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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.” 1

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. 2 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.3 Jeff Moon is a business owner in Paulding, Georgia.4

* 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 the Villanova Law Review and everyone who contributed to this Comment throughout the writing process.


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These average, hard-working Americans all have something in common.\(^5\) Transcontinental, a natural gas pipeline company, contacted them about placing a possible natural gas pipeline beneath their property through eminent domain.\(^6\) 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.\(^7\)

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

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.\(^11\) These discoveries have changed the country’s nat-

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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 2244740, 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).


ural gas market, which has historically relied upon natural gas transported from Texas up the east coast. 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. This avoids the need to transport the gas long distances across the country. Accordingly, pipeline infrastructure must increase to handle the increased supply of natural gas from a new part of the nation. 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.

\textit{Remarks:}

- 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).


- See id. (explaining landscape changes).


Williams Companies Inc. is a large natural gas infrastructure company that has invested in expanding pipeline infrastructure.\textsuperscript{17} 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.\textsuperscript{18} Williams, through its subsidiary Transcontinental, has sought to expand its pipeline to incorporate the added supply from the Marcellus and Utica Shales.\textsuperscript{19} The proposed expansion requires several thousand miles of added pipeline, some of which would have to be placed on private property.\textsuperscript{20} 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.\textsuperscript{21}

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.\textsuperscript{22} 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.\textsuperscript{23} In 2018 alone, federal circuit courts heard five cases regarding natural gas pipeline approvals in which Transcontinental

\begin{itemize}
\item \textsuperscript{18} See Transco, supra note 12 (describing pipeline at issue in all cases).
\item \textsuperscript{19} See DuPuis, supra note 17 (identifying that William’s has invested $8 billion in the Marcellus and Utica Shales).
\item \textsuperscript{20} For a further discussion of Transcontinental’s proposed pipelines, see supra notes 18-19 and accompanying text.
\item \textsuperscript{21} See Transcon. Gas Pipe Line Co. v. 6.04 Acres Over Parcel(s) of Land Appr. 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 Envtl. 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); Adornis, 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).
\item \textsuperscript{22} See Transco, supra note 12 (describing pipeline at issue in all cases).
\item \textsuperscript{23} For a further discussion of Transcontinental, see supra notes 17-22 and accompanying text.
\end{itemize}
was a party.\textsuperscript{24} Comparatively, Transcontinental was a party to only six legal suits in federal circuit courts from 1989 to 2017.\textsuperscript{25}

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.\textsuperscript{26} Even sophisticated lawyers and judges can mistake the proper steps required to gain the proper pipeline approval.\textsuperscript{27} Congress, in conjunction with FERC, should reevaluate the purpose and procedures of natural gas pipeline approval to ensure the process is functioning as intended.\textsuperscript{28}

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

\textsuperscript{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).


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

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

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

\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{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. Finally, Part V discusses the impact these rulings will have on future decisions.

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. 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. As of 2015, FERC has rejected only two pipeline project proposals in the past thirty years.

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 (describing increased demand); DuPuis, supra note 17 (describing opportunity Pennsylvania has to build its economy around natural gas pipeline).


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 WelHillhoff, 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. FERC “is an independent agency that regulates the interstate transmission of natural gas, oil, and electricity.” The Commission was created to regulate the transmission and sale of energy commodities.


- Regulation of retail electricity and natural gas sales to consumers;
- Approval for the physical construction of electric generation facilities;
- Regulation of activities of the municipal power systems, federal power marketing agencies like the Tennessee Valley Authority, and most rural electric cooperatives;
- Regulation of nuclear power plants by the Nuclear Regulatory Commission;
- Issuance of State Water Quality Certificates;
- Oversight for the construction of oil pipelines;
- Abandonment of service as related to oil facilities;
- Mergers and acquisitions as related to natural gas and oil companies;
- Responsibility for pipeline safety or for pipeline transportation on or across the Outer Continental Shelf;
- Development and operation of natural gas vehicles;
- Reliability problems related to failures of local distribution facilities; and
- Tree trimming near local distribution power lines in residential neighborhoods.

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;
- Approval for the physical construction of electric generation facilities;
- Regulation of activities of the municipal power systems, federal power marketing agencies like the Tennessee Valley Authority, and most rural electric cooperatives;
- Regulation of nuclear power plants by the Nuclear Regulatory Commission;
- Issuance of State Water Quality Certificates;
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- Responsibility for pipeline safety or for pipeline transportation on or across the Outer Continental Shelf;
- Development and operation of natural gas vehicles;
- Reliability problems related to failures of local distribution facilities; and
- Tree trimming near local distribution power lines in residential neighborhoods.

See id. (bullet points omitted) (placing limitations on FERC’s oversight power).
sion oversees the approval and implementation of interstate natural gas pipelines.39 FERC is staffed by about 1,500 employees and has a budget of about $350 million.40 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.41

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.42 Notwithstanding, the government’s right to eminent domain is not unqualified.43 Congress has identified different requirements and factors for FERC and the courts to consider when determining whether eminent domain is proper.44

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).


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’”); 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).

There are two main types of eminent domain taking procedures: standard condemnation and quick-take.\textsuperscript{45} 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.\textsuperscript{46} Further, the NGA authorizes the government to grant eminent domain to private companies that are acting in the public interest.\textsuperscript{47}

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.\textsuperscript{48} 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.\textsuperscript{49}

\begin{itemize}
\item 45. For a further discussion of quick-take eminent domain procedure, see \textit{infra} notes 53-56 and accompanying text. For a further discussion of standard condemnation, see \textit{infra} notes 50-52 and accompanying text.
\item 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).
\item 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 \textit{Easement, BLACK’S LAW DICTIONARY} (11th ed. 2019) (defining gas line easements and alternative terms used to describe same easement).
\item 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); Stockman Ridge GP, LLC v. Exclusive Natural Gas Storage Easement Beneath 11.078 Acres, No. 08-168, 2009 WI 434645, 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 \textit{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
\end{itemize}
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.\(^{50}\) The specific procedure for this type of condemnation is set forth in Rule 71.1 of the Federal Rules of Civil Procedure.\(^ {51}\) 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.\(^ {52}\)

A quick-take represents a different eminent domain procedure that permits the immediate possession of private property.\(^ {53}\) The Declaration of Taking Act (DTA) grants the power of a quick-take, but the NGA does not mention such power.\(^ {54}\) 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.\(^ {55}\) Once the estimated compensation is paid, the United States is automatically granted the property’s title.\(^ {56}\)
B. Natural Gas Pipeline Approval Process

FERC provides an infographic on its website that outlines the natural gas pipeline approval process. 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.

In actuality, the natural gas pipeline approval process is more complex and intensive. FERC’s natural gas pipeline approval process commences when a company that wants to build an interstate natural gas pipeline submits an application or prefiling application to FERC. 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. 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. Private landowners who may be affected by the pipeline’s projected route are then mailed

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).


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 prefiling 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.\textsuperscript{63} 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.\textsuperscript{64}

During this time, FERC can make adjustments to the proposed pipeline route.\textsuperscript{65} 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.\textsuperscript{66} If the pipeline is approved, the parties have thirty days from when the certificate was issued to seek a rehearing with FERC.\textsuperscript{67} If it is approved, the company and the private citizens negotiate a compensation price and easement agreement.\textsuperscript{68} All final decisions from FERC can be appealed to federal courts for rehearing.\textsuperscript{69} 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.\textsuperscript{70} 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.\textsuperscript{71}

\textsuperscript{63}. See id. (identifying notification procedures to inform private citizens of impeding takings through eminent domain).

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

\textsuperscript{65}. See \textit{An Interstate Natural Gas Facility on My Land?}, supra note 9, at 4 (describing procedure).

\textsuperscript{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 Envtl. 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”).

\textsuperscript{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).

\textsuperscript{68}. See id. (describing private negotiation between parties).

\textsuperscript{69}. See \textit{The Natural Gas Pipeline Application Process at FERC}, supra note 41 (describing procedure).

\textsuperscript{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).

\textsuperscript{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))).

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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. Though these cases differ substantively, all address some aspect of the pipeline approval process. Notably, in all five cases the courts decided in favor of Transcontinental.

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. 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. 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. On April 4, 2014, FERC ap...
proved Transcontinental’s pre-filing process request. During the pre-filing process, FERC received feedback from ninety-three speakers in addition to over 600 written comments from the community. On March 31, 2015, Transcontinental filed the application for the construction of the natural gas pipeline. 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. 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.

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

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 establish, 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.86 Following the summary judgment briefing, Transcontinental filed an omnibus motion for a preliminary injunction.87 The district court granted partial summary judgment in favor Transcontinental as well as an omnibus motion for a preliminary injunction; the landowners appealed the preliminary injunction.88

The Third Circuit heard the matter and upheld the district court’s decision to grant partial summary judgement and omnibus motion for a preliminary injunction in favor of Transcontinental.89 The court began its

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 judgement 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, noncomformity 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.\[90\] 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.\[91\]

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.\[92\] The Third Circuit explained eminent domain broadly and described two primary types of governmental eminent domain: quick-take and standard condemnation.\[93\] The Third Circuit distinguished quick-take from a standard condemnation by the “different procedures and opportunities for participation” included in a standard condemnation proceeding.\[94\] 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 conceptors’ 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. § 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.\footnote{See id. at 733 (explaining the proper procedure).} The court recognized that Transcontinental had properly followed this procedure in the district court below.\footnote{See id. at 734-35 (identifying that Transcontinental filed its complaint under Rule 71.1, condemnation, and motion for summary judgment).} 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.\footnote{See id. (distinguishing landowners’ argument).} The Third Circuit identified that, in this case, the process was only being hastened and concluded that the preliminary injunction was proper.\footnote{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 717(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).}
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 Presault 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. 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. 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. 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. Official notice of FERC’s environmental scoping was mailed to landowners and published in the Federal Register in October 2014. Transcontinental submitted the official application to FERC in March 2015, and FERC approved the application and issued the certificate of convenience in August 2016. The approved application included two alternate routes for the pipeline as a result of environmental concerns with the pipeline.

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. Transcontinental had proposed easements to the landowners that went beyond the scope of FERC’s approvals. For instance, Transcontinental sought to gain indefinite easements for access to the landowners’ entire property in order to transport several substances including...
“[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.\(^{108}\)

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.\(^{109}\) The district court limited the condemnation to the “extent depicted on the relevant alignment sheets and survey plats” that were previously approved by FERC.\(^{110}\) The condemnation proceedings also required Transcontinental to post bond and give forty-eight hours’ notice before entering the property.\(^{111}\) Transcontinental gave blanket notice to landowners, stating that it would be assessing the land soon and construction would take nine-to-twelve months.\(^{112}\) 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.\(^{113}\) Subsequently, the pipeline was installed.\(^{114}\)

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.\(^{115}\) 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.\(^{116}\) The court reasoned that the injunction was proper because Transcontinental’s right to condemn was “finally determined” through a motion for summary judgment.\(^{117}\) 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

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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.”

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. 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. Transcontinental sought approvals from FERC and NJDEP for its proposed Garden State Expansion Project that would place natural gas pipeline though freshwater wetlands in New Jersey. In addition to the normal natural gas pipeline approval process, Transcontinental had to obtain additional water permits. NJDEP held two public hearings and received over 1,800 written comments specifically regarding New Jersey water quality concerns. 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.

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.125 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.126 To comply with the CWA, a company must adhere to federal discharge limitations and state water quality standards.127

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.128 Bordentown hoped to prevent the expansion of Transcontinental’s pipeline facilities.129 The Bordentown Plaintiffs also raised concerns about the conditional certificate issuance and NJDEP’s denial of an adjudicatory hearing.130 The Third Circuit ruled in favor of FERC and held that the Bordentown Plaintiffs’ challenges to FERC’s orders lacked merit.131 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.132 Moreover, the Third Circuit held that FERC is permitted to conditionally issue a certificate of public convenience before the proper CWA permits are obtained.133 Nevertheless, construction could not commence on the approved project until all of the state permits were obtained.134 But, as a result of the conditional certificate, Transcontinental was able to commence standard condemnation earlier, and ownership of the property...
could transfer sooner.\textsuperscript{135} 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.”\textsuperscript{136} As a result, the Third Circuit instead concluded that ownership could transfer before the CWA permits were received.\textsuperscript{137}

D. Delaware Riverkeeper

\textit{Delaware Riverkeeper Network v. Secretary Pennsylvania Department of Environmental Protection}\textsuperscript{138} 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.\textsuperscript{139} 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.\textsuperscript{140} PADEP granted the water certification with certain conditions attached.\textsuperscript{141} 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.\textsuperscript{142} 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.\textsuperscript{143} The Third Circuit held that PADEP’s decision was final, and as such the court had jurisdiction over the

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\textsuperscript{135} See id. (describing practical result).
\textsuperscript{136} See id. at 247 (detailing Third Circuit’s reasoning).
\textsuperscript{137} See id. (holding that ownership could transfer).
\textsuperscript{138} 903 F.3d 65 (3d Cir. 2018).
\textsuperscript{139} See id. at 68, 76 (describing case).
\textsuperscript{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).
\textsuperscript{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.
\textsuperscript{142} See id. (finding that petitioners simultaneously filed suit with the district court and Pennsylvania’s Environmental Hearing Board).
\textsuperscript{143} See Del. Riverkeeper Network, 903 F.3d 65 at 70 (describing Delaware Riverkeepers’ argument); DELAWARE RIVERKEEPER NETWORK, Who We Are, https://
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.” 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. As a result, condemnation proceedings can move forward without obtaining all required permits.

E. Adorers

Adorers recognized that the NGA provides the exclusive procedure for judicial review of natural gas pipeline approvals regardless of other federal claims. 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. The Adorers did not participate in the public comment portion of FERC’s natural gas pipeline approval process. The Adorers brought a claim against FERC and Transcontinental for violation of the Religious Freedom Restoration Act (RFRA). 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


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.\(^{152}\) For this reason, the construction of a natural gas pipeline on the Adorers’ land conflicted with their religious beliefs.\(^{153}\)

FERC issued Transcontinental a certificate of public convenience and necessity in February 2017.\(^{154}\) The Adorers did not grant Transcontinental an easement to access their land for construction during private negotiations.\(^{155}\) As a result, Transcontinental filed a condemnation proceeding against the Adorers, but the Adorers did not respond to the complaint.\(^{156}\) 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.\(^{157}\)

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.\(^{158}\) 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.\(^{159}\) 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.\(^{160}\) The Adorers appealed to the Third Circuit claiming that the RFRA supersedes other laws.\(^{161}\)

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.\(^{162}\) Instead, the Third Circuit held that the NGA and RFRA procedurally com-

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\(^{152}\) 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. More specifically, the NGA requires petitioning for a FERC rehearing that must be followed when bringing an RFRA claim. The Adorers filed a writ of certiorari to the Supreme Court of the United States, but the Court has since denied certiorari. This means that within the Third Circuit, other federal claims do not allow landowners to ignore, or not follow, the NGA.

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. When viewed together, these five cases show a trend favorable to gas companies and display clarity regarding the natural gas pipeline approval process. 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)).
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 Envtl. 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. 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. The legislature, with FERC, should reevaluate the purpose and procedures of natural gas pipeline approval to ensure the process is functioning as intended.

The natural gas pipeline approval process is promulgated from multiple areas of the law. 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. Justifiably, eminent domain favors gas companies because pipelines serve many citizens across the United States. Notwithstanding, this justification does not mean that landowners do not deserve a comprehensive understanding of the process. 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. 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. The process currently allows for a gas company to either install a pipeline on a private landowner’s property

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 RFRA 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).


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


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.

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or have ownership transferred before all appeals are exhausted.\textsuperscript{178} Yet, FERC advertises that landowners can appeal.\textsuperscript{179} 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.\textsuperscript{180} 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.\textsuperscript{181}

The 2018 federal circuit court cases are consistent with the statutory framework provided by Congress.\textsuperscript{182} For instance, the Third Circuit was

\textsuperscript{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).

\textsuperscript{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 an opportunity to appeal to federal court).

\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{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 Envtl. 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-

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correct in upholding the district court’s decision that the preliminary injunction was not a quick-take under the DTA in Conestoga Township. 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. The practical result of an injunction is that it affords gas companies access to private property before all administrative appellate avenues are exhausted. 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. A future where land is consistently taken unjustly for the purposes of constructing pipelines is cause for concern.

Federal courts of appeals are taking an expansive approach towards the boundaries of eminent domain power. Although they may be able to do this under the current legal framework, in practice it is creating disarray. There is confusion within the Third Circuit regarding certain 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 Envtl. 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 Envtl. 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).
NGA procedures.\textsuperscript{190} For example, in the \textit{Bordentown} decision, the Third Circuit held that during standard condemnation proceedings, the district court must “attempt to mirror the state courts’ condemnation proceedings.”\textsuperscript{191} On the other hand, the Third Circuit in \textit{Conestoga Township} held that the district court must follow only the standard condemnation proceedings under Rule 71.1.\textsuperscript{192}

Furthermore, the Third Circuit subjectively places emphasis on following natural gas pipeline approval procedures in some instances and not others.\textsuperscript{193} 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.\textsuperscript{194} 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.\textsuperscript{195} 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.\textsuperscript{196} 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.\textsuperscript{197}

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

\textsuperscript{191.} See \textit{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”).

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

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

\textsuperscript{194.} See \textit{Conestoga Twp.}, 907 F.3d at 739 n.79; \textit{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 \textit{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 \textit{id.} (describing parties’ interests).


\textsuperscript{196.} See \textit{Del. Riverkeeper}, 903 F.3d at 69 (explaining purpose of the CWA).

\textsuperscript{197.} See \textit{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.198 Once a gas company obtains the standard condemnation, ownership is transferred.199 A practical result could be that ownership is transferred when the required permits would never be obtained.200 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.201

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.202 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.203 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.204 FERC’s procedures appear important and necessary until selective exceptions call the process into question.205 In Land Lot 1049 for instance, the Eleventh Circuit found that a gas company giving blanket notice to

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.\(^{206}\) 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.\(^{207}\) To be fair, the Adorers are not blameless as the group did not participate in FERC’s initial approval process.\(^{208}\) 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.\(^{209}\) 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.\(^{210}\)

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.”\(^{211}\) The five federal courts of appeals cases discussed within this Comment align with

\(^{206}\) 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).


\(^{210}\) 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).

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this landowner’s sentiment. 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. 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. 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. 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.

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).