IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC,	:	
Plaintiff,	:	
	:	No. 1:23-cv-00463
v.	:	
PENNSYLVANIA ENVIRONMENTAL HEARING BOARD, et al.,	:	
Defendants.	:	

DEFENDANTS DELAWARE RIVERKEEPER NETWORK, MAYA K. VAN ROSSUM, THE DELAWARE RIVERKEEPER, AND CITIZENS FOR PENNSYLVANIA'S FUTURE'S MEMORANDUM OF LAW IN OPPOSITION TO TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC'S EMERGENCY MOTION FOR PRELIMINARY INJUNCTION

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I. INTRODUCTION

Plaintiff Transcontinental Gas Pipe Line Company, LLC's ("Transco's") Emergency Motion for Preliminary Injunction is a legally unfounded attempt to derail the Pennsylvania Environmental Hearing Board's ("EHB's") administrative appeal process provided by Pennsylvania law and left untouched by the federal Natural Gas Act ("NGA"), 15 U.S.C. §§ 717–717z. Not only is the relief sought by Plaintiff foreclosed by the plain language of the NGA and binding Third Circuit precedent, but Plaintiff also falls far short of establishing irreparable harm resulting from continuation of the EHB process. Ultimately, even if Plaintiff met these threshold requirements, greater harm would befall Defendants Delaware Riverkeeper Network, Maya K. van Rossum, the Delaware Riverkeeper, and Citizens for Pennsylvania's Future (collectively "EHB Appellants"), and a cessation of the EHB proceedings would be contrary to the public interest.

The EHB reviews actions taken by the Pennsylvania Department of Environmental Protection ("PADEP"), including the decisions to issue an Erosion and Sediment Control Permit and Water Obstruction and Encroachment Permits (collectively, "REAE Permits") to Transco for the expansion of its existing natural gas pipeline, the Regional Energy Access Expansion Project ("REAE" or "Project"). EHB Appellants have raised substantial issues concerning the adverse effects of the Project on the water resources of the Commonwealth. Because the NGA explicitly

preserves state authority to regulate pursuant to the federal Clean Water Act ("CWA"), 33 U.S.C. §§ 1251–1388, and does not deprive state administrative agencies of their quasi-judicial authority to review state administrative action, there is no basis to enjoin the EHB proceeding.

II. COUNTERSTATEMENT OF FACTS

Transco's Project is an expansion of existing natural gas infrastructure that would involve the construction of new natural gas facilities in Pennsylvania, New Jersey, and Maryland. In Pennsylvania, the Project includes 22.2 miles of 30-inch diameter pipeline and associated structures in Luzerne County (the Regional Energy Lateral); 13.8 miles of 42-inch diameter pipeline and associated structures in Monroe County (the Effort Loop); modifications to Compressor Station 515 in Luzerne County, Compressor Station 195 in York County, and Compressor Station 200 in Chester County; modifications to the Mainline A Regulator in Bucks County and the Delaware River Regulator in Northampton County; modifications to three existing pipeline tie-ins; and new and expanded access roads and contractor staging areas.

Because the Project would be used to transport natural gas in interstate commerce, Transco obtained a certificate from the Federal Energy Regulatory Commission ("FERC") pursuant to Section 7 of the NGA, 15 U.S.C. § 717f, on January 11, 2023. *See Transcontinental Gas Pipe Line Company, LLC*, 182 FERC ¶ 61,006 (2023) ("Certificate Order"). Because the Certificate Order is a federal

license or permit to conduct an activity that may result in a discharge into the navigable waters, Section 401 of the CWA requires Transco to obtain a certification from the state in which the discharge originates ensuring that any federally-authorized activity will comply with a State's water quality standards and the state and federal laws that protect water quality. 33 U.S.C. § 1341(a). Conditions included in a Section 401 certification automatically become conditions of the federal authorization. *Id*. § 1341(d). In addition, FERC's Certificate Order for the Project includes a series of environmental conditions, including the requirement that "[a]ll conditions attached to the water quality certificate issued by [PADEP] . . . constitute mandatory conditions of the Certificate Order." Certificate Order, Appx. B, ¶ 13.

On March 31, 2021, Transco applied to PADEP for a Section 401 water quality certification. Shortly thereafter, on April 9, 2021, Transco submitted (1) an application for an Erosion and Sediment Control General Permit (ESCGP-3) pursuant to Chapter 102 of the Pennsylvania Code for construction of the Project in Luzerne, Monroe, Bucks, Northampton, and Chester Counties in Pennsylvania, (2) a joint permit application for a Water Obstruction and Encroachment Permit pursuant to Chapter 105 of the Pennsylvania Code and a Section 404 permit pursuant to the CWA for construction and operation of the Project in Luzerne and Monroe counties.

PADEP issued the section 401 water quality certification (the "401 WQC") on March 30, 2022. *See* Pl.'s Compl., Ex. C. The 401 WQC certified 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" and "Pennsylvania water quality standards provided that [the Project] complies with the following [PA]DEP water quality permitting programs, criteria and conditions established pursuant to Pennsylvania law . . . ." *Id*. The 401 WQC then goes on to list several permits required by Pennsylvania's Clean Streams Law, 35 P.S. §§ 691.1–691.1001, the Storm Water Management Act, 32 P.S. §§ 680.1–680.17, the Dam Safety and Encroachments Act, 32 P.S. §§ 693.1–693.27, and the Flood Plain Management Act, 32 P.S. §§ 679.101–679.601, including the Chapter 102 and 105 permits at issue in this case. *See* Pl.'s Compl., Ex. C.

On February 3, 2023, PADEP issued a Chapter 102 Erosion and Sediment Control Permit, Permit No. ESG830021002-00, as well as a Chapter 105 Water Obstruction and Encroachment Permit for Luzerne County, Permit No. E4083221-006, and Monroe County, Permit No. E4583221-002, to Transco for its Project ("REAE Permits").

After learning of the REAE Permits through a submission Transco made to the FERC, EHB Appellants filed a timely notice of appeal with the EHB on March 14, 2023. *See Citizens for Pennsylvania's Future v. Commw. of Pa. Dep't of Envtl.*

Prot., EHB Docket No. 2023-026-L (filed Mar. 14, 2023) ("EHB Appeal" or "EHB proceedings").

The EHB is a "quasi-judicial agency independent of [PADEP]" pursuant to the Environmental Hearing Board Act, 35 P.S. §§ 7511–7516, and also serves as "the adjudicator for purposes of compliance with" Pennsylvania's Administrative Agency Law, 2 Pa. C.S. §§ 101, 501–508, 701–704. *Cole v. Pa. Dep't of Envtl. Prot.*, 257 A.3d 805, 809 (Pa. Commw. Ct. 2021) *petitions for allowance of appeal filed*, Nos. 312 EAL 2021 & 415 MAL 2021 (Pa. July 15, 2021). The EHB conducts a *de novo* review to determine whether PADEP's decision can be supported, and the burden of proof lies with the party seeking review of the PADEP action. *Id*. at 808 (citing *Pa. Trout v. Dep't of Envtl. Prot.*, 863 A.2d 93, 106 (Pa. Commw. Ct. 2004)).

Plaintiff filed the instant action on March 16, 2023, seeking a declaration that the Third Circuit has original and exclusive jurisdiction pursuant to 15 U.S.C. § 717r(d)(1) to review the issuance of the REAE Permits by PADEP, that the EHB appeal is preempted by federal law, and that the EHB is without authority to assert and maintain jurisdiction over the proceedings. *See* Pl.'s Compl. at 18–19, ECF No. 1 (Mar. 16, 2023). Plaintiff also seeks an injunction prohibiting the EHB from maintaining jurisdiction, conducting a hearing, or rendering a decision on the EHB Appeal, and an injunction prohibiting EHB Appellants from seeking any other relief

before the EHB. *Id*. On March 24, 2023, Plaintiff filed an Emergency Motion for Preliminary Injunction, ECF No. 8, which EHB Appellants now oppose.

III. STATEMENT OF THE QUESTION INVOLVED

The NGA preserves state authority under the CWA, and requires the filing of "any civil action" reviewing state CWA decisions in the federal Courts of Appeals. The Third Circuit held that "civil action" does not include quasi-judicial proceedings before administrative agencies. PADEP issued the REAE Permits pursuant to its CWA authority. Has Transco established that it is entitled to a preliminary injunction of an appeal of the REAE Permits to the EHB, a quasi-judicial state administrative agency?

[Suggested Answer: No.]

IV. ARGUMENT

A. Legal Standard

Federal Rule of Civil Procedure 65 governs this Court's authority to issue a preliminary injunction, a type of relief that is "extraordinary in nature and available only in limited circumstances." *Federoff v. Geisinger Clinic*, 571 F. Supp. 3d 376 (M.D. Pa. 2021). Courts within the Third Circuit must conclude that the movant has shown:

> (1) a likelihood of success on the merits; (2) that it will suffer irreparable harm in the injunction is denied; (3) that granting preliminary relief will not result in even greater

> harm to the nonmoving party; and (4) that the public interest favors such relief.

Arrowpoint Capital Corp. v. Arrowpoint Asset Management, LLC, 793 F.3d 313, 318–19 (3d Cir. 2015) (quoting *Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004)).

The first two factors are considered "gateway" factors—if they are not met, then a court need not continue on to consider the remaining factors. *See Reilly v. City of Harrisburg*, 858 F.3d 173, 179 (3d Cir. 2017). Plaintiff bears the burden of demonstrating a sufficient likelihood of prevailing on the merits, which means "a showing significantly better than negligible but not necessarily more likely than not." *Id*. at 180. Because Plaintiff's substantive claims lack legal support, and because any harm caused by the EHB proceedings cannot be considered "irreparable," it stumbles at the threshold of this inquiry.

Even if this Court were to consider the remaining factors, both weigh in favor of denying Plaintiff's request for a preliminary injunction. EHB Appellants would be seriously harmed by a preliminary injunction, as they would be prohibited from litigating the merits of their claims while construction on the Project proceeded apace. Finally, Plaintiff's assertion that its own view of the law is coterminous with the public interest is insufficiently specific to support a finding that a preliminary injunction is warranted.

B. Plaintiff is unlikely to succeed on the merits.

To support its request for a preliminary injunction, Plaintiff must establish that it is "likely to succeed on its underlying legal claims." *Arrowpoint Capital Corp.*, 793 F.3d at 319. Plaintiff's complaint includes two counts of declaratory relief, seeking (1) enforcement of 15 U.S.C. § 717r's "exclusive review" provision and (2) a declaration that the NGA preempts state law granting the EHB jurisdiction over EHB Appellants' appeal. Both counts must necessarily fail, as the Third Circuit has plainly stated the NGA deprives only *state courts* of their judicial review authority for permits issued by the state, and the NGA explicitly preserves state authority to regulate pursuant to the CWA.

1. *The Third Circuit has held that Section 717r(d)(1) of the NGA applies only to "civil actions" in courts of law or equity and does not disturb state administrative review processes.*

Section 717r(d)(1) of the NGA provides that:

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

The permits at issue in this case are an action by a state agency (PADEP) to issue a permit required by Federal law (the CWA). Accordingly, any "*civil action* for the

review" of PADEP's action (or any subsequent action by the EHB) must be brought in the Third Circuit Court of Appeals, the circuit in which the REAE Project is proposed to be constructed and operated. The term "'civil action' refers only to civil cases brought in courts of law or equity and does not refer to hearings or other quasi-judicial proceedings before administrative agencies." *Twp. of Bordentown v. FERC*, 903 F.3d 234, 267 (3d Cir. 2018). By the plain terms of § 717r(d)(1), it does not apply to the EHB Appeal, a quasi-judicial administrative proceeding.

Plaintiff distorts the series of Third Circuit decisions in the *Delaware Riverkeeper* cases, claiming that each holding was a resounding deprivation of EHB jurisdiction. Not so. In *Delaware Riverkeeper I*, petitioners sought judicial review in the Third Circuit of a water quality certification issued by PADEP. PADEP argued that the Third Circuit did not have jurisdiction because the certification was not issued *pursuant* to federal law, but rather as a *requirement* of federal law. *See Del. Riverkeeper Network v. Sec'y Pa. Dep't of Envtl. Prot.* (*Del. Riverkeeper I*), 833 F.3d 360, 371 (3d Cir. 2016). The court concluded that a water quality certification ensures compliance with federal CWA standards, and that if the water quality certification was merely a state law requirement, then that law would be preempted by the NGA. *Id*. at 371–72. Thus, the court affirmed that "a state action taken pursuant to the [CWA] . . . is subject to review exclusively in the Courts of Appeals."

Id. at 372.[1] The role of the EHB in Pennsylvania's administration of the CWA was not discussed in the opinion, and instead the issue was focused on whether petitioners properly filed their civil action in the Third Circuit.

In *Delaware Riverkeeper II*, petitioners argued that PADEP's water quality certification and Chapter 105 permits were "non-final" because they had yet to be reviewed by the EHB. *Del. Riverkeeper Network v. Sec'y of Pa. Dep't of Envtl. Prot.* (*Delaware Riverkeeper II*), 870 F.3d 171, 175 (3d Cir. 2017). Without deciding whether § 717r(d)(1) includes a "finality" requirement, the Third Circuit held that the permits issued by PADEP *were* final because petitioners had not timely perfected an appeal before the EHB, and because the permits "b[ore] the traditional hallmarks of final agency action." *Id*. at 176–78 (citing *Bennet v. Spear*, 520 U.S. 154, 177–78 (1997)). Thus, the issue of whether a timely-filed appeal with the EHB would be barred by § 717r(d)(1) was not addressed in this case.

In *Delaware Riverkeeper III*, the Third Circuit squarely addressed the issue of whether there is a "finality" requirement included in § 717r(d)(1), concluding that "the [NGA] provides jurisdiction to review only 'final agency action of a type that is customarily subject to judicial review.'" *Del. Riverkeeper Network v. Sec'y Pa.*

[1] The court also held, regarding separate permits issued by the New Jersey Department of Environmental Protection, that where those permits are effectively conditions of the water quality certification, they were also issued pursuant to federal law. *Del. Riverkeeper I*, 833 F.3d at 374.

Dep't of Envtl. Prot. (*Delaware Riverkeeper III*), 903 F.3d 65, 71 (3d Cir. 2018) (quoting *Berkshire Envtl. Action Team, Inc. v. Tenn. Gas Pipeline Co., LLC*, 851 F.3d 105, 111 (1st Cir. 2017)). Petitioners had filed parallel timely appeals with the EHB, so the court went on to address whether those appeals rendered PADEP's decisions non-final. *Id.* at 71–72.

Because an appeal to the EHB does not prevent the PADEP decision from taking immediate legal effect, and because the EHB is a separate state agency that reviews final PADEP decisions *de novo* as opposed to being a "appellate" section of the same agency that issued the permit, the PADEP decision was final as a matter of federal law. *Id*. at 72–74. The Third Circuit also rejected petitioners' argument that due process required that they "have an opportunity to present evidence at a hearing before the EHB," as the due process requirement was satisfied by the opportunity to comment on PADEP's decision and an ability to petition the Third Circuit for review. *Id*. at 74. *Delaware Riverkeeper III* therefore stands for the proposition that PADEP permits are final when issued, and can be immediately challenged by filing a civil action in the Third Circuit.

Finally, *Delaware Riverkeeper IV* and *Delaware Riverkeeper V* were unpublished decisions that merely applied the holding of *Delaware Riverkeeper III* to similar facts in cases that were fully briefed before *Delaware Riverkeeper III* was decided. *See Del. Riverkeeper Network v. Sec'y Pa. Dep't of Envtl. Prot.* (*Delaware*

Riverkeeper IV), 751 Fed. App'x 169, 172–73 (3d Cir. 2018), *Del. Riverkeeper v. Sec'y Pa. Dep't of Envtl. Prot.* (*Delaware Riverkeeper V*), 783 Fed. App'x 124, 127 (3d Cir. 2019).

In sum, the *Delaware Riverkeeper* series of cases establish that water quality certifications issued by PADEP, as well as the permits issued by PADEP required as conditions of those water quality certifications, are "order[s] or action[s] of a . . . State administrative agency acting pursuant to Federal law" within the meaning of § 717r(d)(1), and that those actions are final and ripe for review in the Courts of Appeals "[n]otwithstanding the availability of an appeal to the EHB." *Del. Riverkeeper III*, 903 F.3d at 74.

The question that the *Delaware Riverkeeper* series of cases did not squarely address, however, was whether the EHB *retains* its jurisdiction over administrative appeals notwithstanding the availability of an appeal to the Third Circuit. That question was answered by the Third Circuit in an opinion published just one day after *Delaware Riverkeeper III*.

In *Township of Bordentown*, petitioners challenged New Jersey Department of Environmental Protection ("NJDEP") permits issued to Transco for its Garden State Expansion Project by first seeking an adjudicatory hearing from NJDEP, which denied the request based on its interpretation of the *Delaware Riverkeeper* series of cases, believing that all final permits must be appealed directly to the Third Circuit

and that the state administrative hearing process provided by New Jersey statute was "not applicable to permits for interstate natural gas projects." 903 F.3d at 245–46. The Third Circuit rejected this interpretation, holding that the statutory term "'civil action' refers only to civil cases brought in courts of law or equity and does not refer to hearings or other quasi-judicial proceedings before administrative agencies." *Id*. at 267. Instead, the court held:

> the NGA explicitly permits states to participate in environmental regulation of interstate natural gas facilities under the CWA, and only removes from states the right for *their courts* to hear civil actions seeking review of interstate pipeline-related state agency orders made pursuant thereto, the NGA *leaves untouched* the state's internal administrative review process, which may continue to operate as it would in the ordinary course under state law.

Id. at 268 (cleaned up) (emphases added) (quoting *Del. Riverkeeper I*, 833 F.3d at 368). The *Bordentown* court also highlighted the difference between § 717r(b)—which provides for review of FERC orders in the Courts of Appeals—and § 717r(d)(1)—which provides exclusive jurisdiction over "civil actions" for review of state administrative agency decisions. *Id*. at 268. This distinction highlighted Congress's intent to avoid "affirmatively installing federal courts to oversee the administrative process, as it did in § 717r(b)," and instead allow states' administrative processes to remain intact. *Id*. Directly addressing the *Delaware Riverkeeper* series of cases as well as *Berkshire*, the *Bordentown* court explained

that those decisions focused on the finality of PADEP decisions "*notwithstanding* the availability of an appeal to the EHB"—thus, the court concluded, those decisions were "based on the understanding—express or implicit—that state administrative review was available *if desired*." *Id*. at 268–69 (cleaned up) (emphases added).

Tellingly, Plaintiff's motion is devoid of discussion of this latest and most relevant published decision from the Third Circuit interpreting § 717r(d)(1). Instead, Plaintiff relegates this case to a footnote, seemingly arguing that § 717r(d)(1) *indirectly* preempts the EHB action because (according to Plaintiff) any relief provided by the EHB regarding Plaintiff's permit would not be subject to review in the Third Circuit. *See* Pl.'s Br. at 26, ECF No. 10.

The EHB, like PADEP, is also a "state administrative agency," and thus any decision by the EHB adversely affecting Plaintiff's permit would necessarily be a "conditioning" or a "denial" of a permit required under Federal law, any civil action seeking review of such decision would be subject to § 717r(d)(1). *Cf.* 42 Pa. C.S.A. § 763(a)(1) (providing that the Commonwealth Court has exclusive jurisdiction of appeals from final orders of "Commonwealth agencies," including the EHB).

Indeed, the *Bordentown* court explicitly recognized that the "myriad 'state procedures giving rise to orders reviewable under § 717r(d)(1) may (and undoubtedly do) vary widely from jurisdiction to jurisdiction," and that § 717r(d)(1)

is thus appropriately tailored to deprive only state courts and federal district courts of jurisdiction over "civil actions." *Twp. of Bordentown*, 903 F.3d at 269.

The Commonwealth Court of Pennsylvania recently applied *Bordentown* to Pennsylvania's administrative scheme. Reviewing a decision from the EHB—similar to NJDEP's decision in *Bordentown*—to dismiss an appeal of PADEP-issued permits for lack of jurisdiction, the Commonwealth Court held that § 717r(d)(1) does not divest the EHB of its jurisdiction over appeals from PADEP decisions. *See Cole*, 257 A.3d at 805. In that case, petitioners challenged an EHB order dismissing their appeal of a plan approval issued by PADEP pursuant to the Clean Air Act for a compressor station associated with an interstate natural gas pipeline project. *Id*. at 809–10. The Commonwealth Court held that "[p]roceedings before the EHB, an administrative agency independent of PADEP, are administrative proceedings, not civil actions" and that the petitioners' appeal to the EHB was thus not prohibited by § 717r(d)(1). *Id*. at 815. The Commonwealth Court explained:

> Section 717r(d)(1), by its express terms, precludes state court review—*i.e.*, *this* Court's review—of permitting decisions by DEP that fall under the scope of the provision. It does not preempt the Commonwealth's administrative review process, which vests within the EHB the authority to conduct administrative reviews of DEP permitting decisions. That review remains available, *if desired*.

Id. at 820–21. Petitioners have a choice of seeking administrative review of PADEP decisions through the EHB process, or seeking direct judicial review in the Third Circuit. *See id.* at 821.[2]

As the Third Circuit explained in *Bordentown*,

> Assuming that a state considers an order final even though additional state agency procedures may be available—and that the classification is consistent with federal finality standards—we may consider a judicial challenge to the order despite the petitioner's failure to exhaust those further state administrative remedies. And conversely, even though a petitioner might have the right immediately to commence a civil action in this Court, this does not necessarily extinguish his or her right instead to seek redress via the available administrative avenues before filing that civil action.

903 F.3d at 272 n.25 (*citing Del. Riverkeeper III*, 903 F.3d at 72, 74). Accordingly, far from depriving the EHB of its jurisdiction, the *Delaware Riverkeeper* series of cases applied the finality requirement—which, in the words of the Third Circuit, is "a constraint on our own jurisdiction, not a determination that we are the only forum available to consider final orders." *Twp. of Bordentown*, 903 F.3d at 271.

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[2] PADEP, in its response in support of Plaintiff's motion, decries the differing standards that apply in an administrative appeal before the EHB and a judicial review proceeding in the Third Circuit. *See* PADEP Br. at 13–14, ECF No. 23. So too for permits issued by NJDEP—administrative hearings involve the introduction of new evidence and cross-examination, while judicial review of NJDEP action is limited to a determination of whether the decision is arbitrary, capricious, or unreasonable. *Compare* N.J.S.A. 52:14B-10 *with In re Taylor*, 731 A.2d 35, 42 (N.J. 1999). Yet these divergent standards and procedures presented no obstacle to the *Bordentown* court's decision.

Case law in the Third Circuit and in Pennsylvania courts firmly establish that Plaintiff is not entitled to a declaration that § 717r(d)(1) deprives the EHB of its jurisdiction over administrative appeals of the REAE Permits. As a result, Plaintiff has not established that it is likely to succeed on the merits of its first claim.

2. The NGA does not otherwise preempt Pennsylvania's ability to exercise its administrative authority in regulating pursuant to the CWA.

While the NGA preempts state authority to regulate the transportation and sale of natural gas in interstate and foreign commerce, it specifically and explicitly preserves state authority to regulate associated facilities pursuant to the CWA. *See* 15 U.S.C. § 717b(d)(3) ("Except as specifically provided in this chapter, nothing in this chapter affects the rights of States under . . . the Federal Water Pollution Control Act (33 U.S.C. § 1251 *et seq*.)."). Pennsylvania's administrative scheme implementing the CWA, which includes PADEP permitting and enforcement as well as EHB review of PADEP action, remains intact despite the statute's preemption of other state laws. *Cf. Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988) (concluding that a state law regulating the issuance of long-term securities by natural gas companies is "field" preempted by the NGA), *but see id*. at 299 ("Of course, Congress explicitly may define the extent to which its enactments pre-empt state law."). The Third Circuit has explained that "the NGA explicitly permits states to participate in environmental regulation of interstate natural gas facilities under the CWA . . . [and] leaves untouched the state's internal administrative review process,

which may continue to operate as it would in the ordinary course under state law." *Twp. of Bordentown*, 903 F.3d at 268 (cleaned up) (quoting *Del. Riverkeeper I*, 833 F.3d at 368).

The REAE Permits in this case were conditions of the 401 WQC—a federal approval pursuant to the CWA—and are therefore explicitly exempted from the NGA's preemptive effect. *See Del. Riverkeeper II*, 870 F.3d at 175–76. In addition, FERC's Certificate Order specifically requires, as a condition of authorization, compliance with the 401 WQC and its conditions. *See* Certificate Order at P (C)(3), Appx. B ¶ 13 ("All conditions attached to the water quality certificate issued by the Pennsylvania Department of Environmental Protection . . . constitute mandatory conditions of the Certificate Order.").

When a permit is appealed to the EHB, the EHB applies the same statutes and regulations in its review that governed the PADEP permitting process, and reviews PADEP's action *de novo*, meaning that new evidence that was not before PADEP may be introduced and considered. *See United Refining Co. v. Dep't of Envtl. Prot.*, 163 A.3d 1125, 1135–36 (Pa. Commw. Ct. 2017) (quoting *Warren Sand & Gravel Co., Inc. v. Dep't of Envtl. Res.*, 341 A.2d 556, 565 (Pa. Commw. Ct. 1975)). The EHB must determine whether third-party appellants such as the EHB Appellants have shown "by a preponderance of the evidence that [PADEP] acted contrary to the law or unreasonably or that its decision is not supported by the facts." *New Hanover*

Twp v. Commw. of Pa., 2020 EHB 124, 167, 2020 WL 2120289 at *25 (Pa. Envtl. Hearing Bd. 2020) (citing *Solebury School v. DEP*, 2014 EHB 482,2014 WL 4087592 at *21 (Pa. Envtl. Hearing Bd. 2014)). In reviewing the permits, the EHB must apply the laws that are required to be complied with as a condition of the 401 WQC, and may remand and/or rescind the permits on the basis of such determination.

Ultimately, Plaintiff fails to explain why, despite EHB's integral role in Pennsylvania's administration of the CWA, EHB review of PADEP permits is such a unique "obstacle" to the NGA that it should be preempted. This argument falls flat, as the statute itself reserves state authority pursuant to the CWA, and the Third Circuit and other Courts of Appeals have found that state administrative appeals of permits issued pursuant to the CWA may proceed unaffected by § 717r(d)(1).

Perhaps recognizing the vulnerability of its argument that Pennsylvania's CWA authority is preempted by the NGA, Plaintiff turns to a generic condition in Transco's FERC Certificate governing the application of state and local laws to the REAE Project:

> Any state or local permits issued with respect to the jurisdictional facilities authorized herein must be consistent with the conditions of this certificate. The Commission encourages cooperation between interstate pipelines and local authorities. However, this does not mean that state and local agencies, through application of state or local laws, may prohibit or unreasonably delay the

> construction or operation of facilities approved by this Commission.

Certificate Order at P 84. This condition speaks to state and local agencies applying state law that, if inconsistent with the NGA or Certificate Order, would be preempted. It is not directed at state and local agencies acting pursuant to the CWA, Clean Air Act, or Coastal Zone Management Act, federal statutes under which state authority is explicitly preserved. Even if the EHB proceeding delayed or prohibited the construction of the pipeline, such action would be pursuant to the state's preserved authority under the CWA, and not through application of preempted state law alone.

Furthermore, the permits subject to review in the EHB are required as conditions of the 401 WQC. Any condition included in a water quality certification "shall become a condition on any Federal license or permit subject to the provisions of" Section 401 of the CWA. 33 U.S.C. § 1341(d). Transco's FERC Certificate itself acknowledges this requirement. *See* Certificate Order at P (C)(3), Appx. B, ¶ 13. A failure to comply with the conditions of the 401 WQC is a failure to comply with the Certificate Order itself.

The out-of-circuit and out-of-state cases cited by Plaintiff are inapposite. First, in *Protecting Air for Waterville v. Butler*, the Ohio Environmental Review Appeals Commission ("ERAC") dismissed appellants' administrative appeal on the basis that the Ohio Environmental Protection Agency's permits were "final" and thus

appealable only to the Courts of Appeals, without explicitly evaluating the statutory term "civil action." *See* Case Nos. ERAC 16-6884 & 16-6885, at ¶¶ 21–37, 2017 WL 5504540, at *3–6 (Ohio Envtl. Rev. Appeals Comm'n Nov. 9, 2017). Instead, the ERAC merely compared its own review to that of Ohio's courts of common pleas. *See id.* at ¶ 33, *5. The Third Circuit's interpretation of § 717r(d)(1) should govern this Court's analysis, rather than that of the ERAC. *See Twp. of Bordentown*, 903 F.3d at 268.

Notably, on review of an EHB order similarly dismissing an appeal of an approval plan under the Clean Air Act, Pennsylvania's own Commonwealth Court reached a different conclusion—"[p]roceedings before the EHB, an administrative agency independent of DEP, are administrative proceedings, not civil actions" and, therefore, do not "fall within the exclusive jurisdiction of the Third Circuit under Section 717r(d)(1)." *Cole*, 257 A.3d at 815. A Pennsylvania court's interpretation of Pennsylvania's administrative system is far more illuminating for an understanding of the nature of an EHB appeal.

Second, in *Rockies Express Pipeline LLC v. Indiana State Natural Resources Commission*, an unreported decision from the U.S. District Court for the Southern District of Indiana, the state administrative actions at issue (including the authorization from the Indiana Department of Natural Resources *and* the administrative review of the Indiana State Natural Resources Commission) were *not*

pursuant to the CWA, and thus were preempted by the NGA. *See* No. 1:08-cv-1651, 2010 WL 3882513, at *4 (S.D. Ind. Sept. 28, 2010). Here, the permits issued by PADEP are undoubtedly issued pursuant to the Commonwealth's authority under the CWA, an authority that is reserved by NGA's savings clause. *See* 15 U.S.C. § 717b(d)(3).

Plaintiff's discussion of *NE Hub Partners, L.P. v. CNG Transmission Corp.* also misses the mark. In that case, appellants to the EHB sought to raise thirty issues pertaining to the construction and operation of a natural gas storage facility that had previously been raised before FERC in an NGA Section 7 proceeding. *See* 239 F.3d 333 at 336–39 (3d Cir. 2001). The thirty issues were raised again in the context of an EHB appeal of drilling, noncoal mining, and construction permits that had been issued by PADEP for the underground storage facility, rather than permits issued pursuant to PADEP's CWA authority. *Id*. Thus, to the extent that *NE Hub* "strongly suggests" field preemption of environmental regulation of natural gas facilities, that preemption is expressly disclaimed with regard to a state's CWA authority. *See* 15 U.S.C. § 717b(d)(3).

In sum, both the NGA and Transco's Certificate Order explicitly acknowledge and refrain from overriding Pennsylvania's authority to regulate pursuant to the CWA. If the EHB retains jurisdiction over this matter and revokes the REAE Permits, then it will be acting pursuant to that authority. If the Project fails to meet

the conditions of its 401 WQC, then by operation of federal law, it has failed to meet the conditions of the Certificate Order. *See* 33 U.S.C. § 1341(d). Far from being preempted, the EHB's authority is *preserved* by the NGA. For these reasons, Plaintiff has failed to show that it is likely to succeed on its second claim that the EHB's authority to review the permits at issue is preempted by the NGA.

C. Plaintiff will not suffer irreparable harm without a preliminary injunction.

Plaintiff falls far short of establishing that any harm it would suffer as a result of the normal operation of Pennsylvania's administrative process is irreparable. "In order to demonstrate irreparable harm the plaintiff must demonstrate potential harm which cannot be redressed by a legal or an equitable remedy following a trial. The preliminary injunction must be the only way of protecting the plaintiff from harm." *Siemens USA Holdings Inc. v. Geisenberger*, 17 F.4th 393, 407–08 (3d Cir. 2021) (quoting *Campbell Soup Co. v. ConAgra, Inc.*, 977 F.2d 86, 91 (3d Cir. 1992)).

Plaintiff puts forth no evidence concerning any costs associated with the deadlines in the EHB's Pre-Hearing Order, that those costs are not recoverable, or even to explain in its brief why that would be so. *See Adams v. Freedom Forge Corp.*, 204 F.3d 475, 487 (3d Cir. 2000) ("A preliminary injunction may not be based on facts *not* presented at a hearing, or not presented through affidavits, deposition testimony, or other documents, about the particular situations of the moving parties."). "[T]he use of judicial power to arrange relationships prior to a full

determination on the merits is a weighty matter, and the preliminary injunction device should not be exercised unless the moving party shows that it specifically and personally risks irreparable harm." *Id*. The harm to be avoided by a preliminary injunction "'must be irreparable—not merely serious or substantial,' and it 'must be of a peculiar nature, so that compensation in money cannot atone for it.'" *Id*. at 408 (quoting *Campbell Soup Co.*, 977 F.2d at 91–92). Furthermore, the "expense of litigation, however, as burdensome as it may be, does not constitute irreparable harm." *Lusardi v. Xerox Corp.*, 747 F.2d 174, 178 (3d Cir. 1984) (citing *Renegotiation Bd. v. Bannecraft Clothing Co.*, 415 U.S. 1, 24 (1974)).

Plaintiff does not explain why the EHB Appeal presents a greater risk of delay than a civil action filed in the Third Circuit, its preferred forum. Even if Plaintiff had established that an EHB proceeding would take longer than a proceeding before the Third Circuit, "[o]nly under extraordinary circumstances will administrative delay lead to a 'clear showing of irreparable injury.'" *Randolph-Sheppard Vendors of Am. v. Weinberger*, 795 F.2d 90, 108 (D.C. Cir. 1986) (citing *Renegotiation Bd.*, 415 U.S. at 24). Any alleged harm beyond litigation costs associated with the EHB appeal is too speculative to support a preliminary injunction. *See Continental Grp., Inc. v. Amoco Chem. Corp.*, 614 F.2d 351, 358–59 (3d Cir. 1980) (explaining that *risk* of irreparable harm is not sufficient to support a preliminary injunction, which "may not be used simply to eliminate a possibility of a remote future injury, or a

future invasion of rights" (quoting *Holiday Inns of Am., Inc. v. B & B Corp.*, 409 F.2d 614, 618 (3d Cir. 1969))).

Plaintiff leans heavily on the analysis in *NE Hub* for the proposition that the continuation of the EHB appeal threatens irreparable harm. *See* Pl.'s Br. at 24–25. That case, however, is readily distinguishable. While the *NE Hub* court explained that "the need to participate in a state regulatory process in conflict with federal policy has been recognized as a hardship," 239 F.3d at 346, that discussion was in the context of whether plaintiff's claim seeking a permanent injunction of allegedly-preempted EHB proceedings was *ripe*. *See id*. at 345–46. The third prong of the ripeness inquiry is practical utility—"whether the parties' plans of actions are likely to be affected by a declaratory judgment," which includes the consideration of "the hardship to the parties of withholding judgment." *Id*. at 344–45 (first quoting *Step-Saver Data Systems, Inc. v. Wyse Technology*, 912 F.2d 643, 649 n.9 (3d Cir. 1990), and then citing *Freehold Cogeneration Assocs., L.P. v. Bd. of Regulatory Comm'rs of State of N.J.*, 44 F.3d 1178, 1189 (3d Cir. 1995)). This consideration of "hardship" is not equivalent to a showing of irreparable harm sufficient to support the extraordinary remedy of a preliminary injunction.

In addition, because the Third Circuit was reviewing the district court's decision on a motion to dismiss, it "treat[ed] the allegations of the complaint as true and afford[ed] the plaintiff the favorable inferences to be drawn from the complaint."

Id. at 341. On a motion for preliminary injunction, however, the burden rests with Plaintiff to show irreparable harm, which is "not an easy burden." *Adams*, 204 F.3d at 484–85 (citing the example of lost income due to termination of employment, which is unquestionably a harm, but not one that rises to the level of "irreparable harm"). If a preliminary injunction was warranted to remedy mere "hardships" alleged by aggrieved plaintiffs, then one would be warranted in nearly every meritorious case.[3]

Similarly, the injunctive relief granted to plaintiff in *National Fuel Gas Supply Corporation v. Public Service Commission of New York* was granted after a decision on the merits, not because plaintiff showed irreparable harm sufficient to support a preliminary injunction. 894 F.2d 571, 575 (2d Cir. 1990). The court's discussion highlighted by Plaintiff, Pl.'s Br. at 25, were findings in support of the conclusion that the processes at issue were preempted, rather than findings of specific irreparable harms that would befall the plaintiff in that case and would warrant preliminary relief. *See Nat'l Fuel Gas*, 894 F.2d at 576–78.

Nor would Transco be deprived of the opportunity to appeal any adverse decision of the EHB to the Third Circuit. Should the EHB proceeding result in the

[3] For this reason, this Court should reject the finding in *Tennessee Gas Pipeline Company, LLC v. Delaware Riverkeeper Network* that possible delays and litigation costs associated with the EHB process, without more, constitute irreparable harm. 921 F. Supp. 2d 381, 395–96 (M.D. Pa. 2013), *overruled in part by Del. Riverkeeper III*, 903 F.3d at 71.

revocation or modification of the REAE Permits, the EHB would have "conditioned" or "denied" a permit required under Federal law, and thus any civil action reviewing that decision would properly be lodged in the Third Circuit. *See* 15 U.S.C. § 717r(d)(1).

Finally, in support of its argument that "any delay in placing the Project into service would irreparably harm Transco," Plaintiff cites to an outdated declaration submitted in support of its opposition to a motion to stay the FERC Certificate in another court proceeding. *See* Pl.'s Mot. Ex. C, ECF No. 8-2. That declaration discusses Transco's need to complete tree felling prior to March 31, 2023, in order to avoid construction delays. *See id*. at ¶¶ 15–18. Since that declaration was filed, tree felling was completed ahead of schedule and Transco received a notice to proceed with full construction of the REAE Project. *See* Notice to Proceed, Doc. Accession No. 20230323-3094, *Transcontinental Gas Pipe Line Company, LLC*, FERC Docket No. CP21-94-000 (Mar. 23, 2023).

The remainder of the declaration that speaks to harms associated with delays generally merely alleges economic harms, which are insufficient to support a preliminary injunction. *See* Pl.'s Mot. Ex. C at ¶¶ 35–38. *See Acierno v. New Castle Cty.*, 40 F.3d 645, 653 (3d Cir. 1994) (citing *Sampson v. Murray*, 415 U.S. 61, 90

(1974)).[4] Additionally, the declaration fails to specifically tie any speculative construction delays to the instant proceeding, instead referring to the judicial review of its FERC Certificate. *See* Pl.'s Mot. Ex. C at ¶ 38.

By failing to put forth any evidence that proceeding with the EHB Appeal will cause irreparable harm, Plaintiff has fallen short of the second threshold requirement to obtain a preliminary injunction. This Court need not consider the remaining two factors. *See Reilly*, 858 F.3d at 179. However, as set forth below, those factors also weigh in favor of denying Plaintiff's motion.

D. EHB Appellants will be subject to greater harm if the preliminary injunction is granted.

Plaintiff claims that EHB Appellants will not be harmed by a preliminary injunction because it is "not too late" to lodge an appeal of the REAE Permits in the Third Circuit. Pl.'s Br. at 28. There is no reason why EHB Appellants should be forced to forego their right to an administrative hearing before the EHB to ensure that the REAE Permits comply with the CWA and relevant state law requirements. Plaintiff's statement that "the EHB Appellants [do not] have any right or interest in the review of the REAE Permits by the EHB" can only be true if this Court accepts Plaintiff's argument on the merits, which, as detailed above, necessarily fails.

[4] The declaration also mentions potential reputational harm, which the Third Circuit has determined is "usually insufficient to support a conclusion that irreparable harm exists." *Acierno*, 40 F.3d at 654 (citing *Morton v. Beyer*, 822 F.2d 364 (3d Cir. 1987)).

Nor does FERC's or PADEP's prior consideration of the Project's environmental effects alleviate the harm that would be inflicted on EHB Appellants. The gravamen of EHB Appellants' appeal is that PADEP inadequately considered the Project's impacts on the Commonwealth's water resources, and the FERC Certificate relies in part on PADEP's decisions.[5] *See* Certificate Order at P (C)(3), Appx. B, ¶ 13.

Any relief ultimately secured by EHB Appellants in this action would likely be "too little, too late," as irreparable environmental harm would have already occurred while the preliminary injunction remained in effect. Far from "preserving the status quo," a preliminary injunction in this case would allow the harms EHB Appellants seek to prevent to occur, while tying their hands and preventing them from obtaining EHB review of the PADEP Permits. *See Acierno*, 40 F.3d at 653 ("A party seeking a mandatory preliminary injunction that will alter the status quo bears a particularly heavy burden in demonstrating its necessity." (quoting *Punnett v. Carter*, 621 F.2d 578, 582 (3d Cir. 1980))).

The harms that will accrue to EHB Appellants cannot be remedied by costs or damages, as construction of the Project risks permanent and irreparable

[5] In addition, Delaware Riverkeeper Network and Maya K. van Rossum, the Delaware Riverkeeper, sought rehearing of the FERC Certificate and subsequently filed an appeal in the U.S. Court of Appeals for the D.C. Circuit. *See Del. Riverkeeper Network v. FERC*, No. 23-1077 (D.C. Cir. filed Mar. 20, 2023).

environmental harm. *See Amoco Production Co. v. Village of Gambell, AK*, 480 U.S. 531, 545 (1987) ("Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable."). Accordingly, a grant of preliminary relief will result in an even greater harm to the nonmoving parties—EHB Appellants.

E. The public interest favors a denial of Plaintiff's request for a preliminary injunction.

The public interest weighs in favor of adjudicating EHB Appellants' claims before the EHB in a timely manner and in favor of allowing the administrative appeal process to proceed as provided by Pennsylvania law, so that the deficiencies in the Permits may be remedied before irreparable environmental harm occurs. *See Village of Gambell*, 480 U.S. at 545. An injunction will prevent the normal operation of the appeals process which will deprive EHB Appellants, and the public, of an opportunity to remedy the deficiencies in the permits at issue prior to the conclusion of the Project's construction.

Broad arguments that the "public interest" requires that the Plaintiff's view of the law is enforced are insufficiently specific to support a preliminary injunction. "If the interest in the enforcement of [the law] were the equivalent of the public interest factor in deciding whether or not to grant a preliminary injunction, it would be no more than a makeweight for the court's consideration of the moving party's probability of eventual success on the merits." *Continental Grp., Inc.*, 614 F.2d at

358. By reflexively repeating its own view of the law, Plaintiff does not meet its burden of establishing the "public interest" prong.

In rehashing its merits argument, Plaintiff relies on the now-overruled analysis and conclusion of the *Tennessee Gas* court, which opined that § 717r(d)(1) was meant to cut off administrative review of state-issued permits. *See* 921 F. Supp. 2d at 391. The Third Circuit explicitly "reject[ed] that proposition" and disclaimed the *Tennessee Gas* court's reading of the *Islander East* cases, which contained mere "drive-by jurisdictional rulings" that do not carry any precedential weight. *See Del. Riverkeeper III*, 903 F.3d at 71 (quoting *Goldman v. Citigroup Glob. Mkts. Inc.*, 834 F.3d 242, 251 (3d Cir. 2016)). The very next day, the Third Circuit resoundingly affirmed the role of administrative review of permits issued by a state pursuant to the CWA. *See Twp. of Bordentown*, 903 F.3d at 268 (holding that hearings before administrative bodies are not impacted by § 717r(d)(1)).

Regarding FERC's finding that the Project is required by the public convenience and necessity, that finding was, again, conditioned on compliance with the conditions set forth in the 401 WQC. *See* Certificate Order at P (C)(3), Appx. B, ¶ 13. If the permits issued by PADEP fail to meet the regulatory standards, then revocation or modification of the permits by EHB would be required to ensure compliance with the conditions of the Certificate.

In addition, there is no support in the record before FERC for the proposition that the public interest requires that Project must be in-service by the 2023–2024 heating season. In fact, the Certificate Order provides that the Project must be completed within three years from the date of the order—by January 2026. *See* Certificate Order at P (C)(1). The amount of time any individual project is granted for completion is determined on a case-by-case basis by the Commission. *See* 18 C.F.R. § 157.20(b). If the public interest required an in-service date by the 2023–2024 heating season, the Commission had the ability to require it.

Plaintiff fails to put forth any specific reason why the public interest requires that REAE Permits should be spared administrative review before the EHB. Instead, Plaintiff would prefer to tie EHB Appellants' hands while it proceeds with construction impacting the Commonwealth's water resources. Accordingly, the public interest weighs heavily in favor of a denial of Plaintiff's motion for preliminary injunction.

F. Plaintiff fails to explain why All Writs Act provides this Court with the authority to enjoin the EHB proceeding.

Plaintiff cites the All Writs Act, 28 U.S.C. § 1651, as the source of authority for this court to enjoin the EHB proceeding. However, Plaintiff fails to explain the independent source of this Court's jurisdiction that an injunction is necessary to aid. *See Ali v. State Police of Pa.*, 378 F. Supp. 888, 890 (E.D. Pa. 1974) ("The All Writs Act . . . gives the district courts power to issue writs of mandamus in aid of their

jurisdiction, but it does not create an independent basis for jurisdiction."), *U.S. ex rel. State of Wis. v. First Fed. Sav. & Loan Ass'n*, 248 F.2d 804, 808–09 (7th Cir. 1957) ("This provision does not enlarge or expand the jurisdiction of the courts but merely confers ancillary jurisdiction where jurisdiction is otherwise granted and already lodged in the court."). Federal District Courts have no role in the review of permits issued for interstate natural gas facilities subject to the NGA, thus, this Court cannot issue an injunction in aid of its NGA jurisdiction pursuant to the All Writs Act. *See* 15 U.S.C. § 717r(b), (d)(1) (providing for review of FERC, Federal agency, and state agency actions in the Courts of Appeals). Accordingly, Plaintiff's discussion of the All Writs Act fails to shed any light on this Court's authority to enjoin the EHB proceedings.

V. CONCLUSION

For the foregoing reasons, EHB Appellants respectfully request that this Court deny Plaintiff's Emergency Motion for Preliminary Injunction.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC,	:	
Plaintiff,	:	
	:	No. 1:23-cv-00463
v.	:	
PENNSYLVANIA ENVIRONMENTAL HEARING BOARD, et al.,	:	
Defendants.	:	

WORD COUNT CERTIFICATE

Pursuant to M.D. Pa. L. R. 7.8(b), the foregoing brief contains 7,996 actual words, as measured by the word count function in Microsoft Word.

/s/ Kacy C. Manahan
Kacy C. Manahan, Esquire

Dated: April 17, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC, Plaintiff, v. PENNSYLVANIA ENVIRONMENTAL HEARING BOARD, et al., Defendants.	:	No. 1:23-cv-00463

CERTIFICATE OF SERVICE

I, Kacy C. Manahan, certify that on April 17, 2023, a true and correct copy of Defendants Delaware Riverkeeper Network, Maya K. van Rossum, the Delaware Riverkeeper's, and Citizens for Pennsylvania's Future's Memorandum of Law in Opposition to Transcontinental Gas Pipe Line Company, LLC's Emergency Motion for Preliminary Injunction was served upon all counsel of record via this Court's CM/ECF system.

/s/ Kacy C. Manahan
Kacy C. Manahan, Esquire

Dated: April 17, 2023