**Energy and the Environment in the Northeast: Biggest Challenges of 2020**
**Houston, Texas**

# Litigation Updates in the Energy and Environmental Landscape

**Saul Ewing Arnstein & Lehr LLP**
Andrew T. Bockis, Esq.
Cathleen M. Devlin, Esq.
Patrick F. Nugent, Esq.
Cristina Stummer, Esq.

**March 5, 2020**

The Federal Energy Regulatory Commission ("FERC") is the lead agency in charge of regulating the interstate transmission of electricity, natural gas, and oil, including hydropower and interstate natural gas pipeline projects. FERC projects today are subject to significant public comment and state and federal agency review.

This outline highlights recent cases and agency policies that will influence the development of various projects, including interstate natural gas pipeline projects, particularly in Pennsylvania and the Northeast. While we use several pipeline cases as examples, the principles established in these cases may apply to any number of development projects subject to energy and environmental regulation.

## I. Consideration of Potential Environmental Impacts.

A. After first determining whether an agency needs to prepare an Environmental Assessment or an Environmental Impact Statement, what is the scope of an agency's analysis under the National Environmental Policy Act ("NEPA"), particularly with respect to other projects that may be developed around the same time?

1. An agency's consideration of the proper scope of its NEPA analysis should be guided by the governing regulations at 40 C.F.R. § 1508.25(a). *Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304, 1315 (D.C. Cir. 2014).

2. "[W]hen an agency considers projects non-contemporaneously … and when projects have substantial independent utility … separate environmental statements can be appropriate." *City of Boston Delegation v. FERC*, 897 F.3d 241, 252 (D.C. Cir. 2018) (quotations and citations omitted).

   a. *City of Boston Delegation v. FERC*, 897 F.3d 241, 252 (D.C. Cir. 2018) ("With regard to temporal overlap, the Commission issued the AIM Project certificate in March 2015, Algonquin submitted the application for Atlantic Bridge in October 2015, and Algonquin

has yet to file the Access Northeast application. The projects thus were not under simultaneous consideration by the agency.").

b. *City of Boston Delegation v. FERC*, 897 F.3d 241, 252 (D.C. Cir. 2018) ("In denying rehearing, the Commission observed that Algonquin's three projects 'held separate open seasons,' 'executed individual precedent agreements' with largely distinct shippers, and 'have different negotiated and recourse rates and separate in-service dates.' Rehearing Order ¶ 75. In those circumstances, the Commission reasonably concluded that 'the projects do not depend on the other[s] for access to the natural gas market.'").

i. ***Precedent agreements.*** Long-term agreements subscribing to capacity suffice to demonstrate public need under the Natural Gas Act. *See Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199, at *1 (D.C. Cir. Feb. 19, 2019); *Allegheny Def. Project v. FERC*, 932 F.3d 940, 947 (D.C. Cir. 2019), *reh'g en banc granted, judgment vacated,* 943 F.3d 496 (D.C. Cir. 2019); *Twp. of Bordentown, New Jersey v. FERC*, 903 F.3d 234, 262-63 (3d Cir. 2018).

(a) ***But see*** *City of Oberlin, Ohio v. FERC*, 937 F.3d 599, 606-08 (D.C. Cir. 2019) (unclear whether precedent agreements with foreign companies serving customers in foreign countries may be credited toward a public convenience and necessity determination).

(b) ***Compare*** *Town of Weymouth, Mass. v. FERC*, No. 17-1135, 2018 WL 6921213, at *1 (D.C. Cir. Dec. 27, 2018) ("The petitioners also contend that the project does not serve the public convenience and necessity because roughly half its gas is slated for export to Canada. But given that much of the gas will be used for domestic consumption, petitioners have not identified why granting the certificate in this case would not still advance the public convenience and necessity, even if a portion of the gas is ultimately diverted for export.").

c. *Allegheny Def. Project v. FERC*, 932 F.3d 940, 943 (D.C. Cir. 2019), *reh'g en banc granted, judgment vacated,* 943 F.3d 496 (D.C. Cir. 2019) ("The record supports the Commission's determination that the Southeast Market Pipeline and the Project are independently justified and that each has its own distinct

utility. *City of Boston Delegation*, 897 F.3d at 252. That is because, even if the Project were never built, the Southeast Market Pipeline still would be connected to enough natural gas supply to exceed its capacity. J.A. 843. On this record, that disproves any claim of improper segmentation.").

3. Upon judicial review, a reviewing court "must ensure that the agency has examined the relevant data and articulated a satisfactory explanation for its action." *Defenders of Wildlife v. U.S. Department of the Interior*, 931 F.3d 339, 345 (4th Cir. 2019) (Vacating, for a second time, a Biological Opinion and Incidental Take Statement issued by the U.S. Fish and Wildlife Service on grounds that the agency actions were not based on the best available information and ignored other evidence that the agency developed.)

B. Can agencies adopt the environmental assessment performed by FERC?

1. An agency "may adopt FERC's EIS only if it undertakes 'an independent review of the [EIS]' and 'concludes that its comments and suggestions have been satisfied.' 40 C.F.R. § 1506.3(c). It must also ensure that the EIS is 'adequate' under NEPA regulations." *Sierra Club, Inc. v. United States Forest Serv.*, 897 F.3d 582, 594 (4th Cir.), *reh'g granted in part*, 739 F. App'x 185 (4th Cir. 2018).

2. ***But see*** *Sierra Club, Inc. v. United States Forest Serv.*, 897 F.3d 582, 596 (4th Cir. 2018) (concluding that agency "acted arbitrarily and capriciously in adopting the sedimentation analysis in the EIS" when there was "no statement in the [record of decision] explaining the [agency's] abandonment of its earlier concerns"), *reh'g granted in part*, 739 F. App'x 185 (4th Cir. 2018).

   a. On August 3, 2018, FERC issued a stop work order to Mountain Valley Pipeline in light of the United States Court of Appeals for the Fourth Circuit's decision on July 27, 2018, which vacated and remanded decisions by the Department of the Interior's Bureau of Land Management (BLM) and by the Department of Agriculture's Forest Service (Forest Service).

   b. In its order, FERC stated "There is no reason to believe that the Forest Service or the Army Corps of Engineers, as the land managing agencies, or the BLM, as the federal rights-of-way grantor, will not be able to comply with the Court's instructions and to ultimately issue new right-of-way grants that satisfy the Court's requirements. However, Commission staff cannot predict when these agencies may act or whether these agencies will

ultimately approve the same route." *See Mountain Valley Pipeline, LLC*, Docket No. CP16-10-000 (Aug. 3, 2018, Notification of Stop Work Order).

3. ***But see*** *Cowpasture River Pres. Ass'n v. Forest Serv.*, 911 F.3d 150, 168 (4th Cir. 2018) (United States Forest Service's adoption of alternative routes analysis in FERC's final environmental impact statement was arbitrary and capricious in violation of NEPA because the EIS applied a different standard than the one imposed on the Forest Service by the National Forest Management Act and its own Forest Plans), *cert. granted sub nom. United States Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 36 (2019), and *cert. granted sub nom. Atl. Coast Pipeline, LLC v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 36 (2019); *see also Cowpasture River Pres. Ass'n v. Forest Serv.*, 911 F.3d 150, 173-74 (4th Cir. 2018) (concluding that United States Forest Service violated NEPA by adopting FERC's final environmental impact statement where Forest Service previously expressed serious concerns which FERC did not address in its EIS), *cert. granted sub nom. United States Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 36 (2019), and *cert. granted sub nom. Atl. Coast Pipeline, LLC v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 36 (2019).

   a. *Friends of Buckingham v. State Air Pollution Control Bd.*, No. 19-1152, 2020 WL 63295, at *12 (4th Cir. Jan. 7, 2020) ("We have held that a permitting agency 'may adopt FERC's EIS only if it undertakes 'an independent review of the EIS' and 'concludes that its comments and suggestions have been satisfied.'' *Cowpasture River Pres. Ass'n v. Forest Serv.*, 911 F.3d 150, 170 (4th Cir. 2018) (quoting 40 C.F.R. § 1506.3(c) (alteration omitted)). There is no evidence that such review happened here with regard to electric turbines. Relatedly, because DEQ relied on a nonexistent redefining the source doctrine, DEQ effectively relieved the Board from even *considering* the alternative energy source *at all*, so the Board could not have sufficiently and independently considered the impacts of electric turbines. As a result, we have no idea how much of an impact the Board thinks the electric turbines would make.").

C. How have courts recently reviewed agency assessments of potential indirect and cumulative impacts, including the assessment of potential impacts to global climate change?

1. "[T]he adequacy of an environmental impact statement is judged by reference to the information available to the agency at the time of review, such that the agency is expected to consider only those future impacts that

are reasonably foreseeable." *City of Boston Delegation v. FERC*, 897 F.3d 241, 253 (D.C. Cir. 2018).

a. "At the time of the Commission's consideration of the AIM Project, the impacts of the Atlantic Bridge Project were reasonably foreseeable. And the Commission thoroughly considered the environmental effects of Atlantic Bridge throughout the cumulative impacts section of the AIM Project's environmental impact statement." *City of Boston Delegation v. FERC*, 897 F.3d 241, 253 (D.C. Cir. 2018).

b. "The cumulative impacts discussion of the Access Northeast Project is much more limited, and understandably so. At the time of the AIM Project's environmental impact statement, Access Northeast was months away from entering the pre-filing process and over a year away from issuance of a notice of intent to prepare an environmental impact statement. Given Access Northeast's preliminary stage and the resulting lack of available information about its scope at the time, the project was 'too preliminary to meaningfully estimate [its] cumulative impacts.'" *City of Boston Delegation v. FERC*, 897 F.3d 241, 253 (D.C. Cir. 2018) (quoting *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 513 (D.C. Cir. 2010)).

c. "Additionally, the AIM Project and Access Northeast would 'not overlap in time,' meaning the short-term impacts from constructing the former would abate before construction commenced on the latter, and no long-term cumulative impacts were reasonably anticipated. Rehearing Order ¶¶ 144-145. In light of 'the uncertainty surrounding [Access Northeast], and the difference in timing between the two projects, this discussion suffices under NEPA.'" *City of Boston Delegation v. FERC*, 897 F.3d 241, 253 (D.C. Cir. 2018) (quoting *Minisink Residents for Envtl. Pres. & Safety v. FERC*, 762 F.3d 97, 113 (D.C. Cir. 2014)).

2. "Under NEPA, agencies must consider each 'cumulative impact' of permitted actions, and that term is defined as 'the impact on the environment which results from the *incremental impact* of the action when added to other past, present, and reasonably foreseeable future actions.' 40 C.F.R. § 1508.7 (emphasis added)." *Atchafalaya Basinkeeper v. U.S. Army Corps of Eng'rs*, 894 F.3d 692, 703 (5th Cir. 2018).

a. "Here, the EAs concluded that because of appropriate mitigation measures, in terms of construction conditions and limitations in the permit, and Bayou Bridge's purchase of compensatory mitigation

bank acreage, there would be *no incremental impact*; hence, there could be no cumulative effects with regard to pre-existing spoil banks." *Atchafalaya Basinkeeper v. U.S. Army Corps of Eng'rs*, 894 F.3d 692, 703 (5th Cir. 2018).

3. FERC's NEPA analysis does not have to address the indirect effects of anticipated exports of natural gas because the Department of Energy has sole authority to license the export of natural gas and FERC has no legal authority to prevent the adverse environmental effects of natural gas exports. *Sierra Club v. FERC*, 827 F.3d 36, 47 (D.C. Cir. 2016); *Sierra Club v. FERC*, 867 F.3d 1357, 1373 (D.C. Cir. 2017).

4. FERC must estimate (or explain why it cannot estimate) the amount of power-plant carbon emissions (greenhouse gas emissions) caused by a pipeline that will transport natural gas to power plants because it is reasonably foreseeable that the plants will burn the gas and release carbon compounds into the atmosphere that may contribute to climate change. *Sierra Club v. FERC*, 867 F.3d 1357, 1371–72 (D.C. Cir. 2017).

    a. FERC must do so as part of its analysis of indirect and cumulative effects, and must discuss the "significance" of this indirect effect. *Sierra Club v. FERC*, 867 F.3d 1357, 1374 (D.C. Cir. 2017).

    b. Congress gave FERC broad authority to consider the public convenience and necessity when evaluating applications to construct and operate interstate pipelines, which includes adverse environmental effects. *Sierra Club v. FERC*, 867 F.3d 1357, 1373 (D.C. Cir. 2017).

    c. The existence of permit requirements overseen by another agency or permitting authority cannot substitute for a proper NEPA analysis. *Sierra Club v. FERC*, 867 F.3d 1357, 1375 (D.C. Cir. 2017).

5. FERC properly factored downstream greenhouse-gas emissions into its evaluation of environmental impacts when FERC estimated the amount of CO2 emissions resulting from the gas that the project would transport and predicted that those emissions would be partially offset by reductions in higher carbon-emitting fuel that the project's natural gas would replace. "Unsubstantiated objections" to FERC's analysis "are not enough to stop an agency's action." *Allegheny Def. Project v. FERC*, 932 F.3d 940, 946 (D.C. Cir. 2019), *reh'g en banc granted, judgment vacated*, 943 F.3d 496 (D.C. Cir. 2019); *see also Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199, at *2 (D.C. Cir. Feb. 19, 2019) ("FERC provided an estimate of the upper bound of emissions resulting from end-use

combustion, and it gave several reasons why it believed petitioners' preferred metric, the Social Cost of Carbon tool, is not an appropriate measure of project-level climate change impacts and their significance under NEPA or the Natural Gas Act. That is all that is required for NEPA purposes."); *Town of Weymouth, Mass. v. FERC*, No. 17-1135, 2018 WL 6921213, at *2 (D.C. Cir. Dec. 27, 2018) ("FERC both quantified the project's expected greenhouse-gas emissions and discussed how the project would interact with Massachusetts's climate-change goals.").

6. ***But see*** *Sierra Club v. United States Dep't of Energy*, 703 F. App'x 1 (Mem) (D.C. Cir. Nov. 1, 2017). The Court ruled in *Sierra Club* that the Department of Energy had no obligation under NEPA to engage in a more localized analysis of upstream natural gas production, particularly in light of the fact that Sierra Club did "not sufficiently pinpoint the location of additional production as to facilitate meaningful analysis, especially given the fungibility of natural gas and the existence of a national pipeline network." *Sierra Club* at *2. "Given the speculative and nonspecific nature of the additional information about the location of incremental gas production, it was neither arbitrary nor capricious for the Department not to engage in a more localized analysis." *Id.* at *2-*3.

    a. ***Compare*** *Birckhead v. FERC*, 925 F.3d 510, 518-20 (D.C. Cir. 2019 ("[W]e are dubious of the Commission's assertion that asking Tennessee Gas to provide additional information about the origin of the gas would be futile," and "We are troubled, as we were in the upstream-effects context, by the Commission's attempt to justify its decision to discount downstream impacts based on its lack of information about the destination and end use of the gas in question. . . . It should go without saying that NEPA also requires the Commission to at least *attempt* to obtain the information necessary to fulfill its statutory responsibilities.").

7. On May 18, 2018, in an order denying rehearing related to the grant of a FERC certificate to Dominion Transmission for its New Market Project, FERC announced a policy limiting its analysis of certain projects' climate change impacts. Commissioners LaFleur and Glick issued dissents, objecting to this policy shift. The majority explained that their approach did not abandon an analysis of climate change impacts altogether, but only when the "upstream production and downstream use of natural gas are not cumulative or indirect impacts of the proposed pipeline project." Order at 20. The majority went on to explain, "[w]e will continue to analyze upstream and downstream environmental effects when those effects are sufficiently causally connected to and are reasonably foreseeable effects of

the proposed action." Order at 21. *See Dominion Transmission, Inc.*, 163 FERC ¶ 61,128, Docket No. CP14-497-001 (Order Denying Rehearing).

8. On June 15, 2018, FERC denied a request for rehearing regarding its approval of Mountain Valley Pipeline LLC's natural gas pipeline. The Commission was split on the issue of FERC's obligation to consider the climate change impacts of the project. *See Mountain Valley Pipeline*, 163 FERC ¶ 61,197, Docket Nos. CP16-10-001, CP16-13-001 (Order on Rehearing); *see also Florida Southeast Connection, LLC*, 163 FERC ¶ 61,158, Docket No. CP17-463-000 (Order Issuing Certificate) (FERC approved the construction of part of the Southeast Market gas pipelines project designed to serve a Florida power plant. The FERC Commissioners split in their decisions regarding the scope of a proper climate change analysis for a project).

9. In early January 2020, the White House Council on Environmental Quality proposed a new package of NEPA rule changes that would allow federal agencies to sign off on infrastructure projects (such as oil and gas pipelines) without considering their broader impacts on climate change by narrowing the definition of what "effects" must be considered in conjunction with a project application.

D. Is FERC re-assessing its natural gas pipeline approval policies?

1. On April 19, 2018, FERC formally began a review of its 19-year-old natural gas pipeline approval policy. FERC issued a notice of inquiry seeking public feedback on potential changes to its 1999 pipeline approval policy statement.

2. FERC focused on four key topics in the notice:

   a. FERC's consideration of precedent shipping agreements and service contracts as evidence of a pipeline project's need;

   b. The consideration of eminent domain proceedings and landowner interests;

   c. The evaluation of a project's environmental impacts, and

   d. Making the permitting process more efficient.

3. The public comment period on FERC's potential policy revision ended on July 26, 2018.

   a. PADEP, the Department of Conservation and Natural Resources, and the Department of Community and Economic Development

submitted comments to FERC. The comments raised the following points:

i. In determining whether there is public need for a proposed project, the Commission should provide particular attention and weight to whether the pipeline will provide local benefit in the states through which it will travel.

ii. The Commission should examine—along the entire pathway of the pipeline—how the project provides benefit to local communities including: 1) access to natural gas; and 2) long-term resiliency and reliability of power.

iii. The Commission should consider the intended end use of the natural gas in order to determine a resulting public need for the project.

iv. The Commission's process does not adequately consider public and private landowner concerns related to tree clearing that may occur as a pre-construction activity prior to the Commission's final approval of a pipeline project.

b. The New York State Department of Environmental Conservation ("NYSDEC") submitted comments to FERC. The comments urged the following points:

i. FERC should not issue a Certificate until the applicant receives all state permits and certifications required to commence construction.

ii. FERC should grant or deny rehearing requests within 30 days. FERC should not use tolling orders to extend the pendency of rehearing petitions.

4. On April 9, 2018, FERC, EPA, DOT, and DOI signed a Memorandum of Understanding seeking to incorporate guidance from President Trump to speed up the permitting process for pipelines and other infrastructure projects. The Memorandum of Understanding makes it a *goal to complete environmental and permitting reviews for projects within two years*, using a process by which a single agency would act as the lead agency for a project and the other agencies would lend support and rely on the analysis and review conducted by the lead agency.

E. Are NPDES permits for the discharge of stormwater associated with construction activities required for interstate natural gas projects?

1. The Clean Water Act generally exempts oil and gas operations, including construction of pipelines, from the requirement to obtain an NPDES permit for the discharge of stormwater associated with construction activities. The CWA provides that:

> The Administrator shall not require a permit under this section, nor shall the Administrator directly or indirectly require any State to require a permit, for discharges of stormwater runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities, composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with, or do not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations.
>
> 33 U.S.C. § 1342(l)(2).

2. In 2006, EPA published a final rule that effectively exempted stormwater discharges of sediment from construction activities associated with oil and gas facilities. 40 CFR § 122.26(a)(2). The Natural Resources Defense Council ("NRDC") challenged the rule, and the Ninth Circuit Court of Appeals agreed with NRDC and held that EPA's rule was overbroad and that NPDES permitting is triggered if a discharge would result in violation of a water quality standard or the discharge of a "reportable quantity" of oil or other hazardous substance. *NRDC v. EPA*, 526 F.3d 591, 596, 607-08 (9th Cir. 2008).

3. While the Ninth Circuit vacated EPA's 2006 rule exempting all oil and gas facilities without reportable releases from NPDES construction permitting, the Court did not vacate Section 402(*l*)(2) of the Clean Water Act, nor the Energy Policy Act's definition of oil and gas transmission facilities.

4. The Fourth Circuit Court of Appeals recently upheld Virginia's Section 401 Certification for the Mountain Valley Pipeline, which required implementation of state erosion and sediment control measures, but did not require an NPDES permit for stormwater charges.

    a. "[I]t was reasonable for the State Agencies to conclude that [the state agency], like the EPA, would be able to use the tools at its disposal to adjust to any unexpected contingencies that may lead to a short-term exceedance. We note that § 1341(d) plainly

contemplates a state requiring water monitoring as a basis for its reasonable assurance certification. *See* 33 U.S.C. § 1341(d) ('Any certification provided under this section shall set forth any ... monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable ... limitations ... and with any other appropriate requirement of State law set forth in such certification.'). We see no reason why reliance on such monitoring would be arbitrary or capricious." *Sierra Club v. State Water Control Bd.*, 898 F.3d 383, 404–05 (4th Cir. 2018).

b. "While it is always true that government agencies could undertake analysis that is more in-depth and more specific to a particular project, we do not believe the State Agencies acted arbitrarily in placing significant reliance on the effectiveness of its 'tried and true' methods here. In making this judgment, we cannot ignore the fact that the State Agencies vigorously participated at every stage of the decision-making process and did not issue their final 401 certificate until they had added all of the protections that they concluded were needed to give them reasonable assurance that state water quality would be protected. This is exactly how the system was designed to work." *Sierra Club v. State Water Control Bd.*, 898 F.3d 383, 406 (4th Cir. 2018).

5. The contours of the NPDES permit exemption are subject to current litigation pending before Judge Diamond. *See Delaware Riverkeeper Network v. Sunoco Pipeline, L.P.*, Civil Action No. 18-2447 (E.D. Pa.) (complaint filed June 12, 2018).

6. The Third Circuit has held that a notice of intent to comply with PADEP's general hydrostatic testing permit is not subject to the Clean Water Act's public notice requirements. *See Delaware Riverkeeper Network v. Sec'y Pennsylvania Dep't of Envtl. Prot.*, 783 F. App'x 124 (3d Cir. 2019).

## II. The Contours of Judicial Review.

A. Who has jurisdiction to review agency actions associated with interstate natural gas pipeline projects?

1. The Energy Policy Act of 2005, in part, amended Section 19 of the Natural Gas Act ("NGA") to provide an expedited direct cause of action in the federal appellate courts to challenge a state administrative agency's order, action, or failure to act with respect to a permit application required under federal law in order to proceed with a natural gas facility project subject to section 5 or 7 of the NGA. *Islander East Pipeline Co., LLC v.*

*Connecticut Department of Environmental Protection*, 482 F.3d 79, 83-84 (2d Cir. 2006).

2. Prior to the Energy Policy Act amendments, NGA applicants were subject to "a series of sequential administrative and State court and Federal court appeals that [could] kill a project with a death by a thousand cuts just in terms of the time frames associated with going through all those appeal processes." *Islander East Pipeline Co., LLC v. Connecticut Department of Environmental Protection*, 482 F.3d 79, 85 (2d Cir. 2006).

3. The purpose of the Energy Policy Act amendments to the NGA's review provisions was to streamline the review of state decisions taken under federally-delegated authority. *Delaware Riverkeeper Network v. Secretary Pennsylvania Department of Environmental Protection*, 833 F.3d 360, 372 (3d Cir. 2016).

B. How have courts addressed issues associated with "finality" of agency action?

1. Courts of Appeals have jurisdiction to review only final agency actions under Section 19(d)(1) of the NGA. *Delaware Riverkeeper Network v. Sec'y Pennsylvania Dep't of Envtl. Prot.*, 903 F.3d 65, 71 (3d Cir. 2018) ("[T]he Natural Gas Act provides jurisdiction to review only final agency action of a type that is customarily subject to judicial review.") (quotations omitted); *Berkshire Environmental Action Team, Inc. v. Tennessee Gas Pipeline Company, LLC*, 851 F.3d 105, 107-11 (1st Cir. 2017).

   a. Administrative finality is interpreted pragmatically and focuses on whether judicial review will disrupt the administrative process. Final agency action must mark the consummation of the agency's decision-making 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. *Delaware Riverkeeper Network v. Sec'y Pennsylvania Dep't of Envtl. Prot.*, 903 F.3d 65, 72 (3d Cir. 2018); *Delaware Riverkeeper Network v. Secretary, Pennsylvania Department of Environmental Protection*, 870 F.3d 171, 176-77 (3d Cir. 2017).

   b. An agency action is final where it represents the culmination of the agency's decision-making process and conclusively determines the rights and obligations of the parties with respect to the matters at issue. *Berkshire Environmental Action Team, Inc. v. Tennessee Gas Pipeline Company, LLC*, 851 F.3d 105, 111 (1st Cir. 2017).

c. In Pennsylvania, the Third Circuit has ruled that it has exclusive jurisdiction under the NGA to review permits issued by PADEP because such permits are final irrespective of whether they have been appealed to the Environmental Hearing Board. *Delaware Riverkeeper Network v. Sec'y Pennsylvania Dep't of Envtl. Prot.*, 903 F.3d 65, 72–75 (3d Cir. 2018).

i. In Pennsylvania, PADEP is the state administrative agency that is charged by the CWA to issue, condition, or deny Section 401 Certifications, not the Environmental Hearing Board. *Tennessee Gas Pipeline Company, LLC v. Delaware Riverkeeper Network*, 921 F. Supp. 2d 381, 390-91 (M.D. Pa. 2013).

ii. "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." *Delaware Riverkeeper Network v. Sec'y Pennsylvania Dep't of Envtl. Prot.*, 903 F.3d 65, 74 (3d Cir. 2018) (quoting *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 193 (1985)).

iii. PADEP's permits bear the traditional hallmarks of final agency action. *Delaware Riverkeeper Network v. Secretary, Pennsylvania Department of Environmental Protection*, 870 F.3d 171, 178 (3d Cir. 2017); *Delaware Riverkeeper Network v. Sec'y Pennsylvania Dep't of Envtl. Prot.*, 903 F.3d 65, 75 (3d Cir. 2018). PADEP's issuance of a permit is "immediately effective, notwithstanding … appeals to the EHB" and is "neither tentative nor interlocutory and [i]s one from which legal consequences ... flow[]." *Delaware Riverkeeper Network v. Sec'y Pennsylvania Dep't of Envtl. Prot.*, 903 F.3d 65, 73 (3d Cir. 2018) (quotations omitted).

iv. "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." *Delaware Riverkeeper Network v. Sec'y Pennsylvania Dep't of Envtl. Prot.*, 903 F.3d 65, 74 (3d Cir. 2018); *see also Twp. of Bordentown, New Jersey v. FERC*, 903 F.3d 234, 269 n.22 (3d Cir. 2018) (recognizing that whether State "schemes … create a single or unitary proceeding" is probative in determining

finality). "[T]he NGA does not preempt the regular progression of intra-agency review of a permitting decision." *Twp. of Bordentown, New Jersey v. FERC*, 903 F.3d 234, 271 (3d Cir. 2018).

(a) "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." *Delaware Riverkeeper Network v. Sec'y Pennsylvania Dep't of Envtl. Prot.*, 903 F.3d 65, 73 (3d Cir. 2018) (quoting *Berkshire Environmental Action Team, Inc. v. Tennessee Gas Pipeline Company, LLC*, 851 F.3d 105, 112 (1st Cir. 2017)). "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. . . . Both in formal terms, 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." *Id*. (citations omitted).

(b) *Compare Twp. of Bordentown, New Jersey v. FERC*, 903 F.3d 234, 271 (3d Cir. 2018) (holding that "petitioners were entitled under New Jersey law to have alternatively first sought ***an intra-agency adjudicative hearing***") (emphasis added); *see also id.* at 271 n.24 (focusing analysis on whether the administrative review was ***within*** "the agency charged with administering the permitting process").

v. With respect to permits and authorizations issued by PADEP, a permit or authorization is unquestionably final if a party does not perfect an appeal to the Environmental Hearing Board within thirty days. *Delaware Riverkeeper Network v. Secretary, Pennsylvania Department of Environmental Protection*, 870 F.3d 171, 177 (3d Cir. 2017).

2. Jurisdiction under Section 19(d)(1) ultimately depends on whether an agency acted pursuant to federal law in issuing, conditioning, or denying permits. *Delaware Riverkeeper Network v. Secretary Pennsylvania Department of Environmental Protection*, 833 F.3d 360, 370 (3d Cir. 2016).

3. A Section 401 Certification is issued pursuant to federal law. *Delaware Riverkeeper Network v. Secretary Pennsylvania Department of Environmental Protection*, 833 F.3d 360, 371-72 (3d Cir. 2016).

C. How have courts addressed issues associated with "exhaustion of administrative remedies"?

1. Section 19(d)(1) of the NGA does not require exhaustion of administrative remedies prior to judicial review. *Tennessee Gas Pipeline Company, LLC v. Delaware Riverkeeper Network*, 921 F. Supp. 2d 381, 391 (M.D. Pa. 2013).

2. "[O]ur own limitation to hearing only final orders is not necessarily tantamount to creating an exhaustion requirement in the state process. . . . [W]e may consider a judicial challenge to [a final] order despite the petitioner's failure to exhaust . . . state administrative remedies." *Twp. of Bordentown, New Jersey v. FERC*, 903 F.3d 234, 271 n.25 (3d Cir. 2018).

D. What is the standard of review that courts use in reviewing agency action related to interstate natural gas projects?

1. Under the Energy Policy Act amendments, reviewing courts have jurisdiction to remand agency actions if they are (1) inconsistent with federal law governing such action, and (2) would prevent the construction, expansion, or operation of the facility subject to the NGA. *Islander East Pipeline Co., LLC v. Connecticut Department of Environmental Protection*, 482 F.3d 79, 94 (2d Cir. 2006); *Islander East Pipeline Co. LLC v. McCarthy*, 525 F.3d 141, 150 (2d Cir. 2008).

2. Whether an action is inconsistent with federal law is subject to a two-step test: (1) *De novo* review to determine whether the agency complied with the requirements of relevant federal law; and (2) arbitrary and capricious review of challenged findings and conclusions. *Islander East Pipeline Co., LLC v. Connecticut Department of Environmental Protection*, 482 F.3d 79, 94 (2d Cir. 2006); *Islander East Pipeline Co. LLC v. McCarthy*, 525 F.3d 141, 150 (2d Cir. 2008).

a. At step one, a state complies with the procedural dictates of the CWA by applying state water quality standards to a Section 401 Certification application. The CWA reflects Congress' intent that state environmental agencies consider the factors enumerated in a state's federally-approved water quality standards. *Islander East Pipeline Co., LLC v. Connecticut Department of Environmental Protection*, 482 F.3d 79, 94 (2d Cir. 2006); *Islander East Pipeline Co. LLC v. McCarthy*, 525 F.3d 141, 150, 151 n.10 (2d Cir. 2008).

b. Under the arbitrary or capricious standard of review, Courts will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned. *Delaware Riverkeeper Network v. United States Army Corps of Engineers*, 869 F.3d 148, 161 (3d Cir. 2017); *Delaware Riverkeeper Network v. Secretary, Pennsylvania Department of Environmental Protection*, 870 F.3d 171, 184 (3d Cir. 2017).

   i. PADEP's interpretation of water dependency is reasonable in light of the text and structure of Pennsylvania's regulatory scheme. PADEP interprets its regulations as requiring a water dependency finding to be based on the unavailability of alternatives that could avoid adverse impacts on aquatic sites and the environment, and a project's ability to avoid or minimize the adverse impact of the encroachment on the environment. *Delaware Riverkeeper Network v. Secretary, Pennsylvania Department of Environmental Protection*, 870 F.3d 171, 182 (3d Cir. 2017).

   ii. Corps' rejection of compression-only alternative based on adverse environmental consequences was not arbitrary and capricious. "While the compression alternative would disturb less land, its impact would be mostly permanent. The pipeline project would disturb more land, but its impact would be mostly temporary. In making a policy choice between those environmental tradeoffs, the agency's discretion was at its apex." *Delaware Riverkeeper Network v. United States Army Corps of Engineers*, 869 F.3d 148, 151 (3d Cir. 2017).

   iii. "[W]here an agency decision is sufficiently supported by even as little as a single cognizable rationale, that rationale, by itself, warrants our denial of [a] petition for review under the arbitrary-and-capricious standard of review."

*Constitution Pipeline Co. v. NYSDEC*, 868 F.3d 87, 101-02 (2d Cir. 2017).

iv. *But see Sierra Club v. U.S. Department of the Interior*, 899 F.3d 260 (4th Cir. 2018) (vacating National Park Service approval for failure to show how a right-of-way allowing the pipeline to cross the Blue Ridge Parkway was consistent with purposes of national park system).

3. Courts apply a harmless error analysis to any administrative action they review. *Delaware Riverkeeper Network v. Secretary Pennsylvania Department of Environmental Protection*, 833 F.3d 360, 377 (3d Cir. 2016); *Delaware Riverkeeper Network v. United States Army Corps of Engineers*, 869 F.3d 148, 158 (3d Cir. 2017).

4. Under the Clean Water Act Section 404 Guidelines, the U.S. Army Corps of Engineers' review of applications for Section 404 permits is subject to the principle of commensurate review and therefore need not be a detailed review in every case. *Delaware Riverkeeper Network v. United States Army Corps of Engineers*, 869 F.3d 148, 163 (3d Cir. 2017).

E. What is the time limit for appeals of agency (non-FERC) actions related to projects regulated under the Natural Gas Act?

The Natural Gas Act does not provide a time limit for appeals from actions of state or federal agencies (other than FERC). Timeliness may be governed by the four-year catchall limitations period established by 28 U.S.C. § 1658(a) or laches. *Delaware Riverkeeper Network v. Secretary, Pennsylvania Department of Environmental Protection*, 870 F.3d 171, 179 (3d Cir. 2017).

F. Can challengers object to a project through statutory avenues outside the Natural Gas Act?

1. "[T]he Natural Gas Act indicates that Congress knew how to allow for district court jurisdiction, yet it chose not to do so when it came to issues related to review of a Certificate. Rather, in such situations, Congress gave 'exclusive' jurisdiction to the appropriate court of appeals—but only after going through the review process with FERC. [15 U.S.C.] § 717r." *Berkley v. Mountain Valley Pipeline, LLC*, 896 F.3d 624, 630 (4th Cir. 2018), *cert. denied sub nom. Berkley v. FERC*, No. 18-561, 2019 WL 271968 (Jan. 22, 2019).

2. The Religious Freedom Restoration Act "does not abrogate or provide an exception to a specific and exclusive jurisdictional provision prescribing a particular procedure for judicial review of an agency's action." *Adorers of*

*the Blood of Christ v. FERC*, 897 F.3d 187, 190 (3d Cir. 2018); *see also id.* at 195 ("By challenging the permissibility of the Pipeline Project under RFRA, the Adorers are seeking to 'modify or set aside' FERC's order—a matter the NGA places in the 'exclusive' purview of the court of appeals, only after administrative exhaustion.").

3. Challenge to FERC's "purported ongoing pattern and practice of issuing certificates in violation of the Fifth Amendment of the United States Constitution" are subject to the NGA's exclusive jurisdiction provisions and "fall within the exclusive jurisdiction of the appropriate court of appeals." *New Jersey Conservation Found. v. FERC*, No. CV 17-11991(FLW), 2018 WL 5342833, at *1, *6 (D.N.J. Oct. 29, 2018); *id.* at *6 ("Plaintiff's constitutional claims — while attacking FERC's pattern and policy — actually seek to invalidate FERC's Certificate concerning the PennEast project. In fact, Plaintiff alleges that it has standing to bring suit because it would suffer economic injury from FERC's issuance of the Certificate, and that injury is precisely what Plaintiff seeks to remedy by bringing this litigation. Plaintiff cannot have it both ways. By seeking to invalidate the Certificate at issue, Plaintiff's claims would necessarily fall within the exclusive jurisdiction of the appropriate court of appeals pursuant to § 717r."); *id.* at *3 (holding that NGA explicitly precludes review of plaintiff's constitutional claims, but even if the Court were to apply the *Thunder Basin* framework – used to determine whether Congress has impliedly precluded jurisdiction in the district courts by creating a statutory scheme of administrative adjudication and delayed judicial review in a particular court – jurisdiction would remain lacking) (quotations omitted).

4. FERC has comprehensive authority over facilities of natural gas companies under the NGA. *Oneok, Inc. v. Learjet, Inc.*, 135 S.Ct. 1591, 1600 (2015).

5. Conflict preemption may invalidate a state law even though field preemption does not. *Oneok, Inc. v. Learjet, Inc.*, 135 S.Ct. 1591, 1602 (2015).

    a. *Algonquin Gas Transmission, LLC v. Weymouth Conservation Comm'n*, No. CV 17-10788-DJC, 2017 WL 6757544, at *6 (D. Mass. Dec. 29, 2017) ("[T]o the extent FERC considered the activity as a part of its consideration and approval of an application to construct an interstate natural gas facility, and authorized the activity, a contrary determination by a state agency pursuant to state law would be in conflict and thus preempted."), *aff'd Algonquin Gas Transmission, LLC v. Weymouth, Mass.*, 919 F.3d 54, 63-66 (1st Cir. 2019).

b. The NGA preempts state environmental regulation of interstate natural gas facilities, except for state action taken under the Coastal Zone Management Act, the Clean Air Act, and the Clean Water Act. *Delaware Riverkeeper Network v. Secretary Pennsylvania Department of Environmental Protection*, 833 F.3d 360, 372 (3d Cir. 2016).

c. *Millennium Pipeline Co., L.L.C. v. Seggos*, 288 F. Supp. 3d 530, 545 (N.D.N.Y. 2017) (crediting argument that "New York state permitting requirements for a FERC-approved project are preempted by the NGA" in determining that pipeline had demonstrated a strong likelihood of success on the merits).

G. Have any courts recently addressed FERC's use of tolling orders?

1. FERC's use of tolling orders is permissible under the NGA. *See Delaware Riverkeeper Network v. FERC*, 895 F.3d 102, 113 (D.C. Cir. 2018) ("We have long held that FERC's use of tolling orders is permissible under the Natural Gas Act, which requires only that the Commission 'act upon' a rehearing request within 30 days, 15 U.S.C. § 717r(a), not that it finally dispose of it."); *see also id.* ("To prevail on its claim here, Riverkeeper would need to show that FERC's statutorily authorized practice of taking more than 30 days to finally dispose of a rehearing petition violates due process in each and every instance, no matter the reasons for taking more time, the complexity of the application, or the amount of development allowed or blocked in the interim. The Constitution imposes no such categorical rule, and Riverkeeper makes no serious effort to contend otherwise."); *see Berkley v. Mountain Valley Pipeline, LLC*, 896 F.3d 624, 631 (4th Cir. 2018) ("[T]he statute does not require a final decision within 30 days; it requires FERC to take *some kind of action* within 30 days for the petition not to be deemed denied by operation of law. FERC does so by issuing the tolling order."), *cert. denied sub nom. Berkley v. FERC*, No. 18-561, 2019 WL 271968 (Jan. 22, 2019).

2. On May 30, 2018, FERC denied a request for rehearing regarding its approval of the PennEast pipeline project and rejected challenges to its use of tolling orders to allow it additional time to act on the rehearing requests before it. Notably, Commissioner Glick, who originally voted against PennEast's approval, concurred with his colleagues but said the matter highlights the need for FERC to act promptly on rehearing requests. In his concurring statement, Glick challenged FERC's use of conditional construction certificates and use of tolling orders generally, noting that "when the commission issues a tolling order, it is critical that the commission issue a subsequent order addressing the merits of the

rehearing request as expeditiously as reasonably possible in order to both protect the public from unnecessary harm and permit the parties to timely seek their day in court." *See PennEast Pipeline Company, LLC*, 163 FERC ¶ 61,159, Docket No. CP15-558-002 (Order on Rehearing).

3. On August 2, 2019, the D.C. Circuit affirmed FERC's use of tolling orders "as long as FERC's public-convenience-and-necessity determination is not legally deficient." *Allegheny Def. Project v. FERC*, 932 F.3d 940, 948 (D.C. Cir. 2019), *reh'g en banc granted, judgment vacated*, 943 F.3d 496 (D.C. Cir. 2019). In issuing a concurring opinion, however, Judge Millett criticized FERC's use of tolling orders in way that places objectors "in seemingly endless administrative limbo": "While I acknowledge that circuit precedent currently forecloses the Homeowners' constitutional challenge to the tolling orders, this case starkly illustrates why a second look by us or by the Commission is overdue." *Id.* at 948, 956.

## III. Recent Cases Regarding Clean Water Act Section 401 Certifications.

A. Who determines whether a state has waived its CWA Section 401 Certification authority?

1. FERC determines waiver. *Millennium Pipeline Company, L.L.C. v. Seggos*, 860 F.3d 696, 700-01 (D.C. Cir. 2017) ("For any company desiring to construct a natural gas pipeline, all roads lead to FERC.")

2. Courts have held that applicants lack standing to raise waiver claims in the first instance with federal appellate courts under the agency delay provision of the Natural Gas Act.

a. A Section 401 Certification applicant has no standing to assert a waiver claim against a state certifying agency because there is no injury to the applicant if waiver has occurred. *Weaver's Cove Energy, LLC v. Rhode Island Department of Environmental Management*, 524 F.3d 1330, 1333 (D.C. Cir. 2008).

b. Delay triggers Section 401's waiver provision and allows an applicant to bypass the state agency and present evidence of waiver to obtain approval for construction. *Millennium Pipeline Company, L.L.C. v. Seggos*, 860 F.3d 696, 698, 700 (D.C. Cir. 2017).

B. When does the Section 401 Certification waiver period commence?

1. Waiver period begins upon an agency's receipt of a request for certification. The request for certification need not be considered "complete" by the receiving agency for the waiver period to begin running. *New York State Department of Environmental Conservation v. FERC*, 884 F.3d 450, 455-56 (2d Cir. 2018).

2. *Contrast with AES Sparrows Point LNG, LLC v. Wilson*, 589 F.3d 721, 729 (4th Cir. 2009) (waiver period triggered by Army Corps determination that applicant has submitted a valid request for Section 401 Certification).

C. What is the length of the Section 401 Certification period for interstate natural gas projects?

1. The CWA requires a state to "act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request." 33 U.S.C. § 1341(a).

2. "The temporal element imposed by the statute is 'within a reasonable period of time,' followed by the conditional parenthetical, '(which shall

not exceed one year).'" *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1103–04 (D.C. Cir. 2019), *cert. denied sub nom. California Trout v. Hoopa Valley Tribe*, No. 19-257, 2019 WL 6689876 (U.S. Dec. 9, 2019). "Thus, while a full year is the absolute maximum, it does not preclude a finding of waiver prior to the passage of a full year. Indeed, the Environmental Protection Agency ('EPA')—the agency charged with administering the CWA—generally finds a state's waiver after only six months. *See* 40 C.F.R. § 121.16." *Id.*

a. *See also Millennium Pipeline Company, L.L.C. v. Seggos*, 860 F.3d 696, 698 (D.C. Cir. 2017) (Section 401 allows a decision on a Section 401 Certification to be made within "a reasonable period of time (which shall not exceed one year)").

b. ***But see***: FERC has established a bright-line one-year waiver period. *National Fuel Gas Supply Corporation*, 164 FERC ¶ 61,084, Docket No. CP15-115-002, Order on Rehearing and Motion for Waiver Determination (Aug. 6, 2018); *Constitution Pipeline Company, LLC*, 164 FERC 61,029, Docket No. CP18-5-001, Order Denying Rehearing (July 19, 2018).

   i. *See also National Fuel Gas Supply Corporation*, 164 FERC ¶ 61,084, Docket No. CP15-115-002, Order on Rehearing and Motion for Waiver Determination (Aug. 6, 2018) (finding NYSDEC waived Section 401 Certification in issuing denial more than a year after certification application was submitted, even though applicant and agency agreed to treat a subsequent date (within the year period) as the receipt date).

   ii. *See also Constitution Pipeline Company, LLC*, 164 FERC 61,029, Docket No. CP18-5-001, Order Denying Rehearing (July 19, 2018) (establishing a bright-line one-year waiver period and finding that NYSDEC did not waive its Section 401 Certification authority because its denial occurred within a year of the application being submitted, even though a previous identical version of the application had been pending for more than a year prior to the denial).

3. "[T]he withdrawal-and-resubmission of water quality certification requests does not trigger new statutory periods of review." *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1101 (D.C. Cir. 2019), *cert. denied sub nom. California Trout v. Hoopa Valley Tribe*, No. 19-257, 2019 WL 6689876 (U.S. Dec. 9, 2019).

a. *See also Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1104 (D.C. Cir. 2019) (withdrawal-and-resubmittal arrangement "does not exploit a statutory loophole; it serves to circumvent a congressionally granted authority … [and] could be used to indefinitely delay federal licensing proceedings and undermine FERC's jurisdiction to regulate such matters"), *cert. denied sub nom. California Trout v. Hoopa Valley Tribe*, No. 19-257, 2019 WL 6689876 (U.S. Dec. 9, 2019).

4. Section 401 of the CWA provides the only applicable deadline – FERC's federal authorizations deadline does not apply to Section 401 Certifications. *Millennium Pipeline Company, L.L.C. v. Seggos*, 860 F.3d 696 (D.C. Cir. 2017).

D. Can FERC issue a Certificate of Public Convenience and Necessity prior to issuance or waiver of applicable Section 401 Certifications?

A conditional Certificate of Public Convenience and Necessity that does not itself authorize any activity which might result in a discharge to navigable waters does not run afoul of the sequencing requirement of Section 401. *Delaware Riverkeeper Network v. FERC*, 857 F.3d 388, 397, 399 (D.C. Cir. 2017); *see also Twp. of Bordentown, New Jersey v. FERC*, 903 F.3d 234, 246 (3d Cir. 2018); *cf. Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199, at *1 (D.C. Cir. Feb. 19, 2019) (upholding FERC's issuance of certificates with conditions).

E. Can a Section 401 Certification be conditioned on an applicant's receipt of additional permits?

1. There is no harm from the sequencing of a state's permitting actions when it issues a Section 401 Certification conditioned on the applicant's obtaining additional state permits (for which the state performs an environmental review) before construction can begin. *Delaware Riverkeeper Network v. Secretary Pennsylvania Department of Environmental Protection*, 833 F.3d 360, 385-86 (3d Cir. 2016).

2. Reliance on conditions – even prospective ones – does not render a State's issuance of a Section 401 Certification arbitrary and capricious. *Appalachian Voices v. State Water Control Bd.*, 912 F.3d 746, 758 (4th Cir. 2019).

3. Letter orders from FERC authorizing pre-construction and construction activity are final agency actions that are separately appealable after rehearing before FERC. *Delaware Riverkeeper Network v. FERC*, 857 F.3d 388, 397, 399 (D.C. Cir. 2017).

4. *But see State of Ohio v. Rover Pipeline, LLC*, Case No. 2017-CV-02216 (Court of Common Pleas of Stark County, Ohio Mar. 12, 2019) (permit requirements imposed in a late-issued (deemed waived) Section 401 Certification do not have legal effect) ("The State of Ohio cannot, through the instant litigation, assert rights given to it under the Clean Water Act which it waived by failing to act within the specified time provided by the Clean Water Act.").

F. Do route alternatives fall within the scope of a State's Section 401 Certification review?

1. FERC maintains exclusive authority over the siting of natural gas facilities. *See Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300-01, 305 (1988); *Nat'l Fuel Gas Supply Corp. v. Pub. Serv. Comm'n*, 894 F.2d 571, 579 (2d Cir. 1990); *Weaver's Cove Energy, LLC v. R.I. Coastal Res. Mgmt. Council*, 589 F.3d 458, 472 (1st Cir. 2009).

   a. FERC's decisions with respect to adopting alternative routes are upheld so long as FERC's analysis demonstrates an evaluation of relevant factors. *See Birckhead v. FERC*, 925 F.3d 510, 515-16 (D.C. Cir. 2019); *Allegheny Def. Project v. FERC*, 932 F.3d 940, 946-47 (D.C. Cir. 2019), *reh'g en banc granted, judgment vacated*, 943 F.3d 496 (D.C. Cir. 2019).

2. ***But see*** *Constitution Pipeline Co. v. NYSDEC*, 868 F.3d 87, 101 (2d Cir. 2017) ("A state's consideration of a possible alternative route that would result in less substantial impact on its waterbodies is plainly within the state's authority.").

G. What is the impact of conditions that are imposed in a Section 401 Certification?

1. The federal licensing/permitting agency is bound to incorporate all state-imposed conditions to a Section 401 Certification into its federal license/permit. *American Rivers, Inc. v. FERC*, 129 F.3d 99, 102, 106-11 (2d Cir. 1997).

2. The legality of the conditions to the Section 401 Certification can be challenged only by the licensee/permittee in a court of appropriate jurisdiction. *American Rivers, Inc. v. FERC*, 129 F.3d 99, 102 (2d Cir. 1997).

3. Courts of Appeals have jurisdiction under Section 19(d)(1) of the NGA to review permits that are conditions of a Section 401 Certification. *Delaware Riverkeeper Network v. Secretary Pennsylvania Department of Environmental Protection*, 833 F.3d 360, 373 (3d Cir. 2016); *Delaware*

*Riverkeeper Network v. Secretary, Pennsylvania Department of Environmental Protection*, 870 F.3d 171, 175-76 (3d Cir. 2017).

## IV. The Pennsylvania Environmental Rights Amendment and Pipelines.

A. Language of the Amendment

"The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people." Pa. Const. art. I, § 27.

B. Evolution of the Environmental Rights Amendment's Application

1. In the 1970s, *Payne v. Kassab*, 312 A.2d 86 (Pa. Cmwlth. 1973), *aff'd* 361 A.2d 263 (Pa. 1976) established a three-part test to evaluate Environmental Rights Amendment cases. This was the first time a court gave "teeth" to the Environmental Rights Amendment. Under the *Payne* test, a court would decide whether a state action violated the Environmental Rights Amendment by determining the following:

    a. Is there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources?;

    b. Has there been a reasonable effort to reduce the environmental incursion to a minimum?; and

    c. Does the environmental harm so clearly outweigh the benefits that to proceed further would be an abuse of discretion?

2. In 2013, a plurality of the Pennsylvania Supreme Court criticized the *Payne* test, finding it inappropriate "in all but the narrowest category of cases, i.e., those cases in which a challenge is premised simply upon an alleged failure to comply with statutory standards . . ." *See Robinson v. Commonwealth*, 83 A.3d 901 (Pa. 2013) (plurality) (striking down portions of Act 13, an amendment to the Oil and Gas Act, and held that Act 13 unconstitutionally deprived municipalities of the ability to make zoning decisions about oil and gas extraction).

    a. The plurality found the *Payne* test was too narrow, and the court instead focused on the trustee language in the Environmental Rights Amendment. The plurality held that the Environmental Rights Amendment made the natural resources of the

Commonwealth the corpus of a public trust, and as a "trustee, the Commonwealth is a fiduciary obligated to comply with the terms of the trust and with standards governing a fiduciary's conduct." *Id.* at 957.

b. While the plurality criticized the three part test established in *Payne* to determine whether an environmental action complied with the Environmental Rights Amendment, the court did not reverse the decision. *Id.* at 958.

3. In 2017, a majority of the Pennsylvania Supreme Court rejected the *Payne* test and found that the Environmental Rights Amendment bound the Commonwealth of Pennsylvania and limited the way the Commonwealth manages its public natural resources. *See Pennsylvania Environmental Defense Foundation v. Commonwealth*, 161 A.3d 911 (Pa. 2017).

a. The court stated that Pennsylvania could not treat natural resources as government property, but had to act as the trustee of natural resources. *See id.* at 932.

b. In its analysis, the court split the Environmental Rights Amendment into two parts:

i. The first right is an individual right in contained in the first sentence, "which is a prohibitory clause declaring the right of citizens to clean air and pure water, and to the preservation of natural, scenic, historic and esthetic values of the environment." *Id.* at 933. This clause limits the state's power to act contrary to this right, and "any laws that unreasonably impair the right are unconstitutional." *Id.*

ii. The second right is the trustee obligation. This right is in the second sentence and is the common ownership by the people, including future generations, of Pennsylvania's public natural resources. The third clause establishes a public trust where the natural resources make up the trust, the Commonwealth is the trustee, and "the people are the named beneficiaries." *Id.* at 934.

c. The court cited to *Robinson* to explain that "[t]he explicit terms of the trust require the government to 'conserve and maintain' the corpus of the trust . . . [t]he plain meaning of the terms conserve and maintain implicates a duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources. As a fiduciary, the Commonwealth has a duty to act

toward the corpus of the trust – the public natural resources – with prudence, loyalty, and impartiality." *Id.* (quoting *Robinson*, 83 A.3d at 956-57).

C. The Third Circuit has rejected the argument that PADEP did not comply with its duties to hold Pennsylvania's natural resources in trust under the Environmental Rights Amendment in issuing a Water Quality Certification when PADEP's decision was conditioned on a pipeline company's obtaining other substantive permits where PADEP would have to consider the trust requirement.

1. *See Delaware Riverkeeper Network v. Sec'y Pennsylvania Dep't of Envtl. Prot.*, No. 17-1456, 2018 WL 4519953, at *3 (3d Cir. Sept. 20, 2018).

2. *See also Delaware Riverkeeper Network v. Sec'y Pennsylvania Dep't of Envtl. Prot.*, 903 F.3d 65, 78 (3d Cir. 2018) (rejecting petitioner's claim that PADEP could not have met its obligation to safeguard natural resources because it granted a Water Quality Certification before collecting the environmental impact data that would be required to issue substantive permits on which it was conditioned because pipeline company would have to obtain those substantive permits to begin construction and PADEP would have to consider the Environmental Rights Amendment in analyzing those permits).

D. The Third Circuit has also found that the Natural Gas Act grants federal courts jurisdiction to hear challenges under the Environmental Rights Amendment to permits issued for interstate pipelines. *See Delaware Riverkeeper Network v. Sec'y Pennsylvania Dep't of Envtl. Prot.*, 903 F.3d 65, 78 (3d Cir. 2018).

E. The Pennsylvania Commonwealth Court has found that a Township's duties as a trustee under the Environmental Rights Amendment did not defeat preemption of the Township's ordinance prohibiting residential construction of a below-ground pipeline for natural gas liquids without an explanation about how the ordinance impacted long-standing pre-existing law involving regulation of public utilities, how the ordinance furthered the Township's trustee duties under the Environmental Rights Amendment, or how the ordinance related to conserving public natural resources, especially when the pipeline would be place near a pre-existing pipeline right of way and parallel to a pre-existing pipeline. *See Delaware Riverkeeper Network v. Sunoco Pipeline L.P.*, 179 A.3d 670, 696 (Pa. Cmwlth. Ct.), *appeal denied*, 192 A.3d 1106 (Pa. 2018).

F. The Environmental Rights Amendment does not apply to private parties. *See Feudale v. Aqua Pa., Inc.*, 122 A.2d 462, 466 (Pa. Cmwlth. 2015).

G. The Environmental Rights Amendment does not create federally protected liberty or property interests. *See Delaware Riverkeeper Network v. Fed. Energy Regulatory Comm'n*, 895 F.3d 102, 110 (D.C. Cir. 2018).

**-- Saul Ewing Arnstein & Lehr LLP --**