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## Comment

### PUTTING THE PIECES OF THE PUZZLE TOGETHER: THE NATURAL GAS PIPELINE APPROVAL PROCESS IS A PROCEDURAL JIGSAW

VICTORIA MAZZOLA\*

“The art of simplicity is a puzzle of complexity.”<sup>1</sup>

#### I. START WITH THE CORNERS: AN INTRODUCTION TO NATURAL GAS PIPELINE EMINENT DOMAIN

Blair and Megan Mohn are landowners in Lancaster, Pennsylvania who sought to sell their property.<sup>2</sup> A women’s Roman Catholic religious order known as the Adorers of the Blood of Christ (Adorers) owns a parcel of land containing a retirement home and farm land in Columbia, Pennsylvania.<sup>3</sup> Jeff Moon is a business owner in Paulding, Georgia.<sup>4</sup>

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\* J.D. Candidate, 2020, Villanova University Charles Widger School of Law; B.S. 2017, The College of New Jersey. This Comment is dedicated to my mother, Christine Mari-Mazzola. Although I lost you before this Comment reached publication, thank you for motivating me to push through the obstacles of life to reach my goals. My mother’s mantra was “slow to anger, rich in kindness, loving and forgiving.” Thank you for teaching me that how you treat people and the relationships you build matter more than tangible success. Furthermore, thank you for introducing me to the energy industry and the manner that energy impacts people around the world. This Comment seeks to shed light on the treatment of everyday people during the natural gas pipeline approval process. I would also like to thank my family for their constant support. Specifically, my dad for keeping me up to date on what is happening in the world, my sister, Santina, for being my sounding board, and my feline, Rigatoni for consistently walking on my laptop during the drafting process (we didn’t want those pages in the final draft anyway). I would also like to thank the *Villanova Law Review* and everyone who contributed to this Comment throughout the writing process.

1. Douglas Horton, GOODREADS, <https://www.goodreads.com/quotes/200738-the-art-of-simplicity-is-a-puzzle-of-complexity> [<https://perma.cc/BG27-RWBE>] (last visited Jan. 31, 2019) (quoting Douglas Horton, an American Protestant clergyman).

2. See *Transcon. Gas Pipe Line Co. v. Permanent Easement for 1.33 Acres of Land, Owned by Lynda Like*, No. 17-3116, 2018 WL 2244740, at \*5-6 n.1 (E.D. Pa. May 7, 2018) (describing party suing under eminent domain and obstacles that arose during the process).

3. See *Adorers of Blood of Christ v. FERC*, 897 F.3d 187, 191 (3d Cir. 2018) (identifying parties to case), *cert. denied*, 139 S. Ct. 1169 (2019). For a further discussion of *Adorers*, see *infra* notes 148-166 and accompanying text.

4. See *Transcon. Gas Pipe Line Co. v. 6.04 Acres Over Parcel(s) of Land Approx. 1.21 Acres Situated in Land Lot 1049*, 910 F.3d 1130, 1130 (11th Cir. 2018) (describing parties to case).

These average, hard-working Americans all have something in common.<sup>5</sup> Transcontinental, a natural gas pipeline company, contacted them about placing a possible natural gas pipeline beneath their property through eminent domain.<sup>6</sup> These landowners may or may not have been aware of the intricate natural gas pipeline construction and operation approval process, but they promptly sought to understand it.<sup>7</sup>

The Federal Energy Regulatory Commission (FERC) is a governmental agency charged with overseeing and ultimately approving or denying pipeline proposals.<sup>8</sup> FERC also publishes guidelines for landowners to help explain the pipeline approval and implementation process in a way lay persons would understand.<sup>9</sup> Yet, those guidelines may not be enough, as the process is unclear even to sophisticated judges, attorneys, and business people.<sup>10</sup>

The problem posed by the difficulty lay people have understanding this process has only been exacerbated since the discovery of the Marcellus and Utica Shales, natural gas rock formations holding approximately 3.4 billion barrels of usable natural gas in the northeastern region of the United States.<sup>11</sup> These discoveries have changed the country's nat-

5. See *Adorers*, 897 F.3d at 191 (describing party in case); see also *Like*, 2018 WL 2244740, at \*5-6 (providing facts similar to those of other Third Circuit quick-take eminent domain cases).

6. See *Adorers*, 897 F.3d at 191 (describing normal steps landowners take when contacted about possible eminent domain taking on their property); see also *Like*, 2018 WL 224474, at \*6 (describing normal steps landowners take when contacted about possible eminent domain taking on their property).

7. See *Adorers*, 897 F.3d at 191 (identifying lay persons' possible lack of knowledge); see also *Like*, 2018 WL 2244740, at \*6 (describing normal steps landowners take when contacted about possible eminent domain taking on their property).

8. See *Natural Gas Pipelines*, FED. ENERGY REG. COMM'N, <https://www.ferc.gov/industries/gas/indus-act/pipelines.asp> [<https://perma.cc/F4N3-YTDF>] (last visited Jan. 31, 2019) (describing Commission's authority over natural gas pipeline approval process).

9. See generally FED. ENERGY REG. COMM'N, *An Interstate Natural Gas Facility on My Land?* (2015), <https://www.ferc.gov/resources/guides/gas/gas.pdf?csrt=3630210690987318250> [<https://perma.cc/49ZW-2QKG>] (describing government information packet meant to assist landowners in understanding the process of natural gas pipeline eminent domain takings).

10. See Jon Bernhardt, *Is National Gas Pipeline Regulation Worth the Fuss?*, 40 STAN. L. REV. 753, 753 (1988) (stating industry players disagree with some portion of current procedure).

11. See *How Much Gas is in the Marcellus Shale?*, U.S. GEO. SURVEY, [https://www.usgs.gov/faqs/how-much-gas-marcellus-shale?qt-news\\_science\\_products=0#qt-news\\_science\\_products](https://www.usgs.gov/faqs/how-much-gas-marcellus-shale?qt-news_science_products=0#qt-news_science_products) [<https://perma.cc/3CXK-BMZ5>] (last visited Jan. 31, 2019) (providing details on the quantity of natural gas in the Marcellus Shale). It is difficult to estimate the actual amount of gas within the Marcellus Shale because the resources are thousands of feet underground within a rock that varies in thickness, composition, and character. See Hobart M. King, *Marcellus Shale-Appalachian Basin Natural Gas Play*, <https://geology.com/articles/marcellus-shale.shtml> [<https://perma.cc/L8H5-F59K>] (last visited Jan. 15, 2019) (describing challenges with quantifying the amount of natural gas in the Marcellus Shale). The Energy Information Administration estimated "that the Marcellus Shale contained approx-

ural gas market, which has historically relied upon natural gas transported from Texas up the east coast.<sup>12</sup> In this new landscape, companies frack the natural gas underneath the Marcellus and Utica Shales on the east coast and subsequently clean and transport the gas to different facilities in the region.<sup>13</sup> This avoids the need to transport the gas long distances across the country.<sup>14</sup> Accordingly, pipeline infrastructure must increase to handle the increased supply of natural gas from a new part of the nation.<sup>15</sup> Alongside the economic advantages, there are several legal and environmental challenges in accessing the untapped supply of natural gas found in the Marcellus and Utica Shales.<sup>16</sup>

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imately 410 trillion cubic feet of technically recoverable natural gas, but [later] revised that number to 141 trillion cubic feet.” See *id.* To put this into perspective, 141 trillion cubic feet is estimated to provide six years of natural gas consumption in the United States. See *id.* Recently, experts discovered that there is another shale, the Utica Shale, located below the Marcellus Shale, which could contain a large additional amount of natural gas. See *id.* (describing drilling potential of Utica Shale).

12. See *Transco*, WILLIAMS, [https://co.williams.com/operations/atlantic-gulf-operating-area/transco/\[https://perma.cc/3C5M-892Y\]](https://co.williams.com/operations/atlantic-gulf-operating-area/transco/[https://perma.cc/3C5M-892Y]) (last visited Jan. 27, 2019) (providing information on the Transco pipeline); see also Susan Phillips, *Philly’s Energy Hub: A Renaissance for the Delaware Valley or a Pipe Dream?*, STATEIMPACT PA. (Apr. 1, 2016), <https://stateimpact.npr.org/pennsylvania/2016/04/01/phillys-energy-hub-a-renaissance-for-the-delaware-valley-or-a-pipe-dream/> [<https://perma.cc/T7N8-Q835>] (describing impeding economic changes in market).

13. See *Production Process*, MARCELLUS SHALE COAL., [http://marcelluscoalition.org/marcellus-shale/production-processes/\[https://perma.cc/P7VR-D4F7\]](http://marcelluscoalition.org/marcellus-shale/production-processes/[https://perma.cc/P7VR-D4F7]) (last visited Jan. 31, 2019) (detailing process of extracting natural gas from ground). Natural gas can also be directly transported to customers without going through an interstate facility. See *id.* (explaining alternative natural gas transportation routes).

14. See *id.* (explaining landscape changes).

15. See *Transco*, *supra* note 12 (describing increases in amount of natural gas pipeline in the US); see also Krista Weidner, *Natural Gas Exploration: A Landowner’s Guide to Leasing in Pennsylvania*, PENN STATE EXTENSION (last updated Sept. 19, 2017), <https://extension.psu.edu/natural-gas-exploration-a-landowners-guide-to-leasing-in-pennsylvania> [<https://perma.cc/6GK-XBSN>] (explaining that increased demand will result in further geographic exploration); THE CTR. FOR RURAL PA., *Economic Changes in Pennsylvania within the Context of Marcellus Shale Development* 5 (2017), [http://www.rural.palegislature.us/documents/reports/Marcellus\\_Wave\\_2\\_Economic\\_Impacts.pdf](http://www.rural.palegislature.us/documents/reports/Marcellus_Wave_2_Economic_Impacts.pdf) [<https://perma.cc/UJF3-YFS8>] (identifying economic changes since discovery of Marcellus Shale). Pipeline infrastructure refers to pipeline in the ground used to transport natural gas. See, e.g., Joe Markosek, *Marcellus Shale Development in Pennsylvania*, PRIMER HOUSE APPROPRIATIONS COMMITTEE (D) 5-6 (Jan. 16, 2018), [http://www.pahouse.com/Files/Documents/Appropriations/series/3017/MarcellusShaleDev\\_BP\\_011618.pdf](http://www.pahouse.com/Files/Documents/Appropriations/series/3017/MarcellusShaleDev_BP_011618.pdf) (identifying insufficient pipeline infrastructure growth as a pressing concern in the northeast).

16. See Kristen Lombardi & Jamie Smith Hopkins, *Natural Gas Building Boom Fuels Climate Worries, Enrages Landowners*, NPR (July 17, 2017), <https://www.npr.org/2017/07/17/536708576/natural-gas-building-boom-fuels-climate-worries-enrages-landowners> [<https://perma.cc/V2PL-FBLC>] (describing discord surrounding natural gas pipeline implementation).

Williams Companies Inc. is a large natural gas infrastructure company that has invested in expanding pipeline infrastructure.<sup>17</sup> One of Williams' major holdings is a transcontinental natural gas pipeline that transports gas from Texas up the east coast, ultimately reaching the northeastern market.<sup>18</sup> Williams, through its subsidiary Transcontinental, has sought to expand its pipeline to incorporate the added supply from the Marcellus and Utica Shales.<sup>19</sup> The proposed expansion requires several thousand miles of added pipeline, some of which would have to be placed on private property.<sup>20</sup> Most private landowners accept compensation in exchange for the use of their land, but there are some who hold out for more money or altogether refuse to sell.<sup>21</sup>

As a major player in the Marcellus and Utica Shale's development and distribution, Transcontinental is paving the way for managing and implementing great infrastructure growth as the natural gas market transforms.<sup>22</sup> In an effort to complete its pipeline expansion, Transcontinental has been involved in numerous legal suits as it seeks to gain federally mandated pipeline approvals.<sup>23</sup> In 2018 alone, federal circuit courts heard five cases regarding natural gas pipeline approvals in which Transcontinental

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17. See Roger DuPuis, *Williams CEO Talks Gas, Regs in Harrisburg Interview*, CENT. PENN. BUS. JOURNAL (Apr. 27, 2017), <https://www.cpbj.com/williams-ceo-talks-gas-regs-in-harrisburg-interview/> [<https://perma.cc/42K7-LMHT>] (identifying that Williams gathers over 30% of nation's natural gas).

18. See *Transco*, *supra* note 12 (describing pipeline at issue in all cases).

19. See DuPuis, *supra* note 17 (identifying that William's has invested \$8 billion in the Marcellus and Utica Shales).

20. For a further discussion of Transcontinental's proposed pipelines, see *supra* notes 18-19 and accompanying text.

21. See *Transcon. Gas Pipe Line Co. v. 6.04 Acres Over Parcel(s) of Land Approx. 1.21 Acres Situated in Land Lot 1049*, 910 F.3d 1130, 1145 (11th Cir. 2018) (holding that preliminary injunction allowing gas company onto landowner's property because the right to condemn was "finally determined"); *Transcon. Gas Pipe Line Co. v. Permanent Easements for 2.14 Acres & Temp. Easements for 3.59 Acres in Conestoga Twp.*, 907 F.3d 725, 729 (3d Cir. 2018) (holding that just compensation was not required before a just taking and that procedure did not deprive landowners of opportunity to appeal to FERC); *Twp. of Bordentown v. FERC*, 903 F.3d 234, 246 (3d Cir. 2018) (holding that FERC is permitted to conditionally issue a certificate of public convenience before the proper CWA permits are obtained); *Del. Riverkeeper Network v. Sec'y Pa. Dep't of Env'tl. Prot.*, 903 F.3d 65, 69 (3d Cir. 2018) (holding that providing a certificate before all required permits were acquired was not arbitrary or capricious and that a hearing did not need to be held); *Adorers*, 897 F.3d at 191 (holding that the NGA provided exclusive means to contest FERC's order and that the RFRA is not an exception).

22. See *Transco*, *supra* note 12 (describing pipeline at issue in all cases).

23. For a further discussion of Transcontinental, see *supra* notes 17-22 and accompanying text.

was a party.<sup>24</sup> Comparatively, Transcontinental was a party to only six legal suits in federal circuit courts from 1989 to 2017.<sup>25</sup>

As seen by this increase in litigation, the process a company must take to obtain approval for a proposed pipeline can seem daunting and confusing, especially to landowners who do not have previous knowledge of the subject.<sup>26</sup> Even sophisticated lawyers and judges can mistake the proper steps required to gain the proper pipeline approval.<sup>27</sup> Congress, in conjunction with FERC, should reevaluate the purpose and procedures of natural gas pipeline approval to ensure the process is functioning as intended.<sup>28</sup>

This Comment reviews FERC's current pipeline approval process and analyzes how Transcontinental is maneuvering the system in the Marcellus and Utica Shale era.<sup>29</sup> Part II discusses the background and procedures of obtaining land via eminent domain through FERC.<sup>30</sup> Part III reviews the five Transcontinental federal courts of appeals cases decided in 2018.<sup>31</sup>

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24. See *Adorers*, 897 F.3d at 191 (describing case where interested party combated eminent domain taking); see also *Del. Riverkeeper Network*, 903 F.3d at 69 (same); *Bordentown*, 903 F.3d at 246 (same); *Conestoga Twp.*, 907 F.3d at 729 (same); *Land Lot 1049*, 910 F.3d at 1145 (same). Four of Transcontinental's 2018 cases were within the Third Circuit and one case was in the Eleventh Circuit. See *Adorers*, 897 F.3d at 191 (Third Circuit); see also *Del. Riverkeeper Network*, 903 F.3d 69 (Third Circuit); *Bordentown*, 903 F.3d at 246 (Third Circuit); *Conestoga Twp.*, 907 F.3d at 729 (Third Circuit); *Land Lot 1049*, 910 F.3d at 1145 (Eleventh Circuit).

25. See *Del. Riverkeeper Network v. Fed. Energy Regulatory Comm'n*, 857 F.3d 388 (D.C. Cir. 2017) (identifying federal courts of appeals cases with Transcontinental as party); *Transcon. Gas Pipe Line Co. v. Permanent Easement for 2.59 Acres, Temp. Easements for 5.45 Acres & Temp. Access Easement for 2.12 Acres in Pine Grove Twp., Schuylkill Cty., PA*, 709 F. App'x 109 (3d Cir. 2017) (same); *Del. Riverkeeper Network v. Sec'y Penn. Dep't of Env'tl. Prot.*, 833 F.3d 360 (3d Cir. 2016) (same); *In re Nat. Gas Royalties*, 562 F.3d 1032, 1037 (10th Cir. 2009) (same); *Transcon. Gas Pipe Line Corp. v. Societe D'Exploitation du Solitaire SA*, 299 F. App'x 347 (5th Cir. 2008) (same); *Williams Nat. Gas Co. v. City of Oklahoma City*, 890 F.2d 255 (10th Cir. 1989) (same). This increase is likely due in part to the strategic expansion of the Transcontinental pipeline as companies tap into the Marcellus and Utica Shales. See DuPuis, *supra* note 16 (identifying that William's has invested \$8 billion in the Marcellus and Utica Shales). For a description of the Marcellus and Utica shales, see *supra* notes 11-16 and accompanying text.

26. For a further description of the pipeline approval process, see *infra* notes 57-71 and accompanying text.

27. For a further discussion of confusion surrounding the natural gas pipeline approval process, see *infra* notes 167-210 and accompanying text.

28. For a further discussion of the critical analysis, see *infra* notes 167-210 and accompanying text.

29. For a review of the FERC pipeline approval process, see *infra* notes 57-71 and accompanying text. For a further discussion of cases discussing this process, see *infra* notes 75-166 and accompanying text.

30. For a further discussion on the background of the relationship between eminent domain and the FERC approval processes, as well as the Marcellus Shale, see *infra* notes 34-71 and accompanying text.

31. For a further overview of the five cases discussed in this Comment, see *infra* notes 75-166 and accompanying text.

Part IV provides a critical analysis of where natural gas pipeline jurisprudence stands in light of the most recent eminent domain rulings.<sup>32</sup> Finally, Part V discusses the impact these rulings will have on future decisions.<sup>33</sup>

## II. BUILD A FRAMEWORK: BACKGROUND

Since the discovery of the Marcellus and Utica Shales and commencement of drilling in 2003, natural gas drilling on the east coast has been on the rise, causing a corresponding need for more natural gas pipeline infrastructure.<sup>34</sup> Before a company can build a new interstate pipeline, FERC must approve the pipeline, and the company must obtain right of ways from private landowners.<sup>35</sup> As of 2015, FERC has rejected only two pipeline project proposals in the past thirty years.<sup>36</sup>

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32. For a further analysis, see *infra* notes 167-210 and accompanying text.

33. For a further discussion of the impact of the federal courts of appeals' decisions on eminent domain as it relates to natural gas pipelines, see *infra* notes 211-216 and accompanying text.

34. See King, *supra* note 11 (describing Marcellus Shale). The Marcellus Shale is located about one mile underground in the states of Ohio, West Virginia, Pennsylvania, and New York. See *id.* (describing geographical location of natural gas shale). There are also small portions of the Shale in Maryland, Kentucky, Tennessee, and Virginia. See *id.* This availability of natural gas on the east coast greatly alters the economic energy landscape within the United States. See *A Hazy Future: Pennsylvania's Energy Landscape in 2045*, FRACTRACKER ALLIANCE 6 (Jan. 10, 2018), <https://www.fractracker.org/a5ej20sjfwe/wp-content/uploads/2018/01/AHazyFuture-FracTracker-2018.pdf> [<https://perma.cc/UZC7-BGR6>] (describing increased demand); DuPuis, *supra* note 17 (describing opportunity Pennsylvania has to build its economy around natural gas pipeline).

35. See Natural Gas Act, 15 U.S.C. § 717f(h) (2018) (describing procedure of natural gas pipeline construction approval).

36. See Lombardi & Hopkins, *supra* note 16 (reporting FERC's high approval rate of pipeline projects). The Center for Public Integrity and StateImpact Pennsylvania, a public media partnership between NPR member stations WITF in Harrisburg and WHYY in Philadelphia, uncovered this high approval rate during an investigation. See *id.* The investigation included interviews with over one hundred people, reviews of FERC records, and analyses of nearly five hundred pipeline cases. See *id.* Ultimately, the investigation revealed that the two rejected pipeline projects did not have customer contracts for the pipelines. See *id.* In other words, this study suggests that approval of a new natural gas pipeline is highly likely when gas utilities can demonstrate a need for increased pipeline capacity. See *id.* (identifying possible reason pipeline proposals were rejected). When Public Integrity and StateImpact asked Cheryl A. LaFluer, FERC's acting chairperson at the time, about this notably high rate of approval, she denied an interview and the Commission disclosed that it does not keep track of pipeline rejections. See *id.* (quoting Cheryl A. LaFluer). Others may shed some light on why the approval rate is so high, as some critics say that FERC is too quick, or does not take enough time to sufficiently consider the merits, in approving pipelines. See *id.* (quoting Jon Wellinghoff, a former FERC commissioner and current renewable-energy consultant) (identifying why the approval rate is high). Still, others argue that the high quality of pipeline proposals is the reason so few are rejected. See *id.* (quoting Donald F. Santa Jr., a former FERC commissioner and current head of the Interstate Natural Gas Association of America).



FERC was created in October 1977 as a reorganization of the Federal Power Commission.<sup>37</sup> FERC “is an independent agency that regulates the interstate transmission of natural gas, oil, and electricity.”<sup>38</sup> The Commis-

37. See *History of FERC*, FERC <https://www.ferc.gov/students/ferc/history.asp> [<https://perma.cc/9DHB-WABW>] (last visited Jan. 31, 2019). FERC has enumerated responsibilities. See *What FERC Does*, FERC (Aug. 14, 2018) <https://www.ferc.gov/about/ferc-does.asp?csrt=2115691281350920884> [<https://perma.cc/5FNF-GNZ7>] (explaining FERC’s responsibilities). When the Energy Policy Act of 2005 was passed, the number of FERC’s enumerated responsibilities increased. See *id.* (describing FERC’s evolution). These additional responsibilities include:

Regulat[ing] the transmission and wholesale sales of electricity in interstate commerce; [r]evie[w] certain mergers and acquisitions and corporate transactions by electricity companies; [r]egulat[ing] the transmission and sale of natural gas for resale in interstate commerce; [r]egulat[ing] the transportation of oil by pipeline in interstate commerce; [a]pprov[ing] the siting and abandonment of interstate natural gas pipelines and storage facilities; [r]evie[w] the siting application for electric transmission projects under limited circumstances; [e]nsur[ing] the safe operation and reliability of proposed and operating LNG terminals; [l]icens[ing] and inspect[ing] private, municipal, and state hydroelectric projects; [p]rotect[ing] the reliability of the high voltage interstate transmission system through mandatory reliability standards; [m]onitor[ing] and investigat[ing] energy markets; [e]nforc[ing] FERC regulatory requirements through imposition of civil penalties and other means; [o]verse[ing] environmental matters related to natural gas and hydroelectricity projects and other matters; and [a]dminister[ing] accounting and financial reporting regulations and conduct of regulated companies.

See *id.* (bullet points omitted) (identifying FERC’s authority). FERC’s website also lists responsibilities that are not included in FERC’s jurisdiction such as:

Regulation of retail electricity and natural gas sales to consumers; [a]pproval for the physical construction of electric generation facilities; [r]egulation of activities of the municipal power systems, federal power marketing agencies like the Tennessee Valley Authority, and most rural electric cooperatives; [r]egulation of nuclear power plants by the Nuclear Regulatory Commission; [i]ssuance of State Water Quality Certificates; [o]versight for the construction of oil pipelines; [a]bandonment of service as related to oil facilities; [m]ergers and acquisitions as related to natural gas and oil companies; [r]esponsibility for pipeline safety or for pipeline transportation on or across the Outer Continental Shelf; [r]egulation of local distribution pipelines of natural gas; [d]evelopment and operation of natural gas vehicles; [r]eliability problems related to failures of local distribution facilities; and [t]ree trimmings near local distribution power lines in residential neighborhoods.

See *id.* (bullet points omitted) (placing limitations on FERC’s oversight power).

38. See *About, FERC*, <https://www.ferc.gov/about/about.asp?csrt=2115691281350920884> [<https://perma.cc/YT75-85LH>] (last visited Jan. 31, 2019) (providing background information on FERC). FERC also oversees natural gas and hydro-power projects. See *id.* (explaining FERC’s responsibilities). FERC’s mission is to provide economically efficient, safe, reliable, and secure energy for consumers. See *id.* (describing FERC’s mission). The Commission strives to do this by assisting consumers in obtaining economically efficient, safe, reliable, and secure energy services at a reasonable cost through appropriate regulatory and market means and collaborative efforts. See *id.* (describing means to reach mission). Because FERC is considered an independent agency, no more than three members of the five-member commission can be members of the same political party. See Law-



sion oversees the approval and implementation of interstate natural gas pipelines.<sup>39</sup> FERC is staffed by about 1,500 employees and has a budget of about \$350 million.<sup>40</sup> Moreover, FERC publishes procedures and guidelines to help natural gas companies and other interested parties gain a clear understanding of natural gas pipeline implementation procedures.<sup>41</sup>

### A. *Background on Eminent Domain*

The Fifth Amendment to the United States Constitution allows the government to take private property with just compensation, a process known as eminent domain.<sup>42</sup> Notwithstanding, the government's right to eminent domain is not unqualified.<sup>43</sup> Congress has identified different requirements and factors for FERC and the courts to consider when determining whether eminent domain is proper.<sup>44</sup>

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rence R. Greenfield, FED. ENERGY REG. COMM'N, *An Overview of the Federal Energy Regulatory Commission and Federal Regulation of Public Utilities* 3 (2017), <https://www.ferc.gov/about/ferc-does/ferc101.pdf> [<https://perma.cc/X7N3-V9L9>] (providing background on FERC). The Commission is also overseen by the judicial system and the executive and legislative branches do not have direct influence over it. *See id.* The President nominates commissioners and the Senate confirms them. *See id.* at 4-5 (describing composition of FERC); *see also Commission Members*, FERC, <https://www.ferc.gov/about/com-mem.asp?cst=2115691281350920884> [<https://perma.cc/S9B6-FNXV>] (last updated Mar. 12, 2019) (describing appointment process).

39. *See* Greenfield, *supra* note 38, at 19 (explaining FERC's authority).

40. *See id.* at 5 (describing the organizational structure and budget of FERC).

41. *See The Natural Gas Pipeline Application Process at FERC*, DEP'T OF ENERGY, <https://www.ferc.gov/about/ferc-infographic.pdf> [<https://perma.cc/3QFA-W2TZ>] (last visited Jan. 10, 2018) (detailing proper procedure for receiving approval to construct a pipeline).

42. *See* U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation"); *see also* Dolan v. City of Tigard, 512 U.S. 374, 384 (1994) (holding one principal purpose of Fifth Amendment is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole" (internal quotation marks omitted) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960))); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994) (holding Fifth Amendment "prevents the Legislature (and other government actors) from depriving private persons of vested property rights except for a 'public use' and upon payment of 'just compensation'"); *First English Evangelical Lutheran Church of Glendale v. Los Angeles Cty.*, 482 U.S. 304, 305 (1987) (holding that just compensation clause is designed not to limit governmental interference of property rights per se, but rather, to secure compensation in event of otherwise proper interference amounting to taking); *United States v. Jones*, 109 U.S. 513, 518 (1883) (holding right of eminent domain is inherent in sovereignty and exists without recognition by Constitution); *Kohl v. United States*, 91 U.S. 367, 369 (1875) (clarifying eminent domain is sovereign's right to take private property for own public uses rather than for use by a third party).

43. *See, e.g., First English*, 482 U.S. at 304 (finding that Fifth Amendment does not prohibit taking of private property, but instead places condition on exercise of that power).

44. *See, e.g., Natural Gas Act*, 15 U.S.C. § 717f(h) (2018) (detailing circumstances in which company may seek use of eminent domain to construct pipeline).

There are two main types of eminent domain taking procedures: standard condemnation and quick-take.<sup>45</sup> The Natural Gas Act (NGA) authorizes the government to take property through eminent domain for the purpose of constructing natural gas pipelines by following standard condemnation procedures.<sup>46</sup> Further, the NGA authorizes the government to grant eminent domain to private companies that are acting in the public interest.<sup>47</sup>

Moreover, the NGA requires a private company to obtain a certificate of public convenience and necessity, a document issued by FERC, in order to properly acquire the rights of way necessary to construct, operate, and maintain a pipeline.<sup>48</sup> Courts have identified a three prong test that must be met in order for a company to exercise eminent domain under the NGA: 1) the party must hold a FERC certificate of public convenience and necessity; 2) the party has not been able to acquire the property rights required to construct, operate, and maintain a FERC-approved pipeline by agreement with the landowners; and 3) the value of the property sought to be condemned must be greater than \$3,000.<sup>49</sup>

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45. For a further discussion of quick-take eminent domain procedure, see *infra* notes 53-56 and accompanying text. For a further discussion of standard condemnation, see *infra* notes 50-52 and accompanying text.

46. See 15 U.S.C. § 717f(h) (2018) (allowing eminent domain for construction of natural gas pipelines).

47. See *id.* (enumerating proper procedures for granting eminent domain before and during installation of natural gas pipelines). Section 717f(h) specifies the eminent domain procedures for constructing pipelines. See *id.* (explaining relevant regulation at issue). This regulation provides whichever district court in which the property is located with jurisdiction over disputes between companies and private landowners after the company has previously obtained a certificate of convenience and necessity. See *id.* This district court has the power to determine the rights of each party and the amount of compensation for the company's taking of private property. See *id.* (describing power legislative branch granted to judicial branch).

48. See *id.* (explaining proper procedure for FERC approval of natural gas pipelines under NGA). Rights of way means "an easement that permits entry or crossing of property to install, inspect, operate, and maintain piping and associated equipment for transporting natural gas." See *Easement*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining gas line easements and alternative terms used to describe same easement).

49. See *Transcon. Gas Pipe Line Co. v. Permanent Easement for 2.14 Acres*, No. CV 17-1725, 2017 WL 3624250, at \*2 (E.D. Pa. Aug. 23, 2017) (citing *Columbia Gas Transmission, LLC v. 1.01 Acres*, 768 F.3d 300, 304 (3d Cir. 2014); *Steckman Ridge GP, LLC v. Exclusive Natural Gas Storage Easement Beneath 11.078 Acres*, No. 08-168, 2008 WL 4346405, at \*12-13 (W.D. Pa. Sept. 19, 2008); *Alliance Pipeline L.P. v. 4.360 Acres of Land*, 746 F.3d 362, 364 (8th Cir. 2014); *Millennium Pipeline Co. v. Certain Permanent and Temporary Easements*, 777 F. Supp. 2d 475, 479 (W.D.N.Y. 2011), *aff'd*, 552 F. App'x 37 (2d Cir. 2014) (identifying requirements for natural gas pipeline certificate of convenience and necessity)). For example, utility companies can be granted eminent domain to install pipeline or electricity wires necessary to serve the public. See *Millennium Pipeline Co.*, 777 F. Supp. 2d at 479 (providing example). Three requirements must be met before a gas company can acquire property through eminent domain: 1) the gas company must obtain a letter of public convenience and necessity from FERC, 2) the gas

A standard condemnation, the most common type of eminent domain taking, occurs when a court enters a final judgment and determines that the compensation offered by the company for the property is just.<sup>50</sup> The specific procedure for this type of condemnation is set forth in Rule 71.1 of the Federal Rules of Civil Procedure.<sup>51</sup> In such a procedure, a party submits a complaint to the court stating the authority for the taking, a description of the property, a designation of every defendant who has an interest in each piece of property being contested, and the uses for which the property is to be taken.<sup>52</sup>

A quick-take represents a different eminent domain procedure that permits the immediate possession of private property.<sup>53</sup> The Declaration of Taking Act (DTA) grants the power of a quick-take, but the NGA does not mention such power.<sup>54</sup> When a quick-take occurs, the government files a “declaration of taking” that establishes the authority of the taking, the public use for the taking, a description of the land being taken, and an estimated compensation amount.<sup>55</sup> Once the estimated compensation is paid, the United States is automatically granted the property’s title.<sup>56</sup>

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company must show that negotiations to acquire the right of way were unsuccessful, and 3) the property owner must allege their property is worth more than \$3,000. *See* 15 U.S.C. § 717f(h) (2018) (providing conditions of natural gas pipeline approval). If all of these conditions are met, the gas company can obtain a right of way to the private property in district court rather than through FERC. *See id.* (describing procedure of natural gas pipeline approval).

50. *See* 40 U.S.C.A. § 3113 (Westlaw through Pub. L. No. 116-5) (describing procedures for government or government actors to properly obtain private property through standard condemnation eminent domain).

51. *See* Fed. R. Civ. P. 71.1 (enumerating procedures for condemning real or personal property through standard condemnation eminent domain).

52. *See id.* (enumerating procedures for standard condemnation eminent domain).

53. *See* 40 U.S.C.A. § 3114 (Westlaw current through Pub. L. 116-29) (describing procedures for government or government actors to properly obtain private property through quick-take eminent domain).

54. *See id.* (granting power of quick-take). *But see* 15 U.S.C. § 717f(h) (2018) (allowing eminent domain for construction of natural gas pipelines but failing to reference power of quick-take). Case law, however, identifies quick-take power. *See* *Transcon. Gas Pipe Line Co. v. Permanent Easements for 2.14 Acres & Temp. Easements for 3.59 Acres in Conestoga Twp.*, 907 F.3d 725, 736-37 (3d Cir. 2018) (“The NGA gives natural gas companies the power to acquire property by eminent domain, but it provides only for standard eminent domain power, not the type of eminent domain called ‘quick-take’ that permits immediate possession.”); *see also* *N. Border Pipeline Co. v. 86.72 Acres of Land*, 144 F.3d 469, 472 (7th Cir. 1998) (“One possible route to immediate possession of the defendants’ land would be the exercise of quick-take authority under . . . the federal Declaration of Taking Action . . . but [Plaintiff] does not argue that the Natural Gas Act incorporates these statutes.” (citations omitted)).

55. *See* 40 U.S.C.A. § 3114 (describing procedures for government or government actors to properly obtain private property through quick-take eminent domain).

56. *See id.* (describing procedures for the government or government actors to properly obtain private property through quick-take eminent domain). The actual just compensation is later determined by a court and often includes interest.

### B. *Natural Gas Pipeline Approval Process*

FERC provides an infographic on its website that outlines the natural gas pipeline approval process.<sup>57</sup> The infographic states:

- 1) companies wanting to build a new or modify an existing interstate natural gas pipeline must submit an application to FERC;
- 2) FERC's scientific, legal, and economic experts evaluate the environmental, cultural, geological, land use, and socioeconomic aspects of the project. As part of this review, FERC seeks written comments from the public and holds public scoping meetings;
- 3) FERC issues its analysis for further public comment;
- 4) after consideration of the environmental analysis; engineering, economic, legal, and policy reviews; and all public comments; FERC decides whether to approve or deny an application and, if approved, what conditions to apply to it;
- 5) all parties to an application can ask FERC for rehearing, or a new decision, if they are unsatisfied;
- 6) FERC considers this request before making a final decision;
- 7) all final decisions from FERC can be appealed to federal courts.<sup>58</sup>

In actuality, the natural gas pipeline approval process is more complex and intensive.<sup>59</sup> FERC's natural gas pipeline approval process commences when a company that wants to build an interstate natural gas pipeline submits an application or pre-filing application to FERC.<sup>60</sup> FERC's scientific, legal, and economic experts then evaluate several factors such as the environmental and cultural impacts, and then it issues its analysis for public comment.<sup>61</sup> Depending on who is being affected by the pipeline, public hearings may be required to elicit a holistic view of the pipeline's effects; there may be media coverage as well.<sup>62</sup> Private landowners who may be affected by the pipeline's projected route are then mailed

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*See id.* (identifying quick-take procedures). If the actual just compensation is more than the estimated just compensation, the government will have to pay the additional amount. *See id.* (clarifying delayed payment of just compensation).

57. *See The Natural Gas Pipeline Application Process at FERC*, *supra* note 41 (displaying infographic showing each step in the pipeline approval process).

58. *See id.* (detailing approval process).

59. *See generally An Interstate Natural Gas Facility on My Land?*, *supra* note 9 (describing natural gas pipeline process).

60. *See id.* at 4 (describing procedure). After a gas company decides to consider placing a pipeline that would run through private property, it may decide to participate in FERC's nonmandatory pre-filing process or it could complete independent projections. *See id.* (describing optional pre-filing process in which gas company may opt to participate).

61. *See id.* (describing process). These are called environmental studies and may include either an environmental impact statement or an environmental assessment. *See id.* (detailing FERC requirements and procedures in natural gas pipeline approval).

62. *See id.* (identifying opportunity for private citizens and interested parties to give feedback on natural gas pipelines).

a brochure informing them of the process and providing notice of potential eminent domain takings.<sup>63</sup> FERC reviews the application, makes a final decision to accept or deny, and, if the application is accepted, determines what conditions attach to that approval.<sup>64</sup>

During this time, FERC can make adjustments to the proposed pipeline route.<sup>65</sup> The gas company does not need to have all state and federal permits in hand so long as it is in the process of obtaining them.<sup>66</sup> If the pipeline is approved, the parties have thirty days from when the certificate was issued to seek a rehearing with FERC.<sup>67</sup> If it is approved, the company and the private citizens negotiate a compensation price and easement agreement.<sup>68</sup> All final decisions from FERC can be appealed to federal courts for rehearing.<sup>69</sup> A court can have jurisdiction over the matter if the party filed for a FERC rehearing within thirty days of the issuance of the certificate of public convenience and necessity.<sup>70</sup> Once a party files within a specific circuit, the circuit has “exclusive” jurisdiction over the sufficiency of FERC’s certificate of public convenience and necessity.<sup>71</sup>

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63. *See id.* (identifying notification procedures to inform private citizens of impeding takings through eminent domain).

64. *See The Natural Gas Pipeline Application Process at FERC, supra* note 41 (describing step FERC takes); Weidner, *supra* note 15 (describing procedure).

65. *See An Interstate Natural Gas Facility on My Land?, supra* note 9, at 4 (describing procedure).

66. *See Twp. of Bordentown v. FERC*, 903 F.3d 234, 243-45 (3d Cir. 2018) (“The mere ability to initiate condemnation proceedings, proceedings regarding land from which discharge into the United States’ navigable waters might not even occur, plainly is not an activity that the CWA prohibits prior to obtaining a Section 401 permit.”); *Del. Riverkeeper Network v. Sec’y Pa. Dep’t of Env’tl. Prot.*, 903 F.3d 65, 68 (3d Cir. 2018) (holding that the PADEP did not act arbitrarily or capriciously “by issuing a Water Quality Certification that was immediately effective despite being conditioned on Transco obtaining additional permits in the future”).

67. *See Transcon. Gas Pipe Line Co. v. Permanent Easements for 2.14 Acres & Temp. Easements for 3.59 Acres in Conestoga Twp.*, 907 F.3d 725, 736-37 (3d Cir. 2018) (describing need for appeal); *see also Adorers of Blood of Christ v. FERC*, 897 F.3d 187, 189-90 (3d Cir. 2018) (identifying that under section 717r(a), a party has thirty days from issuance of certificate to seek rehearing).

68. *See id.* (describing private negotiation between parties).

69. *See The Natural Gas Pipeline Application Process at FERC, supra* note 41 (describing procedure).

70. *See id.* (identifying alternative option if agreement cannot be reached); *see also Adorers*, 897 F.3d at 190 (noting party would be barred from appealing in court if FERC appeal was not filed within thirty days of issuance).

71. *See Natural Gas Act*, 15 U.S.C. §§ 717r(b), (d)(1) (2018) (identifying who has jurisdiction); *see also Adorers*, 897 F.3d at 190 (specifying chosen court of appeals to have sole power to “affirm, modify, or set aside” FERC’s order (quoting 15 U.S.C. § 717r(b))).

### III. DECISIONS CREATE A PUZZLING PICTURE: SUMMARY OF EMINENT DOMAIN CASES

In 2018, Transcontinental was a party in five federal courts of appeal cases regarding natural gas pipeline approvals.<sup>72</sup> Though these cases differ substantively, all address some aspect of the pipeline approval process.<sup>73</sup> Notably, in all five cases the courts decided in favor of Transcontinental.<sup>74</sup>

#### A. *Conestoga Township*

*Conestoga* was the first of several cases brought by Transcontinental in 2018 and focuses on the allowance of a preliminary injunction during the pipeline approval process.<sup>75</sup> Transcontinental sought to install a natural gas pipeline through privately owned property in Pennsylvania by obtaining the proper eminent domain permissions for easements from FERC.<sup>76</sup> The Atlantic Sunrise Expansion Project, the pipeline at issue, would run 197 miles and have the capacity to transport approximately 1,700 million cubic feet of gas per day.<sup>77</sup> On April 4, 2014, FERC ap-

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72. See *Land Lot 1049*, 910 F.3d at 1145 (holding that preliminary injunction allowing gas company onto landowner's property was proper because the right to condemn was "finally determined"); *Conestoga Twp.*, 907 F.3d at 729 (holding that just compensation was not required before a just taking and that procedure did not deprive landowners of opportunity to appeal to FERC); *Bordentown*, 903 F.3d at 246 (holding that FERC is permitted to conditionally issue certificate of public convenience before the proper CWA permits are obtained); *Del. Riverkeeper Network*, 903 F.3d at 69 (holding that providing a certificate before all required permits were acquired was not arbitrary or capricious and that a hearing did not need to be held); *Adorers*, 897 F.3d at 191 (holding that NGA provided exclusive means to contest FERC's order and that RFRA is not an exception).

73. See *Land Lot 1049*, 910 F.3d at 1145 (holding that preliminary injunction allowing gas company onto landowner's property was proper because the right to condemn was "finally determined"); *Conestoga Twp.*, 907 F.3d at 729 (holding that just compensation was not required before a just taking and that procedure did not deprive landowners of opportunity to appeal to FERC); *Bordentown*, 903 F.3d at 246 (holding that FERC is permitted to conditionally issue certificate of public convenience before the proper CWA permits are obtained); *Del. Riverkeeper Network*, 903 F.3d at 69 (holding that providing a certificate before all required permits were acquired was not arbitrary or capricious and that a hearing did not need to be held); *Adorers*, 897 F.3d at 191 (holding that NGA provided exclusive means to contest FERC's order and that RFRA is not an exception).

74. See *Adorers*, 897 F.3d at 191 (identifying cases where Transcontinental was party); see also *Land Lot 1049*, 910 F.3d at 1145 (same); Permanent Easement for 2.14 Acres, 907 F.3d at 729 (same); *Bordentown*, 903 F.3d at 246 (same); *Del. Riverkeeper Network*, 903 F.3d at 69 (same).

75. See *Conestoga Twp.*, 907 F.3d 725 at 729, 739-40 (holding preliminary injunction proper even though FERC's approval requirements were not all met).

76. See *id.* (describing facts). The proposed pipeline, called the Atlantic Sunrise Expansion Project, will run through Pennsylvania, Maryland, Virginia, North Carolina, and South Carolina. See *id.* (describing facts).

77. See *Lombardi & Hopkins*, *supra* note 16 (describing the Atlantic Sunrise Expansion Project).



proved Transcontinental's pre-filing process request.<sup>78</sup> During the pre-filing process, FERC received feedback from ninety-three speakers in addition to over 600 written comments from the community.<sup>79</sup> On March 31, 2015, Transcontinental filed the application for the construction of the natural gas pipeline.<sup>80</sup> FERC issued the final environmental impact statement (EIS) and an order issuing certificate, which is a certificate of public convenience and necessity, for the pipeline subject to certain conditions.<sup>81</sup> Subsequently, the landowners filed for a rehearing and stays on the certificate of public convenience and necessity as well as on the physical construction of the pipeline.<sup>82</sup>

Transcontinental offered compensation in excess of \$3,000 to the landowners, but the landowners rejected its offers.<sup>83</sup> As a result, on February 15, 2017, Transcontinental filed four condemnation actions against the landowners in district court.<sup>84</sup> Transcontinental filed for partial summary judgment and requested an injunction to allow the company to commence surveying and inserting the pipeline on the land.<sup>85</sup> The district

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78. *See Conestoga Twp.*, 907 F.3d 725 at 729 (noting FERC's distribution of a notice of intent to prepare an environmental impact statement, request for comments on environmental issues, and a notice of public scoping meetings (NOI)). 2,500 interested parties, including the government, interest groups, Native American tribes, affected property owners, and local media were informed of the impending scoping meetings. *See id.* (recounting facts of case).

79. *See id.* (identifying extent to which parties were interested).

80. *See id.* (recounting required FERC filings). After FERC informed interested parties, including landowners, that a natural gas pipeline application had been filed and issued a draft EIS, it gathered testimony from 203 speakers, obtained 560 written comments, and received 900 identical letters. *See id.* at 729-30. After two alternative pipeline routes were established, additional notices were sent out and twenty-five further comments were received. *See id.* at 730 (detailing adjustments made to the initial pipeline proposal as a result of interested party comments).

81. *See id.* (describing FERC's role in pipeline approval process). FERC issued the EIS on January 9, 2017, and the certificate of convenience and necessity on February 3, 2017. *See id.* (detailing dates of actions). The Commission reasoned that the benefits of the pipeline would outweigh the minimal adverse effects on landowners and surrounding communities and lack of adverse effect on existing customers and other pipelines. *See id.* (describing district court's reasoning in ruling in favor of gas company). Conditions of the certificate included the pipeline's construction and service date to be within three years of the order issuing certificate and specific environmental as well as rate schedule requirements. *See id.* (identifying conditions on FERC's approval of pipeline for the Atlantic Sunrise Expansion Project).

82. *See id.* at 730-31 (describing procedural history).

83. *See id.* at 731 (explaining actions taken by Transcontinental to comply with FERC requirements).

84. *See id.* (describing judicial procedural history). The plaintiffs brought actions pursuant to FRCP 71.1. *See id.* (identifying applicable Federal Rule of Civil Procedure).

85. *See id.* (providing facts of case). The injunction for survey access was requested only on the actions brought by Hilltop and Hoffman. *See id.* (providing further pertinent details of case). Hilltop and Hoffman are two of the many interested parties in the case. *See id.* (explaining parties to the suit).



court denied the injunction because it did not have the opportunity to determine the merits of the condemnation action but granted Transcontinental limited survey access.<sup>86</sup> Following the summary judgment briefing, Transcontinental filed an omnibus motion for a preliminary injunction.<sup>87</sup> The district court granted partial summary judgment in favor of Transcontinental as well as an omnibus motion for a preliminary injunction; the landowners appealed the preliminary injunction.<sup>88</sup>

The Third Circuit heard the matter and upheld the district court's decision to grant partial summary judgment and omnibus motion for a preliminary injunction in favor of Transcontinental.<sup>89</sup> The court began its

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86. *See id.* (discussing court's reasoning). The district court clarified that a preliminary injunction could be proper once Transcontinental established its right to condemn. *See id.* (clarifying district court's holding).

87. *See id.* (describing procedural history). An omnibus motion is a motion that includes smaller motions and "makes several requests or asks for multiple forms of relief." *See Motion*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining motion). The district court heard oral arguments on the motion, during which a witness for Transcontinental testified that Transcontinental would need access to the land through the right of way by August 18, 2017, "or else it would suffer various harms." *See Conestoga Twp.*, 907 F.3d at 731-32 (recounting testimony from judicial hearing). During the oral argument, all four landowners had the opportunity to testify and all acknowledged that they participated in the FERC administrative process. *See id.* (detailing district court trial).

88. *See id.* at 732 (explaining procedural background of decision). The district court considered the landowners' due process claims but held that the court lacked jurisdiction over the claims because attacks on FERC's certificate were outside of the court's jurisdiction. *See id.* (identifying district court's holding and reasoning). The proper procedure for appealing the FERC certificate requires going first through FERC's procedures. *See id.* (describing proper procedure for appealing FERC certificate). Only after all of the legislative measures have been exhausted can a party appeal the FERC certificate to a district court. *See id.* (describing proper procedure). The district court noted that had there been jurisdiction, there was "adequate due process" because of sufficient oral argument participation, an FERC rehearing request, and an appeal within the D.C. Circuit Court of Appeals. *See id.* (describing district court holding and reasoning). The district court also addressed the lack of time limit that FERC had to rule on the landowners' motion for rehearing and stay, and the district court held that a delay in judgment does not constitute a deprivation. *See id.* (describing district court holding and reasoning). The district court rejected the argument that all of the conditions of a FERC certificate needed to be met prior to the exercise of eminent domain. *See id.* Instead, the court clarified that neither the NGA nor the specific certificate contained such requirements. *See id.* (describing district court holding and reasoning). In regard to the preliminary injunction, the district court found that all four factors were met because (1) there were no remaining merit-based issues, (2) the gas company would suffer irreparable harm if the right of way was delayed, (3) Transcontinental had the substantive rights to possession, (4) the landowners would have recourse if a decision was subsequently altered, and (5) there was a strong public interest in the pipeline. *See id.* at 732-33 (describing district court holding and reasoning). In regard to irreparable harm, the district court identified construction delays, nonconformity with environmental survey conditions, possible breach of shipper contracts, and monetary harm. *See id.* at 733 (detailing district court's reasoning).

89. *See id.* at 728 (describing holding of court). The preliminary injunction gave Transcontinental immediate possession of the rights of way on the landown-

analysis with a discussion of whether Transcontinental met the requirements of section 717(h), finding that Transcontinental satisfied all of the requirements.<sup>90</sup> In reaching that conclusion, the Third Circuit analyzed the record, specifically the three-year administrative review, which included public participation and occurred before FERC granted the certificate of public convenience and necessity.<sup>91</sup>

Next, the Third Circuit addressed whether the district court effected a quick-take when it granted partial summary judgment, awarded possession of the rights-of-way, and provided equitable relief in the form of a preliminary injunction.<sup>92</sup> The Third Circuit explained eminent domain broadly and described two primary types of governmental eminent domain: quick-take and standard condemnation.<sup>93</sup> The Third Circuit distinguished quick-take from a standard condemnation by the “different procedures and opportunities for participation” included in a standard condemnation proceeding.<sup>94</sup> The Third Circuit noted the proper procedure for effecting a standard condemnation includes establishing one’s substantive rights by filing for summary judgment under a standard con-

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ers’ property. *See id.* (explaining result of lower court holding). First, the Third Circuit Court of Appeals held that the district court granting a preliminary injunction effectively constituted a quick-take. *See id.* (describing court’s analysis). Second, the court held that Transcontinental was not required to pay just compensation to landowners before it could take possession of the rights-of-way under the Fifth Amendment’s Due Process and Takings Clauses. *See id.* (describing analysis). Third, the court held that the district court’s procedures did not violate separation of powers through a usurpation of legislative power or by overstepping the boundaries of judicial power. *See id.* (describing analysis). Finally, the court held that the district court’s procedures did not deprive landowners of the opportunity to challenge FERC’s decision to issue the certificate of public convenience and necessity. *See id.* (describing analysis).

90. *See id.* at 729 (describing court’s reasoning). To meet section 717f(h), a company must demonstrate that it holds a certificate of public convenience and necessity from FERC, that it was unable to acquire the right of way through negotiation with the landowner, and that the amount claimed by the owner of the property is greater than \$3,000. *See id.* (detailing requirements of section 717f(h)). For a further discussion of section 717f(h), see *supra* notes 44-54 and accompanying text.

91. *See id.* (explaining court’s reasoning in determining whether section 717f(h) requirements were met). For a further discussion of the administrative review, see *supra* notes 78-82 and accompanying text.

92. *See id.* at 733-35 (explaining issues the Third Circuit addressed).

93. *See id.* at 734-35 (finding that the NGA identifies standard condemnation power, not quick-take power). Quick-takes are permitted by 40 U.S.C. § 3114 while standard condemnations are permitted by 40 U.S.C. § 3113. *See* 40 U.S.C. § 3113 (2018) (granting condemnation power to federal government officer); 40 U.S.C. § 3114 (2018) (granting the government power to file declaration of taking at any court proceeding). For a further discussion of a quick-take, see *supra* notes 53-56 and accompanying text. For a further discussion of standard condemnation, see *supra* notes 50-52 and accompanying text.

94. *See Conestoga Twp.*, 907 F.3d at 734-35 (identifying differences between two eminent domain procedures). The different opportunities to participate include speaking and writing comments to FERC. *See id.* at 729 (specifying what court meant by participation).

demnation through an abuse of discretion standard.<sup>95</sup> The court recognized that Transcontinental had properly followed this procedure in the district court below.<sup>96</sup> The Third Circuit clarified the difference between granting substantive rights that were not previously authorized and “merely hasten[ing]” the enforcement of substantive rights that were previously granted.<sup>97</sup> The Third Circuit identified that, in this case, the process was only being hastened and concluded that the preliminary injunction was proper.<sup>98</sup>

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95. *See id.* at 733 (explaining the proper procedure). The Third Circuit established that the appeal before it was questioning only the constitutionality of the district court’s decision and not the actual application of the preliminary injunction test. *See id.* (explaining matters court had jurisdiction over and which matters fall under legislative authority). Further, the Third Circuit identified that it does not have jurisdiction over any of the due process claims that contest or collaterally attack the FERC certificate of public convenience and necessity. *See id.* at 740-41 (explaining matters court had jurisdiction over and which matters fall under legislative authority).

96. *See id.* at 734-35 (identifying that Transcontinental filed its complaint under Rule 71.1, condemnation, and motion for summary judgment).

97. *See id.* (distinguishing landowners’ argument). The landowners argued that the use of a preliminary injunction amounted to a quick-take because it granted a substantive right to immediate access and that only Congress can expressly authorize immediate possession. *See id.* (explaining arguments). The Third Circuit disagreed with the landowners’ argument and held that just because quick-take power exists does not mean that other types of immediate access do not exist. *See id.* at 735-36 (explaining reasoning for coming to a determination). Going further, the Third Circuit clarified that even if Transcontinental’s actions did constitute a quick-take, the fact the NGA did not explicitly grant quick-take authority did not mean that the power was unavailable. *See id.* at 735 (clarifying allowance of quick-take even though it was not applicable in the matter at hand). The Third Circuit reasoned that Congress did not intend “to remove the judiciary’s access to equitable remedies to enforce an established substantive right.” *See id.* at 734, 741 (describing Third Circuit’s holding). Instead, the Third Circuit’s holding indicates that a quick-take is still a proper procedure during the construction of natural gas pipeline approvals. *See id.* (clarifying Third Circuit holding).

98. *See id.* at 736 (citing *Transwestern Pipeline Co. v. 17.19 Acres, 550 F.3d 770, 771* (9th Cir. 2008); *N. Border Pipeline Co. v. 86.72 Acres, 144 F.3d 469, 471* (7th Cir. 1998)) (explaining court’s holding). The Third Circuit distinguished several cases cited by the landowners in support of their argument before concluding. *See id.* The Third Circuit reasoned that because all of the cases cited by the landowners involved rulings where the substantive right to condemn was not established before seeking a preliminary injunction, they could be distinguished from the present case. *See id.* at 736-37 (describing court’s reasoning). In *Transwestern*, the Ninth Circuit Court of Appeals held that because the company did not obtain an order of condemnation, the preliminary injunction was improper. *See Transwestern, 550 F.3d at 777-78* (describing Ninth Circuit’s holding). Having a FERC certificate of public convenience and necessity and meeting the factors set out in section 717f(h) were insufficient to establish the right to condemn. *See id.* (explaining Ninth Circuit’s holding and reasoning). The Ninth Circuit, however, stated that if the gas company had followed the procedure of first obtaining an order of condemnation, such as through summary judgment, a preliminary injunction would be proper. *See id.* (explaining proper procedure). In *Northern Border*, the Seventh Circuit similarly decided that a preliminary injunction was improper where the gas company did not obtain an order that determined the right to condemn. *See N. Border, 144 F.3d at 469* (describing Seventh Circuit’s holding). The

landowners in *Conestoga Township* relied greatly on a statement from *Northern Border*: “A preliminary injunction may issue only when the moving party has a substantive entitlement to the relief sought. . . . [The company has] an entitlement that will arise at the conclusion of the normal eminent domain process’ but not the right of immediate access.” See *Conestoga Twp.*, 907 F.3d at 733 (alteration in original) (describing misplaced reliance). The Third Circuit clarified that the *Northern Border* dicta was correct; the NGA did not create an entitlement to immediate possession nor did it include quick-take authority. See *id.* (explaining reasoning of Third Circuit in reaching its determination). The Third Circuit stated, however, that the dicta was inapplicable here because unlike the case at hand, the gas company in *Northern Border* did not properly have the right to condemn. See *id.* at 736-37 (explaining reasoning of court). The court continued to distinguish cases upon which the landowners relied, namely ones that could be read to require just compensation prior to the condemning and taking of property. See *id.* at 737 (citing *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 10 (1984); *Cherokee Nation v. S. Kan. Ry. Co.*, 135 U.S. 641, 643 (1890); *Atl. Seaboard Corp. v. Sterkenburg*, 318 F.2d 455, 459-60 (4th Cir. 1963)). The Third Circuit stated that established law indicates that condemnation can occur so long as, during the proceedings, landowners have the “opportunity . . . to be heard and to offer evidence as to the value of the land taken.” See *Conestoga Twp.*, 907 F.3d at 733; see also *id.* at 737 n.71 (“[W]hen the alleged deprivation is effectively a physical taking, procedural due process is satisfied so long as private property owners may pursue meaningful post-deprivation procedures to recover just compensation.” (alteration in original) (quoting *Presley v. Charlottesville*, 464 F.3d 480, 489-90 (4th Cir. 2006))); *Collier v. Springdale*, 733 F.2d 1311, 1314 (8th Cir. 1984) (establishing policy). The Third Circuit distinguished the aforementioned cases by pointing out that the Fifth Amendment requires only the availability of a “provision for obtaining compensation.” See *id.* at 737 (quoting *Preseault v. I.C.C.*, 494 U.S. 1, 11 (1990) (distinguishing landowners’ argument from case law)). The Third Circuit clarified that none of the cases require a company to exercise its option to buy the property in order for the possession of the property to vest. See *Conestoga Twp.*, 907 F.3d at 737 (declining to follow landowner’s argument). The Third Circuit next rejected the argument that a preliminary injunction should be suspended during condemnation proceedings. See *id.* at 738 (rejecting landowners’ argument). The Third Circuit stated the landowners failed to point to any authority in support of their argument that a preliminary injunction should not be issued. See *id.* (reasoning if there is no case law or procedure to support a motion to deny a preliminary injunction, it cannot be upheld). A history of the NGA reveals that when the act was first passed, district courts had to follow state eminent domain procedures as closely as possible. See *id.* (presenting background of the NGA). States that did not have a statutorily implemented procedure for eminent domain would utilize their general private utilities laws to accomplish the same objective. See *id.* at 738 n.77 (explaining what occurred). This system, however, became moot when Federal Rule of Civil Procedure (FRCP) 71.1 was passed. See *id.* at 738 (presenting background). FRCP 71.1 institutionalized a uniform eminent domain proceeding that supersedes state law. See *id.* (explaining current state of law). “It is clear to us that Rule 71A was promulgated to override a number of confusing federal eminent domain practice and procedure provisions, such as that of 15 U.S.C. § 717f(h), and to provide a unified and coherent set of rules and procedures to be used in deciding federal eminent domain actions.” *Id.* at 738 n.79 (internal quotation marks omitted) (quoting *E. Tenn. Nat. Gas Co. v. Sage*, 361 F.3d 808, 822 (4th Cir. 2004)); see also *S. Nat. Gas Co. v. Land, Cullman Cty.*, 197 F.3d 1368, 1375 (11th Cir. 1999) (identifying purpose of rule). On the other hand, the Third Circuit noted that other circuits have disagreed with the notion that the NGA ensures the occurrence of “a hearing that itself affords due process” with respect to the taking because the statute provides that eminent domain actions conform with the practice and procedure of such actions in the courts of the state where the property is

B. *Land Lot 1049*

*Land Lot 1049* spotlights the leeway courts provide to gas companies by allowing notice requirements for an extended time period to be proper when forty-eight hours' notice was required by standard condemnation proceedings.<sup>99</sup> On March 19, 2015, Transcontinental filed an application with FERC for approval of a proposed natural gas pipeline referred to as the Dalton Expansion Project.<sup>100</sup> The Dalton Expansion Project was a proposed pipeline that would run from Mercer County, New Jersey through Georgia, eventually connecting with another pipeline in Mississippi.<sup>101</sup> During the pre-application process of the pipeline, Transcontinental notified potentially-affected landowners of possible eminent domain takings of their land as a result of the pipeline.<sup>102</sup> Official notice of FERC's environmental scoping was mailed to landowners and published in the Federal Register in October 2014.<sup>103</sup> Transcontinental submitted the official application to FERC in March 2015, and FERC approved the application and issued the certificate of convenience in August 2016.<sup>104</sup> The approved application included two alternate routes for the pipeline as a result of environmental concerns with the pipeline.<sup>105</sup>

Transcontinental filed condemnation proceedings against several landowners in Georgia to obtain an easement to access the landowners' property after FERC issued a certificate of necessity and public convenience.<sup>106</sup> Transcontinental had proposed easements to the landowners that went beyond the scope of FERC's approvals.<sup>107</sup> For instance, Transcontinental sought to gain indefinite easements for access to the landowners' entire property in order to transport several substances including

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situated. *See id.* (internal quotation marks omitted) (quoting *Del. Riverkeeper Network v. FERC*, 895 F.3d 102, 110-11 (C.A.D.C. 2018) (placing emphasis on following both state and federal procedures)).

99. *See* *Transcon. Gas Pipe Line Co. v. 6.04 Acres Over Parcel(s) of Land Approx. 1.21 Acres Situated in Land Lot 1049*, 910 F.3d 1130, 1141, 1150 (11th Cir. 2018) (noting favor to gas company).

100. *See id.* (describing case at issue).

101. *See id.* at 1141-42 (describing facts). Natural gas would be gathered from the Marcellus Shale and transported to Mercer County through a different pipeline. *See id.* (describing proposed pipeline plan). Long-term contracts for transportation services were also executed and would occur only if the pipeline was approved by FERC. *See id.* at 1142 (identifying dependency for pipeline to be completed in a specified amount of time).

102. *See id.* (noting Transcontinental also held open houses in several cities during this period).

103. *See id.* (noting steps taken to inform landowners). FERC subsequently filed a second notice as well. *See id.* at 1142-43 (identifying additional notice procedures).

104. *See id.* (describing facts of case).

105. *See id.* at 1143 (identifying alternative pipeline routes considered and adopted by FERC during process of pipeline approval).

106. *See id.* at 1143-44 (describing facts of case). 78% of the easements necessary for the Dalton Expansion Project were gathered at this time. *See id.* at 1145.

107. *See id.* at 1145-46 (describing how company overstepped in contracting).

“[natural] gas, oil petroleum products, or any other liquids, gases, or substances which can be transported through pipelines” when the NGA only authorizes rights of ways for natural gas transportation.<sup>108</sup>

The district court held that it had jurisdiction over the condemnation proceedings and issued a preliminary injunction permitting Transcontinental to access the landowners’ property to begin construction.<sup>109</sup> The district court limited the condemnation to the “extent depicted on the relevant alignment sheets and survey plats” that were previously approved by FERC.<sup>110</sup> The condemnation proceedings also required Transcontinental to post bond and give forty-eight hours’ notice before entering the property.<sup>111</sup> Transcontinental gave blanket notice to landowners, stating that it would be assessing the land soon and construction would take nine-to-twelve months.<sup>112</sup> Though Transcontinental did not specifically give forty-eight hours’ notice of entry to the landowner’s property, the district court held that the notification was sufficient to satisfy the notice requirement.<sup>113</sup> Subsequently, the pipeline was installed.<sup>114</sup>

At the time the case was appealed to the Eleventh Circuit Court of Appeals, the landowners had still not yet been compensated for the pipeline on their property and argued that the flow of natural gas through their property constituted an ongoing trespass that would continue until they were compensated and title was transferred to the company.<sup>115</sup> The Eleventh Circuit held that the district court had proper jurisdiction over the issuance of a preliminary injunction that provided Transcontinental with access onto the disputed land.<sup>116</sup> The court reasoned that the injunction was proper because Transcontinental’s right to condemn was “finally determined” through a motion for summary judgment.<sup>117</sup> The Eleventh

108. *See id.* at 1144 (explaining Transcontinental’s actions in privately negotiating easements with landowners).

109. *See id.* at 1151-52 (describing holding of district court in favor of Transcontinental).

110. *See id.* at 1148 (describing holding and limitations district court placed on its ruling in favor of Transcontinental).

111. *See id.* at 1150 (describing holding of district court and procedures that needed to be followed). Transcontinental was required to provide notice and give a description of the “nature and duration” of its access to the property. *See id.* (describing requirements).

112. *See id.* at 1151 (describing facts of case that led to appeal).

113. *See id.* (describing holding of district court).

114. *See id.* (describing holding of district court and procedures that needed to be followed).

115. *See id.* (describing court’s reasoning in making its determination).

116. *See id.* at 1153-54 (upholding the district court’s decision).

117. *See id.* at 1152 (reasoning the Eleventh Circuit should align its holding with those of other circuits). The Eleventh Circuit referenced similar decisions made in other circuits. *See id.* (identifying persuasive authority). The Eleventh Circuit stated: “Every circuit that has addressed this issue has held that a preliminary injunction granting immediate access is permissible so long as the pipeline company’s right to condemn the property has been finally determined, such as through the grant of a motion for summary judgment, and all other requirements



Circuit joined the Third, Fourth, Seventh, Eighth, and Ninth Circuits in holding that a “district court may, in appropriate circumstances, issue a preliminary injunction granting a pipeline company immediate access to property that it has an established right to condemn under the Natural Gas Act.”<sup>118</sup>

### C. *Township of Bordentown*

*Township of Bordentown* found that property ownership in an eminent domain taking can be transferred before the gas company obtains all of the required permits.<sup>119</sup> On January 6, 2017, the Township of Bordentown, Township of Chesterfield, and Pinelands Preservation Alliance (Bordentown Plaintiffs) brought a lawsuit against FERC, the New Jersey Department of Environmental Protection (NJDEP), and Transcontinental.<sup>120</sup> Transcontinental sought approvals from FERC and NJDEP for its proposed Garden State Expansion Project that would place natural gas pipeline through freshwater wetlands in New Jersey.<sup>121</sup> In addition to the normal natural gas pipeline approval process, Transcontinental had to obtain additional water permits.<sup>122</sup> NJDEP held two public hearings and received over 1,800 written comments specifically regarding New Jersey water quality concerns.<sup>123</sup> Transcontinental obtained a certificate of public convenience and necessity from FERC following the standard process, but FERC conditioned the certificate of public convenience and necessity on Transcontinental first obtaining the necessary state water quality permits.<sup>124</sup>

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for issuance of a preliminary injunction have been met.” *See id.* (citing *Transcon. Gas Pipe Line Co. v. Permanent Easements for 2.14 Acres & Temp. Easements for 3.59 Acres in Conestoga Twp.*, 907 F.3d 725, 735-37 (3d Cir. 2018); *Columbia Gas Transmission, L.L.C. v. 1.01 Acres*, 768 F.3d 300, 314-16 (3d Cir. 2014); *All. Pipeline L.P. v. 4.360 Acres*, 746 F.3d 362, 368-69 (8th Cir. 2014); *Transwestern Pipeline Co. v. 17.19 Acres of Prop.*, 550 F.3d 770, 776-78 (9th Cir. 2008); *E. Tenn. Nat. Gas Co. v. Sage*, 361 F.3d 808, 823-30 (4th Cir. 2004) (concluding that a pipeline company could not obtain a preliminary injunction allowing immediate possession of the defendants’ properties because it did not first demonstrate a substantive entitlement to immediate possession))). The Eleventh Circuit adopted the same rule as the other circuits, holding “a district court may, in appropriate circumstances, issue a preliminary injunction granting a pipeline company immediate access to property that it has an established right to condemn under the Natural Gas Act.” *See id.* (identifying agreement among circuits regarding proper procedure).

118. *See id.* at 1152 (noting agreement among circuits).

119. *See Twp. of Bordentown v. FERC*, 903 F.3d 234, 243-45 (3d Cir. 2018) (identifying that it was proper because construction could not commence before the permits were obtained).

120. *See id.* (describing facts of case).

121. *See id.* at 243 (describing facts of case).

122. *See id.* (identifying additional requirements).

123. *See id.* at 245 (describing facts of case adhering to FERC procedural requirements).

124. *See id.* (describing facts of case).



Under the Clean Water Act (CWA), states have the power to establish minimum water quality standards, including the regulation of pollutants into bodies of water in the state.<sup>125</sup> Natural gas pipeline companies must adhere to the CWA when a natural gas pipeline project discharges into or displaces water into navigable waters of the United States.<sup>126</sup> To comply with the CWA, a company must adhere to federal discharge limitations and state water quality standards.<sup>127</sup>

The Bordentown Plaintiffs appealed FERC's issuance of Transcontinental's Garden State Expansion Project pipeline permits and NJDEP's denial of an adjudicatory hearing on the permit to the Third Circuit Court of Appeals.<sup>128</sup> Bordentown hoped to prevent the expansion of Transcontinental's pipeline facilities.<sup>129</sup> The Bordentown Plaintiffs also raised concerns about the conditional certificate issuance and NJDEP's denial of an adjudicatory hearing.<sup>130</sup> The Third Circuit ruled in favor of FERC and held that the Bordentown Plaintiffs' challenges to FERC's orders lacked merit.<sup>131</sup> The Third Circuit also held that NJDEP was wrong to deny an adjudicatory hearing, but it did not address substantive challenges and left NJDEP to decide the sufficiency of NJDEP portion of the permits.<sup>132</sup> Moreover, the Third Circuit held that FERC is permitted to conditionally issue a certificate of public convenience before the proper CWA permits are obtained.<sup>133</sup> Nevertheless, construction could not commence on the approved project until all of the state permits were obtained.<sup>134</sup> But, as a result of the conditional certificate, Transcontinental was able to commence standard condemnation earlier, and ownership of the property

125. *See id.* at 243-44 (identifying relevant law).

126. *See id.* (detailing applicability of law).

127. *See id.* (identifying procedures to adhere with law).

128. *See id.* at 245-46 (describing facts of case). An adjudicatory hearing is "an agency proceeding in which person's rights and duties are decided after notice and opportunity to be heard." *See Hearing*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining what was denied to Bordentown Plaintiffs). The judiciary hearing was denied because NJDEP believed that the Third Circuit had exclusive jurisdiction. *See Twp. of Bordentown*, 903 F.3d at 246 (explaining reasoning for denial).

129. *See id.* (describing facts of case).

130. *See id.* at 243 (describing facts of case).

131. *See id.* at 243 (describing court's holding). FERC's issuance of the certificate of public necessity and convenience complied with section 401 of the CWA for water quality certification: FERC was not required to consider cumulative impacts of the proposed project and another proposed pipeline to properly complete a NEPA review; FERC was not required to conduct an environmental analysis of the pipeline because the pipeline is intrastate; FERC's application was not unreasonable under NEPA; FERC was not arbitrary and capricious in concluding that the project's groundwater impacts would not be significant; FERC was not arbitrary and capricious in concluding that the proposed project would be required by public convenience and necessity; and a civil action within the Natural Gas Act refers only to civil cases brought in courts of law or equity. *See id.* (detailing court's holding and reasoning).

132. *See id.* (describing Third Circuit's holding).

133. *See id.* (describing Third Circuit's holding).

134. *See id.* at 246 (identifying limitations to rule).

could transfer sooner.<sup>135</sup> The Third Circuit reasoned that adopting the Bordentown Plaintiffs' argument would "expand the CWA from a statute meant to safeguard the nation's water sources to a statute regulating the initiation of an interstate pipeline's construction process."<sup>136</sup> As a result, the Third Circuit instead concluded that ownership could transfer before the CWA permits were received.<sup>137</sup>

#### D. *Delaware Riverkeeper*

*Delaware Riverkeeper Network v. Secretary Pennsylvania Department of Environmental Protection*<sup>138</sup> identifies that plaintiffs challenging the construction of a gas pipeline do not need to exhaust state agency appellate avenues before seeking redress in federal court and found a water certification to be proper before all required permits are obtained.<sup>139</sup> In spring of 2015, Transcontinental filed an application with FERC for natural gas pipeline approval for the Atlantic Sunrise Project and simultaneously filed an application with the Pennsylvania Department of Environmental Protection (PADEP) for a water quality certification.<sup>140</sup> PADEP granted the water certification with certain conditions attached.<sup>141</sup> Subsequently, Delaware Riverkeeper filed suit in a district court within the Third Circuit; the Third Circuit identified that both parties agreed that both FERC and PADEP's approvals had to be obtained before construction could commence.<sup>142</sup> Delaware Riverkeeper, a non-profit that advocates for water quality throughout the Delaware River Watershed, argued that PADEP's decision was not final because Pennsylvania's Environmental Hearing Board did not hear the matter on appeal.<sup>143</sup> The Third Circuit held that PADEP's decision was final, and as such the court had jurisdiction over the

135. *See id.* (describing practical result).

136. *See id.* at 247 (detailing Third Circuit's reasoning).

137. *See id.* (holding that ownership could transfer).

138. 903 F.3d 65 (3d Cir. 2018).

139. *See id.* at 68, 76 (describing case).

140. *See id.* at 69 (describing facts of case). Similar to the process of obtaining a certificate from FERC, PADEP posted notice of possible development in the Pennsylvania Bulletin (similar to the Federal Register) and received feedback regarding the proposal. *See id.* (describing facts of case).

141. *See id.* (describing facts of case). These conditions included

1. a permit under the National Pollutant Discharge Elimination System, 25 PA. CODE §§ 92a.1–104, covering the discharge of water during hydrostatic pipeline testing; 2. a permit under Chapter 102 of PADEP's own regulations, 25 PA. CODE §§ 102.1–51, covering erosion and sediment disturbance associated with pipeline construction; and 3. a permit under Chapter 105 of the Department's regulations, 25 PA. CODE §§ 105.1–449, covering obstructions of and encroachments on Pennsylvania waters.

*See id.* (describing conditions).

142. *See id.* (finding that petitioners simultaneously filed suit with the district court and Pennsylvania's Environmental Hearing Board).

143. *See Del. Riverkeeper Network*, 903 F.3d 65 at 70 (describing Delaware Riverkeepers' argument); DELAWARE RIVERKEEPER NETWORK, *Who We Are*, <https://>

case.<sup>144</sup> For a decision to be final, it must not be “tentative or interlocutory” by nature, but rather be a decision “by which rights or obligations have been determined, or from which legal consequences will flow.”<sup>145</sup> The Third Circuit also found that water quality certifications can be granted without all proper permits being obtained because construction will not begin before the permits are obtained.<sup>146</sup> As a result, condemnation proceedings can move forward without obtaining all required permits.<sup>147</sup>

### E. *Adorers*

*Adorers* recognized that the NGA provides the exclusive procedure for judicial review of natural gas pipeline approvals regardless of other federal claims.<sup>148</sup> In 2014, Transcontinental contacted FERC about a proposed pipeline project, the Atlantic Sunrise Project, and FERC sent notice to interested parties, including the *Adorers*, requesting feedback.<sup>149</sup> The *Adorers* did not participate in the public comment portion of FERC’s natural gas pipeline approval process.<sup>150</sup> The *Adorers* brought a claim against FERC and Transcontinental for violation of the Religious Freedom Restoration Act (RFRA).<sup>151</sup> The *Adorers* are a “vowed religious order of Roman Catholic women” who have a deeply-held religious belief that compels them to preserve the earth as God’s creation; a belief which includes

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www.delawareriverkeeper.org/who-we-are (last visited June 15, 2019) (noting the Watershed runs through Pennsylvania, New Jersey, New York, and Delaware.).

144. *See Del. Riverkeeper Network*, 903 F.3d at 72 (internal quotation marks omitted) (quoting *Del. Riverkeeper Network v. Sec’y of Pa. Dep’t of Envtl. Prot.*, 870 F.3d 171, 178 (3d Cir. 2017) (describing what constitutes a final decision)).

145. *See Del. Riverkeeper Network*, 903 F.3d 65 at 72 (internal quotation marks omitted) (quoting *Del. Riverkeeper Network*, 870 F.3d at 178 (describing what constitutes a final decision)).

146. *See id.* at 76-77 (reasoning issuance to be proper).

147. *See id.* at 77 (identifying practical result).

148. *See Adorers of Blood of Christ v. FERC*, 897 F.3d 187, 190-91 (3d Cir. 2018) (holding that RFRA claims are not an exception to the NGA process).

149. *See id.* (identifying Transcontinental’s pipeline for which it sought eminent domain). FERC sent notice to about 2,500 interested parties, including property owners. *See id.* (noting public participation in pipeline approval process). The notice included dates and times of public meetings in 2014. *See id.* (detailing notice sent to landowners who had an interest in the project). Over 600 written responses were received and ninety-three speakers gave feedback about the proposed pipeline. *See id.* (describing feedback FERC considers when making determination).

150. *See id.* at 191 (describing facts of case). The public comment portion included a second round of notices FERC sent out after changes were made to the proposed pipeline route, as well as an opportunity to provide feedback, EIS review, and four additional public hearings in 2016. *See id.* at 192 (providing details on extent of feedback opportunities offered to interested parties).

151. *See id.* at 192 (describing case).

caring for the land in a way that protects and preserves the Earth.<sup>152</sup> For this reason, the construction of a natural gas pipeline on the Adorers' land conflicted with their religious beliefs.<sup>153</sup>

FERC issued Transcontinental a certificate of public convenience and necessity in February 2017.<sup>154</sup> The Adorers did not grant Transcontinental an easement to access their land for construction during private negotiations.<sup>155</sup> As a result, Transcontinental filed a condemnation proceeding against the Adorers, but the Adorers did not respond to the complaint.<sup>156</sup> The district court gave Transcontinental the right to condemn on July 7, 2017, and granted a preliminary injunction for the rights of way on the Adorers' land on August 23, 2017.<sup>157</sup>

The Adorers did not respond or object to any of Transcontinental's actions until July 14, 2017, when the Adorers filed a claim against FERC and Transcontinental in district court under the RFRA.<sup>158</sup> The district court dismissed the case for lack of subject matter jurisdiction because the Adorers did not comply with the procedures set forth in the NGA to review FERC's orders; namely, the requirement that the plaintiff seek a rehearing within thirty days.<sup>159</sup> The district court held that the Adorers could not bring a claim because they did not seek rehearing from FERC within thirty days of receiving the certificate of necessity and public convenience issuance.<sup>160</sup> The Adorers appealed to the Third Circuit claiming that the RFRA supersedes other laws.<sup>161</sup>

On appeal, the Third Circuit held that invoking federal question jurisdiction through the RFRA claim is not an exception to the NGA's specific procedure for judicial review of natural gas pipeline approval.<sup>162</sup> Instead, the Third Circuit held that the NGA and RFRA procedurally com-

152. *See id.* at 190 (describing landowner and origins of case). The land is used to grow crops and sponsor St. Anne's Retirement Community. *See id.* at 191 (describing use of land in dispute).

153. *See id.* (describing Adorers' reasoning). The Adorers referenced a letter, "*Laudato Si*" of the Holy Father Francis Care for Our Common Home, written by Pope Francis, which calls upon Catholics to preserve the Earth as God's creation. *See id.* (identifying religious document reflecting the Adorers' deeply-held beliefs). The purpose of Pope Francis' letter was to identify and help combat climate change. *See id.* (identifying purpose of letter). Specifically, the Adorers argued that the release of methane gas into the atmosphere, a phenomenon which would occur through leakage from the proposed pipeline, conflicted with their religious beliefs. *See id.* (clarifying Adorers' argument).

154. *See id.* (describing facts of case).

155. *See id.* (describing facts of case).

156. *See id.* (describing facts of case).

157. *See id.* (describing facts of case).

158. *See id.* (describing facts of case).

159. *See id.* at 192-93 (describing facts of case). For a further discussion of the NGA's procedure for judicial review of orders issued by FERC, see *supra* notes 57-71 and accompanying text.

160. *See id.* (describing district court's holding).

161. *See id.* (describing procedural history of case).

162. *See id.* at 194-95 (describing Third Circuit's holding).

plement each other.<sup>163</sup> More specifically, the NGA requires petitioning for a FERC rehearing that must be followed when bringing an RFRA claim.<sup>164</sup> The Adorers filed a writ of certiorari to the Supreme Court of the United States, but the Court has since denied certiorari.<sup>165</sup> This means that within the Third Circuit, other federal claims do not allow landowners to ignore, or not follow, the NGA.<sup>166</sup>

#### IV. THE MISSING PIECES: CRITICAL ANALYSIS

Through these 2018 cases, federal circuit courts have filled in some of the missing procedural pieces of the natural gas pipeline approval process.<sup>167</sup> When viewed together, these five cases show a trend favorable to gas companies and display clarity regarding the natural gas pipeline approval process.<sup>168</sup> Most of the cases address the purpose of the NGA in some capacity as well as Congress' purpose in granting eminent domain

163. *See id.* at 195-96 (describing court's reasoning).

164. *See id.* at 196-97 (providing proper procedure). When identifying the proper procedure, the court noted, "[y]ou may not bypass the specific method that Congress has provided for reviewing adverse agency action simply by suing the agency in federal district court under 1331 or 1337; the specific statutory method, if adequate, is exclusive." *See id.* (internal quotation marks omitted) (quoting *Gen. Fin. Corp. v. FTC*, 700 F.2d 366, 368 (7th Cir. 1983)).

165. *See Adorers of Blood of Christ v. FERC*, 139 S. Ct. 1169 (2019) (denying certiorari).

166. *See Adorers of Blood of Christ*, 897 F.3d at 190-91 (holding that the Adorers had to of sought an appeal with FERC within 30 days).

167. *See Transcon. Gas Pipe Line Co. v. 6.04 Acres Over Parcel(s) of Land Approx. 1.21 Acres Situated in Land Lot 1049*, 910 F.3d 1130, 1145 (11th Cir. 2018) (holding that preliminary injunction allowing gas company onto landowner's property was proper because the right to condemn was "finally determined"); *Transcon. Gas Pipe Line Co. v. Permanent Easements for 2.14 Acres & Temp. Easements for 3.59 Acres in Conestoga Twp.*, 907 F.3d 725, 729 (3d Cir. 2018) (holding that just compensation was not required before a just taking and that procedure did not deprive landowners of opportunity to appeal to FERC); *Twp. of Bordentown v. FERC*, 903 F.3d 234, 246 (3d Cir. 2018) (holding that FERC is permitted to conditionally issue certificate of public convenience before the proper CWA permits are obtained); *Del. Riverkeeper Network v. Sec'y Pa. Dep't of Env'tl. Prot.*, 903 F.3d 65, 69 (3d Cir. 2018) (holding that providing a certificate before all required permits were acquired was not arbitrary or capricious and that a hearing did not need to be held); *Adorers*, 897 F.3d at 191 (holding that NGA provided exclusive means to contest FERC's order and that RFRA is not an exception).

168. *See Land Lot 1049*, 910 F.3d at 1145 (holding that preliminary injunction allowing gas company onto landowner's property was proper because the right to condemn was "finally determined"); *Conestoga Twp.*, 907 F.3d at 729 (holding that just compensation was not required before a just taking and that procedure did not deprive landowners of opportunity to appeal to FERC); *Bordentown*, 903 F.3d at 246 (holding that FERC is permitted to conditionally issue certificate of public convenience before the proper CWA permits are obtained); *Del. Riverkeeper Network*, 903 F.3d at 69 (holding that providing a certificate before all required permits were acquired was not arbitrary or capricious and that a hearing did not need to be held); *Adorers*, 897 F.3d at 191 (holding that NGA provided exclusive means to contest FERC's order and that RFRA is not an exception).

power to gas companies for pipelines.<sup>169</sup> When the puzzle pieces are put together, however, the picture they create is different than the perception put forth to landowners in FERC's documents.<sup>170</sup> The legislature, with FERC, should reevaluate the purpose and procedures of natural gas pipeline approval to ensure the process is functioning as intended.<sup>171</sup>

The natural gas pipeline approval process is promulgated from multiple areas of the law.<sup>172</sup> Legal questions regarding the applicability of certain rules create uncertainty for landowners who have to make an educated decision regarding whether to combat gas companies.<sup>173</sup> Justifiably, eminent domain favors gas companies because pipelines serve many citizens across the United States.<sup>174</sup> Notwithstanding, this justification does not mean that landowners do not deserve a comprehensive understanding of the process.<sup>175</sup> Unless a landowner has large pocketbook or support from a larger organization, combatting an eminent domain taking for a natural gas pipeline is unrealistic once FERC grants the certificate of public convenience and necessity.<sup>176</sup> Ideally, FERC and Congress would alter the eminent domain process for natural gas pipelines in a way that would make it more meaningful, but at the very least they should reconsider the advertisement of an appeal.<sup>177</sup> The process currently allows for a gas company to either install a pipeline on a private landowner's property

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169. See *Land Lot 1049*, 910 F.3d at 1145 (holding that preliminary injunction allowing gas company onto landowner's property was proper because the right to condemn was "finally determined"); *Conestoga Twp.*, 907 F.3d at 729 (holding that just compensation was not required before a just taking and that procedure did not deprive landowners of opportunity to appeal to FERC); *Bordentown*, 903 F.3d at 246 (holding that FERC is permitted to conditionally issue certificate of public convenience before the proper CWA permits are obtained); *Del. Riverkeeper Network*, 903 F.3d at 69 (holding that providing a certificate before all required permits were acquired was not arbitrary or capricious and that a hearing did not need to be held); *Adorers*, 897 F.3d at 191 (holding that NGA provided exclusive means to contest FERC's order and that RFA is not an exception).

170. See *An Interstate Natural Gas Facility on My Land?*, *supra* note 9 at 4; *Natural Gas Pipeline Application Process at FERC*, *supra* note 41, at 4 (describing procedure).

171. See Bernhardt, *supra* note 10 (describing need to reevaluate policy in the 1980s).

172. See 15 U.S.C. § 717f(h) (2018) (identifying eminent domain right for pipeline construction); Fed. R. Civ. P. 71.1 (providing federal rule for condemning real or personal property); *Transcon. Gas Pipe Line Co. v. Conestoga Twp.*, 907 F.3d 725, 729 (3d Cir. 2018) (establishing approval process).

173. See *Conestoga Twp.*, 907 F.3d at 729 (holding powers such as quick-take is excluded by NGA).

174. See *Twp. of Bordentown v. FERC*, 903 F.3d 234, 248-49 (3d Cir. 2018) (describing interest in having pipeline approved in timely fashion).

175. See *id.* (providing opposing viewpoint).

176. See *Adorers*, 897 F.3d at 191 (describing monetary support of Adorers by farming).

177. For a further discussion of the current process, see *supra* notes 57-71 and accompanying text.



or have ownership transferred before all appeals are exhausted.<sup>178</sup> Yet, FERC advertises that landowners can appeal.<sup>179</sup> As a result, a landowner could be in the situation where a pipeline is incorrectly installed on their property or where ownership is improperly transferred.<sup>180</sup> Even if a landowner appeals, in the instance that the gas company can commence construction on the landowner's property, the significance of an appeal is diminished when someone's property is dismantled.<sup>181</sup>

The 2018 federal circuit court cases are consistent with the statutory framework provided by Congress.<sup>182</sup> For instance, the Third Circuit was

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178. See *Land Lot 1049*, 910 F.3d at 1145 (holding that preliminary injunction allowing gas company onto landowner's property was proper because the right to condemn was "finally determined"); *Conestoga Twp.*, 907 F.3d at 729 (holding that just compensation was not required before a just taking and that procedure did not deprive landowners of opportunity to appeal to FERC); *Bordentown*, 903 F.3d at 246 (holding that FERC is permitted to conditionally issue certificate of public convenience before the proper CWA permits are obtained); *Del. Riverkeeper Network*, 903 F.3d at 69 (holding that providing a certificate before all required permits were acquired was not arbitrary or capricious and that a hearing did not need to be held).

179. See *The Natural Gas Pipeline Application Process at FERC*, *supra* note 41 (describing step five as an opportunity for rehearing and step seven as opportunity to appeal to federal court).

180. See *Land Lot 1049*, 910 F.3d at 1145 (holding that preliminary injunction allowing gas company onto landowner's property was proper because the right to condemn was "finally determined"); *Conestoga Twp.*, 907 F.3d at 729 (holding that just compensation was not required before a just taking and that procedure did not deprive landowners of opportunity to appeal to FERC); *Bordentown*, 903 F.3d at 246 (holding that FERC is permitted to conditionally issue certificate of public convenience before the proper CWA permits are obtained); *Del. Riverkeeper Network*, 903 F.3d at 69 (holding that providing a certificate before all required permits were acquired was not arbitrary or capricious and that a hearing did not need to be held). *But See The Natural Gas Pipeline Application Process at FERC*, *supra* note 41 (identifying issue between case law and FERC process).

181. See *Land Lot 1049*, 910 F.3d at 1145 (holding that preliminary injunction allowing gas company onto landowner's property was proper because the right to condemn was "finally determined"); *Conestoga Twp.*, 907 F.3d at 729 (holding that just compensation was not required before a just taking and that procedure did not deprive landowners of opportunity to appeal to FERC); *Bordentown*, 903 F.3d at 246 (holding that FERC is permitted to conditionally issue certificate of public convenience before the proper CWA permits are obtained); *Del. Riverkeeper Network*, 903 F.3d at 69 (holding that providing a certificate before all required permits were acquired was not arbitrary or capricious and that a hearing did not need to be held). *But see The Natural Gas Pipeline Application Process at FERC*, *supra* note 41 (identifying issue between case law and FERC process).

182. See *generally Adorers*, 897 F.3d at 191 (holding that NGA provided exclusive means to contest FERC's order and that RFRA is not an exception); *Del. Riverkeeper Network v. Sec'y Pa. Dep't of Env'tl. Prot.*, 903 F.3d 65, 69 (3d Cir. 2018) (holding that providing a certificate before all required permits were acquired was not arbitrary or capricious and that a hearing did not need to be held); *Conestoga Twp.*, 907 F.3d at 729 (holding that just compensation was not required before a just taking and that procedure did not deprive landowners of opportunity to appeal to FERC); *Transcon. Gas Pipe Line Co. v. 6.04 Acres Over Parcel(s) of Land Approx. 1.21 Acres Situated in Land Lot 1049*, 910 F.3d 1130, 1145 (11th Cir. 2018) (holding that preliminary injunction allowing gas company onto land-



correct in upholding the district court's decision that the preliminary injunction was not a quick-take under the DTA in *Conestoga Township*.<sup>183</sup> Notwithstanding, just because a preliminary injunction is not a quick-take does not mean that courts should dismiss the argument that, practically speaking, the two have a similar, if not the same effect.<sup>184</sup> The practical result of an injunction is that it affords gas companies access to private property before all administrative appellate avenues are exhausted.<sup>185</sup> This means that gas companies can begin surveying land, digging in the ground, and installing pipeline before a final decision. The facts of *Land Lot 1049* demonstrate how a landowner's property can be tampered with and a pipeline installed prior to the exhaustion of all remedies.<sup>186</sup> A future where land is consistently taken unjustly for the purposes of constructing pipelines is cause for concern.<sup>187</sup>

Federal courts of appeals are taking an expansive approach towards the boundaries of eminent domain power.<sup>188</sup> Although they may be able to do this under the current legal framework, in practice it is creating disarray.<sup>189</sup> There is confusion within the Third Circuit regarding certain

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owner's property was proper because the right to condemn was "finally determined"); *Bordentown*, 903 F.3d at 246 (holding that FERC is permitted to conditionally issue certificate of public convenience before the proper CWA permits are obtained).

183. See *Conestoga Twp.*, 907 F.3d at 738 (describing holding of case). For a further discussion of the holding in *Conestoga Township*, see *supra* notes 89 and 98 and accompanying text.

184. See *id.* (noting that even if procedure is not considered a quick-take, it still permits land to be taken before final step in procedure).

185. See *id.* (describing practical result).

186. See *Land Lot 1049*, 910 F.3d at 1145 (providing example where gas company builds on property before exhaustion of appeals).

187. See *id.* (forecasting future concerns).

188. See *Adorers of Blood of Christ v. FERC*, 897 F.3d 187, 191 (3d Cir. 2018) (holding that NGA provided exclusive means to contest FERC's order and that RFRA is not an exception); *Del. Riverkeeper Network v. Sec'y Pa. Dep't of Env'tl. Prot.*, 903 F.3d 65, 69 (3d Cir. 2018) (holding that providing a certificate before all required permits were acquired was not arbitrary or capricious and that a hearing did not need to be held); *Conestoga Twp.*, 907 F.3d at 729 (holding that just compensation was not required before a just taking and that procedure did not deprive landowners of opportunity to appeal to FERC); *Land Lot 1049*, 910 F.3d at 1145 (holding that preliminary injunction allowing gas company onto landowner's property was proper because the right to condemn was "finally determined"); *Twp. of Bordentown v. FERC*, 903 F.3d 234, 265 n.21 (3d Cir. 2018) (holding that FERC is permitted to conditionally issue certificate of public convenience before the proper CWA permits are obtained).

189. See *Adorers of Blood of Christ v. FERC*, 897 F.3d 187, 191 (3d Cir. 2018) (holding that NGA provided exclusive means to contest FERC's order and that RFRA is not an exception); *Del. Riverkeeper Network v. Sec'y Pa. Dep't of Env'tl. Prot.*, 903 F.3d 65, 69 (3d Cir. 2018) (holding that providing a certificate before all required permits were acquired was not arbitrary or capricious and that a hearing did not need to be held); *Conestoga Twp.*, 907 F.3d at 729 (holding that just compensation was not required before a just taking and that procedure did not deprive landowners of opportunity to appeal to FERC); *Land Lot 1049*, 910 F.3d at 1145 (holding that preliminary injunction allowing gas company onto landowner's

NGA procedures.<sup>190</sup> For example, in the *Bordentown* decision, the Third Circuit held that during standard condemnation proceedings, the district court must “attempt to mirror the state courts’ condemnation proceedings.”<sup>191</sup> On the other hand, the Third Circuit in *Conestoga Township* held that the district court must follow only the standard condemnation proceedings under Rule 71.1.<sup>192</sup>

Furthermore, the Third Circuit subjectively places emphasis on following natural gas pipeline approval procedures in some instances and not others.<sup>193</sup> Courts provide FERC with leeway to issue a certificate of convenience and necessity before all the proper permits are obtained, but do not afford the same flexibility to landowners who bring a suit in court before filing an appeal.<sup>194</sup> The Third Circuit has reasoned that stopping a certificate of public convenience and necessity and standard condemnation proceeding until water permits are obtained expands the CWA beyond its purpose of regulating the United States’ water sources.<sup>195</sup> The CWA is, however, a statute that regulates the initiation of an interstate pipeline’s construction process because a natural gas pipeline cannot be fully approved without obtaining the CWA permits.<sup>196</sup> The CWA fulfills its purpose of safeguarding the nation’s water sources by withholding pipeline approval until FERC and the respective state can ensure that the pipeline can be built without diminishing the water quality below state requirements.<sup>197</sup>

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property was proper because the right to condemn was “finally determined”); *Twp. of Bordentown v. FERC*, 903 F.3d 234, 265 n.21 (3d Cir. 2018) (holding that FERC is permitted to conditionally issue certificate of public convenience before the proper CWA permits are obtained).

190. See *Conestoga Twp.*, 907 F.3d at 739 n.79 (identifying Rule 71A as the proper procedure to follow); *Bordentown*, 903 F.3d at 265 n.21 (stating the NGA “requires district courts to attempt to mirror the state courts’ condemnation proceedings”).

191. See *Bordentown*, 903 F.3d at 265 n.21 (requiring district court to “attempt to mirror state condemnation proceedings, not to adopt the state’s administrative schemes”).

192. See *Conestoga Twp.*, 907 F.3d at 739 n.79 (describing disagreement among circuits regarding whether to follow state eminent domain procedures).

193. See *id.* at 740 (finding preliminary injunction to be allowed by the rules and the NGA); *Bordentown*, 903 F.3d at 246 (finding CWA not to prohibit condemnation proceedings before obtaining permit).

194. See *Conestoga Twp.*, 907 F.3d at 739 n.79; *Bordentown*, 903 F.3d at 246-47 (finding CWA does not prohibit condemnation proceedings before obtaining permit). One common argument is that the process necessarily accounts for all issues because it is long and thorough. See *id.* (describing one argument). Another asserts that the installation and delay of a pipeline costs a company money, especially when contracts were executed with a specific start date. See *id.* (describing parties’ interests).

195. See *Del. Riverkeeper Network v. Sec’y Pa. Dep’t of Envtl. Prot.*, 903 F.3d 65, 69 (3d Cir. 2018) (describing purpose).

196. See *Del. Riverkeeper*, 903 F.3d at 69 (explaining purpose of the CWA).

197. See *id.* (explaining how the CWA’s purpose is carried out).

Meanwhile, the Third Circuit effectively rendered the CWA requirements meaningless by allowing Transcontinental to file standard condemnation proceedings and obtain ownership of the land when Transcontinental's CWA permit could have been subsequently denied.<sup>198</sup> Once a gas company obtains the standard condemnation, ownership is transferred.<sup>199</sup> A practical result could be that ownership is transferred when the required permits would never be obtained.<sup>200</sup> Efficiency of implementation is not a substantial enough reason for FERC to issue the certificate of public convenience and necessity before a water permit is obtained.<sup>201</sup>

The Third Circuit provides procedural flexibility on the part of the corporation seeking condemnation, but it does not provide the same flexibility to landowners who do not file an appeal within thirty days.<sup>202</sup> Transcontinental had flexibility in acquiring the water permits, whereas the landowners did not appeal FERC's decision within thirty days and were provided no remedy.<sup>203</sup> Courts taking an expansive viewpoint in favor of landowners rather than gas companies could provide that landowners filing in court constitutes an appeal meeting the thirty-day requirement.<sup>204</sup>

FERC's procedures appear important and necessary until selective exceptions call the process into question.<sup>205</sup> In *Land Lot 1049* for instance, the Eleventh Circuit found that a gas company giving blanket notice to

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198. *See id.* (describing practical result of allowing certification before all permits are obtained).

199. *See id.* (explaining procedure of ownership in eminent domain taking).

200. *See id.* (providing hypothetical).

201. For a further discussion of the water permits in *Del. Riverkeeper*, see *supra* notes 140-143 and accompanying text.

202. *See* *Transcon. Gas Pipe Line Co. v. Permanent Easements for 2.14 Acres*, 907 F.3d 725, 729 (3d Cir. 2018) (finding that gas company did not need all permits before having access to land through preliminary injunction); *see also Del. Riverkeeper*, 903 F.3d at 69 (permitting permits to be obtained after certifications are given).

203. *See Del. Riverkeeper*, 903 F.3d at 69, 76-77 (permitting permits to be obtained after certifications are given).

204. *See Conestoga Twp.*, 907 F.3d at 729; *see also Del. Riverkeeper*, 903 F.3d at 69 (offering alternative to only giving gas companies leeway).

205. *See Adorers of Blood of Christ v. FERC*, 897 F.3d 187, 192 (3d Cir. 2018) (holding that NGA provided exclusive means to contest FERC's order and that RFRA is not an exception); *see also Transcon. Gas Pipe Line Co. v. 6.04 Acres Over Parcel(s) of Land Approx. 1.21 Acres Situated in Land Lot 1049*, 910 F.3d 1130, 1145 (11th Cir. 2018) (holding that preliminary injunction allowing gas company onto landowner's property was proper because the right to condemn was "finally determined"); *Conestoga Twp.*, 907 F.3d at 729 (holding that just compensation was not required before a just taking and that procedure did not deprive landowners of opportunity to appeal to FERC); *Twp. of Bordentown v. FERC*, 903 F.3d 234, 246 (3d Cir. 2018) (holding that FERC is permitted to conditionally issue certificate of public convenience before the proper CWA permits are obtained); *Del. Riverkeeper*, 903 F.3d 69 (holding that providing a certificate before all required permits were acquired was not arbitrary or capricious and that a hearing did not need to be held).

access a landowner's property was adequate to satisfy the condemnation proceedings requirement of providing forty-eight hours' notice before entering the property.<sup>206</sup> *Adorers* provides another example of a case in which the Third Circuit was stringent on the thirty-day appeal while taking a more expansive position with respect to the requirements levied against gas companies.<sup>207</sup> To be fair, the *Adorers* are not blameless as the group did not participate in FERC's initial approval process.<sup>208</sup> On the other hand, if the *Adorers* have a reasonable explanation of why they did not sooner participate in the process, violating a religious group's deeply-held belief because a timely appeal was not filed goes against RFRA's purpose.<sup>209</sup> Given the influx of cases in 2018, the legislature and FERC should reevaluate the natural gas pipeline approval process to ensure attainment of intended results and equal understanding amongst all parties.<sup>210</sup>

## V. CONCLUSION

The current state of eminent domain law regarding natural gas pipelines was accurately summarized by one landowner faced with such a taking: “[d]on’t even try to stop pipelines. They always win.”<sup>211</sup> The five federal courts of appeals cases discussed within this Comment align with

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206. See *Land Lot 1049*, 910 F.3d, at 1141, 1150 (showing favor to gas company).

207. See *Adorers*, 897 F.3d at 191 (providing example of the court filing to give leeway to landowner).

208. See *id.* (describing landowner's pitfalls).

209. See *id.* (identifying another argument); see, e.g., 135 A.L.R. Fed. 121 § 3.5 (originally published in 1996) (identifying purpose of RFRA). “Congress enacted RFRA in order to provide greater protection for religious exercise than is available under the First Amendment.” See 135 A.L.R. Fed. 121 (1996) (citing U.S. CONST. amend. I; Religious Freedom Restoration Act of 1993, § 2 et seq., 42 U.S.C. § 2000bb et seq.; *Holt v. Hobbs*, 135 S. Ct. 853 (2015) (describing purpose of RFRA)).

210. See *Land Lot 1049*, 910 F.3d at 1145 (holding that preliminary injunction allowing gas company onto landowner's property was proper because the right to condemn was “finally determined”); *Conestoga Twp.*, 907 F.3d at 729 (holding that just compensation was not required before a just taking and that procedure did not deprive landowners of opportunity to appeal to FERC); *Bordentown*, 903 F.3d at 246 (holding that FERC is permitted to conditionally issue certificate of public convenience before the proper CWA permits are obtained); *Del. Riverkeeper Network*, 903 F.3d at 69 (holding that providing a certificate before all required permits were acquired was not arbitrary or capricious and that a hearing did not need to be held); *Adorers*, 897 F.3d at 191 (holding that NGA provided exclusive means to contest FERC's order and that RFRA is not an exception).

211. See *Lombardi & Hopkins*, *supra* note 16 (quoting *Jeb Bell*, a landowner in Georgia). *Jeb Bell* had owned property utilized in the Sabal Trail pipeline project. See *id.* *Bell* was compelled to pay *Enbridge*, the company that owned a majority of the Sabal Trail, over \$40,000 in legal fees for baseless trespass claims brought after Sabal Trail was granted eminent domain over the property. See *id.* (detailing situation that resulted in landowner paying gas company's attorney's fees).

this landowner's sentiment.<sup>212</sup> These decisions, added to existing jurisprudence, suggest that gas companies more often than not win lawsuits regarding natural gas pipeline approvals, in part, because the courts appear willing to provide those companies greater leeway in their compliance with the process.<sup>213</sup> Landowners must ask themselves whether the legal battle is worthwhile or if the probability of winning is so miniscule that they are better off accepting the compensation offered by the gas company to save years of distress and fees.<sup>214</sup> Regardless of the decision, homeowners must educate themselves on how pipeline approvals actually work in order to have a chance at saving their property from sophisticated energy companies and their attorneys.<sup>215</sup> The five cases discussed in this Comment have clarified some of the confusion in the natural gas pipeline approval process but leave landowners with less opportunity to prevent their land from being taken.<sup>216</sup>

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212. See *Land Lot 1049*, 910 F.3d at 1145 (holding that preliminary injunction allowing gas company onto landowner's property was proper because the right to condemn was "finally determined"); *Conestoga Twp.*, 907 F.3d at 729 (holding that just compensation was not required before a just taking and that procedure did not deprive landowners of opportunity to appeal to FERC); *Bordentown*, 903 F.3d at 246 (holding that FERC is permitted to conditionally issue certificate of public convenience before the proper CWA permits are obtained); *Del. Riverkeeper Network*, 903 F.3d at 69 (holding that providing a certificate before all required permits were acquired was not arbitrary or capricious and that a hearing did not need to be held); *Adorers*, 897 F.3d at 191 (holding that NGA provided exclusive means to contest FERC's order and that RFRA is not an exception).

213. See *Land Lot 1049*, 910 F.3d at 1145 (holding that preliminary injunction allowing gas company onto landowner's property was proper because the right to condemn was "finally determined"); *Conestoga Twp.*, 907 F.3d at 729 (holding that just compensation was not required before a just taking and that procedure did not deprive landowners of opportunity to appeal to FERC); *Bordentown*, 903 F.3d at 246 (holding that FERC is permitted to conditionally issue certificate of public convenience before the proper CWA permits are obtained); *Del. Riverkeeper Network*, 903 F.3d at 69 (holding that providing a certificate before all required permits were acquired was not arbitrary or capricious and that a hearing did not need to be held); *Adorers*, 897 F.3d at 191 (holding that NGA provided exclusive means to contest FERC's order and that RFRA is not an exception).

214. For an analysis on whether litigation is worthwhile for landowners contesting eminent domain on their property, see *supra* notes 172-73, 179-81, 193-94 and accompanying text.

215. See *An Interstate Natural Gas Facility on My Land?*, *supra* note 9 (describing steps landowner must take to combat eminent domain taking).

216. See *Land Lot 1049*, 910 F.3d at 1145 (holding that preliminary injunction allowing gas company onto landowner's property was proper because the right to condemn was "finally determined"); *Conestoga Twp.*, 907 F.3d at 729 (holding that just compensation was not required before a just taking and that procedure did not deprive landowners of opportunity to appeal to FERC); *Bordentown*, 903 F.3d at 246 (holding that FERC is permitted to conditionally issue certificate of public convenience before the proper CWA permits are obtained); *Del. Riverkeeper Network*, 903 F.3d at 69 (holding that providing a certificate before all required permits were acquired was not arbitrary or capricious and that a hearing did not need to be held); *Adorers*, 897 F.3d at 191 (holding that NGA provided exclusive means to contest FERC's order and that RFRA is not an exception).