Nos. 16-2212, 16-2400

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

LANCASTER AGAINST PIPELINES, *Petitioner*,
v.
SECRETARY OF THE PENNSYLVANIA DEPARTMENT OF PROTECTION and COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, *Respondents.*

SIERRA CLUB, *Petitioner*
v.
SECRETARY OF THE PENNSYLVANIA DEPARTMENT OF PROTECTION and COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, *Respondents.*

REPLY BRIEF OF PETITIONERS LANCASTER AGAINST PIPELINES AND SIERRA CLUB

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This matter concerns Petitioners Lancaster Against Pipelines ("LAP") and Sierra Club's ("SC") challenge to the Pennsylvania Department of Environmental Protection's ("PADEP") issuance of a Conditional Water Quality Certification ("Water Quality Certification") to Transcontinental Gas Pipe Line Company LLC, ("Transco") for the Atlantic Sunrise Pipeline Project ("Project"). LAP and SC shall be hereinafter referred to collectively as "LAP/SC".

I. The Water Quality Certification Is Not Ripe for Review By This Court

As set forth in LAP's merits brief, the Water Quality Certification in the above-captioned matter is not ripe for review by this Court. It is not a "final" order of PADEP, a prerequisite for federal court review. Rather, the matter must first be heard by the Pennsylvania Environmental Hearing Board ("EHB"). Failing to require that this matter first proceed before the EHB would require that this Court consider the case on an incomplete record and would deprive LAP/SC of significant due process rights.

This Court Has Not Previously Addressed When a Water Quality Certification is Ripe for Federal Judicial Review

Relying on *Delaware Riverkeeper Network v. Secretary, Pennsylvania Department of Environmental Protection*, 833 F.3d 360 (3d Cir. 2016), Transco argues that this Court has already held that it has exclusive original jurisdiction over an appeal of a PADEP water quality certification. Brief of Intervenor, pp. 5-

6.[1] It has not. In *Delaware Riverkeeper*, this Court only addressed the question of whether PADEP's action was an "order or action of a State administrative agency acting pursuant to Federal law." 833 F.3d at 370-372. The Court did not address whether the order or action was ripe for federal review. As the EHB found, for this reason "[w]e do not believe the Third Circuit's Opinion in the *Delaware Riverkeeper* case is particularly helpful" in resolving this issue. *Lancaster Against Pipelines v. Commonwealth of Pennsylvania, Department of Environmental Protection*, EHB Docket No. 2016-075-L (Consolidated with 2016-076-L and 2016-078-L) (May 10, 2017), Slip Op. at 4. (AD 8).

Issuance of the Conditional Water Quality Certification is Not the "Culmination" of PADEP's Action

Transco argues that PADEP's issuance of the Water Quality Certification "represents the culmination of PADEP's decision-making process" because it "conclusively determines the rights and obligations of the parties." Brief of Intervenor, p. 7. This argument conflicts with the plain language of the Environmental Hearing Board Act, which provides that "no 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 [B]oard . . . ." 35 P.S. § 7514(c). No

[1]In contrast to Transco, PADEP concedes that "[t]his court did not address the issue of whether a final state action is necessary to invoke this Court's jurisdiction under Section 19(d)(1) of the NGA . . . ." Brief of Respondent, p. 2. "PADEP also does not oppose a transfer to the PAEHB . . ." *Id.*, p. 5.

action of the PADEP is "culminated" or "conclusively decided" unless and until a person has had the opportunity for review by the EHB.

To support its argument that the un-reviewed issuance of the Water Quality Certification represents the culmination of PADEP's decision-making process, Transco also argues that "an appeal to the EHB does not negate the effectiveness of a PADEP action." Brief of Intervenor, p. 8. Presumably, Transco is referring to the fact that an appeal to the EHB does not act as an ***automatic*** supersedeas. This argument is flawed for two reasons. First, whether an appeal to the EHB acts as a supersedeas of a PADEP action has no bearing on whether an action is final. It is not, as Transco would have it, the "hallmark" of finality. Second, under the Environmental Hearing Board Act, while a supersedeas is not automatic, the EHB "may, however, grant a supersedeas upon cause shown." 35 P.S. § 7514(d)(1). See recent decisions granting supersedeas at, e.g., *Bradley and Amy Simon v. DEP*, EHB Docket No. 2017-019-L, 2017 WL 2399755 (May 25, 2017); *Center for Coalfield Justice and Sierra Club v. DEP*, EHB Docket No. 2016-155-B, 2017 WL 663900 (February 1, 2017). Thus, contrary to Transco's thesis, a proper appeal to the EHB may very well "negate the effectiveness of a PADEP action."

In addition, Transco argues that the EHB cannot be viewed as an integrated part of Pennsylvania's administrative environmental review process. Such an argument too is belied by the express terms and history of the Environmental

Hearing Board Act. In creating the Environmental Hearing Board, the Pennsylvania legislature directed that "[t]he board shall continue to exercise the powers to hold hearings and issue adjudications which (powers) were vested in agencies listed in section 1901-A of the act of April 9, 1929 (P.L.177, No.175), known as The Administrative Code of 1929." 35 P.S. § 7514(c). Section 1901-A of the Administrative Code relates to the powers and duties of ***PADEP***.[2] Transco ignores the fact that the very functions it claims are separate and distinct from PADEP were once exercised by PADEP itself. In arguing that EHB review is not part of the administrative review process, Transco elevates form (i.e. the title of the reviewing entity) over substance (i.e., the purpose and nature of the review undertaken by the EHB). The EHB does nothing more than provide the administrative review of the PADEP's action. As discussed more fully below, this is the very same function served by the Massachusetts Department of Environmental Protection ("MassDEP") administrative law judge.

Pennsylvania and Massachusetts Administrative Processes are Nearly Identical

Transco attempts to undermine the applicability of the First Circuit's persuasive decision in *Berkshire Environmental Action Team, Inc. v. Tennessee Gas Pipeline,* LLC, 851 F.3d 105 (1st Cir. 2017), by claiming that the

[2]Section 1901-A references the "Department of Environmental Resources". The Department of Environmental Resources was abolished by Act 18 of 1995. Its functions were transferred to, *inter alia*, the Department of Environmental Protection.

"administrative procedure in Massachusetts at issue in *Berkshire* is not comparable to Pennsylvania's . . . ." Brief of Intervenor, p. 12. This argument too has been squarely addressed and rejected by the EHB, which found that "Pennsylvania's procedures are ***nearly identical*** in substance to the Massachusetts procedures that the First Circuit found not to be final until the adversely affected party had an opportunity to take advantage of that state's hearing process." *Lancaster Against Pipelines*, EHB Docket No. 2016-075-L, slip op. at 5 (AD 9) (emphasis added).

In furtherance of its argument, Transco produces a table purporting to compare the Pennsylvania and Massachusetts administrative review processes. *See* Brief of Intervenor, pp. 13-14. Transco's table is both misleading and ignores the most relevant items of comparison. A more accurate table is set forth here:

	Pennsylvania	**Massachusetts**
Agency action is subject to an administrative appeal with an adjudicatory hearing	Yes. 35 P. S. § 7514; 25 Pa. Code § 1021.51	Yes. 314 CMR 9.10(1)
Administrative adjudication is *de novo* review of agency action	Yes. *Leatherwood, Inc. v. Com., Dept. of Environmental Protection*, 819 A.2d 604, 611 (Pa. Cmwlth. 2003)	Yes. *Berkshire Environmental*, 851 F.3d at 112
Adjudicatory hearing is presided over by administrative law judge	Yes. 35 P. S. § 7513(b); 25 Pa. Code § 1021.116	Yes. 310 CMR 1.01(5)(a)
Adjudicatory hearing can include witness	Yes. 25 Pa. Code §1021.117	Yes. 310 CMR 1.01(5)(a), (b)

testimony and other evidence		
Adjudication can include pre-hearing discovery	Yes. 25 Pa. Code § 1021.102	Yes. 310 CMR 1.01(12)
Agency action is not "final" until opportunity for an administrative appeal	Yes. 35 P. S. § 7514(c)	Yes. *Berkshire Environmental*, 851 F.3d at 112
Party can appeal to judiciary following decision by administrative law judge	Yes. See 25 Pa. Code § 1021.201	Yes. 310 CMR 1.01(14)(f)

Like Massachusetts, Pennsylvania has an administrative appeal process for challenging an agency action, which involves the taking of evidence and *de novo* consideration. S*ee Berkshire Environmental*, 851 F.3d at 112; *Leatherwood, Inc. v. Com., Dept. of Environmental Protection*, 819 A.2d 604, 611 (Pa. Cmwlth. 2003). Like Massachusetts, the process may culminate in an adjudicatory hearing where parties may present evidence on issues of fact, and argument on issues of law and fact prior to the issuance of a final decision. 851 F.3d 112; 25 Pa. Code §1021.117. And, like Massachusetts, the agency action does not become "final" until after an aggrieved party has had the opportunity to pursue the administrative appeal process. 851 F.3d at 112; 35 P.S. § 7514(c). "[T]he manner in which

Massachusetts has chosen to structure its internal agency decision-making strikes us as hardly unusual . . . ." 851 F.3d at 112.[3]

EHB Review Is Not a Series of Sequential Administrative Appeals

Transco argues that allowing the EHB, in the first instance, to review this matter would delay the project through a "series of sequential administrative . . . appeals" that could kill the project "with a death of a thousand cuts." *See* Brief of Intervenor, p. 12. Such a statement mischaracterizes the EHB process. It is not "a thousand" or even a "series of sequential" administrative appeals. Rather it is a single step which is part of the ***unified*** administrative process which may be employed to review virtually every administrative approval by PADEP.

Finality is Necessary for Federal Court Jurisdiction

Transco also argues that finality of an administrative order is not a requirement because the term "final" is not mentioned in Section 717r(d)(1) of the Natural Gas Act ("NGA"), 15 U.S.C. § 717r(d)(1). *See* Brief of Intervenor, p. 16. However, finality is not required because the NGA or any other substantive statute requires it. Rather, finality is required because it is an element of this Court's jurisdiction. As PADEP acknowledges, "[t]he federal courts are only empowered

[3]In a further effort to show that the EHB is not part of the state environmental administrative review process, Transco presents the Court with an August 8, 2017 letter from the EHB to two State Senators in an unrelated matter. *See* Brief of Intervenor, AD 123-124. In the letter, the EHB administrative law judge advises the Senators that the EHB cannot accept a letter from them as part of the record of the case. Ironically, Massachusetts has a similar rule to prevent such extraneous information from being considered in an adjudicatory appeal. *See* 310 CMR 1.03(7).

to review an agency's ***final*** action. See 5 U.S.C. § 704 and *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 659 (2007)." Brief of Respondent, p. 38 (emphasis in original). *See also Id.* at pp. 40-41.

The Record Before the Court is Incomplete

Finally, Transco argues that appeal to this Court protects petitions due process rights because the record before this Court is complete. *See* Brief of Intervenor, p. 22. It is difficult to understand how Transco can make such an argument when Transco itself felt it necessary to append almost 100 pages of documents, including the Federal Energy Regulatory Commission ("FERC") Certificate of Public Convenience, to its brief as an addendum, because these documents were not part of the "record". See Brief of Intervenor, AD 28-124.

More importantly, PADEP does not establish a "record" for review by the judiciary. This role has been subsumed by the EHB. *See* 35 P.S. § 7514(c). In Pennsylvania, "[a] party's due process rights are protected by virtue of the party's ability to appeal an adverse determination to the board." *Fiore v. Department of Environmental Protection*, 655 A.2d 1081, 1086 (Pa Cmwlth. 1995). For this reason, "an action taken by the [PADEP] is not final until the adversely affected party has had an opportunity to appeal the action to the board." *Id.* The Court cannot dispense with such significant safeguards.

II. LAP/SC Will Suffer Irreparable Harm to Their Environmental Interests

LAP/SC's Environmental Interests Fall Within the Zone of Interests Protected by the Clean Water Act

Transco argues that the asserted harm suffered by LAP/SC does not fall within the "zone of interests" protected by the Clean Water Act, 33 U.S.C. § 1251, *et seq*. Brief of Intervenor, p. 42. In support of its claim, Transco relies on a single split decision from the District of Columbia Circuit, *Gunpowder Riverkeeper v. FERC*, 807 F.3d 267 (D.C. Cir. 2015). Transco's attack on the harm suffered by LAP/SC fails for both factual and legal reasons.

First, contrary to Transco's allegations, the harm suffered by LAP/SC and their members is not based merely on "property" interests, but on a myriad of environmental, recreational and aesthetic interests. *See* Merits Brief of LAP, pp. 17-18; Merits Brief of SC, p. 2.

Second, even absent the clear allegations regarding environmental harm, the majority in *Gunpowder Riverkeeper* establishes an artificial distinction between "property interests" and "environmental interests" and should be rejected by this Court. *Gunpowder Riverkeeper* was a decision of a three judge panel, in which one judge dissented and concurred in result. In *Gunpowder Riverkeeper*, petitioner Gunpowder Riverkeeper ("Gunpowder") challenged the issuance of a Certificate of Public Convenience for a natural gas pipeline issued by FERC. The majority found that Gunpowder was attempting to vindicate its members' "property rights"

and that these interests fell outside of the "environmental interests" protected by the Clean Water Act. 807 F.3d at 274.

Judge Rogers disagreed and found the majority's conclusion inconsistent with precedent from the D.C. Circuit and other Circuits. Rather, Judge Rogers, stated that the D.C. Circuit had previously concluded that the relevant zone-of-interests for environmental statutes "encompasses environmental values, read, of course, very broadly." 807 F.3d at 276 (*quoting Realty Income Trust v. Eckerd*, 564 F.2d 447, 452 n. 11 (D.C.Cir.1977)). Any petitioner who "arguably" asserts an environmental interest, read "very broadly," satisfies the test. *Id.* Only "strictly financial" interests of a petitioner fall outside of the zone of interests encompassed by the environmental statutes. *Id.*

Judge Rogers took specific issue with the majority's finding that Gunpowder's use of the word "property" and not "environment" as a reason for concluding that Gunpowder's interests fell on the "purely financial" side of the line and failed the zone of interest test, finding that "[t]he court misapplied the test." *Id.* at 277. Rather, she found that although Gunpowder has referred to its members' "property interests," an interest in "property" does not necessarily refer to commercial or financial interests alone, as the standing affidavits and agency record make plain. *Id.* at 278 (citations omitted). The asserted interests pertain to using that property—which encompasses trees, water, wildlife, etc.—to "live,

work, and recreate." (citations omitted). "The use of the word 'property' did not magically transform Gunpowder's members' stated interests in their natural environment into an interest in money alone. The court's conclusion that their only interest is monetary is too obtuse for a test that 'is not meant to be especially demanding.'" *Id.* (*quoting Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 399 (1987)).

In the case at bar, LAP/SC are not-for-profit organizations whose core purposes include promoting the preservation and health of the Susquehanna River watershed, where their members live, work, and recreate. The organizations are engaged in natural resource protection and conservation on behalf of their members, aiming to maintain and enhance the water quality and aquatic and natural resources of the watershed. Their members stand to lose the opportunities to use and enjoy the property on which they live, work, and recreate. Their loss of such opportunities is different from the purely monetary interests of a business seeking to impose regulatory costs on a competitor, or a company trying to steer business its way through the regulation of distant land use. LAP/SC's members are not absentee landowners, but actually live on the property affected by the challenged action. As a result, even if LAP/SC's interests were limited only to the "property" interests of their members, some of LAP/SC's members face the loss of the use and enjoyment of that property, and the environmental, recreational and

aesthetic interests associated therewith. This is enough for LAP/SC to come within the zone of interests of the Clean Water Act.

PADEP's Issuance of the Conditional Water Quality Certification Results In Direct and Irreparable Harm to LAP/SC's Environmental Interests

PADEP and Transco argue that LAP/SC are merely attempting to challenge PADEP's general authority to condition a Water Quality Certification and re-litigate this Court's decision in *Delaware Riverkeeper Network v. Secretary, Pennsylvania Department of Environmental Protection*, 833 F.3d 360 (3d Cir. 2016). *See, e.g.*, Brief of Respondents, p. 25. PADEP and Transco misconstrue and mischaracterize LAP/SC's argument.

In *Delaware Riverkeeper Network v. Secretary, Pennsylvania Department of Environmental Protection*, 833 F.3d 360 (3d Cir. 2016), the Court found that Delaware Riverkeeper Network "failed to demonstrate that it suffered harm from the sequence of PADEP's permitting actions" because the pipeline company "could not begin construction until it obtained all applicable authorizations required under federal law." 833 F.3d at 385. "Because environmental review was required before construction could begin, the Riverkeeper was not harmed by the timing of the required review, and PADEP did not act arbitrarily or capriciously." *Id.*

In the case at bar, however, LAP/SC asks this Court to look beyond the harms merely resulting from "construction" to the myriad of irreparable harms that

result from PADEP's issuance of the Conditional Water Quality Certification that will occur long ***before*** any of the conditions in the Water Quality Certification are met, if they are ever me at all. As LAP clearly states in its merits brief, "[i]n the case at bar, however, LAP does not argue that the sequencing has merely resulted in environmental harm that will not occur until after the environmental permits are issued. Rather, it contends, *inter alia*, that the sequencing results in a real and present deprivation of rights under the Fifth and Fourteenth Amendments of the United States Constitution, by taking private property without an established 'public use' and without 'due process of law.'" Merits Brief of LAP, p. 38. LAP/SC's members stand to lose the property on which they live, work, and recreate, and the related environmental, recreational and aesthetic interests.

The Conditional Water Quality Certification Is the Cause of LAP/SC's Harm

PADEP and Transco argue that the issuance of the Water Quality Certification is unrelated to the environmental harm that results from the loss and enjoyment of property. PADEP argues that "Petitioners' argument improperly conflates FERC's responsibilities . . . with PADEP's responsibilities under Section 401 of the [Clean Water Act]." Brief of Respondent p. 33. For its part, Transco argues that PADEP's issuance of the Water Quality Certification is not a "prerequisite" to the issuance of the FERC Certificate. Brief of Intervenor, p. 42.

First, whether or not a Water Quality Certification is a prerequisite for a FERC Certificate is irrelevant in this case, as PADEP issued the Water Quality Certification prior to the FERC Certificate, and FERC relied on the Water Quality Certification in issuing its Certificate. Further, whether or not the Water Quality Certification is a ***pre***-requisite to the issuance of the FERC Certificate, it is beyond dispute that the Water Quality Certification is a requisite or requirement for a valid Certificate. Section 401 of the Clean Water Act expressly provides that to obtain a FERC Certificate, Transco must obtain "a certification from the State in which the discharge originates or will originate . . . ." 33 U.S.C. § 1341(a)(1). FERC relies on this certification to assure that the actions it is authorizing will comply with state water quality standards and associated state law requirements. 33 U.S.C. § 1341(a)(1), (d). As PADEP itself notes, "[t]he state's role in certifying that projects requiring federal approval comply with the state's water quality standards is vital to the functioning of state programs to protect water quality. Section 401 is one of the central provisions of establishing states' rights . . . ." Brief of Respondent, pp. 13-14. "The state's ability to deny certification ultimately assures that . . . it has sufficient firepower to insist that its standards are accurately interpreted." Brief of Respondent, p. 13 (*quoting American Paper Inst. v. EPA,* 996 F.2d 346 (D.C. Cir. 1993)). Yet, PADEP now seeks to wash its hands of the impact to environmental interests caused by its issuance of the Water Quality

Certification. It is disingenuous for PADEP and Transco to discount the importance of the Water Quality Certification in the FERC review process, and claim that that it can ignore the harm to environmental interests that result from the issuance of the Water Quality Certification.

The importance of the relationship between the FERC Certification and the Water Quality Certification was made clear in PADEP's June 27, 2016 letter to FERC. In the June 27 letter, PADEP complained that FERC placed too much reliance on PADEP's issuance of the Water Quality Certification and failed to "fully acknowledge the State law requirements that Transco must fulfill to meet its obligations under Section 401 of the Clean Water Act" as require by the conditional Water Quality Certification. *See* June 27, 2016 Letter from PADEP to FERC (AD 19-21). Specifically, PADEP stated that:

> the Section 401 of the Clean Water Act imposes an obligation on Transco to obtain a certification from Pennsylvania that the discharges from the project will protect the quality of Pennsylvania's water resources. In Pennsylvania, that protection is assured through State law permits that PADEP has identified as conditions of the State Water Quality Certification. FERC's short-hand method of describing Pennsylvania's State Water Quality Certification and its State law permits required thereunder as permits issued under Section 401 of the Clean Water Act is misleading and should be corrected to accurately describe these requirements as applicable State law authorizations.

Id. While FERC considered the Water Quality Certification dispositive on the issue of safeguarding Pennsylvania's water quality standards, PADEP was forced to advise FERC that the Water Quality Certification is nothing more than an empty vessel that failed to safeguard anything without the underlying environmental permits. Of course, FERC's reliance on the Water Quality Certification for assurance that the Project would safeguard environmental interests in Pennsylvania was entirely justified, as this is the very reason why the Clean Water Act requires the issuance of a Water Quality Certification. The direct connection between the Water Quality Certification and FERC's action cannot be denied.

III. LAP/SC's Relief Does Not Come in "Other Proceedings"

PADEP and Transco argue that LAP/SC should seek redress for the harms to their environmental interests in "other proceedings", such as challenges to the Certificate of Public Convenience, eminent domain actions, or environmental permits issued by PADEP. *See* Brief of Intervenor, pp. 44-47; Brief of Respondent, p. 34. This argument – that Petitioners' relief can be found in some other future (or past) proceeding – has become standard fare. What this argument highlights, however, is the shell game perpetrated by PADEP, the harm directly created by PADEP's issuance of a flawed Water Quality Certification, and the limited issues that can be pursued in these "other proceedings". PADEP and Transco seek to

perpetuate a "Catch-22" that insulates from judicial review government action that substantially impacts people's lives.

PADEP, along with FERC, have established a complex system of interrelated and "conditional" approvals, with each government approval relying on yet another approval for its substance. The FERC Certificate of Public Convenience relies on the state Water Quality Certification for assurance that the Project will protect water quality in Pennsylvania through compliance with state water quality standards and associated state law requirements. The Water Quality Certification, in turn, relies on yet to be issued state environmental permits to assure such compliance.

Challenging the FERC Certificate Does Not Safeguard LAP/SC's Environmental Interests

Transco argues that LAP/SC can seek redress of their environmental interests through a challenge of the Certificate of Public Convenience issued by FERC. In fact, LAP and SC have filed a challenge to Certificate of Public Convenience issued by FERC in the United States Circuit Court for the District of Columbia, No. 17-1098. However, Transco has filed a motion to dismiss the action, claiming that the Certificate of Public Convenience is subject to a "tolling order" issued by FERC. Under the tolling order, the challenge to the FERC Certificate will sit indefinitely without any ability of LAP/SC nor any other challenger to proceed further. Nonetheless, even while the tolling order is in full

force and effect, Transco will be permitted to undertake eminent domain proceedings, depriving LAP/SC's members of use and enjoyment of their property, and the environmental, recreational and aesthetic interests associated therewith. As Transco would have it, these people should be deprived of their environmental interests while their challenges to the Certificate of Public Convenience remain trapped at FERC.

Even were LAP/SC permitted to proceed with their challenges the issuance of the FERC Certificate, FERC and Transco would likely argue that FERC had no choice but to rely on the "certification" issued by the State, as flawed as it may be, for assurance that the Project will protect water quality in Pennsylvania. They would likely argue that LAP/SC are precluded from pursuing the issue of harm to their environmental interests in that proceeding. If accepted by the Court, such an argument would preclude LAP/SC from vindicating their environmental interests in a challenge to the Certificate of Public Convenience.

Eminent Domain Proceedings Do Not Safeguard LAP/SC's Environmental Interests

Additionally, it is unlikely that LAP/SC could successfully challenge PADEP's issuance of the flawed Water Quality Certification in an eminent domain proceeding. Rather, this Court has found that once a holder of a Certificate of Public Convenience has established its right to condemn, it has "the ability to obtain automatically the necessary right of way through eminent domain, with the

only open issue being the compensation the landowner defendant will receive in return for the easement." *Columbia Gas Transmission, LLC v. 1.01 Acres, More or Less in Penn Tp., York County, Pa., Located on Tax ID #£440002800150000000 Owned by Brown*, 768 F.3d 300, 304 (3d Cir. 2014).

Challenging the Yet Unissued Underlying Environmental Permits Will Not Safeguard LAP/SC's Environmental Interests

Nor would LAP/SC's challenges of environmental permits that may be issued at some future time likely remedy the harm caused by PADEP's flawed Water Quality Certification. The aggrieved parties may, at some future date, have an opportunity to challenge the underlying permits when, and if, PADEP issues such permits. However, in the interim, PADEP has given FERC the greenlight to proceed with granting Transco authority to take private property. The resulting harm suffered by LAP/SC and their members is directly related to PADEP's issuance of the flawed Water Quality Certification.

According to the pipeline interests, regardless of the claim, a petitioner is always either too early, too late or in the wrong jurisdiction. If they had their way, there would never be a right time or right place for judicial review.

IV. PADEP Failed to Follow Its Own Rules and Policies In Issuing the Conditional Water Quality Certification

PADEP argues that its issuance of the Water Quality Certification[4] complied with "established Department procedures." Brief of Respondent, p. 35. It did not. PADEP's Chapter 105 Water Obstruction and Encroachment regulations clearly contemplate that the decision to issue or deny a Water Quality Certification be based upon a determination to issue or deny a Chapter 105 permit. Specifically, the regulations provide that:

> For structures or activities where water quality certification is required under section 401 of the Clean Water Act (33 U.S.C.A. § 1341), an applicant requesting water quality certification under section 401 shall prepare and submit to the Department for review, an environmental assessment containing the information required by ***subsection (a)*** for every dam, water obstruction or encroachment located in, along, across or projecting into the regulated water of this Commonwealth.

25 Pa. Code § 105.15(b) (emphasis added).[5] Subsection (a) provides that:

> For dams, water obstructions or encroachments permitted under this chapter, the Department will base its evaluation on the information required by § 105.13 (***relating to permit applications***—information and fees)

[4]PADEP refers to the Water Quality Certification as a "stand-alone water quality certification", which it describes as a request that is not accompanied by applications for the relevant state water quality permits. *See* Brief of Respondent, pp. 17, 31. This is an odd characterization of the Water Quality Certification as, as part of the approval process, Transco has applied for relevant state water quality permits, and the Water Quality Certification is expressly conditioned on these state water quality permits.

[5]In its merits brief, LAP mistakenly quoted language from PADEP's policy manual rather than 25 Pa. Code § 105.15(b).

> and the factors included in § 105.14(b) (***relating to review of applications***) and this section.

25 Pa. Code § 105.15(b) (emphasis added). It would be absurd for regulations to require that PADEP base a Water Quality Certification on all "the information required by" the "permit applications" and the factors "relating to review of applications", but that it issue such a Water Quality Certification without regard to those very permit applications.

However, it is not necessary to guess what is intended by PADEP's regulations. Rather, the meaning is clearly explained in PADEP's policy manual. As the manual provides:

> The decision to issue or deny the Commonwealth's applicable Water Obstruction and Encroachment . . . permits provides the ***basis and vehicle for granting or denying 401 Water Quality Certification***.

Water Quality Permitting Policy and Procedure Manual (362-2000-001) (emphasis added) (emphasis added) (AD 46).[6]

[6]PADEP argues that the harm to LAP/SC, and its own policy, should be ignored because an applicant requires "field-verified" surveys in order to obtain State water quality permits. *See* Brief of Petitioner, pp. 24-25. Transco similarly conflates the terms "site-specific conditions" with "field-verified" surveys in an attempt to argue complying with PADEP's policy of having State environmental permits used as the "basis and vehicle for granting or denying 401 Water Quality Certification" is an impractical. Brief of Intervenor, n. 16. The only authority cited for the proposition that "field-verified" surveys are required to obtain a State water quality permit is 25 Pa. Code § 105.13(e)(3). Brief of Intervenor, p. 24. This argument is troubling for two reasons. First, there is nothing in 25 Pa. Code § 105.13 that demands "field-verified" surveys or other information. Secondly, the requirements of 25 Pa. Code § 105.13 expressly apply to Transco's Water Quality Certification application. *See* 25 Pa. Code § 105.15(a). If, as PADEP and Transco contend, Section 105.13 requires "field-verified" surveys that they are yet to obtain, PADEP and

Where an agency fails to comply with its own procedures, its action is arbitrary, capricious, or otherwise not in accordance with the law. *See, e.g., INS v. Yang*, 519 U.S. 26, 32 (1996); *Big Horn Coal Co. v. Temple*,793 F.2d 1165, 1169 (10th Cir. 1986). PADEP departed from its historical practice without reason or explanation, and ignored the plain language of its own regulations and guidance document. Such action is clear evidence of arbitrary conduct.

V. PADEP Failed to Establish Procedures Sufficient to Satisfy the Notice Requirements of Section 401(a)(1) of the Clean Water Act

The Clean Water Act provides a clear non-discretionary duty that a state agency issuing Section 401 water quality certifications "***shall establish procedures*** for public notice in the case of all applications for certification by it." *See* Merits Brief of Petitioner, pp. 38-41. PADEP's failure to "establish" the Section 401 "procedures" for the substantive Chapter 102 permits harms Petitioners' interests and renders the issuance of the Water Quality Certification arbitrary, capricious, or otherwise not in accordance with law.

PADEP and Transco attempt to circumvent this clear notice requirement by arguing that PADEP noticed the application for the Water Quality Certification itself, and that the underlying environmental permits are separate and distinct from the Water Quality Certification and, therefore, not subject to the notice

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Transco must also concede that the Water Quality Certification application was insufficient and improperly approved.

requirement. Brief of Respondent, p. 38; Brief of Intervenor, pp. 51-52. However, PADEP and Transco cannot have it both ways: they cannot claim, on the one hand, that the underlying environmental permits are incorporated into and made a part of the Water Quality Certification, thereby purportedly safeguarding the public's environmental interests, but that these permits are not subject to the Water Quality Certification notice requirements. Notice of a Water Quality Certificate is functionally worthless without the notice of the underlying environmental permits that are incorporated into and form the foundation of the Water Quality Certification.

VI. PADEP'S Issuance of the Conditional Water Quality Certification Violates Article I, Section 27 of the Pennsylvania Constitution

Transco argues that PADEP does not need to comply with Article I, Section 27 of the Pennsylvania Constitution when issuing a Water Quality Certification. Brief of Intervenor, p. 59. Transco is wrong. The issuance of a Water Quality Certification is an action of the PADEP intended to safeguard Pennsylvania's environmental resources. Section 27 governs ***all*** PADEP actions that impact "Pennsylvania's public natural resources" and the peoples' "right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment." Pa. Const. Art I, § 27. Such actions include the Water Quality Certification.

For its part, PADEP argues that, so long as it complies with a statute "whose stated purposes and objectives include protection of the Commonwealth's natural resources and compliance with the goals of Article 1, Section 27", its actions "enjoy of presumption of constitutionality." Brief of Respondent, pp. 43-44. This is also wrong and expressly contradicts the Pennsylvania Supreme Court's recent rulings in *Robinson Township v. Commonwealth*, 83 A.3d 901, 951 (Pa. 2013) and *Pennsylvania Environmental Defense Foundation v. Commonwealth of Pennsylvania* ("*PEDF II*"), 161 A.3d 911 (Pa. 2017).

PADEP's argument is a vestige of the *Payne v. Kassab*, 312 A.2d 86 (Pa. Cmwlth. 1973) regime that the Pennsylvania Supreme Court overturned in *PEDF II*, replacing it with a true constitutional analysis that places the Constitution at the center, not a statute. *PEDF II*, 161 A.3d at 930. In striking down the *Payne* framework, the Court noted:

> In *Robinson Township*, the plurality explained the significant drawbacks of the Commonwealth Court's *Payne* test:
>
> > [T]he test poses difficulties both obvious and critical. First, the *Payne* test describes the Commonwealth's obligations—both as trustee and under the first clause of Section 27—in much narrower terms than the constitutional provision. Second, the test assumes that the availability of judicial relief premised upon Section 27 ***is contingent upon and constrained by legislative***

> ***action***. And, finally, the Commonwealth Court's *Payne* decision and its progeny ***have the effect of minimizing the constitutional duties of executive agencies*** and the judicial branch, ***and circumscribing the abilities of these entities to carry out their constitutional duties independent of legislative control***.
>
> *Robinson Twp.*, 83 A.3d at 967.

Id. at 930 n. 20 (emphasis added). In sum, the *Payne* regime placed the General Assembly at the center, not the Pennsylvania Constitution. Here, PADEP tries to do the same thing. It argues that it can comply with Section 27 merely by complying with "the directives of statues which enjoy a presumption of constitutionality." Brief of Respondent, p. 43. *See also* Brief of Intervenor, p. 59 ("The statutory framework underlying these permits ensures the protection of the Commonwealth's natural resources consistent with [Section 27]"). It fails to acknowledge that Section 27 requires an independent analysis separate and apart from the purported compliance with environmental laws. *See Center for Coalfield Justice v. Penn. Dep't of Envtl. Prot.*, EHB Docket No. 2014-720-B, slip op. at 62 (Aug. 15, 2017)(Section 27 Constitutional standard and compliance with environmental statutes are not coextensive). It attempts to hang on to the old regime in which PADEP can comply with its independent Constitutional obligations as Trustee by merely purporting to comply with the letter of an environmental statute, but that old regime is dead. PADEP *must* exercise *whatever*

statutory authority it has consistent with Section 27 and other constitutional limitations.[7]

Under Section 27, PADEP cannot act without being informed of how a potential action it seeks to take may lead to likely or actual degradation of the local environment, including degradation of public natural resources such as water. *PEDF II*, 161 A.3d at 932 (*citing Robinson*, 83 A.3d at 951); *Robinson*, 83 A.3d at 952 ("Clause one of Section 27 requires each branch of government to consider in advance of proceeding the environmental effect of any proposed action on the constitutionally protected features."). Informing itself before it acts is required both to protect the people's right to clean water (set forth in Section 27 clause 1) and to fulfill the PADEP's fiduciary duty of prudence (among others) as a trustee of public natural resources (including water). *PEDF II*, 161 A.3d at 932 (*quoting In re Mendenhall*, 398 A.2d 951, 953 (Pa. 1979); *Robinson*, 83 A.3d at 955.

PADEP's argument is further undermined by the fact that neither the Clean Water Act nor the state Clean Streams Law, are statutes "whose stated purposes and objectives include protection of the Commonwealth's natural resources and

[7]PADEP attempts to minimize the import of *PEDF II* by arguing that "[t]he context of the *PEDF* case . . . differs materially from the context of the instant case." Brief of Respondent, p. 43. This is wrong. As explained, Section 27 is a limitation on government authority, regardless of who the actor is. Thus, whether it is the General Assembly (as in *PEDF II*), or the PADEP (here), Section 27 limits both. Such an argument also fails to grasp that in *PEDF II*, a majority of the Pennsylvania Supreme Court broadly overruled the Pennsylvania Commonwealth Court's decision in *Payne v. Kassab*, 312 A.2d 86, 94 (Pa. Cmwlth. 1973), and affirmed the Pennsylvania Supreme Court's plurality decision in *Robinson*. *See PEDF II*, 161 A.3d at 930.

compliance with the goals of Article 1, Section 27." Brief of Respondent, p. 44.[8] Thus, even under the old regime, had PADEP strictly complied with the requirements of these statutes in issuing the Water Quality Certification, which it did not, PADEP would still have had the independent duty to assure compliance with its Constitutional duties under Section 27.

PADEP readily admits that it did no analysis to determine the likely impact of its Water Quality Certification. Rather, it has postponed such an analysis until sometime in the future, well after Transco has been granted authority to impinge upon the environmental, recreational and aesthetic interests of LAP/SC and their members. This is a classic example of closing the barn door after the horse is out. The Water Quality Certification is a means by which PADEP is supposed protect Pennsylvanians' environmental rights; instead PADEP treats it like an afterthought.

CONCLUSION

LAP/SC respectfully request that this Honorable Court transfer this matter to the Pennsylvania Environmental Hearing Board pursuant to 42 Pa.C.S.A. § 5103. In the alternative, LAP/SC respectfully request that this Court rescind the Water

[8] As PADEP itself notes, "[a]ll of Pennsylvania's current water quality standards and antidegredation implementation requirements have been promulgated pursuant to the Clean Streams Law." Brief of Respondents, p. 12.

Quality Certification. LAP/SC also ask that the Court grant such other relief as it finds to be just and appropriate.

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Dated: August 24, 2017

CERTIFICATE OF COMPLIANCE

1. This Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this Brief contains 6,485 words, excluding the parts of the brief exempted by Fed. R. App. P. 32 (a)(7)(B)(iii).

2. This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in 14 Point Times New Roman.

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L.A.R. 31.1 CERTIFICATION

I, Mark L. Freed, pursuant to L.A.R. 31.1. (c), certify that the text of the electronic brief is identical to text in the paper copies. I also certify that a virus detection program has been run on the files and no virus was detected. The virus detection program used was Webroot SecureAnywhere.

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CERTIFICATE OF SERVICE

I certify that on this day I filed the foregoing motion using the Court's CM/ECF system. All participants in this case are registered to receive service with that system and will receive a copy of this motion upon its filing.

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