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Do Not Pass Go; Do Not Collect \$200; Go Directly to the EHB; The EHB Holds Fast to its Regulatory Role in Interstate Gas Regulation in Delaware Riverkeeper Network v. Department of Environmental Protection

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2015]

DO NOT PASS GO; DO NOT COLLECT \$200;
GO DIRECTLY TO THE EHB: THE EHB HOLDS FAST TO ITS
REGULATORY ROLE IN INTERSTATE GAS REGULATION IN
*DELAWARE RIVERKEEPER NETWORK V. DEPARTMENT OF
ENVIRONMENTAL PROTECTION*

I. INTRODUCTION

While countries such as Russia, Iraq, and Saudi Arabia are well known for their gas production, the United States has recently become the largest natural gas producer in the world.¹ The United States' increased natural gas production is driven by the expansion of fracking in the Marcellus Shale formation in the northeastern region of the country.² The Marcellus Shale is a sedimentary rock formation, millions of years old, meandering through West Virginia, Ohio, Pennsylvania, and into New York state.³ Through the fracking process, energy companies drill for gas trapped within the rock, a byproduct of decomposed mud and organic material.⁴ Investment in natural gas has been a boom to the U.S. economy, and energy companies are joining the revolution.⁵ To keep up with strong industry growth prospects, energy companies are funding more shale projects and increasing the size of their facilities to accommodate the increased production.⁶

One of the companies investing heavily in natural gas, Tennessee Gas Pipeline Company, LLC (Tennessee Gas), operates over a 13,900-mile pipeline infrastructure, transporting natural gas from Louisiana, the Gulf of Mexico, and South Texas to the Northeast,

1. See Marcellus Shale Coalition, *Marcellus Offers "Transformational" Opportunities for our Region*, *Nation* (Sept. 4, 2014), <http://marcelluscoalition.org/2014/09/marcellus-offers-transformational-opportunities-for-our-region-nation/> (referencing statistical report for indication of production growth).

2. See *id.* (explaining role of fracking and shale expansion in natural gas production expansion).

3. See *The Marcellus Shale, Explained*, STATEIMPACT, <http://stateimpact.npr.org/pennsylvania/tag/marcellus-shale/> (last visited Oct. 14, 2014) (describing Marcellus formation).

4. See *id.* (explaining how shale gas is created and obtained).

5. See Marcellus Shale Coalition, *supra* note 1 (showing cause and effect of natural gas production expansion). In the past five years, U.S. natural gas production has increased by 20%. *Id.*

6. See *id.* (explaining reaction to growing interest and demand for better facilities for natural gas production in United States).

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including New York City and Boston.⁷ Tennessee Gas is a subsidiary of Kinder Morgan, the fourth largest energy company in North America.⁸ Tennessee Gas has served the Northeast for fifty years and has upgraded several natural gas projects in the last decade, which now carry shale gas from the Marcellus Formation to New England and the Niagara Falls region.⁹ Progressive expansion of production prompted Tennessee Gas to begin construction on the Northeast Upgrade Project (NEUP).¹⁰ The 500 million dollar project would require expanding current lines in the area and cutting new holes through undisturbed wooded areas around the Delaware River Valley.¹¹

Delaware Riverkeeper Network (DRN), a non-profit corporation established in 1988, and its associated members were not pleased with the thought of tree-cutters rumbling through their neighborhoods.¹² Included in the suit was the current head of DRN, known as the “Delaware Riverkeeper,” Maya Van Rossum, who has been working at DRN since 1994 and has held her current position since 1996.¹³ DRN “provides effective environmental advocacy, volunteer monitoring programs, stream restoration projects

7. See *Tennessee Gas Pipeline*, KINDER MORGAN, (2013), http://www.kindermorgan.com/business/gas_pipelines/east/TGP/ (describing extent and stretch of Tennessee Gas Pipeline and its operations).

8. See *Tennessee Gas Pipeline-300 Line*, KINDER MORGAN, (2013), http://www.kindermorgan.com/business/gas_pipelines/east/TGP/300Line/ (discussing Tennessee Gas’s corporate status and place in energy market).

9. See *Northeast Supply Diversification*, KINDER MORGAN (2013) http://www.kindermorgan.com/business/gas_pipelines/east/TGP/NSD/ (describing major natural gas pipeline in Northeast); see also *Tennessee Gas Pipeline-300 Line*, *supra* note 8 (describing another major Tennessee Gas pipeline).

10. See *Tennessee Gas Pipeline-Northeast Upgrade*, KINDER MORGAN (2013) http://www.kindermorgan.com/business/gas_pipelines/east/northeastupgrade/ (explaining impetus for expansion). The new pipeline would add 636,000 dekatherms per day of gas capacity to its existing production and join with Tennessee Gas’s other major lines. *Id.*

11. See *id.* (showing NEUP’s extent and cost of construction); see also *Pipeline appeal fails, cutting begins*, THE PIKE COUNTY COURIER (Feb. 21, 2013, 6:01 AM), available at <http://pikecountycourier.com/apps/pbcs.dll/article?AID=/20130221/NEWS01/130219956/Pipeline-appeal-fails-cutting-begins> (reporting reaction to wooded areas to be cut as part of project).

12. See *Who We Are*, DELAWARE RIVERKEEPER NETWORK, <http://www.delawareriverkeeper.org/about/whoweare.asp> (last visited Oct. 14, 2014) (explaining DRN’s organization and mission statement). See generally *Ongoing Issues*, DELAWARE RIVERKEEPER NETWORK, <http://www.delawareriverkeeper.org/river-action/ongoing-issue-detail.aspx?Id=43> (last visited Oct. 14, 2014) (providing updates as to litigation involving DRN including current project).

13. *The Delaware Riverkeeper*, DELAWARE RIVERKEEPER NETWORK, <http://www.delawareriverkeeper.org/about/delawareriverkeeper.aspx> (last visited Oct. 10, 2014) (describing role of Delaware Riverkeeper).

and public education.”¹⁴ Historically, DRN does not shirk from utilizing the courts to “ensure the enforcement of environmental safety laws” relating to the Delaware River and its tributaries.¹⁵ As the organization states, it is active in litigation because “[a] river has no right to defend itself in a court of law.”¹⁶

DRN has appealed to the Environmental Hearing Board (EHB) over a dozen times before, and recently appealed the Pennsylvania Department of Environmental Protection’s (PADEP) approval of permits for Tennessee Gas’s new project.¹⁷ The EHB often handles cases in which concerned citizens attempt to protect their lands from environmental threats, and the EHB tends to hold firm as a remedial entity regarding PADEP’s decisions.¹⁸ Tennessee Gas became weary of jumping through hoops and questioned the EHB’s role in regulating interstate gas projects in light of federal preemption concerns.¹⁹ In *Delaware Riverkeeper Network v. Department of Environmental Protection*,²⁰ the EHB, for the first time, rendered an opinion to fight back against preemption claims and re-affirmed its role as part of Pennsylvania’s state permit application procedures.²¹

This Note will discuss the facts and circumstances surrounding *Delaware Riverkeeper* and its impact on Pennsylvania’s environmental law regulatory procedure.²² Section II discusses the facts of the *Delaware Riverkeeper* appeal and the details of the natural gas projects in question.²³ Section III provides the legal, procedural, and substantive framework for the EHB’s decision.²⁴ Section IV provides a nar-

14. *Who We Are*, *supra* note 12 (explaining DRN’s role in maintaining and protecting Delaware Water Gap).

15. *Id.* (explaining lack of fear in litigating claims).

16. *Litigation*, DELAWARE RIVERKEEPER NETWORK, <http://www.delawareriverkeeper.org/river-action/litigation.aspx> (last visited Oct. 10, 2014) (providing motivation for DRN’s mission statement as environmental watch group).

17. *See generally*, *Delaware Riverkeeper Network v. Commonwealth*, No. 2012-196-M, 2013 WL 604393, at *1 (Pa. Env’t. Hearing Bd. Feb. 1, 2013) (explaining impetus for DRN’s appeal).

18. *See History of the Environmental Hearing Board*, THE PENNSYLVANIA ENVIRONMENTAL HEARING BOARD, http://ehb.courtapps.com/content/ehb_history.php (last visited Oct. 14, 2014) (discussing history of EHB and its role in Pennsylvania environmental regulations).

19. *See Delaware Riverkeeper*, at *14-15 (discussing Tennessee Gas’s federal preemption arguments).

20. No. 2012-196-M, 2013 WL 604393.

21. *See id.* at *14-15 (holding EHB proceeding was not preempted).

22. For a comprehensive discussion of *Delaware Riverkeeper* and its impact, see *infra* notes 27-211 and accompanying text.

23. For a discussion of the facts in *Delaware Riverkeeper*, see *infra* notes 27-51 and accompanying text.

24. For a discussion of the legal background of *Delaware Riverkeeper*, see *infra* notes 52-150 and accompanying text.

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rative analysis of the decision, while Section V critically analyzes the EHB's final decision.²⁵ Lastly, Section VI reflects on the impact of the EHB's decision and the future of the EHB in Pennsylvania's burgeoning gas industry.²⁶

II. NEUP COMES TO THE DELAWARE

DRN's appeal to the EHB followed PADEP's approval of three permits for Tennessee Gas to construct the NEUP across Northeastern Pennsylvania and New Jersey.²⁷ PADEP granted Tennessee Gas the permits pursuant to an order from the Federal Energy Regulatory Commission (FERC).²⁸ FERC directed that the state permits must be consistent with the order; additionally, even though the states should work closely with Tennessee Gas, the states could not "prohibit or unreasonably delay the construction . . . approved by [FERC]."²⁹ Furthermore, FERC explained its assessment was conditional on Tennessee Gas's understanding that the company had to comply with other federal and state agencies as part of its environmental mitigation measures.³⁰ Under this directive, Tennessee Gas began preparing for the construction of the pipeline.³¹

NEUP called for the construction of approximately forty miles of thirty-inch diameter pipeline, in addition to the existing compressor and meter stations located in Pennsylvania and New Jersey.³² In Pennsylvania, the pipeline would stretch twenty-two miles through Bradford, Susquehanna, Wayne, and Pike Coun-

25. For a discussion of the EHB's analysis and its criticisms, see *infra* notes 150-200 and accompanying text.

26. For a discussion of the possible impact of *Delaware Riverkeeper*, see *infra* notes 201-11 and accompanying text.

27. *Delaware Riverkeeper Network v. Commonwealth*, No. 2012-196-M, 2013 WL 604393, at *1 (Pa. Envtl. Hearing Bd. Feb. 1, 2013) (discussing approval of permits).

28. See *id.* at *14 (discussing directive of FERC to Tennessee Gas to obtain permits). FERC issued the order after nearly two years of environmental review, producing a lengthy environmental assessment. See *Tennessee Gas Pipeline Co.'s Mot. Dismiss* at ¶¶ 14-15 (summarizing FERC's review of the project).

29. See *Tennessee Gas Pipeline Co., L.L.C.*, 139 FERC ¶ 61161, ¶202 (May 29, 2012) (encouraging cooperation between state review and Tennessee Gas).

30. *Id.* at ¶ 200 (explaining FERC's acknowledgment that other measures were to be taken under state regulation).

31. See *Tennessee Gas Pipeline Company, L.L.C.*, Docket No. CP11-161-000, 142 ¶FERC 61,025 (issuing Notice to Proceed with pipeline preparations). On June 28, 2012, the DRN and others filed a Request for Rehearing. *Id.* On December 14, 2012, while the request was pending, FERC issued a Notice to Proceed, allowing construction to begin. *Id.*

32. *Delaware Riverkeeper*, 2013 WL 604393, at *1 (describing upgrades to pipeline under new project plans).

ties.³³ The project would run along an existing right of way except for a 3.4-mile segment in Pike County.³⁴ The new right of way was required to avoid the Delaware Water Gap National Recreational Area under the jurisdiction of the National Park Service.³⁵

The first permit DRN appealed was an Erosion and Sedimentation Control General Permit for Earth Disturbance Associated with Oil and Gas Exploration, Production, Processing or Treatment Operations or Transmission Facilities (ESCGP-1) under Chapter 102 of the Pennsylvania Code.³⁶ The remaining two permits challenged were water obstruction and encroachments permits under Chapter 105 of the Pennsylvania Code for activities in Wayne and Pike Counties.³⁷ In evaluating the proposed project, PADEP consulted the County Conservation Districts of each of the four counties through which the pipeline would cross.³⁸ PADEP thus coordinated its efforts with the counties and with Tennessee Gas to determine technical deficiencies in the project, sending many of the comments from the counties to Tennessee Gas.³⁹ PADEP conducted several technical reviews, incorporating comments from several counties.⁴⁰ While PADEP incorporated many of Pike County's concerns, they also disagreed with other comments made during this phase; however, they ultimately approved the project.⁴¹

In response, DRN, Maya Van Rossum, and RDA filed for a Temporary Supersedeas and a Petition for Supersedeas to enjoin Tennessee Gas from continuing its operation in Pike County.⁴² As a result, Tennessee Gas filed its Response to DRN's petition along with a Motion to Dismiss asserting the federal law preempted the

33. *Id.* (describing location of pipeline).

34. *Id.* (explaining new right of way in Pike County).

35. *Id.* (explaining why new right of way was required).

36. *Id.* (naming first permit obtained). ESCGP-1 covered the entire length of the NEUP in Pennsylvania. *Id.*

37. *Delaware Riverkeeper*, 2013 WL 604393, at *1 (naming other permits obtained). For further discussion of Pennsylvania permit procedure see *infra* notes 72-79 and accompanying text. One water permit in Wayne County covered twenty-seven wetland and sixteen stream crossings; the other permit in Pike County covered fifty-eight wetland and thirty-one stream crossings. *Delaware Riverkeeper*, 2013 WL 604393, at *1.

38. *Delaware Riverkeeper*, 2013 WL 604393, at *4 (noting Pike County's role in evaluation).

39. *Id.* (explaining objective of Pike County correspondence).

40. *Id.* (noting use of Pike County comments in review letters).

41. *Id.* at *5 (expressing disagreement with Pike County's evaluation). The only county of the four involved that continued to file complaints for alleged deficiencies after the first review was Pike County. *Id.*

42. *Id.* at *2 (discussing legal actions by appellants). For a discussion of Petitions of Supersedeas, see *infra* notes 87-92 and accompanying text.

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EHB and the EHB was without jurisdiction.⁴³ Tennessee Gas maintained the EHB hearing was preempted by FERC's granting of a Certificate of Public Convenience and Necessity.⁴⁴ The company also argued the Natural Gas Act (NGA) established specific procedures for environmental review of interstate natural gas projects, which did not permit EHB review.⁴⁵ Thus, Tennessee Gas filed a separate suit in the Middle District of Pennsylvania to enjoin the EHB from conducting the Supersedeas hearing.⁴⁶ The EHB acknowledged Tennessee Gas's motion and filed a parallel judicial appeal to the district court, specifying that neither the NGA nor FERC preempted the EHB proceeding.⁴⁷ The EHB ultimately denied Tennessee Gas's Motion to Dismiss, but still denied DRN's Petition for Supersedeas because DRN failed to show it would likely succeed on the merits or that DRN would suffer irreparable harm.⁴⁸

III. THE HURDLES OF THE FEDERAL AND STATE NATURAL GAS REGULATORY PARTNERSHIP

Tennessee Gas supported its claim that the EHB lacked authority to hear DRN's appeals based on constitutional principles and precedent.⁴⁹ While FERC directed Tennessee Gas to work with state agencies, and required certain conditions pursuant to such local permits, it was unclear to which state body FERC was directing its order: PADEP or the EHB.⁵⁰ The following sections of this Note will track the development of the relevant legal standards addressed in *Delaware Riverkeeper* as well as the related federal court jurisprudence.⁵¹

43. *Delaware Riverkeeper*, 2013 WL 604393, at *2 (discussing Tennessee Gas's response to DRN's petition).

44. *Id.* at *14 (discussing legal basis for Tennessee Gas's preemption argument). For a discussion of FERC procedures, see *infra* notes 58-61.

45. See *Delaware Riverkeeper*, 2013 WL 604393, at *14 (addressing Tennessee Gas's secondary argument for motion to dismiss).

46. *Id.* at *2 (explaining Tennessee Gas's basis for motion to dismiss).

47. See *id.* at *25-28 (denying Tennessee Gas's motion to dismiss on federal preemption).

48. *Id.* at *1 (denying Petition for Supersedeas).

49. See generally Tennessee Gas Pipeline Company LLC's Mot. Dismiss, at 2-21 (arguing EHB proceeding is preempted by federal law).

50. See generally *Tennessee Gas Pipeline Co., L.L.C.*, 139 FERC ¶ 61161, ¶202 (May 29, 2012) (encouraging state involvement in federal projects).

51. For a further discussion of the relevant legal standards, see *supra* notes 52-150 and accompanying text.

A. Federal Preemption

The Supremacy Clause in the United States Constitution declares the law of the Federal Government supreme to those of the states.⁵² Accordingly, a state law that “interferes with, or is contrary to federal law is invalid.”⁵³ Federal preemption applies in three major situations: (1) express preemption, (2) field preemption, and (3) conflict preemption.⁵⁴ Express preemption applies when Congress expressly intends to preempt state law.⁵⁵ Field preemption applies when Congress’s intent to preempt all state law in a particular area may be inferred because the scheme of federal regulation is sufficiently comprehensive.⁵⁶ Field preemption may be inferred where the “federal interest is so dominant that the federal system will be assumed to preclude enforcement of state law on the same subject.”⁵⁷ Lastly, conflict preemption applies when state law is nullified to the extent that it actually conflicts with federal law, even though Congress has not displaced all state law in a given area.⁵⁸ Moreover, a conflict between state and federal law exists when compliance with both federal and state regulations is a “physical impossibility” or when state law hinders “the full purposes and objectives of Congress.”⁵⁹

B. FERC and the Natural Gas Act

FERC is an independent agency that regulates interstate transmission of electricity, natural gas, and oil.⁶⁰ The NGA also grants FERC exclusive jurisdiction and reviewing power over natural gas

52. See U.S. CONST. art. VI, cl. 2 (declaring law of United States supreme law).

53. *Farina v. Nokia*, 578 F. Supp. 2d 740, 754 (E.D. Pa. 2008) (quoting *Free v. Bland*, 369 U.S. 663 (1962)) (explaining relationship between conflicting state and federal laws).

54. *Id.* (explaining three types of preemption); see also *Northern Natural Gas Co. v. Iowa Utils. Bd.*, 377 F.3d 817, 821 (8th Cir. 2004) (providing overview of three applications of federal preemption).

55. See *id.* (quoting *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985)) (describing express preemption).

56. See *id.* (discussing preemption when Congress intends federal government to occupy field).

57. *Id.* (discussing effect of implied field preemption).

58. *Farina*, 578 F. Supp. 2d at 754 (discussing conflict preemption).

59. *Id.* (citing *Colacicco v. Apotex Inc.*, 521 F.3d 253, 265 (3d Cir. 2008)) (explaining nuances in conflict preemption). Generally, federal courts cannot enjoin state administrative proceedings unless expressly authorized by an Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments. 28 U.S.C. § 2283 (2012) (explaining exceptions to general rule prohibiting injunction of state proceedings).

60. See *What FERC Does*, FERC (Jun. 24, 2014), <http://www.ferc.gov/about/ferc-does.asp> (providing overview of responsibilities of FERC).

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projects.⁶¹ FERC grants Certificates of Public Convenience and Necessity allowing natural gas projects only when it finds the applicant is “willing and able” to comply with federal regulations, and may attach certain conditions and requirements to any Certificate as it deems necessary.⁶² In reviewing an application for a Certificate, FERC must ensure the project complies with the requirements of all relevant federal laws, including the National Environmental Policy Act (NEPA) and the Clean Water Act (CWA).⁶³

If a party disagrees with a FERC action, it may apply for a rehearing within thirty days of the order, at which time FERC may grant or deny a rehearing or modify its order without another proceeding.⁶⁴ The Energy Policy Act of 2005 (EPACT) amended the NGA to provide a forum for review of such orders.⁶⁵ The amendment provides that:

The United States Court of Appeals for the circuit in which a facility . . . is proposed to be constructed, expanded, or operated shall have original and exclusive jurisdiction over any civil action for the review of an order or action of a . . . State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval . . . required under Federal law⁶⁶

61. See 15 U.S.C. § 717f(c)(1)(A) (2012) (granting FERC jurisdiction of interstate natural gas companies). The statute reads:

No natural-gas company . . . upon completion of any proposed construction . . . shall engage in the transportation or sale of natural gas, subject to the jurisdiction of [FERC] . . . unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the [FERC] authorizing such acts or operation”

Id. See also *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300-01 (1988) (discussing function of NGA).

62. See 15 U.S.C. § 717f(e) (2012) (explaining requirements to receive and comply with certificate); see also *Northern Natural Gas Co. v. Iowa Utils. Bd.*, 377 F.3d 817, 821 (8th Cir. 2004) (discussing NGA’s authorization of FERC). One of the benefits of Certificate approval is the authority to obtain rights of way through eminent domain under the authority of the government. See 15 U.S.C. § 717f(h) (2012) (authorizing use of eminent domain in case of inability to negotiate land transfer or sale)

63. See *Tennessee Gas Pipeline Co.’s Mot. Dismiss*, No. 2012-196-M, 2 (discussing FERC requirements to issue Certificate of Public Necessity).

64. See 15 U.S.C. § 717r(a) (2012) (describing rehearing procedure for appealed FERC order); see also *Delaware Riverkeeper Network v. Federal Energy Regulatory Comm’n*, 753 F.3d 1304, 1307 (D.C. Cir. 2014) (hearing appeal of FERC rehearing decision).

65. See 15 U.S.C. § 717r (2012) (enacting rehearing and review of FERC-regulated decisions).

66. 15 U.S.C. 717r(d)(1) (2012) (granting exclusive jurisdiction to circuit courts for reviews of construction of interstate gas facilities).

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If an order is contradictory to federal law governing one of the permits and would prevent construction of a FERC-authorized project, the appeals court will remand the order to the state agency, which must take action consistent with the appeals court's holdings.⁶⁷

C. The Clean Water Act

Although the conditions of the NGA apply generally to natural gas projects, such projects must meet additional requirements under the CWA.⁶⁸ According to the NGA, “[N]othing in [the NGA] affects the rights of States under . . . the [CWA].”⁶⁹ The CWA adds, “Any applicant for a Federal license or permit to conduct any activity including . . . the construction . . . of facilities, which may result in any discharge into navigable waters, shall provide . . . a certification from the State in which the discharge originates or will originate”⁷⁰

The Supreme Court stated in *Arkansas v. Oklahoma*⁷¹ that the CWA “anticipates a partnership between the States and the Federal Government.”⁷² Furthermore, the Second Circuit has held “the Clean Water Act . . . [is] notable in effecting a federal-state partnership to ensure water quality . . . so that state standards approved by the federal government become the federal standard for that state.”⁷³ Thus, the NGA and CWA require applicants to receive certification from states showing compliance with local regulations when applying to federal agencies, such as FERC.⁷⁴

67. *See id.* at § 717r(d)(3) (describing judicial review of state agency procedure).

68. *See Tennessee Gas Pipeline Co. v. Delaware Riverkeeper Network*, 921 F. Supp. 2d 381, 386 (M.D. Pa. 2013) (explaining exceptions in NGA pursuant to provision in CWA).

69. 15 U.S.C. § 717b(d)(3) (2012) (providing exceptions to NGA pursuant CWA).

70. 33 U.S.C. § 1341(a)(1) (2012) (granting states power to regulate and certify local permits).

71. 503 U.S. 91 (1992).

72. *Id.* at 101 (discussing cooperation of state and federal regulations with regard to CWA).

73. *Islander E. Pipeline Co. v. McCarthy*, 525 F.3d 141, 143 (2d Cir. 2008) (noting overlap in state and federal standards for water quality).

74. *See id.* at 144 (explaining co-regulatory scheme between NGA and CWA); *see also Dominion Transmission, Inc. v. Town of Myersville Town Council*, 982 F. Supp. 2d 570, 577 (D. Md. 2013) (holding local regulations not preempted under NGA when enacted under CWA).

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D. PA State Permit Procedures

FERC required Tennessee Gas to obtain the necessary state permits from PADEP.⁷⁵ Pennsylvania's permit review process requires applicants to provide complete and technically adequate applications.⁷⁶ An application is complete if it "contains the necessary information, maps, fees, and other documents, and []these items are of sufficient detail for Technical Review of the application" including addressing regulatory and statutory requirements.⁷⁷ Complete applications subsequently undergo a Technical Review to determine if they contain the necessary scientific and engineering information and a project design addressing specific regulatory requirements.⁷⁸

When a project fails to meet certain regulatory requirements, PADEP responds with a technical deficiency letter, which cites the statute or regulation that the application fails to address sufficiently.⁷⁹ Applications that pass this test are approved within a guaranteed number of business days.⁸⁰ A water obstruction permit must comply with Chapter 105 of the Pennsylvania Code and Section 401 of the CWA.⁸¹ Obtaining a permit also requires compliance with Chapter 102 and the procurement of an ESCGP permit.⁸²

75. See *Tennessee Gas Pipeline Co., L.L.C.*, 139 FERC ¶ 61161 ¶ 53, 71, 76, 78, 82, 147, 171, 172, and 175 (May 29, 2012) (requiring state and local approval for compliance with federal standards).

76. See DEPARTMENT OF ENVIRONMENTAL PROTECTION, *Policy for Implementing the Department of Environmental Protection (Department) Permit Review Process and Permit Decision Guarantee*, 5 (Nov. 2, 2012), available at, http://files.dep.state.pa.us/ProgramIntegration/PermitDecisionGuaranteePortalFiles/021-2100-001_PR_P_and_PDG_Policy.pdf (describing applicant accountabilities through PADEP procedure). PADEP also encourages all applicants to hold pre-application conferences with PADEP to discuss possible issues, especially for large multi-permit projects. *Id.* at 5, 7.

77. *Id.* at 8 (explaining details of completeness review).

78. *Id.* at 10 (describing next step in permit process).

79. *Id.* at 11 (explaining procedure if project is technically deficient).

80. See *id.* at 13 (explaining final step in permit procedure). Applicants who fail to address the technical deficiencies are subject to Elevated Review, which includes face-to-face meetings and telephone calls with Department directors to determine the direction of the project and if permit will be denied. *Id.* at 12; see generally *id.* at 15-25 (providing guaranteed permit decision timeframes).

81. See generally 25 P.S.C.A. §§ 105.11-15 (Supp. 2011) (providing state regulatory application requirements for water obstruction permits); see also 33 U.S.C. § 1341(a)(1) (2012) (requiring compliance with state regulations to comply with federal regulations).

82. 25 P.S.C.A. § 105.14(b)(11) (Supp. 2011) (requiring compliance with Chapter 102 as factor in review of application under Chapter 105).

E. The Environmental Hearing Board

Disgruntled citizens may appeal approved permits to the EHB, a Pennsylvania-created independent “quasi-judicial” agency consisting of five attorneys with experience before administrative agencies.⁸³ The EHB has the power to hear appeals from PADEP orders.⁸⁴ Although PADEP may take action on its orders prior to an EHB review, “[N]o action of [PADEP] adversely affecting a person shall be final as to that person until the person has had the opportunity to appeal the action to the board”⁸⁵ The EHB must conduct a *de novo* review of the action.⁸⁶ Furthermore, the EHB is not limited in determining whether evidence based only on facts found by the PADEP supports the PADEP’s action.⁸⁷ Instead, “the EHB’s duty [is] to determine if [PADEP’s] action can be sustained or supported by the evidence taken by the EHB.”⁸⁸ EHB decisions can be appealed to the Pennsylvania Commonwealth Court, which is not bound by EHB precedent.⁸⁹

F. Petitions for Supersedeas

A Petition for Supersedeas may be filed at any time during a proceeding.⁹⁰ Moreover, a petitioner may file a Temporary Supersedeas when there is a likelihood that a party might suffer immediate and irreparable injury before the EHB can conduct a hearing

83. 35 P.S.C.A. § 7513(a), (b), (e) (Supp. 2000) (explaining structure of EHB and qualifications of its members).

84. *See* 35 P.S.C.A. § 7514(a) (Supp. 2000) (empowering EHB with ability to hear appeals).

85. *See id.* at § 7514(c) (declaring no action of PADEP final until person can appeal to EHB).

86. *Pennsylvania Trout v. Department of Env’tl. Prot.*, 863 A.2d 93, 106 (Pa. Commw. Ct. 2004) (citing *Warren Sand & Gravel Co. v. Commonwealth*, 341 A.2d 556, 565 (Pa. Commw. Ct. 1975)) (explaining level of review).

87. *Id.* (discussing records allowed to be considered in evidence by EHB).

88. *Id.* (explaining EHB’s duty to determine basis for PADEP decision from its own collection of evidence).

89. *See Tire Jockey Serv., Inc. v. Commonwealth*, 915 A.2d 1165, 1178 (Pa. 2007) (discussing appeal of EHB decision to Commonwealth Court); *see also Pennsylvania Trout*, 863 A.2d at 106 (explaining that EHB decisions are not binding on Commonwealth Court).

90. 25 P.S.C.A. § 1021.61(a) (describing permissible timing of Supersedeas petitions). An appeal does not in itself act as a Supersedeas, but a Petition for Supersedeas must be heard by the EHB. *Id.* *See also* 35 P.S.C.A. § 7514(d)(1) (Supp. 2000) (explaining procedure of Supersedeas petition).

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on a Petition for Supersedeas.⁹¹ The EHB takes into account relevant precedent when evaluating the merits for Supersedeas.⁹²

The EHB considers three factors in its analysis to determine if it can grant a Petition for Supersedeas: (1) irreparable harm to the petitioner, (2) the likelihood of the petitioner prevailing on the merits, and (3) the likelihood of injury to the public or other parties, such as the permittee in third party appeals.⁹³ For the EHB to grant a Supersedeas, a petitioner must make a credible showing on each of the three regulatory criteria.⁹⁴ If a petitioner does not meet one of the three factors, the Board “need not consider the remaining requirements for Supersedeas relief.”⁹⁵

G. Permit Preemption in the Courts

1. *The Third Circuit’s Last Foray: NE Hub Partners*

The Third Circuit previously discussed how to address the questions of authority present between state and federal regulatory procedures.⁹⁶ In *NE Hub Partners, L.P. v. CNG Transmission Corporation*, a natural gas company planned to construct a natural gas storage facility for use in interstate commerce.⁹⁷ As a result, the project was subject to FERC’s jurisdiction and required FERC to “exhaustively review . . . [the] proposal for the Facility” and conduct an Environmental Impact Assessment pursuant to NEPA.⁹⁸ After review, FERC issued a Certificate of Public Convenience and Necessity to the natural gas company.⁹⁹

Pursuant to the Certificate, FERC required the gas company to comply with Pennsylvania’s drilling regulations and authorized the state to regulate the project for environmental safety.¹⁰⁰ Despite

91. 25 P.S.C.A. § 1021.64(a) (explaining function of Temporary Supersedeas).

92. 25 P.S.C.A. § 1021.63(a) (explaining weight of judicial precedent in EHB Supersedeas proceedings).

93. *Id.* (enumerating three requirements of successful Supersedeas claim).

94. *See* *Neubert v. Department of Env’tl. Prot.*, No. 2005-103-R, 2005 WL 3872388, at *2 (Pa. Env’tl. Hearing Bd. July 15, 2005) (holding necessity to find credible showing for all three requirements).

95. *Oley Twp v. Department of Env’tl. Prot.*, No. 96-198-MG, 1996 WL 66064, at *6 (Pa. Env’tl. Hearing Bd. Nov. 6, 1996) (holding petitioner must show all three factors for Petition for Supersedeas).

96. *See* *NE Hub Partners, L.P. v. CNG Transmission Corp.*, 239 F.3d 333, 345-49 (3d Cir. 2001) (holding FERC order could preempt state proceedings).

97. *See id.* at 337 (describing gas company’s project).

98. *Id.* at 337-38 (explaining required procedures for interstate commerce project).

99. *See id.* at 339 (explaining factual background of FERC involvement).

100. *See id.* (discussing order given to gas company).

the apparent delegation of regulatory power to the state, the Certificate qualified FERC's instruction by adding language stating that state agencies could not "prohibit or unreasonably delay" the project.¹⁰¹ The gas company thus successfully applied for the necessary permits from PADEP.¹⁰² In response, the gas company's competitors appealed to the EHB protesting the permits obtained from PADEP.¹⁰³

Having already spent four years seeking approval for its project, the gas company filed a complaint in the district court, arguing that the review was preempted and caused unreasonable delay.¹⁰⁴ The company's preemption claims were (1) the Certificate preempted the EHB proceeding and (2) the company was "completely free from any state regulation."¹⁰⁵ The district court dismissed the case for lack of ripeness, because the EHB had not yet taken action against the gas company.¹⁰⁶ The Third Circuit ultimately reversed the district court's decision, and rejected the dismissal.¹⁰⁷

The Third Circuit stated that it "strongly doubted" the case did not involve field preemption, and suggested the district court reconsider its decision on remand.¹⁰⁸ In a footnote, the Third Circuit mentioned that the conflicting language in the Certificate created a "hybrid situation" that "effectively . . . converted the case into a conflict preemption matter."¹⁰⁹ In the main text, however, the court stated preemption of the proceeding does not only apply to field preemption cases, but rather "it is logical to preempt state process concerning such matters as state actions in occupied fields" when

101. *NE Hub Partners*, 239 F.3d at 339 (qualifying FERC's state authorization); see also *Tennessee Gas Pipeline Co., L.L.C.*, 139 FERC ¶ 61161, at ¶95 (explaining limits to state regulation akin to language in *NE Hub Partners*).

102. See *NE Hub Partners*, (explaining successful application to state authority by gas company).

103. See *id.* (showing competitors' response to granted permits).

104. See *id.* (providing procedural posture and NE Hub's arguments); see also *Tennessee Gas Pipeline Co., L.L.C.*, *supra* note 29 and accompanying text (reiterating FERC's unreasonable delay provision).

105. See *NE Hub Partners*, 239 F.3d at 340 (providing two theories of preemption).

106. See *id.* (discussing district court's ruling in favor of EHB).

107. See *id.* at 349 (discussing Third Circuit's reversal of district court). The Third Circuit discussed preemption in-depth, but ultimately did not rule on the issue.

108. *Id.* (disagreeing with district court's holding that case did not involve field preemption).

109. *Id.* at 346 n. 13 (discussing preemption that regulates in field but permits state regulation). The gas company only argued the EHB's review was preempted on thirty identified issues already addressed in the FERC proceedings. *Id.* at 345.

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state processes conflict with federal regulatory laws.¹¹⁰ The court held that “state regulatory processes could be preempted by conflict with federal law, as well as field occupation.”¹¹¹ Furthermore, it would “defy logic to hold that a process which would ultimately conflict with federal law would itself be preempted.”¹¹² While the court suggested that the EHB process could be preempted, it left the ultimate decision to the district court on remand.¹¹³

2. *The Supreme Court Addresses NGA Field Preemption in Schneidewind*

The U.S. Supreme Court’s most recent discussion of concurrent regulation of interstate natural gas companies has been repeatedly cited in subsequent litigation.¹¹⁴ In *Schneidewind v. ANR Pipeline Co.*, a Michigan statute required approval of a state commission for natural gas companies to issue long-term securities.¹¹⁵ The Court stated that the NGA gives FERC exclusive jurisdiction over “the transportation and sale of natural gas in interstate commerce” and “FERC exercises authority over the rates and facilities of natural gas companies used in this transportation and sale,” including the regulation of securities.¹¹⁶ The Court held that the Michigan statute was an attempt to regulate in a field occupied by federal regulation through the NGA, and the objectives of the state coin-

110. See *NE Hub Partners*, 239 F.3d at 347 (finding preemption process not confined to field preemption cases).

111. *Id.* at 348 (holding state regulatory process can be preempted by either conflict preemption or field occupation).

112. *Id.* (holding it would be illogical not to find processes in conflict with federal law preempted).

113. *Id.* at 348-49 (forgoing concluding EHB process is itself preempted). The Third Circuit stressed that the opinion should not be “overread” to mean they were holding the EHB proceeding preempted, but rather that in the right set of circumstances, the proceeding could be. *Id.* at 349 n. 18.

114. See *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 311 (1988) (holding regulation promulgated by Michigan statute preempted by NGA). See also *Rockies Express Pipeline v. Indiana State Natural Res. Comm’n*, 2010 WL 3882513, at *3 (S.D. Ind.) (citing *Schneidewind* in its reasoning for finding FERC’s exclusive jurisdiction over natural gas in interstate commerce). For a discussion of *Rockies Express*, see *infra* notes 117-23 and accompanying text. See also *Natural Fuel Gas Supply Corp. v. Public Serv Comm’n of N.Y.*, 894 F.2d 571, 576, (2d Cir. 1990) (finding *Schneidewind* as weighing heavily in favor of preemption); *Northern Natural Gas. Co. v. Iowa Utils. Bd.*, 377 F.3d 817, 821 (8th Cir. 2004) (holding NGA occupies field of natural gas regulation following reasoning in *Schneidewind*).

115. See *Schneidewind*, 485 U.S. at 295-97 (discussing factual background of case). Michigan’s Public Utilities Securities Act (“Act 144”) directed the Michigan Public Service Commission to approve the issuance of securities of natural gas transporters. *Id.* at 296-98.

116. *Id.* at 300-01 (discussing NGA’s grant of jurisdiction in FERC and FERC’s subsequent powers).

cided with the objectives of FERC.¹¹⁷ Further, the Court found this was a case where a state law impermissibly tried to regulate in an area Congress intended FERC to regulate.¹¹⁸ In holding that the statute was preempted, the Court added the state law may be preempted even though “collision between the state and federal regulation may not be an inevitable consequence.”¹¹⁹

3. *Rockies Express Preempts Review of State Permits by State Agency*

The Southern District of Indiana has previously ruled on behalf of a natural gas company on preemption grounds.¹²⁰ In *Rockies Express Pipeline, LLC v. Indiana State Natural Resources Commission*, a natural gas company received a Certificate of Public Convenience and Necessity from FERC and obtained the state permits authorizing construction of a pipeline from the Indiana Department of Natural Resources (DNR).¹²¹ One of the company’s competitors challenged the permit and appealed to the Indiana State Natural Resources Commission (NRC).¹²² During the pending action, FERC released the gas company to begin construction of the pipeline, and the company sought a declaratory judgment finding the appeals proceeding had been preempted.¹²³

The court determined that although FERC encouraged state participation in the permit process, FERC “does not negate its ultimate authority to determine the route of any gas pipeline regardless of state objections.”¹²⁴ The court suggested that not all proceedings would be preempted if they did not conflict with FERC, but that revocation of a construction permit was not a per-

117. *Id.* at 307 (holding Michigan statute regulated in same field as NGA).

118. *Id.* at 308-09 (summarizing why statute coincides with FERC jurisdiction).

119. *Id.* at 310-11 (internal quotations omitted) (holding state regulation does not have to directly conflict with federal regulation for preemption). The Court determined that “this ‘imminent possibility’ further demonstrates the NGA’s complete occupation of the field Act 144 seeks to regulate.” *Id.*

120. *Rockies Express Pipeline v. Indiana State Natural Res. Comm’n*, 2010 WL 3882513, at *6 (S.D. Ind.) (holding Indiana administrative review of permit preempted by FERC).

121. *See id.* at *1 (describing factual background of case). The FERC certificate encouraged cooperation between the states and the interstate pipelines but states “may [not] prohibit or unreasonably delay the construction or operation of facilities approved by this commission.” *Id.* at *2.

122. *Id.* at *1 (explaining appeals procedure to NRC).

123. *Id.* at *2 (providing procedural posture of action of case).

124. *Id.* at *4 (discussing FERC’s ultimate authority over permit procedures).

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missible state involvement in FERC jurisdiction.¹²⁵ The court concluded that “no matter what label [parties] affix or term of art [parties] use . . . , it is the FERC, with review by the federal courts, and not the DNR or NRC that has the final word here.”¹²⁶

4. *The Second and Fourth Circuits Apply the CWA*

Although *Schneidewind* and its subsequent cases indicated the NGA generally preempts the field of interstate natural gas regulation, the Second and Fourth Circuits analyzed the effect of the CWA on this area of preemption.¹²⁷ In *Islander East Pipeline Co., LLC v. Connecticut Dep’t. of Env’tl. Protection*, the natural gas company sought to construct an interstate pipeline from Connecticut to New York and appealed the state agency’s denial of its petition to construct the pipeline to the Second Circuit.¹²⁸ The Second Circuit determined the case involved the review of a state agency pursuant to an amendment to the NGA as a result of EPACT.¹²⁹ Citing the “limited legislative history” of EPACT, the court found the purpose of EPACT was to help companies like Islander East pass their projects through a streamlined process for necessary construction.¹³⁰ The court stated that Congress preempted the area of interstate natural gas through the NGA, but left room for state regulation through the CWA as “deputized regulators.”¹³¹ The court determined that the state agency had committed to the NGA and CWA regulatory scheme and pursuant to EPACT, could have its actions reviewed by the federal courts.¹³² The Second Circuit

125. *Rockies Express*, 2010 WL 3882513, at *5 (holding federal preemption applies to quasi-judicial proceedings). At the time the decision was rendered, the company had already finished construction of the pipeline. *Id.* at *2.

126. *Id.* at *6 (confirming FERC’s exclusive jurisdiction on interstate natural gas matters).

127. See generally *Islander E. Pipeline Co. v. Connecticut Dep’t. of Env’tl. Protection*, 482 F.3d 79, 81-91 (2d Cir. 2006) (discussing jurisdiction of CWA certifications in federal courts); *AES Sparrows Point LNG, LLC v. Wilson*, 589 F.3d 721, 723-33 (4th Cir. 2009) (discussing NWA/CWA co-regulatory scheme).

128. *Islander*, 482 F.3d at 83 (describing interstate natural gas pipeline pertaining to case at hand).

129. *Id.* (discussing nature of case). For a discussion of EPACT, see *supra* notes 65-67 and accompanying text.

130. *Islander*, 482 F.3d at 85 (discussing limited legislative history of EPACT). Furthermore, “NGA applicants were subject to ‘a series of sequential administrative and State court and Federal court appeals that [could] kill a [project with a death by a thousand cuts]’” *Id.*

131. *Id.* at 90 (describing extent of federal preemption in interstate natural gas and exceptions).

132. *Id.* at 91 (holding state agency under review of federal courts).

reaffirmed this federal-state partnership when the case returned two years later.¹³³

The Fourth Circuit also reviewed the denial of a petition pursuant to a FERC order in *AES Sparrows Point LNG v. Wilson*¹³⁴ and through such action, implicitly assumed that the Circuit Courts have jurisdiction in such petitions.¹³⁵ In its denial of the original petition, the Maryland state agency specifically instructed the natural gas company to petition the Fourth Circuit to review the decision.¹³⁶ Thus, the Fourth Circuit analyzed the state agency's order directly pursuant to its CWA certifications without any further appeals to another reviewing board or to obtain a separate state judicial determination.¹³⁷

5. *The Middle District Strikes a Blow to the EHB*

The Middle District Court of Pennsylvania, days after the EHB's opinion in *Delaware Riverkeeper*, granted Tennessee Gas's Motion to Dismiss.¹³⁸ While admitting that the NGA generally preempts state review of permits pursuant to the NGA or FERC order, the court held that PADEP's permitting process was not preempted by the NGA because of the provisions in the CWA requiring state water quality certifications.¹³⁹ The case instead turned on the plain language and legislative history of Section 717r of the NGA regarding the jurisdiction of DRN's claim against FERC.¹⁴⁰ The court determined that the "state administrative agency acting pur-

133. *See* *Islander E. Pipeline Co. v. McCarthy*, 525 F.3d 141, 143 (2d Cir. 2008) (discussing federal-state partnership in NGA).

134. 589 F.3d 721 (4th Cir. 2009).

135. *AES Sparrows Point LNG, LLC v. Wilson*, 589 F.3d 721, 723-33 (4th Cir. 2009) (confirming circuit court exclusive jurisdiction for NGA claims).

136. *See id.* at 727 (describing notice of state review agency to gas company).

137. *See id.* (bypassing any state review agency or state court).

138. *See Tennessee Gas Pipeline Co. v. Delaware Riverkeeper Network*, 921 F. Supp. 2d 381, 383 (M.D. Pa. 2013) (holding PADEP permitting process allowed but EHB review precluded by FERC order).

139. *See id.* at 385-86 (citing *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 305 (1988)) (explaining holding does not depend on preemption of state procedures due to provisions of CWA); *see also* *Northern Natural Gas Co., v Iowa Utils. Bd.*, 377 F.3d 817, 823 (8th Cir. 2004); *Natural Fuel Gas Supply Corp. v. Public Serv. Comm'n of N.Y.*, 894 F.2d 571, 579, (2d Cir. 1990); *NE Hub Partners, L.P. v. CNG Transmission Corp.*, 239 F.3d 333, 348 (3d Cir. 2001). For further discussion of the CWA and its relationship to the NGA, *see supra* notes 68-74.

140. *Tennessee Gas*, 921 F. Supp. 2d at 388 (holding Section 717r precludes appellate review of EHB). While DRN argued that only the Chapter 105 permits were subject to federal jurisdiction under the CWA, the court determined the ESCGP permits were part and parcel with the Chapter 105 permits. *Id.* at 387. Therefore, the all of the permits granted by the Department were under appeal. *Id.*

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suant to Federal law” whose order would be reviewed referred only to PADEP and not the EHB.¹⁴¹ In contrast, the EHB existed pursuant solely to state law, as opposed to a federal statute.¹⁴² The court disagreed with DRN that the EHB protects a constitutional due process right because Section 717r(d)(1) does not contemplate finality in the state action for the review of an order by the appeals court.¹⁴³ The court also found the legislative history and precedent weighed in favor of Tennessee Gas.¹⁴⁴ The court discussed holdings by the Second and Fourth Circuits that suggested that an order from a PADEP-like agency could be directly appealed to the Circuit Courts.¹⁴⁵ Thus, the court held the NGA granted exclusive jurisdiction of these matters to the United States Court of Appeals.¹⁴⁶

III. NARRATIVE ANALYSIS

The EHB denied DRN’s Petition for Supersedeas, but did so on grounds other than federal preemption.¹⁴⁷ Instead, the EHB found DRN “failed to show that they were likely to succeed on the merits or that they would suffer irreparable harm,” and as such, did not fulfill the requirements for a successful Supersedeas petition.¹⁴⁸ The EHB’s opinion discussed the preemption issue, but only after the case had been decided on other grounds.¹⁴⁹

141. *See id.* at 388-92 (examining plain language and legislative history of provision). The court determined that the EHB was not an agency acting pursuant to the federal law, and that it could be more accurately described as a quasi-judicial branch to the state administrative structure. *Id.* at 388-90.

142. *Id.* at 390 (drawing distinction between PADEP and EHB).

143. *Id.* at 391 (holding federal judicial review not barred because of lack of finality in agency decisions). The court concluded that if Congress had intended to require a finality requirement, Congress would have specified in the need for one in the NGA. *Id.*

144. *See generally id.* at 391-93 (finding legislative history and precedent in favor of Tennessee Gas)

145. *Tennessee Gas*, 921 F. Supp. 2d at 393 (discussing appeal potential); *see* *Islander E. Pipeline Co. v. Connecticut Dep’t. of Env’t. Prot.*, 482 F.3d 79, 131-33; *AES Sparrows Point LNG v. Wilson*, 589 F.3d 721, 723-33 (4th Cir. 2009) (affirming federal jurisdiction over CWA claims).

146. *See Tennessee Gas*, 921 F. Supp. 2d at 388-92 (holding PADEP actions done pursuant to federal law have exclusive jurisdiction in circuit courts).

147. *Delaware Riverkeeper Network v. Department of Env’t. Prot.*, No. 2012-196-M, 2013 WL 604393, at *1 (Pa. Env’t. Hearing Bd. Feb. 1, 2013) (denying DRN’s appeal on non-preemption grounds).

148. *Id.* (denying DRN’s Petition for Supersedeas on merits). For a discussion of the requirements for a Petition for Supersedeas, *see supra* notes 90-95 and accompanying text.

149. *See Delaware Riverkeeper*, 2013 WL 604393, at *1 (acknowledging preemption argument but deciding case on other grounds). For a discussion of how the EHB disposed of the preemption issue, *see infra* notes 148-62 and accompanying text.

In its analysis, the EHB addressed each of DRN's specific objections and found DRN did not meet its burden to demonstrate likelihood of success on the merits.¹⁵⁰ After disposing of each argument related to the EGSCP-1 and Chapter 105 permit concerns, the EHB addressed Tennessee Gas's preemption claims raised in the company's Motion to Dismiss.¹⁵¹ Referencing Tennessee Gas's pending motion in the district court to enjoin the EHB proceeding, the EHB held that the parallel appeal and its repercussions played no role in the final decision.¹⁵² EHB conceded that FERC had already conducted a "lengthy review process" of the NEUP under the conditions of the NGA.¹⁵³ Furthermore, the EHB conceded that FERC's federal regulations had broad preemption of state regulatory processes, including state environmental requirements.¹⁵⁴ The EHB, however, did not find the precedent cited by Tennessee Gas in support of its motion applicable to the instant case.¹⁵⁵

The EHB cited a footnote in *NE Hub Partners* and stated that FERC's direction to Tennessee Gas to secure the necessary state permits and comply with Pennsylvania's regulations "changed the federal preemption analysis from a field preemption analysis to a conflict preemption analysis."¹⁵⁶ The EHB also cited the Third Circuit's holding in *NE Hub Partners*, which stated: "[E]ven within an occupied field federal regulation may tolerate or authorize exercises of state authority."¹⁵⁷ The EHB believed that when FERC directed Tennessee Gas to obtain the necessary permits from

150. See generally *Delaware Riverkeeper*, 2013 WL 604393, at *5-14 (analyzing PADEP's decision on merits as opposed to pleadings).

151. See *id.* at *14-15 (discussing Tennessee Gas's grounds for Motion to Dismiss).

152. *Id.* at *14 (stating preemption issue was not factor in deciding case). Essentially, if Tennessee Gas were successful in its appeal, the EHB could not even decide the case on the merits. See generally *Tennessee Gas Pipeline Co. v. Delaware Riverkeeper Network*, 921 F. Supp. 2d 381, 396 (M.D. Pa. 2013) (holding EHB proceeding enjoined).

153. *Delaware Riverkeeper*, 2013 WL 604393, at *14 (conceding substantial previous review conducted by FERC).

154. *Id.* (conceding broad federal regulation of interstate natural gas projects).

155. *Id.* (finding case law cited by Tennessee Gas inapplicable). The EHB classified this situation as one where "FERC directed Tennessee Gas to secure state environmental permits and approvals, including the state permits under appeal." *Id.*

156. *Id.* (citing *NE Hub Partners, L.P. v. CNG Transmission Corp.*, 239 F.3d 333, 346 n. 13 (3d Cir. 2001)) (noting FERC direction to state regulators effectively changed analysis from field preemption to conflict preemption). For a discussion of *NE Hub Partners*, see *supra* notes 96-114 and accompanying text.

157. *Delaware Riverkeeper*, 2013 WL 604393, at *14 (holding possibility of some state regulation within federally regulated area).

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Pennsylvania, FERC changed the preemption analysis.¹⁵⁸ In a footnote, the EHB questioned whether state authority under Section 401 Certification under the CWA was preempted.¹⁵⁹ Furthermore, the EHB also recognized FERC's condition that state requirements could not conflict with FERC's Certificate of Public Necessity or "cause unreasonable delay."¹⁶⁰ The EHB chose not to discuss either of these provisions further because Tennessee Gas declined to include them in its Motion to Dismiss.¹⁶¹

The EHB rejected Tennessee Gas's argument that PADEP's evaluation for issuing permits was not preempted but the EHB's appeals procedure was preempted.¹⁶² Furthermore, the panel found that Pennsylvania courts have found these review processes to protect constitutional due process through its *de novo* appeal.¹⁶³ The panel rejected the argument that "federal preemption allows federal agencies such as FERC to highjack state permitting procedures or to rewrite state laws . . ."¹⁶⁴ The EHB summarized: "To separate [PADEP]'s permitting decision from [EHB] appeals procedures violates the longstanding state statutory requirements, ignores longstanding due process safeguards and allows PADEP to act in a manner that is beyond review under state law."¹⁶⁵ Thus, FERC's direction to secure the permits from PADEP included the possibility of an appeal to the EHB.¹⁶⁶

V. CRITICAL ANALYSIS

Prior to *Delaware Riverkeeper*, the EHB had not defined the outer limits of its role in the Pennsylvania permitting process, and put this issue aside in only a few paragraphs.¹⁶⁷ The EHB had a litany of precedent to discuss, and could only refute Tennessee Gas's arguments that the NGA preempted the proceeding with sup-

158. *Id.* (holding FERC order changed preemption analysis).

159. *Id.* at 27 n. 17 (noting possible impact of CWA requirements on preemption issue).

160. *Id.* at 28 n. 18 (acknowledging "unreasonable delay" provision in FERC order).

161. *Id.* (forgoing discussion of CWA's impact on litigation).

162. *Delaware Riverkeeper*, 2013 WL 604393, at *15 (dismissing Tennessee Gas's argument in favor of preemption).

163. *Id.* at *15 (discussing EHB's role in providing constitutional due process).

164. *Id.* (rejecting Tennessee Gas's argument stripping EHB of power).

165. *Id.* (holding precedent and state laws prevent EHB from preemption).

166. *Id.* (holding PADEP and EHB both part of PA's permitting process).

167. *See generally Delaware Riverkeeper*, 2013 WL 604393, at *14-15 (acknowledging Tennessee Gas's Motion to Dismiss).

port from a footnote from *NE Hub Partners* addressing preemption analysis.¹⁶⁸ The EHB did not consider the terms of the FERC order addressing “unreasonable delay” provisions.¹⁶⁹ Nor did the EHB directly address the provisions in the NGA and the cases that followed in the other circuit courts.¹⁷⁰ While the EHB merely acknowledged the provisions in the CWA, in *Tennessee Gas*, the Middle District dismissed *Tennessee Gas*’s preemption argument at the outset of its decision.¹⁷¹ In comparison to the Middle District’s extensive analysis of the issue, the EHB left much to be desired from a binding quasi-judicial agency.¹⁷²

A. The EHB’s Application of *NE Hub Partners*

In response to *Tennessee Gas*’s arguments pertaining to precedent, the EHB accurately cited to *NE Hub Partners*, but misrepresented other crucial holdings and rhetoric stated by the Third Circuit in that case.¹⁷³ The EHB seemingly stated that the Third Circuit was unequivocal in determining that a FERC order to secure certain state permits changed the analysis to one of conflict preemption.¹⁷⁴ This mischaracterizes the Third Circuit’s discussion that such an order would be part of a “hybrid” scheme where a completely preempted field of regulation could authorize a degree of state involvement.¹⁷⁵ Further, the Third Circuit went on to state that a process could be preempted even in a conflict preemption scenario.¹⁷⁶ Several times, the Third Circuit suggested the district

168. For a discussion of the legal background and precedent before *Delaware Riverkeeper*, see *supra* notes 96-141 and accompanying text.

169. See *Delaware Riverkeeper*, 2013 WL 604393, at *15 (acknowledging “unreasonable delay” provision in FERC Order).

170. For a discussion of two other circuit court cases addressing the NGA/CWA regulatory scheme, see *supra* notes 131-37, 138-40 and accompanying text.

171. Compare *Delaware Riverkeeper*, 2013 WL 604393, at *14-15, with *Tennessee Gas Pipeline Co. LLC v. Delaware Riverkeeper Network*, 921 F. Supp. 2d 381, 385-86 (M.D. Pa. 2013) (holding pipeline case does not turn on preemption).

172. For further discussion of the Middle District’s opinion, see *supra* notes 142-50 and accompanying text.

173. Compare *Delaware Riverkeeper*, 2013 WL 604393, at *14 (discussing *NE Hub Partners*), with *NE Hub Partners, L.P. v. CNG Transmission Corp.*, 239 F.3d 333, 346-48 (3d Cir. 2001) (holding processes could be preempted if conflicting with federal law).

174. See *Delaware Riverkeeper*, 2013 WL 604393, at *14 (characterizing Third Circuit’s holding in *NE Hub Partners*).

175. See *NE Hub Partners*, 239 F.3d at 346 n. 13 (discussing hybrid preemption situation). For further discussion on hybrid preemption, see *supra* notes 110-11 and accompanying text.

176. See *NE Hub Partners*, 239 F.3d at 348 (holding possibility of preempting process in conflict with federal law); see also *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 310-11 (1988) (holding that process could be preempted even if it is

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court should find the process itself preempted, but restrained itself from ruling beyond the specific issues presented.¹⁷⁷ *NE Hub Partners*, therefore, does not unequivocally support Tennessee Gas's position, but the EHB's reliance on the Third Circuit's reasoning and rationale did not dispose of that argument either.¹⁷⁸

B. Leaving the CWA on the Bench

The EHB could have supported its jurisdictional argument more strongly if it had cited to any of the federal circuit cases discussing the federal-state partnership of the CWA.¹⁷⁹ As a review board for PADEP, the EHB should recognize that Chapter 105 permits required by FERC must comply with the CWA.¹⁸⁰ The NGA itself authorizes the states to play a role in CWA certifications.¹⁸¹ In comparison, the court in *Tennessee Gas* quickly identified this issue in Tennessee Gas's preemption argument, citing to cases such as *Islander East* and *AES Sparrows*.¹⁸²

The EHB mentioned the possible implications of the CWA in a footnote, but such a grant of regulatory powers to the states from the federal government should lead its argument.¹⁸³ The due process arguments the EHB relied on were only marginally persuasive, when DRN had been working closely with FERC and PADEP throughout as evidenced from the technical deficiency letters PADEP sent to Tennessee Gas incorporating notes from DRN.¹⁸⁴ It

inevitable that process conflicts with federal law). Thus, even if EHB review did not exactly conflict with federal law, there was an imminent situation that it might. See *Delaware Riverkeeper*, 2013 WL 604393, at *14.

177. See generally *NE Hub Partners*, 239 F.3d at 348-49 (suggesting possibility of preempted EHB review).

178. For further discussion of *NE Hub Partners*, see *supra* notes 96-114 and accompanying text.

179. See generally *Islander E. Pipeline Co. v. Conn. Dep't. of Env'tl. Prot.*, 482 F.3d 79, 83-90 (2d Cir. 2006); *AES Sparrows Point LNG v. Wilson*, 589 F.3d 721, 723-25 (4th Cir. 2009). For a discussion of these cases, see *supra* notes 130-41 and accompanying text.

180. For further discussion of Chapter 105 requirements, see *supra* notes 76-81 and accompanying text.

181. See 15 U.S.C. § 717b(d)(3) (2012) (providing CWA exceptions to NGA).

182. See *Tennessee Gas Pipeline Co. LLC v. Delaware Riverkeeper Network*, 921 F. Supp. 2d 381, 392-93 (M.D. Pa. 2013) (discussing cases involving CWA's intrusion on federal preemption under NGA).

183. Compare *id.* at 386-87 (holding case does not turn on preemption when CWA involved), with *Delaware Riverkeeper Network v. Department of Env'tl. Prot.*, No. 2012-196-M, 2013 WL 604393, at *14 (Pa. Env'tl. Hearing Bd. Feb. 1, 2013) (declining to discuss CWA's effect on federal preemption).

184. See *Delaware Riverkeeper*, 2013 WL 604393, at *4-5 (discussing extensive role external groups played in evaluating project).

is true that Tennessee Gas did not address the CWA issue in its motion, but it was certainly brought up by PADEP in its briefs.¹⁸⁵

C. What About the NGA?

The EHB also failed to provide an interpretation of the NGA as a matter of first impression.¹⁸⁶ In comparison to the court's approach in *Tennessee Gas*, which thoroughly interpreted the NGA in light of the amendment in EPACT, the EHB did not examine the plain meaning of the language in the NGA.¹⁸⁷ Furthermore, the EHB failed to examine the Congressional intent of EPACT or other interpretations of the NGA from previous judicial opinions.¹⁸⁸ Lastly, the dismissal of the NGA cases cited by Tennessee Gas is contrary to the treatment of such case law by the court in *Tennessee Gas*.¹⁸⁹ While it is true that none of these cases were precisely on point with the facts before the EHB, decisions like *Rockies Express* and *Schneidewind* suggest that the EHB proceeding could be preempted.¹⁹⁰ Therefore, the EHB could have attempted to distinguish these cases explicitly, or more thoroughly, to justify its decision.¹⁹¹

The EHB's rhetoric regarding the "highjacking" of state permitting procedures seems directed less at the functions of PADEP, but rather used as a defense mechanism for its own jurisdiction.¹⁹² The EHB is not made up of Article III judges; it is comprised of

185. See Brief of Department of Environmental Protection In Support of Its Opposition to Tennessee Gas Pipeline Company, L.L.C.'s Mot. Dismiss, No. 2012-196-M, 8-12 (discussing CWA exceptions to NGA preemption arguments).

186. Compare *Rockies Express Pipeline v. Indiana State Natural Res. Comm'n*, 2010 WL 3882513, at *2-6 (S.D. Ind.) (holding state review process preempted by NGA when pipeline already built), with *Delaware Riverkeeper*, 2013 WL 604393, at *1-2 (discussing situation where pipe has not been built and state permits are authorized pursuant to CWA certifications). The EHB was correct in determining the cases cited by Tennessee Gas were not precisely on point, but had similar points of emphasis. *Id.* at *14.

187. See generally *Tennessee Gas Pipeline Co. LLC v. Delaware Riverkeeper*, 921 F. Supp. 2d 381, 388-92 (M.D. Pa. 2013) (discussing plain language of EPACT).

188. See generally *id.* at 391-92 (discussing legislative history of EPACT).

189. Compare *id.* at 385-86 (acknowledging cases finding NGA preempts state regulation speaks to instant issue), with *Delaware Riverkeeper*, 2013 WL 604393, at *14 (holding similar cases not applicable).

190. For a discussion of *Schneidewind*, see *supra* notes 115-21 and accompanying text. For a discussion of *Rockies Express*, see *supra* notes 122-29 and accompanying text.

191. For a more in-depth discussion of the opinion in *Tennessee Gas*, see *supra* notes 142-50 and accompanying text.

192. See generally *Delaware Riverkeeper*, 2013 WL 604393, at *15 (holding Tennessee Gas would be stripping EHB of legal duties).

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practiced lawyers in the field of environmental law in Pennsylvania.¹⁹³ Thus, it is not surprising that the EHB focused on upholding Pennsylvania state law over ceding its authority to the federal government.¹⁹⁴ Its analysis directed attention away from federal laws and toward the rationality of defying the federal law when the DRN motion would be struck down on the merits regardless.¹⁹⁵ In a way, the EHB invoked a canon of avoidance to prevent a threat to its own authority.¹⁹⁶

VI. IMPACT

With increased demand for transporting natural gas along the Eastern seaboard, it is highly probable that natural gas companies, whose interstate pipelines stretch through Pennsylvania, will need to construct large new facilities.¹⁹⁷ PADEP's docket of permit applications on these projects will also continue to grow.¹⁹⁸ Grassroots organizations, such as DRN, will continue to fight these proposals, leading to more opportunities for conflict between FERC and the EHB.¹⁹⁹ Despite the counter-argument of the EHB, the decision in *Tennessee Gas* effectively reduces the EHB's role in protecting Pennsylvania's permitting procedures in interstate gas projects.²⁰⁰

Even so, in light of the EHB's decision, strong advocacy groups like DRN may petition the EHB, if only to delay the inevitable NGA

193. For further discussion of the EHB and its members, see *supra* 83-89 and accompanying text.

194. See generally *Delaware Riverkeeper*, 2013 WL 604393, at *15 (discussing ramifications on state law if EHB held otherwise).

195. See generally *id.* at *1, *15 (denying DRN's petition on merits and avoiding discussion federal law ramifications).

196. See generally *Clark v. Martinez*, 543 U.S. 371, 385 (2005) (discussing canon of constitutional avoidance). While the instant case does not deal with this issue specifically, the decision in *Delaware Riverkeeper* invoked some sort of quasi-avoidance doctrine.

197. See Laura Legere & Katie Colaneri, *Pennsylvania Shale Production Continued to Grow in 2013*, STATEIMPACT (Feb. 19, 2014) <http://stateimpact.npr.org/pennsylvania/2014/02/19/pennsylvania-shale-production-continued-to-grow-in-2013/> (reporting growing annual natural gas production in Pennsylvania and expectations of further growth).

198. For a discussion of PADEP's permit procedure, see *supra* notes 75-82 and accompanying text.

199. See *NE Hub Partners, L.P. v. CNG Transmission Corp.*, 239 F.3d 333, 348-49 (3d Cir. 2001) (suggesting EHB review of FERC orders could be preempted in different case).

200. See *Tennessee Gas Pipeline Co. LLC v. Delaware Riverkeeper Network*, 921 F. Supp. 2d 381, 390-91 (M.D. Pa. 2013) (rejecting EHB's argument that "[] appeal to the Board protects important constitutional due process right[s]").

arguments from interstate gas companies.²⁰¹ The EHB's defiant stance towards federal preemption may continue in other cases with other federal issues.²⁰² The decision in *Tennessee Gas*, however, may call into question the credibility of the EHB.²⁰³ The panel may limit itself to deciding state law questions, and leave more complex federal questions to other, more qualified panels such as the Circuit Courts.²⁰⁴ The federal preemption concerns in this case have not been clearly addressed by the circuit courts, and the complexities these issues present are beyond the EHB's expertise.²⁰⁵ Thus, interstate gas companies like Tennessee Gas whose permits are appealed to the EHB may bypass motions to dismiss within the EHB proceeding, and go directly to the circuit courts seeking to enjoin the proceedings.²⁰⁶ This was the first time the EHB discussed the possibility its proceedings could be preempted, and considering the decisions subsequent, it could be the last.²⁰⁷

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201. For further discussion of DRN and its actions, see *supra* notes 12-19 and accompanying text.

202. See generally Delaware Riverkeeper Network v. Department of Env'tl. Prot., No. 2012-196-M, 2013 WL 604393, at *15 (Pa. Env'tl. Hearing Bd. Feb. 1, 2013) (holding Tennessee Gas would be stripping EHB of legal duties).

203. See generally *Tennessee Gas*, 921 F. Supp. 2d at 390-91 (holding EHB not authorized by FERC to adjudicate interstate natural gas claims).

204. See generally 35 P.S. §§ 7513-16 (Supp.2000). For a further discussion of the makeup and role of the EHB, see *supra* 83-89 and accompanying text.

205. For further discussion of precedent in this arena, see *supra* notes 96-141 and accompanying text.

206. See James D. Elliot, *Tennessee Gas Pipeline Company Goes on the Offensive*, SPILMAN THOMAS & BATTLE (Feb. 26, 2013) <http://www.spilmanlaw.com/resources/attorney-authored-articles/marcellus-fairway/tennessee-gas-pipeline-company-llc-goes-on-the-off> (discussing effect of *Tennessee Gas* on ability of energy companies to protect against unnecessary delays).

207. See *id.* (discussing whether EHB has role in these claims).

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