In the

United States Court of Appeals for the Third Circuit

Case No. 23-2052

TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC,

Appellant,

v.

PENNSYLVANIA ENVIRONMENTAL HEARING BOARD, ET AL.,

Appellees.

On Appeal from an Order Entered by the United States District Court for the Middle District of Pennsylvania (The Honorable Christopher C. Conner)

REPLY BRIEF OF APPELLANT TRANSCONTINENTAL GAS PIPE LINE COMPANY, LLC

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GLOSSARY

401 WQC	Water Quality Certification issued by PADEP under Section 401 of the CWA for Transco's Project
Certificate Order	Certificate of public convenience and necessity that FERC issued to Transco for the Project on January 11, 2023. *Transcon. Gas Pipeline Co., LLC*, 182 FERC ¶ 61,006 (2023)
CWA	Clean Water Act
EHB	Pennsylvania Environmental Hearing Board
EHB Appeal	The EHB Appellants' appeals of the REAE Permits at EHB Docket No. 2023-026-L
EHB Appellants	Citizen's for Pennsylvania's Future, Delaware Riverkeeper Network, and Maya K. van Rossum
ERAC	Ohio Environmental Review Appeals Commission
FERC	Federal Energy Regulatory Commission
NGA	Natural Gas Act
NJDEP	New Jersey Department of Environmental Protection
PADEP	Pennsylvania Department of Environmental Protection
Project	Transco's Regional Energy Access Expansion
REAE Permits	Erosion and Sediment Control Permit No. ESG830021002-00, Water Obstruction and Encroachment Permit No. E4083221-006, and Water Obstruction and Encroachment Permit No. E4583221-002 issued by PADEP for Transco's Project
Riverkeeper	EHB Appellant Delaware Riverkeeper Network

Transco	Appellant Transcontinental Gas Pipe Line Company, LLC

INTRODUCTION

The parties have presented this Court with two divergent ways to interpret its precedent under NGA[1] § 717r(d)(1). Transco's and PADEP's understanding of this Court's precedent harmonizes those decisions with the plain language of § 717r(d)(1), the legislative history accompanying that provision, and the NGA's broad preemption of state regulation, the end result of which is to ensure that PADEP's final permitting decisions are reviewed in this Court as Congress intended. By contrast, the EHB Appellants' interpretation of this Court's precedent does none of those things. They ask this Court to put a square peg in a round hole by importing rulings concerning the application of § 717r(d)(1) in New Jersey's administrative regime to Pennsylvania's administrative regime, despite fundamental (and dispositive) differences between them. The EHB Appellants ask this Court to disregard Congress's express purposes to avoid "sequential *administrative* … *appeals* that [could] kill a project with a death by a thousand cuts,"[2] to ignore the NGA's preemption of state regulation, and to uphold a process that provides no guarantee this Court will ever review PADEP's permitting decisions – defeating the

[1] Transco uses in this reply brief the same defined terms and acronyms that Transco used in its opening brief.

[2] *Islander E. Pipeline Co. v. Conn. Dep't of Envtl. Prot.*, 482 F.3d 79, 85 (2d Cir. 2006) (quoting statement of Mark Robinson, Director, Office of Energy Projects, FERC, Natural Gas Symposium: Symposium Before the S. Comm. on Energy & Natural Res., 109th Cong. 41 (2005) (emphasis added)).

entire purpose of NGA § 717r(d)(1). Whatever their aims for endorsing such an extreme view, this Court should squarely reject it.

The EHB Appellants' counterargument hinges on their unsupported claim that the EHB exercises federally-delegated permitting authority under the CWA. But the law is clear: the EHB does not. Only PADEP exercises the federally-delegated permitting authority in Pennsylvania. And without that critical link in the EHB Appellants' chain of reasoning, their arguments fall apart, as does the District Court's basis for finding that Transco had not shown a sufficient likelihood of success on the merits.

The District Court incorrectly assumed that the EHB Appeal will produce a decision that may then be challenged in this Court, but it cannot because the EHB does not "issue, condition, or deny" permits. 15 U.S.C. § 717r(d)(1). Instead, the EHB's orders may only be appealed to Pennsylvania's Commonwealth Court. *See* 42 P.S. § 763(a)(1); *Del. Riverkeeper Network v. Sec'y Pa. Dep't of Envtl. Prot.*, 903 F.3d 65, 72 (3d Cir. 2018) ("*Riverkeeper III*"), *cert. denied*, 139 S. Ct. 1648 (2019); *Adelphia Gateway, LLC v. Pa. Envtl. Hearing Bd.*, 62 F.4th 819, 827 (3d Cir. 2023).

Even if EHB orders met the statutory requirements to be appealed to this Court under § 717r(d)(1) (and they do not), the EHB compiles a new record, different from the record on which the permit was issued. Any review of an EHB order would violate the NGA because it would *not* be a review of the record on which the permit

was issued, and on which FERC relies in authorizing project activities. *See Del. Riverkeeper Network v. Sec'y Pa. Dep't of Envtl. Prot.*, 833 F.3d 360, 381 (3d Cir. 2016) ("*Riverkeeper I*"); 15 U.S.C. § 717n(d).

Additionally, the District Court overlooked that the NGA preempts the EHB's role because the EHB does not exercise federally-delegated authority that the NGA preserves for the states. The District Court also failed to consider that EHB review directly contradicts the legislative history accompanying the addition of § 717r(d)(1) to the NGA, which was designed to avoid sequential administrative appeals that can delay infrastructure projects that deliver critical energy supply to homes and businesses.

In all of these ways, and others explained below and in Transco's opening brief, the District Court erred in finding that Transco was not likely to succeed on the merits. This error led the court below to conclude, erroneously, that Transco would not suffer irreparable harm from being forced to participate in an onerous, unlawful, and preempted process (with no ability to recoup substantial costs and recover from inappropriate delays), leading to an EHB decision that can only be appealed to Pennsylvania's Commonwealth Court, and with full faith and credit preventing this Court from ever reviewing PADEP's permits, just as in *Adelphia Gateway, LLC v. Pennsylvania Environmental Hearing Board*, 62 F.4th 819 (3d Cir. 2023).

The EHB Appellants will suffer no harm from an injunction; they can file a petition for review with this Court, just as the NGA instructs. In the meantime, Transco is suffering harm with its representatives currently subject to depositions set by the EHB Appellants for October 26, 30, and 31, 2023. And the public interest will be served by upholding Congress's considered judgment to avoid delay by assigning the review of state-issued NGA permits to this Court's exclusive jurisdiction. This Court should reverse.

ARGUMENT

I. Transco Demonstrated That It Is Likely to Succeed on the Merits Under This Court's Precedent Interpreting NGA § 717r(d)(1)

A. *Bordentown*'s Actual Holding Harmonizes This Court's *Riverkeeper* Precedent and the NGA's Plain Language and Legislative History, Whereas the EHB Appellants' Distorted Reading of *Bordentown* Renders the NGA's Review Provision Meaningless and Unworkable

This Court should reverse because the District Court erred by failing to enjoin the EHB Appeal as violating NGA § 717r(d)(1)'s assignment of "original and exclusive jurisdiction" to this Court. The District Court's error was largely based on its misapplication of *Bordentown*. In defense of the District Court's order, the EHB Appellants misconstrue this Court's holding in *Bordentown*, which was not nearly as broad as they claim. This Court held "***only*** that … the petitioners were entitled under New Jersey law to have alternatively first sought an ***intra-agency*** adjudicative hearing." *Twp. of Bordentown v. FERC*, 903 F.3d 234, 271 (3d Cir. 2018) (emphasis

added). *Bordentown*'s holding creates no conflict with the *Riverkeeper* decisions because *Bordentown* addressed the New Jersey state administrative review process where the same agency that issues permits also reviews those permits in an administrative appeal, whereas the *Riverkeeper* decisions addressed the Pennsylvania administrative review scheme where the permitting agency (PADEP) does not conduct any such adjudicative hearing on its way to issuing a final permit. That distinction – "intra-agency review" – which this Court identified nine times in *Bordentown*, makes all the difference here.

The reason is clear: when the state permitting agency conducts an intra-agency review and modifies its permit, that permit may be appealed under NGA § 717r(d)(1). If a non-permitting agency, such as the EHB, conducts a permit review, it does not "issue, condition, or deny any permit" and therefore does not result in a permitting action that may be appealed under NGA § 717r(d)(1). In other words, a non-permitting agency's decision necessarily will ***not*** be one by a "State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit … required under Federal law." 15 U.S.C. § 717r(d)(1). Allowing review by a non-permitting agency means that the NGA's exclusive review provision will be circumvented entirely and rendered meaningless. That is the inescapable result of the EHB Appellants' position, try as they may to obscure it.

The EHB Appellants attempt to escape this result and reconcile the text of the NGA by claiming, with no supporting citations, that the EHB exercises delegated authority "like PADEP," and its review of the REAE Permits would be an "'issuance,' 'conditioning,' or 'denial' of a permit required under Federal law." (EHB Appellants' Br. at 29.) That is not true as a matter of law. A state's federally-delegated authority under the CWA is limited to certifying whether a project will comply with applicable provisions of the CWA. *See Riverkeeper III*, 903 F.3d at 69; *Riverkeeper I*, 833 F.3d at 368, 371. The sole agency in Pennsylvania that certifies compliance under the CWA is PADEP, not the EHB. *See* 33 U.S.C. § 1362(1) (defining "state water pollution control agency" to mean "the State agency designated by the Governor having responsibility for enforcing State laws relating to the abatement of pollution"). Pennsylvania law makes it clear that PADEP alone bears this responsibility. 32 P.S. § 693.9 (authorizing PADEP to issue wetland permits); 35 P.S. § 691.5(b)(5) (authorizing PADEP to issue erosion and sediment control permits); 25 Pa. Code § 105.15(b) (governing submissions to PADEP for water quality certifications under Section 401 of the Clean Water Act); *Tire Jockey Serv., Inc. v. Pa. Dep't of Envtl. Prot.*, 915 A.2d 1165, 1187 (Pa. 2007); *see also Riverkeeper III*, 903 F.3d at 72 (citing PENNSYLVANIA DEPT. OF ENVTL. PROT. BUREAU OF WATER QUALITY PROTECTION, No. 362-2000-001, PERMITTING POLICY AND PROCEDURE MANUAL § 400 at 6); *Riverkeeper*

I, 833 F.3d at 388; 53 Pa. Bull. 4600, 4605 (Aug. 5, 2023) (PADEP's Permitting Policy and Procedure Manual remains current); Comment Letter from PADEP to U.S. EPA (Aug. 2, 2021)[3] at 3-4 (describing PADEP's administration of the Commonwealth's water quality certification program).

Where the law assigns an administrator role to one agency and a quasi-judicial role to another, the Supreme Court of the United States has held that it presumes "Congress intended to invest interpretive power in the administrative actor" that actually enforces the law. *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 152-53 (1991). Relying upon *Martin*, the Pennsylvania Commonwealth Court held that "the General Assembly intended to invest [PADEP] with authoritative interpretive powers," not the EHB. *Dep't of Envtl. Prot. v. N. Am. Refractories Co.*, 791 A.2d 461, 465 (Pa. Commw. Ct. 2002). Additionally:

> Although traditional agencies with unitary structures may use adjudication as a mechanism for lawmaking, when the legislature invests an actor with adjudicative authority only, courts may not infer that the legislature intended the adjudicative actor to use its authority to play a policy-making role. Rather, the more plausible inference is that the legislature intended to delegate the adjudicative actor 'the type of nonpolicy-making adjudicatory powers typically exercised by a *court* in the agency review context.' The Court is persuaded by the reasoning of *Martin* that to invest the EHB with such power would

[3] Available at: https://files.dep.state.pa.us/AboutDEP/Testimony/2021/PA_Department_of_Environmental_Protection_EPA-HQ-OW-2021-0302_FRL-10023-97-OW.pdf.

> place the EHB in a policy-making role that was not intended by the General Assembly.

Id. at 465-66 (citing *Martin*, 499 U.S. at 154) (emphasis in original).

Martin and *North American Refractories* refute the EHB Appellants' bald and unsupported assertion that the EHB exercises Pennsylvania's CWA authority. Even the EHB itself has held that the EHB's "role in the administrative process is to determine whether [PADEP's] action [is] lawful, reasonable, and supported by our *de novo* review of the facts." *Gerhart v. DEP*, EHB Docket No. 2017-013-L, 2019 WL 4896943, at *7 (Pa. Envtl. Hrg. Bd. Sept. 25, 2019); *see Arsenal Coal Co. v. Commw., Dep't of Envtl. Res.*, 477 A.2d 1333, 1336 n.3 (Pa. 1984). But under the NGA, that role is assigned exclusively to the Third Circuit, further supporting Transco's and PADEP's argument that EHB review is conflict preempted. *See* 15 U.S.C. § 717r(d)(3) (federal appellate court review focused on whether agency "action is inconsistent with the Federal law governing such permit").

The EHB Appellants also fail in their attempt to distinguish the decisions in other jurisdictions on this issue, *Protecting Air for Waterville v. Butler* and *Rockies Express Pipeline LLC v. Indiana State Natural Resources Commission*. (EHB Appellants' Br. at 35-37.) With respect to *Protecting Air for Waterville*, the EHB Appellants note that 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 ….” (EHB Appellants’ Br. at 35.) The EHB Appellants argue that “[t]his Court’s previous interpretation of § 717r(d)(1) should govern this Court’s analysis rather than that of the ERAC,” but their distinction supports Transco’s point. (*Id.* at 36.) This Court has found that PADEP permits, once issued, *are* final. *See Riverkeeper III*, 903 F.3d at 73-74. With respect to *Rockies*, the EHB Appellants claim that “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.” (EHB Appellants’ Br. at 36-37 (emphasis in original).) This mischaracterizes *Rockies*. The *Rockies* court noted that the permit issued by the Indiana Department of Natural Resources was one “which the FERC Certificate requires [Rockies Express Pipeline, LLC] to obtain.” *Rockies Express Pipeline LLC v. Ind. State Nat. Res. Comm’n*, No. 1:08-CV-1651-RLY-DML, 2010 WL 3882513, at *3 (S.D. Ind. Sept. 28, 2010). So, just like the REAE Permits, the permit at issue in *Rockies* was required by Federal law. The *Rockies* court acknowledged that “the NGA has a savings clause with regard to delegations of state authority” under the CWA, but found that the quasi-judicial review conducted by the Indiana State Natural Resources Commission (akin to the EHB) did not fall within that enumerated authority. *Id*. at *4.

The EHB Appellants attack the graphic in Transco's brief, and claim that the graphic on page 31 of their brief "represents this Court's reasoning in *Bordentown*," as applied in Pennsylvania. But the EHB Appellants' graphic does not accurately depict the administrative process in Pennsylvania, where a different state agency (the EHB) reviews the permitting decision of the only agency in Pennsylvania which has federally-delegated authority under the CWA (PADEP), and creates a new record in a *de novo* proceeding, not the record used by PADEP in issuing the permit, which means the PADEP permit decision will never be reviewed in the Third Circuit under NGA § 717r(d)(1). The fact that NJDEP has an intra-agency review process is the key difference here. NJDEP intra-agency review fits within the NGA's exclusive review provisions because the permitting agency decision will be the issuance of a revised permit, which can be appealed under 717r(d)(1), but EHB review does not because the EHB will not issue an order that may be appealed under NGA § 717r(d)(1). (*See* Transco's Br. at 20-23, 28-31.) This Court should decline to interpret NGA § 717r(d)(1) in a manner that "would undermine th[e] statutory scheme" and "the design of the statute as a whole and its object," *Brown v. Sage*, 941 F.3d 655, 661–62 (3d Cir. 2019) (internal quotations omitted), which was to streamline the review of state-issued permits in federal appellate courts and avoid

delay caused by "sequential *administrative … appeals* that [could] kill a project with a death by a thousand cuts."[4]

The EHB Appellants then argue that EHB review remains available by citing out-of-context dicta from *Bordentown*. (EHB Appellants' Br. at 18-20.) This Court observed in *Bordentown* that state administrative review may be available in some form or else it would have been unnecessary to consider in the *Riverkeeper* cases whether the NGA's review provision contains a finality requirement. *See Bordentown*, 903 F.3d at 268-69. But that observation is too modest a predicate to support the EHB Appellants' broad conclusion that *all* state administrative review must be available, no matter the process in each state. Instead, this Court acknowledged that in some cases state administrative review may be available, whether to produce a final permit under federal finality standards (which is not needed in Pennsylvania), or because the agency issuing the permit performs an internal administrative review which may (but need not) be invoked before obtaining judicial review. *See id.* Indeed, as the EHB Appellants acknowledge, this Court has already determined that NGA § 717r(d)(1) does not require administrative exhaustion when a permit is final under federal law. (*See* EHB Appellants' Br. at 13

[4] *Islander E.*, 482 F.3d at 85 (quotation omitted) (emphasis added); *see also* PADEP's Br. at 30-36 (detailing Congress's intent).

n.1 (citing *Bordentown*, 903 F.3d at 271 n. 25).) The EHB Appellants do not claim that the REAE Permits are not final.

Against this backdrop, it bears emphasis that the petitioners in the *Riverkeeper* cases did not desire this Court's review of PADEP's permitting decisions in those cases. Quite the opposite: the petitioners vigorously opposed this Court's jurisdiction and wished to proceed before the EHB. *See Riverkeeper III*, 903 F.3d at 70 ("Petitioners contend that we lack jurisdiction to review their claims."). Yet, this Court correctly held that it had original and exclusive jurisdiction to review the PADEP-issued permits at issue in those cases. *See id.* at 75; *Riverkeeper I*, 833 F.3d at 372 ("[A] state action taken pursuant to the Clean Water Act or Clean Air Act is subject to review exclusively in the Courts of Appeals."). The EHB Appellants' suggestion that the NGA permits *a la carte* jurisdiction, such that the *Riverkeeper* cases may be explained away because the petitioners in those cases purportedly desired this Court's review, is entirely incorrect.

Additionally, the EHB Appellants' position raises a host of practical problems that have no good answers and further demonstrate why this Court should decline their invitation to interpret the NGA as they do and invite litigation chaos. For example:

- What happens if one party files a petition for review in this Court but another files an appeal with the EHB?

- What if this Court reaches a decision different from the EHB's decision in a simultaneous appeal? Which decision controls?
- What if PADEP reissues a permit on remand from an EHB appeal? Does an appeal of the original permit in this Court become moot? And what happens if one petitioner appeals the reissued permit to this Court but another appeals to the EHB? When does the cycle of PADEP – EHB review end?
- The EHB builds its own record in a trial-like proceeding, whereas this Court conducts a review of the record on which PADEP issues a permit. If the EHB Appellants were right that an EHB decision could be appealed to this Court under NGA § 717r(d)(1) (it cannot), what record would this Court review: the record upon which PADEP issued the permit, as federal law requires,[5] or the new record created before the EHB? And what if this Court is already reviewing a challenge to the same PADEP permit on PADEP's record? How can those disparate

[5] Consistent with the NGA and federal administrative law, the record this Court reviews "is supposed to reflect the information available to the decision maker at the time the challenged decisions were made, as well as the rationale for why the agency acted as it did." *Riverkeeper I*, 833 F.3d at 381; 15 U.S.C. § 717n(d) (consolidated record).

records be reconciled when an appeal from the EHB decision purportedly comes before this Court?

The EHB Appellants have no principled answers to these basic questions. If this Court accepts the EHB Appellants' arguments, there will be tremendous procedural and substantive uncertainty, which will frustrate Congress's express desire to streamline interstate pipeline permit reviews in federal appellate courts.

And while confusion would abound if the Court were to adopt the EHB Appellants' views, one of the few certainties is that there will be no guarantee that this Court will ever review PADEP's permits. Parties are free to challenge the EHB's orders in Pennsylvania's Commonwealth Court (indeed, that is the only forum in which they may do so), and this Court must give full faith and credit to the Commonwealth Court's decisions. *See Adelphia Gateway, LLC v. Pa. Envtl. Hearing Bd.*, 62 F.4th 819, 825 (3d Cir. 2023). Even if the EHB Appellants insist that they would not seek review of an EHB decision in Commonwealth Court (and setting aside that an EHB order is not appealable to this Court under the plain language of NGA § 717r(d)(1)), their prior actions belie such position. *See Amicus Curiae* Brief of Citizens for Pennsylvania's Future, *Cole v. DEP*, Commonwealth Court Docket No. 1577 CD 2019 (Feb. 24, 2020) (asserting the Commonwealth Court should reverse EHB decision to dismiss appeal for lack of jurisdiction associated with permit for a FERC-regulated natural gas pipeline). Congress's

deliberate decision to entrust the review of pipeline permits to this Court will be thwarted completely.

B. The NGA Preempts the EHB's Role Under State Law

The Court also may choose to reverse on preemption grounds because the NGA preempts EHB review of the REAE Permits. The EHB Appellants resist the NGA's straightforward preemption of the EHB's role in § 717b(d) primarily by asserting, with no supporting authority, that the EHB performs a federally-delegated function with respect to administering the Clean Water Act. As a matter of law, the EHB does not. *See supra* at 6-8. Only PADEP performs the federally-delegated functions in Pennsylvania that the NGA preserves for the states. *See* 15 U.S.C. § 717b(d). The result is that the NGA preempts any role for the EHB from the outset – separate from, and in addition to, NGA § 717r(d)(1). The only avenue to review a PADEP permitting decision for an NGA project is through a "civil action" to this Court.

The EHB Appellants' alternative arguments against preemption are equally meritless. Citing *Bordentown*, they argue that Pennsylvania's "internal administrative review process" is left intact despite the NGA's broad preemption of state regulation. (EHB Appellants' Br. at 33.) *Bordentown*, however, did not analyze Pennsylvania's administrative process, which fundamentally differs from New Jersey's process in a critical and dispositive respect: whereas the same agency

administers and reviews CWA permits in New Jersey (NJDEP), different agencies administer and adjudicate permits in Pennsylvania (PADEP and the EHB, respectively). *See N. Am. Refractories Co.*, 791 A.2d at 465-66. And while PADEP exercises federally-delegated and preserved authority under the CWA (as does NJDEP, the agency at issue in *Bordentown*), the EHB does not.

The EHB Appellants next argue that because the REAE Permits are conditions of the CWA water quality certification, which is a required authorization for the Project, "any subsequent state administrative process – such as the EHB Appeal … are a valid exercise of Pennsylvania's CWA authority." (EHB Appellants' Br. at 33-34.) Again, not so. Only PADEP exercises Pennsylvania's CWA authority. *See supra* at 6-8. And nothing in FERC's Certificate Order purports to preserve a role for the EHB. (*See* EHB Appellants' Br. at 34.)[6]

C. The EHB Appeal Is a Civil Action

The Court need not decide whether proceedings before the EHB constitute civil actions to reverse the decision below, but to the extent that the Court wishes to

[6] The EHB Appellants also criticize Transco's citation to the EHB's decisions in *West Rockhill Township* and *Cole* (ruling that the EHB lacks jurisdiction over similar PADEP permit appeals for NGA projects) by pointing to the Commonwealth Court's reversal of those decisions, but the EHB Appellants fail to mention that the Supreme Court of Pennsylvania granted petitions for allowance of appeal seeking review of the Commonwealth Court's decisions in both of those cases and merits briefing is currently underway. *See Cole, et al. v. Pa. Dep't of Envtl. Prot., et al.*, No. 77 MAP 2023; *West Rockhill Twp. v. Pa. Dep't of Envtl. Prot., et al.*, No. 78 MAP 2023.

do so, it should find that the EHB Appeal is a "civil action" that must be enjoined under NGA § 717r(d)(1), after considering that "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Brown*, 941 F.3d at 661 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)). This Court observed in *Bordentown* that the NGA does not define "civil action," and while the Court concluded that intra-agency proceedings before NJDEP are not civil actions, it should hold that EHB actions are. *Bordentown*, 903 F.3d at 267. This is not a novel position; this Court previously observed that the EHB "has been held to be a 'State Court' for purposes of" certain federal laws. *Baughman v. Bradford Coal Co.*, 592 F.2d 215, 217-18 (3d Cir. 1979). The EHB Appeal shares all relevant attributes of a "civil action" filed with a court, including discovery and a de novo trial-like hearing. The EHB itself puts it best: "[w]e function as a trial court." *Ametek, Inc. v. Pa. Dep't of Envtl. Prot.*, No. 2013-223-R, 2014 WL 1045641, at *3 (Pa. Envtl. Hrg. Bd. Feb. 24, 2014); *see also* Commonwealth of Pennsylvania Environmental Hearing Board, *History of the Environmental Hearing Board* ("Although the Board is not part of the judicial branch of government, it operates like a court.").[7] The Supreme Court of the United States has rejected the argument that an "action" refers only to judicial court proceedings. *See Pennsylvania*

[7] Available at: https://ehb.courtapps.com/content/ehb_history.php.

v. Del. Valley Citizens' Council for Clean Air, 478 U.S. 546, 558-60 (1986). And where quasi-judicial review is conducted by a separate agency, like the EHB, the Supreme Court of the United States has recognized that such review aligns with "the type of nonpolicymaking adjudicatory powers typically exercised by a *court* in the agency-review context." *Martin*, 499 U.S. at 154.

Discovery is proceeding apace in the EHB Appeal. The parties are scheduling depositions (set to occur between now and November 17, 2023) and identifying expert witnesses. The discovery process is indistinguishable from trial court litigation in state and federal courts. Only a decision from this Court reversing the district court's order below will spare Transco from participating in this burdensome and unlawful process, and prevent the EHB from entering an order on the merits that can only be appealed to Commonwealth Court and may forever bar this Court from hearing the EHB Appellants' challenge to PADEP's permits as the NGA intended.

II. Transco Will Be Irreparably Harmed Absent Injunctive Relief

The EHB Appellants misconstrue Transco's arguments as to irreparable harm. Transco is not claiming that the District Court was required to adopt Transco's view that the EHB lacks jurisdiction and that the EHB Appeal was preempted before addressing whether Transco's participation in that process constituted irreparable harm. Rather, the District Court erred by concluding that the EHB had jurisdiction and that the EHB Appeal was not preempted, and as a result, failed to consider

whether participation in an unlawful and preempted process – a process which the NGA was specifically amended to avoid because such state administrative appeals can result in "death by a thousand cuts" – would constitute irreparable harm. In other words, the District Court's conclusion that Transco would not be irreparably harmed was premised on its finding that the EHB had jurisdiction to review the REAE Permits and that the EHB Appeal was not preempted.

The EHB Appellants make no effort to address Transco's argument that participation in an unlawful and preempted process constitutes irreparable harm, and they offer no authority to the contrary. Instead, they rely on the fact that *NE Hub* discussed "hardship" in the context of a ripeness inquiry and try to minimize the burden of participating in a preempted process to the mere "expense of litigation." (EHB Appellants' Br. at 38-39.) Of course, Transco acknowledged that this Court has not previously addressed whether participation in a preempted state appellate process where a federal Court of Appeals has original and exclusive jurisdiction constitutes irreparable harm for purposes of injunctive relief, and that this Court in *NE Hub* only addressed that issue in the context of a ripeness analysis. (Transco's Br. at 41.) But the EHB Appellants offer no good reason why *NE Hub* should not guide the Court's analysis here. The EHB Appellants likewise ignore the other courts that have found such participation constitutes irreparable harm and granted injunctive relief. *See, e.g.*, *Tenn. Gas Pipeline Co. v. Del. Riverkeeper Network*, 921

F. Supp. 2d 381, 395 (M.D. Pa. 2013); *Rockies Express Pipeline LLC v. Ind. State Natural Res. Comm'n*, Case No. 1:08-cv-1651-RLY-JMS (S.D. Ind. July 6, 2009). Further, Transco has suffered harm from having to participate in the EHB proceedings to date in order to protect its interests, and in being forced to prepare for eight upcoming depositions, which the EHB Appellants have proposed to start on October 23, 2023.

As to the cost of litigation, the decisions the EHB Appellants cite are inapposite because they do not address whether the burden of being subjected to an unlawful and preempted administrative process – and having no avenue to recover any monetary damages – constitutes irreparable harm. *See Lusardi v. Xerox Corp.*, 747 F.2d 174, 178 (3d Cir. 1984) (considering litigation costs as irreparable harm when determining whether a jurisdictional exception applied for an interlocutory order to be appealable); *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974) (addressing litigation costs that had to be incurred to exhaust administrative remedies prior to seeking judicial relief). The issue is not simply that Transco will incur litigation costs by being forced to participate in the EHB Appeal; it is the fact that Transco is being deprived of the benefit of the NGA's streamlined review procedure and has no means to recover monetary damages of any kind that it may suffer as a result of participation in the EHB Appeal. The only way to contain that harm is through injunctive relief. And harm that can only be contained through

injunctive relief is, by definition, irreparable. *See* Memorandum, R. 29, at 17, Appx22 (citing *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 801 (3d Cir. 1989)). Moreover, by focusing only on litigation costs, the EHB Appellants ignore the numerous cases that Transco cites which establish that monetary damages constitute irreparable harm when they cannot be recovered. (Transco's Br. at 45-46.)

Finally, the EHB Appellants take issue with Transco's reliance on an earlier declaration to demonstrate the irreparable harm that would result if the Project were delayed as a result of the EHB Appeal. (EHB Appellants' Br. at 39-41.) As an initial matter, Transco relies on the Jaaskelainen Declaration because it is part of the record before the District Court, and this Court is determining whether the District Court erred by denying injunctive relief based on that record. Further, the Jaaskelainen Declaration illustrates the manner in which the Project is constructed and how any delays have a compounding effect that can cause significant financial and business impacts for Transco. The fact that Transco has since requested authorization to place a *portion* of the Project in service as early as October 15, 2023 does not mean that Transco would no longer be harmed by delays.

Only 450,000 dekatherms per day (Dth/d) of firm transportation service out of the Project's total 829,400 Dth/d (54%) are subject to Transco's request to place a portion of the Project into service on an interim basis. *See* Request for Authorization to Place Facilities in Service and Provide Firm Transportation Service

on an Interim Basis, at p. 3, Doc. Accession No. 20230919-5118, *Transcon. Gas Pipe Line Co., LLC*, FERC Docket No. CP21-94-000 (Sept. 19, 2023). The remainder of the Project must still be constructed and placed into service, and is therefore subject to delay. Absent injunctive relief, the EHB could take action at any time that could potentially delay the Project. Until the Project is complete and fully placed in service, the risk of irreparable harm from any EHB-imposed delay remains.

III. The EHB Appellants Will Not Suffer Harm from an Injunction, Which Would Serve the Public Interest

The EHB Appellants do not dispute that if Transco's merits arguments are correct, then they will not be harmed by entry of a preliminary injunction below. (*See* EHB Appellants' Br. at 41-42.) Moreover, the EHB Appellants do not stand to suffer any harm from an injunction because they remain able to petition this Court for review of the REAE Permits. They complain about being deprived the ability to create a new record before the EHB, but this Court has already determined that petitioners are not entitled "to a de novo evidentiary hearing; the opportunity to comment and to petition this Court for review is enough." *Riverkeeper III*, 903 F.3d at 74.

Congress determined that the national public interest is best served by streamlining natural gas pipeline permit reviews in federal appellate courts. *See Riverkeeper I*, 833 F.3d at 372 ("[T]he legislative history of the bill amending [NGA] Section 19(d) … indicates that the purpose of the provision is to streamline the

review of state decisions taken under federally-delegated authority."). Enjoining the EHB Appeal will serve the public interest by avoiding a "series of sequential *administrative … appeals* that [could] kill a project with a death by a thousand cuts." *Islander E.*, 482 F.3d at 85 (quoting statement of Mark Robinson, Director, Office of Energy Projects, FERC, Natural Gas Symposium: Symposium Before the S. Comm. on Energy & Natural Res., 109th Cong. 41 (2005) (emphasis added)). Congress determined on behalf of all Americans that such delay harms the national public interest, and yet that delay is precisely what the EHB Appellants are trying to accomplish here. The public interest therefore strongly favors entry of injunctive relief.[8]

[8] The EHB Appellants claim that in *Riverkeeper III*, this Court rejected the Middle District of Pennsylvania's ruling that the EHB lacked jurisdiction over a similar permit appeal in *Tennessee Gas Pipeline Co. v. Delaware Riverkeeper Network*, 921 F. Supp. 2d 381 (M.D. Pa. 2013), but that is not true. This Court overruled the Middle District only to the extent that the Middle District held the NGA does not require permits to be final before seeking review under § 717r(d)(1). *See Riverkeeper III*, 903 F.3d at 71 (rejecting the Middle District's holding that the NGA gives the Third Circuit "an unqualified right of review over even non-final" PADEP permits) (internal quotations omitted). The EHB Appellants do not dispute that the REAE Permits are final.

CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, and those set forth in Transco's opening brief, Transco respectfully requests that the Court reverse the District Court's order and remand with instructions to enter a preliminary injunction enjoining: (1) the EHB from considering the EHB Appeal; and (2) EHB Appellants from seeking any other relief from the EHB with respect to the REAE Permits.

Respectfully submitted this 4th day of October, 2023.

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE OF APPELLATE PROCEDURE 31.1(C)

I certify the following:

This reply brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because this brief contains **5,626** words, excluding the parts of the brief exempted by Rule 32(f) of the Federal Rules of Appellate Procedure.

This reply brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type-style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word 365 in 14-point Times New Roman font.

This reply brief complies with the electronic filing requirements of Local Rule 31.1(c) because the text of this electronic brief is identical to the text of the paper copies, and the SentinelOne 22.3.5.887 has been run on the file containing the electronic version of this brief and no viruses have been detected.

Dated: October 4, 2023

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that a copy of the foregoing Reply Brief was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

Dated: October 4, 2023

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