Employment in Marcellus Shale Related Oil and Gas Industry 2008-2014* University of Illinois, August 2014.⁵ In addition, a report released by the U.S. Bureau of Labor Statistics found a significant growth

4. <https://www.act13-reporting.puc.pa.gov/Modules/PublicReporting/Overview.aspx>

5. https://ler.illinois.edu/wp-content/uploads/2015/01/Marcellusjobsstudy_FINAL.pdf

in jobs and average annual income among gas industry workers in Pennsylvania. Monthly Labor Review: *The Marcellus Shale gas boom in Pennsylvania: employment and wage trends*.⁶ All of these jobs and the economic benefit that flows from them are at risk if industry growth is constrained due to a lack of interstate pipeline capacity.

The Third Circuit's Decision Would Make It Virtually Impossible to Build an Interstate Pipeline Through Pennsylvania

The potential impact of the Third Circuit's decision can be readily seen by looking at the public land holdings in Pennsylvania, as an example. Although Pennsylvania has not, at this point, asserted Eleventh Amendment immunity from eminent domain proceedings brought pursuant to the NGA, examining the Commonwealth's interests in land can be instructive, should such a position be motivated by the Court's holding. According to publicly available information the Commonwealth owns almost 300,000 acres in state parks, 2.2 million acres of state forest lands in 48 of the 67 counties, and 1.5 million acres of state game lands, accounting for approximately four million acres or 6250 square miles.⁷ Thus more than 13.5% of the land area of the state⁸ is owned in fee by Commonwealth

6. <https://www.bls.gov/opub/mlr/2014/article/the-marcellus-shale-gas-boom-in-pennsylvania.htm>

7. <https://www.dcnr.pa.gov/StateParks/Pages/default.aspx>; <https://www.dcnr.pa.gov/StateForests/Pages/default.aspx>; <https://www.pgc.pa.gov/hunttrap/stategamelands/Pages/default.aspx>, respectively.

8. 6250 square miles divided by 46,058 square miles - https://www.netstate.com/states/geography/pa_geography.htm

agencies creating a significant potential obstacle to any interstate pipeline route crossing through Pennsylvania. Those four million acres account for only the lands in which the Commonwealth has a possessory interest and omits lands on which it or a political subdivision of the Commonwealth may hold an agricultural preservation or conservation easement under various conservation statutes. For example, the Pennsylvania Land Trust Association reports that an additional 4 million acres are enrolled in Agricultural Security Areas.⁹ The Court's opinion is not clear on the exact interest that must be held by a state but similar non-possessory interests held by the State of New Jersey were assumed to be adequate to invoke Eleventh Amendment immunity.

In fact, the Commonwealth takes a view of its ownership of the land under certain stream beds that would greatly increase the obstacles to construction of a pipeline were Pennsylvania follow the Third Circuit's lead. Generally, states, in their capacity as sovereigns, hold title to the beds under navigable waters, whether navigable in law or in fact. See, *PPL Montana v. Montana*, 565 U.S. 576, 590 (2012); *Leaf v. Pennsylvania Co.*, 112 A. 243, 244 (PA 1920). However, Pennsylvania has recently taken a more expansive view of its stream bed ownership, claiming ownership of beds beneath every stream that the Pennsylvania General Assembly has ever designated as a public highway, regardless of their navigability in fact and thereby challenging the private ownership rights of riparian landowners. See, *Shale Gas Development Beneath Publicly-Owned Streambeds*.¹⁰ While many

9. <https://conservationtools.org/guides/49>

10. <https://www.dcnr.pa.gov/Business/StreambedGasLeasing/Pages/default.aspx>

individuals and organizations, including the MSC and PIOGA, disagree with the Commonwealth's position, it is instructive to see the significant swaths of Pennsylvania that could be barred from pipeline infrastructure development if Pennsylvania were to adopt the position taken by New Jersey and Maryland. The Pennsylvania Department of Conservation and Natural Resources has produced a map illustrating the stream beds to which it claims ownership. See, *Publicly Owned Streambeds, Draft Map 02/28/2012*.¹¹ One need only look at that map to see the impossibility of constructing an interstate pipeline through Pennsylvania should the Third Circuit's decision be upheld.

**A Plain Reading of the Statute Indicates That
Congress Could Not Have Intended the Result
Reached by the Third Circuit**

Although the MSC and PIOGA will not repeat the arguments of the Petitioner, one point seems apparent. A plain reading of the statute in question would suggest that the Third Circuit strained to avoid the obvious. 15 U.S.C. §717f(h) provides in relevant part:

When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the

11. The map can be viewed at: http://www.docs.dcnr.pa.gov/cs/groups/public/documents/document/dcnr_009716.pdf.

necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts.

It should be presumed that Congress did not intend an absurd result when enacting a statute. Moreover, the courts should avoid interpretations that produce absurd results or thwart the intent of Congress. See, *United States v. Turkette*, 452 U.S. 576, 580 (1981); *Commissioners v. Brown*, 380 U.S. 563, 571 (1965). As the examples noted above illustrate, given the extensive possessory and non-possessory interests in real estate claimed by the states, Congress must have intended to delegate the federal government's power to condemn state property. Otherwise, it would have created a very odd if not absurd situation. Congress would have established a complex process, under the NGA, for the review and approval of the routing of interstate pipelines only to allow states to undo that process by claiming that their large land holdings and even larger non-possessory interests could not be acquired by eminent domain. To construe the NGA in such a manner would be to produce an absurd result and thwart the intent of Congress.

CONCLUSION

For the reasons set forth above the Marcellus Shale Coalition and the Pennsylvania Independent Oil and Gas Association join Petitioner's request.

Respectfully submitted,

TERRY R. BOSSERT
Counsel of Record
GENERAL COUNSEL
MARCELLUS SHALE COALITION
300 North Second Street,
Suite 1102
Harrisburg, Pennsylvania 17101
(717) 603-0714
tbossert@marcelluscoalition.org

- and -

KEVIN JON MOODY
PENNSYLVANIA INDEPENDENT
OIL & GAS ASSOCIATION
212 Locust Street,
Suite 300
Harrisburg, Pennsylvania 17101
(717) 234-8525

Counsel for Amici Curiae
Marcellus Shale Coalition and
Pennsylvania Independent Oil &
Gas Association