UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Civil Appeal No. 16-2100

BERKSHIRE ENVIRONMENTAL ACTION TEAM, INC., JEAN ATWATER-WILLIAMS, RONALD M. BERNARD, CATHY KRISTOFFERSON, CHERYL D. ROSE, IRVINE SOBELMAN, PAULA L. TERRASI, SUSAN K. THEBERGE, ROSEMARY WESSEL, KATHRYN R. EISEMAN, ARIEL S. ELAN, ELLIOT FRATKIN, MARTHA A. NATHAN, KENNETH HARTLAGE, RONALD R. COLER, JANE WINN, and HEATHER MORRICAL,

Petitioners,

v.

TENNESSEE GAS PIPELINE COMPANY, LLC, and MASSACHUSETTS DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.

On appeal from the Massachusetts Department of Environmental Protection

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PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

Table of Authorities ii

Glossary v

I. Introduction 1

II. Argument 3

A. MassDEP's Certification is Not Ripe for Review 3

B. MassDEP's Certification is Not a Final Order 8

C. MassDEP Has Not Waived its Right to Issue a Certification 12

D. The Citizens' Appeal is Timely 16

E. The Certification is Not Supported by the Record and is Arbitrary and Capricious 19

III. Conclusion 30

Certificate of Compliance 31

Certificate of Service 32

Addendum 33

TABLE OF AUTHORITIES

Federal Cases

Alcoa Power Generating Inc. v. FERC,
643 F.3d 963 (D.C. Cir. 2011) 15

AT&T Comm. Sys. v. Pacific Bell,
203 F.3d 1183 (9th Cir. 2000) 4, 5, 7

AT&T Comm. v Southwestern Bell Tel. Co.,
38 F Supp 2d 902 (D. Kan. 1999) 4

Airport Cmtys. Coal. v. Graves,
280 F. Supp. 2d 1207 (W.D. Wash. 2003) 14

Bell v. New Jersey,
461 U.S. 773, 103 S. Ct. 2187, 76 L. Ed. 2d 312 (1983) 3

Columbia Riverkeeper v. U.S. Coast Guard,
761 F.3d 1084 (9th Cir. 2014) ..... passim

DelCostello v. Int'l Bhd. of Teamsters,
462 U.S. 151 (1983) 16

FPL Energy Me. Hydro LLC v FERC,
551 F3d 58, 63 (1st Cir. 2008) 13

Guardian Pipeline v. 529.42 Acres of Land,
210 F. Supp. 2d 971 (N.D. Ill. 2002) 10, 11

Islander E. Pipeline Co. v. Conn. Dep't of Envtl. Prot.,
467 F.3d 295 (2d Cir. 2006) ..... passim

Kern River Gas Transm'n Co. v. Clark Cty., Nev.,
757 F. Supp. 1110 (D. Nev. 1990) 10

Kingvision Pay-Per-View, Ltd. v. 898 Belmont, Inc.,
366 F.3d 217, 220-221 (3rd Cir. 2004) 17

North Star Steel Co. v. Thomas,
515 U.S. 29, 34-35 (1995) 17

Puerto Rico Sun Oil Co. v. United States EPA,
8 F.3d 73, 75 n.1 (1st Cir. 1993).....14

Tennessee Gas Pipeline L.L.C. v. Delaware Riverkeeper Network,
921 F. Supp. 2d 381 (M.D. Pa. 2013).....5

Weaver's Cove LLC v. R.I. Dep't of Envtl. Mgmt.,
524 F.3d 1330 (D.C. Cir. 2008).....16

Western Radio Servs. Co. v. Qwest Corp.,
530 F.3d 1186 (9th Cir. 2008).....4

State Cases

FPL Energy Me. Hydro LLC v. Dep't of Envtl. Prot.,
926 A.2d 1197 (Me. 2007).....13, 14

FERC Decisions

FPL Energy Me. Hydro LLC v. Dep't of Envtl. Prot.,
2004 FERC LEXIS 1939 (F.E.R.C. 2004) 14

Georgia Strait Crossing Pipeline LP,
2004 FERC LEXIS 783 (F.E.R.C. 2004) 14

Mahoning Creek Hydroelectric Co., LLC,
2011 FERC LEXIS 436 (F.E.R.C. 2011) 14

Federal Statutes

15 U.S.C. § 717r.....passim

33 U.S.C. § 1341(a)(1).....passim

33 U.S.C. § 1344.....12

State Statutes and Regulations

Mass. Gen. L. c. 30A, § 1 8

Mass. Gen. L. c. 30A, § 10 9

Mass. Gen. L. c. 30A, § 14 .....passim

314 C.M.R. § 4.04.....passim

314 C.M.R. § 4.05.....27

314 C.M.R. § 4.06(2) 26

314 C.M.R. § 9.02.....25

314 C.M.R. § 9.06.....passim

314 C.M.R. § 9.07.....20, 21

GLOSSARY

ACOE	Army Corps of Engineers
CWA	Clean Water Act
CTDEP	Connecticut Department of Environmental Protection
EHB	Pennsylvania Environmental Hearing Board
FERC	Federal Energy Regulatory Commission
FERC Certificate	Certificate of Public Convenience and Necessity
MassDEP	Massachusetts Department of Environmental Protection
MassDEP Brief	Respondent MassDEP's Brief dated November 14, 2016
NGA	Natural Gas Act
PADEP	Pennsylvania Department of Environmental Protection
Project	Connecticut Expansion Project
Tennessee Gas	Tennessee Gas Pipeline Company, LLC
Tennessee Gas Brief	Respondent Tennessee Gas's Brief dated November 14, 2016

I. INTRODUCTION

The Citizens'[1] Reply Brief refutes Respondent Tennessee Gas Pipeline Company, LLC's ("Tennessee Gas") assertions that: (i) no final order or action is required, and this Court has jurisdiction even though the Massachusetts Department of Environmental Protection ("MassDEP") has not issued a final order; (ii) the MassDEP water quality certification ("Certification") is a final order; (iii) MassDEP waived its right to issue a Certification; and (iv) the Citizens' appeal is untimely. In addition, in the alternative, the Citizens address Tennessee Gas's and MassDEP's unsupported claims that the MassDEP Certification is not arbitrary and capricious.

Tennessee Gas fails to overcome the Citizens' claim that a final order is required and that the initial determination by the Western Regional Office of MassDEP was not a final order or action as required by 15. U.S.C. § 717r(d). Instead, Tennessee Gas mischaracterizes this case as one primarily regarding exhaustion, waiver, preemption, and timeliness of the appeal.

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[1] The "Citizens" refers to the Petitioners: Berkshire Environmental Action Team, Inc., Jean Atwater-Williams, Ronald M. Bernard, Cathy Kristofferson, Cheryl D. Rose, Irvine Sobelman, Paula L. Terrasi, Susan K. Theberge, Rosemary Wessel, Kathryn R. Eiseman, Ariel S. Elan, Elliot Fratkin, Martha A. Nathan, Kenneth Hartlage, Ronald R. Coler, Jane Winn, and Heather Morrical.

This Court should reject Tennessee Gas's concerted efforts to circumvent an essential state agency process, and deny the Citizens a full and fair adjudicatory determination exclusively reserved to MassDEP by the NGA. Contrary to what Tennessee Gas would have this Court believe, the Citizens' appeal is not (and cannot be) the catalyst for the harms alleged by Tennessee Gas. In advancing this narrative, Tennessee Gas misconstrues the federal-state partnership fundamental to MassDEP's Certification process under Section 401 of the CWA, 33 U.S.C. § 1341(a), and misstates the record in order to aver "harm" which, unless prevented by this Court, will result from MassDEP's continued review.

Notwithstanding Tennessee Gas's claim of injury, the record is devoid of any evidence that Tennessee Gas undertook any action in any forum to expedite the regulatory process or to raise any concerns related to the one-year deadline that it now insists is so problematic. In many ways, any harm, to the extent it exists (which the Citizens do not concede), is self-inflicted.

Finally, in its consideration of the merits of this case, the Court should be mindful that MassDEP is continuing its extensive analysis of Tennessee Gas's application for a Section 401 water quality certification ("Application"). Per MassDEP's schedule, the Citizens have submitted expert testimony and other parties are scheduled to file as well, all during the pendency of this appeal. A.289. It is uncontroverted that MassDEP's review has not yet concluded and the record

submitted at MassDEP thus far has not closed. As such, this case is unique and, as set forth below, there are no precedents to support Tennessee Gas's conclusion that this Court has jurisdiction to review a MassDEP interim Certification at this early stage.

II. ARGUMENT

A. MassDEP's Certification Is Not Ripe For Review.

The question in this case is whether the Court of Appeals has subject matter jurisdiction to consider the Petition for Review. Tennessee Gas mistakenly concludes that a final order is not required before the First Circuit has jurisdiction.[2] Tennessee Gas Brief at 16.

In doing so, Tennessee Gas misconstrues the Ninth Circuit's clear holding in *Columbia Riverkeeper v. U.S. Coast Guard*, 761 F.3d 1084, 1091 (9th Cir. 2014), wherein the Ninth Circuit, following a detailed consideration of Section 19(d)'s explicit language and legislative history, determined that a final agency order or

[2] At the outset, Tennessee Gas opines that since the statute is silent, it should be defined to mean a final decision is not required. Tennessee Gas conveniently ignores the strong presumption that judicial review will only be available when an agency action becomes final. *Bell v. New Jersey*, 461 U.S. 773, 778 (1983); MassDEP Brief at 15.

action is required.[3] *Columbia Riverkeeper*, 761 F.3d at 1091-1093. The Ninth Circuit's thorough analysis confirmed that a final order or action is required for jurisdiction, resolving the legal point. *See* Citizens' Brief at 24-26. This Court should reach the same conclusion.

Furthermore, *AT&T Comm. Sys. v. Pacific Bell*, 203 F.3d 1183 (9th Cir. 2000), cited by Tennessee Gas, in fact reinforces the Ninth Circuit's reasoning in *Columbia Riverkeeper*. The court determined that federal judicial review was warranted directly following a final order.[4] Furthermore, in a subsequent case, the Ninth Circuit reiterated its finding in *Pacific Bell* and explained that finality, not exhaustion of administrative remedies, is required prior to judicial review. *See Western Radio Servs. Co. v. Qwest Corp.*, 530 F.3d 1186, 1196 (9th Cir. 2008) (citations omitted) ("[t]he parties have referred to the "exhaustion" requirement … but it may be more accurate to describe it as a type of finality requirement.").

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[3] Tennessee Gas assertion that *Columbia Riverkeeper* is distinguishable because of the factual distinction between the letter of recommendation and the Certification is not persuasive. The issue in both cases is whether the operative documentation — *i.e.*, letter of recommendation in *Columbia Riverkeeper* and the Certification here — is an order or action as set forth in § 717r(d)(1). The Ninth Circuit was clear in its statement of the law, and its findings are applicable here.

[4] *See Pacific Bell*, 203 F.3d at 1187 (court stated that the agency order at issue explicitly stated that the parties application for review "**is closed**") (emphasis added); *see also AT&T Comm. v. Southwestern Bell Tel. Co.*, 38 F. Supp. 2d 902 (D. Kan. 1999) (district court lacked subject-matter jurisdiction under 47 U.S.C.S. § 252(e)(6) where state commission had not issued final order approving interconnection agreement).

Therefore, *Pacific Bell* only serves as an appropriate analog when a state agency has completed its review process and issued a final determination, and exhaustion of administrative remedies is being contemplated prior to seeking federal judicial review.

Likewise, Tennessee Gas misconstrues the facts in *Tennessee v. Delaware Riverkeeper Network*, 921 F. Supp. 2d. 381, 392 (M.D. Pa. 2013) ("*Delaware Riverkeeper*") and incorrectly concludes that the court in *Delaware Riverkeeper* held that "administrative appeals need not be finalized." Tennessee Gas Brief at 21-22. There, the district court reviewed a **final** permit issued by the certifying state agency ("PADEP") and the referenced discussion in that case was whether a **final** PADEP permit was more appropriately before a different state administrative agency ("EHB") or the United States Court of Appeals. *See* Citizens' Brief at 27-28; *see also Delaware Riverkeeper* at 391. Tennessee Gas ignores the incontrovertible fact that PADEP issued a final order for review by the EHB.

Accordingly, the decision in *Delaware Riverkeeper*, in the context of the facts of a PADEP final order, cannot be read to mean no final order is required as Tennessee Gas insists. Citizens' Brief at 27-28. Nor should the Court accept Tennessee Gas's attempt to incorrectly compare the *de novo* review mandated for appeals of **final** orders in Pennsylvania by the independent and statutorily separate

independent quasi-judicial EHB with the continuing scrutiny by MassDEP as part of its internal review of the Certification. Tennessee Gas Brief at 23-24.

Similarly, Tennessee Gas ignores that the appeal to the Second Circuit in *Islander East Pipeline Co., LLC v. Conn. Dep't of Env'l Prot'n*, 482 F.3d 79 (3rd Cir., 2006) ("*Islander*"), involved a final order by the CTDEP Commissioner following a full and complete adjudicatory process.[5] Tennessee Gas's detailed discussion of the briefs in those cases obfuscates the salient fact that the CTDEP Commissioner issued a final decision following a detailed fact finding and contested adjudicatory process, similar in substance and process to what would result if MassDEP's continuing review in this case was allowed to continue. Tennessee Gas Brief at 25-27.

In addition, Tennessee Gas incorrectly cites the legislative history as set forth in *Islander* for the proposition that "there can be no state review of a [water quality certification]." *Id.* at 22. In fact, the Ninth Circuit, following its review of the very same legislative history, unequivocally rejected Tennessee Gas's conclusion. *See* Citizens' Brief at 25-26. The legislative history of Section 717r(d)(1) supports the notion that a final order or action is required.

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[5] Regulations of Connecticut State Agencies ("RCSA"), Section 22a-430(b), clearly provide that the Commissioner of CTDEP issues a **final** determination following extensive review of the application. This final CTDEP Commissioner ruling may be followed by a declaratory review proceeding. RCSA Sec. 22a-3a-4.

In short, all courts have held that NGA Section 19 (d) requires a **final** order or action before any United States Court of Appeals has jurisdiction to hear an appeal. In each case, the United States Court of Appeals reviewed an order following an adjudicatory process and an agency determination of rights, privileges, and duties. *Id.* at 34. Tennessee Gas's arguments to the contrary are incorrect.

Moreover, Tennessee Gas's reliance on the exhaustion of remedies is unavailing. The Court should not be misled by Tennessee Gas's persistent conflation of exhaustion and finality. First, Tennessee Gas misstates the Citizens' position: the Citizens do not argue (nor does the case law support) the proposition that the appeal in this case is not ripe because state administrative "appeals have not been exhausted." Tennessee Gas Brief at 19-20; Citizens' Brief at 5-6. Tennessee Gas also mistakenly leaps to the conclusion that, because courts have determined that state exhaustion requirements are "not a prerequisite to federal court review," this Court may review MassDEP's Certification determination. Tennessee Gas Brief at 21 (citing *Pacific Bell*).

Whether the order or action is final (as it was in *Islander and Pacific Bell*) is distinct from whether there is any requirement to exhaust administrative remedies — *i.e.*, undertake the declaratory process (*Islander*) or pursue rehearing *(Pacific Bell)*. In short, this Court's determination of whether a final order is necessary

before seeking federal judicial review does not require any consideration of exhaustion or any assessment of whether other state administrative procedures are to be completed, *i.e.* exhaustion.

Accordingly, for the reasons set forth herein and in the Citizens' Brief, a final order is required.

B. MassDEP's Certification is Not A Final Order.

The Certification is not a final order and does not establish the rights, duties, and privileges that are the foundation of a final order. Citizens' Brief at 30-34. In its argument to the contrary, Tennessee Gas wholly ignores and fails even to discuss the regulatory scheme in Massachusetts that mandates MassDEP and other agencies to undertake "adjudicatory proceedings" in order to establish the "legal rights, duties, and privileges" of parties following an opportunity for an agency adjudicatory hearing. M.G.L c. 30A, § 1(1).[6]

Consistent with the statutory scheme, the adjudicatory proceeding currently underway at MassDEP is designed to provide agency applicants and other stakeholders a "full and fair" process, an adjudicatory hearing, and a **final** decision with an opportunity for judicial review. *See* Citizens' Brief at 31-34; MassDEP

[6] M.G.L c. 30A, § 1(1) states, in pertinent part: "Adjudicatory proceeding" means a proceeding before any agency in which the legal rights, duties or privileges of specifically named persons are required … to be determined after opportunity for agency hearing.

Brief at 20-21; *see also* M.G.L c. 30A, §§ 10, 14. The ongoing regulatory process will establish the legal rights, duties, and privileges of the parties, following an adjudicatory hearing and final decision. The Certification issued as part of the ongoing agency adjudicatory proceeding, in advance of a hearing process, does not establish any legal rights, duties and privileges, and as such is not a final order.

Thus, in this case, the Court should permit the MassDEP to complete its review, conduct a hearing and issue a final decision as required by Massachusetts law. Tennessee Gas demurs, claiming that Condition 15 violates federal law and is therefore unenforceable. Tennessee Gas Brief at 30. Tennessee Gas reasons that MassDEP lacks legal authority to prohibit construction because only the FERC or a reviewing court of appeals can stay a FERC order (pursuant to 15 U.S.C. § 717r(c)), and that here FERC has authorized Tennessee Gas to construct the Project. *Id.* That is incorrect.

First, Section 717r(c) pertains only to rehearing requests of *FERC orders*:

> The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order. *See* 15 U.S.C. § 717r(c).

Applying the plain language of Section 717r(c), the present case clearly involves a matter related to the review of a state agency action (and not a FERC

order), and thus Tennessee Gas's claim that Section 717r(c) is applicable to the MassDEP process is false. *Id.* at 30. Indeed, Tennessee Gas even acknowledges that Section 717r(c) refers to staying the *enforcement* of a FERC Certificate, yet maintains that a stay of work during the appeal is "the functional equivalent" of staying the FERC Certificate. *Id.*

Second, while it is without dispute that state or local laws that undermine or otherwise interfere with federal laws are preempted, Tennessee Gas has not demonstrated any application of this general legal principle to the facts here. The cases cited by Tennessee Gas are not remotely analogous to the instant case—as they pertain to eminent domain proceedings and local permitting requirements beyond FERC regulations.[7] Neither of these is at issue here. Moreover, the FERC Certificate itself dispels any notion that Condition 15 effectively stays construction

[7] In *Guardian Pipeline*, the court emphasized that the FERC Certificate is controlling with respect to allowing a project developer to acquire easements by exercising the right of eminent domain—and that "[a]ny objections to the condemnation of public land for the construction of a natural gas pipeline is preempted." *See Guardian Pipeline v. 529.42 Acres of Land*, 210 F. Supp. 2d 971, 975 (N.D. Ill. 2002). In *Kern River*, the court held the federal preemption doctrine bars local permits that required compliance with standards "over and above" those set forth in the Natural Gas Act. *See Kern River Gas Transm'n Co. v. Clark Cty., Nev.*, 757 F. Supp. 1110, 1115 (D. Nev. 1990). Here, Tennessee Gas challenges the jurisdiction of the MassDEP in regards to reviewing a Certification, and has not sought relief in connection with an eminent domain action or alleged MassDEP's Certification included requirements beyond the NGA.

of the Project, and is therefore preempted:

> *The [FERC Certificate] is an "incipient authorization without current force or effect" because it does not allow the pipeline to begin the proposed activity before the environmental conditions are satisfied. Although Tennessee, as a certificate holder under section 7(h) of the NGA, can commence eminent domain proceedings in a court action if it cannot acquire the property rights by contract, Tennessee will not be allowed to construct any facilities on subject property unless and until there is a favorable outcome on all outstanding requests for necessary federal approvals, including a section 401 water quality certificate.* A3920 ¶ 99 (citations omitted).

Tennessee Gas's claim that "it will not be able to meet in-service deadlines" because of Condition 15 is thus contracted by the FERC Certification itself, and should be disregarded as an unsubstantiated objection. Tennessee Gas Brief at 11. *See Guardian Pipeline* 210 F. Supp. 2d at 974 ("This court may reject objections and defenses when it is clear that they are legally insubstantial. *The FERC Certificate is the conclusive answer to most of those objections and defenses.*") (citations omitted) (emphasis added).

Here, Tennessee Gas has not provided any evidence demonstrating that the

MassDEP has or will disrupt the federal permitting process for the Project.[8] Rather, Tennessee Gas recently stated that it "expects to receive the New England ACOE Section 404 permit upon completion of tribal consultation pursuant to Section 106 of the National Historic Preservation Act. The tribes have completed their field surveys for consultation purposes and submitted a final survey report to the Commission on October 1, 2016." *See* Biweekly Status Report at 1.[9] Notably, it makes no mention of the MassDEP proceeding in relation to the 404 Permit.

C. MassDEP Has Not Waived its Right to Issue a Certification.

The Citizens agree with MassDEP that Section 401 does not require the agency to issue a final decision within one year and that there is no waiver here. MassDEP Brief at 26-27, n.5.

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[8] Tennessee Gas misconstrues the significant interplay between the permit required by Section 404 of the CWA ("404 Permit") from the Army Core of Engineers pursuant to 33 U.S.C. § 1344 and the related Section 401 at issue here. The 404 Permit, requires a Certification from the state, and the Section 404 permit is submitted to FERC once the Section 401 and Section 404 requirements are met. Thus, the federal and state permitting process clearly work in parallel to each other, and Tennessee Gas's insinuation that the MassDEP has somehow derailed this process is meritless. *See* A.3897 (¶ 34) ("The issuance of federal, state, and local permits and approvals proceed on a parallel, but separate, review process under the purview of the respective agencies with jurisdiction. It is not practical, nor required, for the Commission to withhold its analysis and decisions until all permits are issued…").

[9] Tennessee Gas Biweekly Status Report – October 22 through November 4, 2016 (Submitted to FERC on November 10, 2016), *available* at http://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=14396422

The plain language of Section 1341 requires a state to "act" on a request for a water quality certification within one year after such request. *See* 33 U.S.C. § 1341(a)(1) ("If the State . . . fails or refuses to *act* on a request for certification, within a reasonable period time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application.") (emphasis added).

On its face, the statute is clearly ambiguous and does not define "act on." Moreover, notwithstanding Tennessee Gas's argument, the court in *FPL Energy Me. Hydro LLC v. Dep't of Envtl. Prot.*, 926 A.2d 1197, 1202 (Me. 2007), correctly determined, and the First Circuit upheld as *res judicata*, that the water quality certification process did not have to be concluded within one year.[10] *See FPL Energy Me. Hydro LLC v FERC* 551 F3d 58, 63 (1st Cir. 2008). Notably, FERC also refused to interpret Section 1341 as requiring a final certification decision within one year of receiving a certification request and stated that:

> There is nothing in the language of section 401 to suggest that a State must not only act on the certification request but also take action on any appeals that might subsequently be

[10] *In FPL Energy*, the Maine DEP issued a water quality certification that was subsequently appealed to a related state agency. The appeal was granted, and ultimately resulted in a final decision (beyond the one-year window) that rescinded the preliminary determination. The court rejected the project developer's assertion that because the state failed to issue its final decision within one year, it had waived its certification rights. *See* 926 A.2d at 1197.

> filed within one year. Accordingly, we cannot find that certification was waived.

See FPL Energy Me. Hydro LLC, 2004 FERC LEXIS 1939, **5 (F.E.R.C. 2004).

Similarly unpersuasive are the cases Tennessee Gas cites which lack both precedent and sufficient context to be applicable here.[11] In particular, Tennessee Gas's reference to *Puerto Rico Sun Oil Co. v. U.S. EPA*, 8 F.3d 73 (1st Cir. 1993) is especially misleading. *See* Tennessee Gas Brief at 35. (According to Tennessee Gas, the First Circuit in that case held that the certifying state agency "waive[d] its right to dictate permit terms **that go beyond what EPA [the federal agency] would do on its own**"). (Bold section omitted from Tennessee Gas quotation). This holding however, merely reflects the general premise that a "…responsible federal agency—[there, the EPA]—is free to disregard an untimely state certification action under section 401 [ ]."[12] Indeed, the Court specifically affirmed

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[11] In *Airport Cmtys.*, the district court "did not hold that the agency's failure to issue a decision on appeal within a year of the request meant that the certification was deemed waived." *See FPL Energy* 926 A.2d at 1203 (citing *Airport Cmtys. Coal. v. Graves*, 280 F. Supp. 2d 1207, 1216 (W.D. Wash. 2003)). Additionally, the references to *Georgia Strait Crossing Pipeline LP*, 2004 FERC LEXIS 783 (F.E.R.C. 2004) and *Mahoning Creek Hydroelectric Co., LLC*, 2011 FERC LEXIS 436 (F.E.R.C. 2011) are inapposite—both cases refer to state agency inaction—in *Georgia Strait*, there was no action at all and in *Mahoning Creek*, no action for two years. That is not the case here.

[12] *See FPL Energy Me. Hydro LLC v. FERC*, 551 F3d at 65 (citing *Puerto Rico Sun Oil Co.*, 8 F.3d 73, 75, n.1). *See also* MassDEP Brief at 26-27, n.5.

that the "waiver" language in Section 1341 can be understood as suggesting only that a federal agency is "free" to ignore a late certification, but not *required* to do so. *Puerto Rico Sun Oil Co.*, 8 F.3d at 79.

Tennessee Gas also misconstrues the holding in *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963 (D.C. Cir. 2011) where the court addressed whether a state waives "… its *Section 401* certification authority when it issues a certification within the one-year period stating that it is not effective until the applicant satisfies a condition that can be satisfied, if at all, only outside of the one-year period?" 643 F.3d 968; Tennessee Gas at 34-35. The court's interpretation of Section 401 to "allow licensing once a certification has been 'obtained,' [ ] even if the certification is not by its terms immediately 'effective,' is consistent with the plain text and statutory purpose of the provision…. Nowhere in *Section 401* is it stated that a certification must be fully effective prior to the one-year period much less prior to licensing; it requires only that a State 'act' within one year of an application and that a certification be 'obtained.'" *Id.* at 976 (citations omitted).[13]

[13] Moreover, if the Certification, as issued, allows the ACOE to proceed with a 404 Permit, then MassDEP cannot be deemed to have waived its authority. *See Alcoa*, 643 F.3d 972 (acknowledging that "the purpose of the waiver provision is to prevent a State from indefinitely delaying a federal licensing proceeding by failing to issue a timely water quality certification under *Section 401*," the court concluded that "it follows that the inverse must also be true: if a certification would allow the Commission to proceed with licensing, then waiver did not occur."

Accordingly, there is no basis to conclude that MassDEP waived its right to issue the Certification.[14]

D. The Citizens' Appeal is Timely.

Although § 717(r)d does not set any specific time frame for filing an appeal from state administrative agency action, Tennessee Gas asserts, and MassDEP concurs, that the thirty-day appeal period set forth in Mass. Gen. L. c. 30A, § 14, relating to judicial review of administrative orders, is the most analogous state provision to NGA Section 19(d). *See* Tennessee Gas Brief at 38-41; MassDEP Brief at 13. Tennessee Gas also cites the Supreme Court's decision in *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 158 (1983), for the proposition that when federal statutes lack a time limit, that Courts will "borrow" the most closely analogous state provision. Tennessee Gas Brief at 40. Tennessee Gas and MassDEP incorrectly conclude that the state provision controls.

While Tennessee Gas acknowledges that courts do not automatically defer to state statutes, it neglects the reasoning set forth in *DelCostello*:

[14] Additionally, Tennessee Gas may not have standing to raise a claim of waiver. *See Weaver's Cove LLC v. R.I. Dep't of Envtl. Mgmt.*, 524 F.3d 1330, 1334 (D.C. Cir. 2008) (The Court held that the applicant in that case was not injured by the state's failure to act in not issuing a Section 401 Certification within one year and therefore did not have standing to assert a claim of waiver).

> In some circumstances . . . state statutes of limitations can be unsatisfactory vehicles for the enforcement of federal law. **In those instances, it may be inappropriate to conclude that Congress would choose to adopt state rules at odds with the purpose or operation of federal substantive law**…. **State legislatures do not devise their limitations periods with national interests in mind**, and it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies.

462 U.S. 161 (citations omitted)(emphasis added).

In this case, a more analogous federal statute exists: §717r(b). *See* Citizens' Brief at 4-5. Deference to a federal statute is appropriate when the state statutes are unsuitable, and when there is an advantage in doing so with respect to upholding federal policy and allowing for judicial efficiency. *See Kingvision Pay-Per-View, Ltd. v. 898 Belmont, Inc.*, 366 F.3d 217, 220-221 (3rd Cir. 2004) (quoting *North Star Steel Co. v. Thomas*, 515 U.S. 29, 34-35 (1995)) ("…we decline to follow a state limitations period only when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking").

Accordingly, the Citizens maintain that Congress did not intend to adopt a state statute (Mass. Gen. L. c. 30A, § 14) that provides a shorter timeline (30 days) than an federal statute (§ 717r(b)) attendant to the federal provision at issue here

(§ 717r(d)).[15] *See Columbia Riverkeeper*, 761 F.3d at 1092 ("In adding § 717r when it enacted the EPAct, Congress did not give any sign it intended federal courts to exercise a broader scope of review over non-FERC decisions than over FERC decisions"). Citizens' Brief at 4.

Should the Court determine that the state statute applies, the Citizens concur with MassDEP that the 30-day limitation period has not been triggered because, as set forth in Mass. Gen. L. c. 30A, § 14, only final agency action is reviewable and no final decision has issued in this case. MassDEP Brief at 29.

Accordingly, the Citizens' appeal is timely.

[15] Tennessee Gas's FERC filing will be governed by Section 717r which provides for the 60-day appeal period for review of a Commission order at the United States Court of Appeals. Section 717r(b) provides a 60 day period to appeal for the **review** of a Commission Order **at the U.S. Court of Appeals**.

E. The Certification Is Not Supported by the Record and Is Arbitrary and Capricious.

In their initial brief, the Citizens submitted a detailed analysis of deficiencies in Tennessee Gas's Application to MassDEP and the significant shortcomings in the MassDEP's approval of the submittal in the interim Certification. Citizens' Brief at 35-60.[16] The Citizens' conclusion that MassDEP's determination, based upon its limited analysis and an incomplete record ignores standards established by its regulations, and is arbitrary, capricious, or otherwise not in accordance with law, is supported in the Citizens' initial brief.

In this Reply, the Citizens do not address every factual and legal issue as set forth by MassDEP and Tennessee Gas; rather they rely upon their initial brief. However, the Citizens herein address a number of significant material issues and,

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[16] In their initial brief, the Citizens noted their intention to present expert evidence in the adjudicatory proceeding underway at MassDEP relating to the substantive determinations of the Certificate and have, in fact, submitted a filing as required by the schedule at MassDEP. On November 14, 2016, the Citizens filed and served the direct testimony of Professional Wetland Scientist Matthew Schweisberg, addressing the Issues for Adjudication to be resolved in the Adjudicatory Hearing before the MassDEP's Office of Appeals and Dispute Resolution pursuant to the Pre-Screening/Pre-Hearing Conference Report and Order that MassDEP issued on October 13, 2016. Tennessee Gas and MassDEP will file and serve their direct cases on or before December 14 and December 28, respectively, and the Citizens will file rebuttal testimony by January 13, 2017, ahead of the January 18 Adjudicatory Hearing (Tennessee Gas also has an opportunity to file a rebuttal to MassDEP's direct case, which is due by January 6). *See* Add.83.

despite MassDEP's and Tennessee Gas's arguments to the contrary, continue to demonstrate that the Certification as issued is arbitrary and capricious.

1. Alternatives.

Although the roadway alternative would drastically reduce impacts (temporary and permanent) to the aquatic ecosystem by placing the pipeline within existing local roads,[17] MassDEP mischaracterizes this near total elimination of direct impacts to wetlands as "only marginal reductions in temporary and permanent operational impacts to wetlands." MassDEP Brief at 40. Tennessee Gas similarly mischaracterizes this massive reduction in impacts to wetlands as providing "no or negligible benefits to the aquatic ecosystem …." Tennessee Gas Brief at 46.

The reasons set forth in the Certification for rejecting this alternative, echoed by Tennessee Gas, were "impacts to residences, required forest clearing adjacent to

[17] MassDEP's regulations establish that "[n]o discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge that would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences." 314 CMR § 9.06(1); *see also* 314 CMR § 9.07(1); 314 CMR § 4.04(5)(a)(2). The scope of alternatives presented and considered "shall be commensurate with the scale and purpose of the proposed activity, the impacts of the proposed activity … ." 314 CMR § 9.06(1)(b). The Project is not water dependent, meaning that practicable alternatives that do not require discharging dredged or fill material are presumed to exist. 314 CMR § 9.06(1)(a).

the road and disruption to area roadways and the general public during construction." A.1714; Tennessee Gas Brief at 46. None of these factors is set forth in the MassDEP's regulations.[18] 314 CMR § 9.06(1). Moreover, MassDEP's reliance on MEPA's determination that the roadway alternative "would not be less environmentally damaging" is misleading, as the types of impacts upon which MEPA relied are not necessarily protected by the water quality standards.[19] MassDEP Brief at 40.[20]

In short, Tennessee Gas and MassDEP failed to properly consider less environmentally damaging alternatives for the Project, and rejected the roadway option (which would significantly decrease negative impacts to the aquatic ecosystem) based upon factors not set forth in the regulations. S*ee* 314 CMR § 9.06(1). Therefore, MassDEP failed to determine that the Project proposes the

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[18] As set forth in the Citizens' Brief, these reasons were refuted in public comments submitted to MassDEP. Citizens' Brief at 42-46.

[19] MassDEP's reliance on the MEPA alternatives analysis as evidence that those water quality standards were satisfied is misplaced and has no basis in the regulations. The Citizens do not attempt to conflate the MEPA and MassDEP alternatives analysis processes and scope, or collaterally attack the MEPA process, as alleged by MassDEP. MassDEP Brief at 41, n. 12. Rather, the Citizens have relied on materials in MassDEP's record regarding alternatives to the Project which would have less adverse impact on the aquatic ecosystem and were therefore relevant to the MassDEP's determination that the Project complies with the water quality standards, including §§ 314 CMR 4.04(5)(a)(2), 9.06(1), 9.07(1).

[20] The Citizens maintain that other alternatives to avoid or minimize impacts were never seriously considered. Citizens' Brief at 47-48.

'least environmentally damaging practicable alternative,' and meets the criteria at 314 CMR § 9.06(1). A.295. Accordingly, the Certification fails to satisfy the standard set forth in the regulations, and is arbitrary and capricious.

2. Environmental Degradation.

a. Tennessee Gas and MassDEP Ignored Impacts to BVW, IVW, and LUW.

Tennessee Gas mischaracterized direct impacts on water quality as indirect impacts, and did not identify or evaluate all of the Project's indirect, or secondary, adverse impacts to BVW and IVW, all in violation of 314 CMR § 4.04(5)(a)3. *See* A.3223. [21] In addition, despite this proximity of its work on the Project to 18 Vernal pools, Tennessee Gas admits that it failed to certify these areas as "certified vernal pools," and the record establishes that it did not accurately and completely describe their impacts. A.1765-1785; Tennessee Gas Brief at 54. Essentially, without any basis or opportunity for review, Tennessee Gas defined the problem away.

As the Project's indirect impacts were not described in the Certification or identified by Tennessee Gas, MassDEP could neither calculate the nature and

[21] For example, the Applicant's February 2016 "Final Compensatory Wetland Mitigation Plan" identifies the Project's indirect impacts as being "associated with the conversion of wetland vegetation type," including excavation of forested or shrub wetlands for pipeline installation and subsequent restoration and maintenance of wetlands. This work should be characterized as direct impacts.

extent of those impacts, nor determine that the Project complies with 314 CMR § 4.04(5)(a)3. Accordingly, MassDEP failed to consider whether the Project's proposed discharges and activities would be conducted to minimize adverse impacts on water quality, and its omission is arbitrary and capricious.

b. Impacts of Hydrostatic Testing.

Similarly, Tennessee Gas and MassDEP did not properly measure impacts on water quality from the Tennessee Gas's proposed discharge of 1,000,000 gallons of water following hydrostatic testing, which runs afoul of 314 CMR § 4.04(5)(a)3. Tennessee Gas does not directly address this issue in its brief, arguing only that the state Stormwater Management Standards do not apply to the Project. Tennessee Gas Brief at 55-56. MassDEP relies on Condition 47 in the Certification as the sole evidence that this 1,000,000-gallon discharge will not cause erosion or increased sedimentation to jurisdictional waters. MassDEP Brief at 56-57. Condition 47 merely provides that Tennessee Gas "shall comply with the approved plans for the management of all discharges of residual water from pipe testing to ensure that those activities do not result in a discharge to Waters of the United States within the Commonwealth." A.309.

The plans approved in the Certification, however, do not include any erosion and sedimentation controls downgradient of the dewatering structure to prevent or

reduce adverse water quality impacts to Spectacle Pond Brook.[22] The plans fail to acknowledge that the discharge of this volume of water running downhill on a 15% to 18% slope will cause erosion, or to recognize that the lack of erosion and sedimentation controls below the dewatering structure will result in turbid discharges and increased sedimentation to waterbodies including Spectacle Pond Brook and the Clam River, adversely impacting water quality. A.2329-2331. In the absence of these protections, the MassDEP wrongly concludes that the state water quality standards are satisfied. Accordingly, its determination is arbitrary and capricious.

c. Impacts to Vernal Pools.

Tennessee Gas and MassDEP concede that Tennessee Gas was allowed to circumvent the MassDEP's jurisdiction over Vernal Pools by failing to submit data to NHESP to have the Vernal Pools certified. *See* MassDEP Brief at 50-52; Tennessee Gas Brief at 54-55; Citizens' Brief at 57. MassDEP attempts to distinguish between vernal pools and vernal pool habitat, arguing that the latter is not protected under the water quality standards. This position contradicts the MassDEP's regulations, which define the term "aquatic ecosystem" as "Waters of the United States within the Commonwealth, including wetlands, that serve as

[22] FERC's May 2013 guidance document recommends slope breakers every 200 feet for slopes >15% to 30%. A.1992-1993.

habitat for interrelated and interacting communities and populations of plants and animals." 314 CMR § 9.02 (emphasis added). Vernal Pools are protected by the water quality standards, as well as by other state and federal laws, precisely because they provide unique and valuable wildlife habitat.

MassDEP's argument that the Project as approved would not result in the "Discharge of Dredged or Fill Material" to Vernal Pools is incorrect.[23] The MassDEP's regulations require consideration of the Project's direct and indirect impacts to Vernal Pools and wetlands containing Vernal Pool habitat. Under this proper scope, the Project will unquestionably result in negative impacts to Vernal Pools with indirect impacts to 17 of 18 vernal pools. Citizens' Brief at 56-57; *see also* A.3248.

MassDEP failed to require the Tennessee Gas to accurately identify Outstanding Resource Waters, or to apply its regulations prohibiting discharges to Outstanding Resource Waters without a variance to do so, and, therefore the

[23] "Discharge of Dredged or Fill Material" is broadly defined as "[a]ny addition of dredged or fill material into … waters of the United States within the Commonwealth. This term includes, but is not limited to: (a) direct placement of fill, including any material used for the primary purpose of replacing with dry land or of changing the bottom elevation of a wetland or water body; (b) runoff from a contained land or water disposal area… " 314 CMR § 9.02.

Certification approves a Project that contravenes 314 CMR § 9.06(3).[24] This failure is arbitrary and capricious.

d. Blasting Impacts.

Tennessee Gas concedes that it does not identify specific blasting locations and otherwise fails to provide specific information relating to blasting operations. Tennessee Gas Brief at 50. Tennessee Gas's lack of information underscores its failure to provide necessary information in it Blasting Plan to determine what impacts would result from blasting. A.1452-1453; Citizens' Brief at 52.

Moreover, although Tennessee Gas has identified bedrock blasting locations, MassDEP does not address the "high probability" location within wetlands, and instead focused on the "moderate probability" location to allow trenching under an unnamed stream. MassDEP Brief at 44-45; A.1454-1455. Likewise, the Certification is silent on this issue, and does not address this potential serious risk to surface waters, including wetlands, and ground water. Accordingly, MassDEP lacked required specific information with respect to blasting, and ignored its own

[24] 314 CMR § 9.06(3) prohibits discharge of dredged or fill material to Outstanding Resource Waters without a variance. Outstanding Resource Waters are defined to include vernal pools. 314 CMR § 4.06(2).

regulations, and its determination is arbitrary and capricious or otherwise not in accordance with law.[25]

e. Impacts on Thermal Conditions.

The temperatures of Spectacle Pond and Spectacle Pond Book will be impacted by tree-cutting and clearing of vegetation, as well as the warming of 1,000,000 gallons of water being discharged to Spectacle Pond Brook and the downstream Clam River, contrary to 314 CMR §§ 4.05(3)(b)(2), 9.06(7).[26] Tennessee Gas concedes that "removal of trees and vegetation will only 'temporarily' reduce shading," while MassDEP recognizes that "tree cutting along some stream portions on the Project Site may result in a temporary increase in water temperature…." Tennessee Gas Brief at 51-52; MassDEP Brief at 48. Neither Tennessee Gas nor MassDEP address the thermal impacts of the discharge

[25] Nor is Tennessee Gas's reliance on the FERC finding determinative. Tennessee Gas Brief at 50. The FERC standard and review is not the same as and is not a substitute for MassDEP's standards. The NGA authorizes the states pursuant to their own requirements to evaluate water quality impacts. 33 U.S.C. § 1341.

[26] The Citizens' argument that aspects of the Project are contrary to 314 CMR § 9.06(7) is not a concession that other provisions of the standards have been satisfied; rather, the Citizens simply allege failure to satisfy multiple provisions on MassDEP's regulations. *See* MassDEP Brief at 49, n.19; Tennessee Gas Brief at 51, n.22.

of 1,000,000 gallons of water to Spectacle Pond Brook and the Clam River. The failure to adequately address thermal impacts is arbitrary and capricious.

f. Stream Crossings.

MassDEP concedes that stream crossings create "impacts to Spectacle Pond Brook and two unnamed streams resulting from trenching work that 'cross' the waterbody," but asserts that stream crossing standards do not apply to the Project.[27] MassDEP Brief at 43; Tennessee Gas Brief at 49. MassDEP misconstrues the five criteria set forth under 314 CMR § 9.06(2)(b), identifying compliance with the Stream Crossing Standards as one of five factors for MassDEP to consider where a stream crossing is proposed. Indeed, MassDEP recognizes that the Certification itself "implicates" the Stream Crossing Standards relative to Tennessee Gas's removal of existing culverts as part of the Project. MassDEP Brief at 43, n.16. MassDEP's failure to apply stream crossing standards is arbitrary and capricious.

[27] Contrary to MassDEP's argument, the regulations do not adopt the narrow definition of "stream crossing" set forth in the Stream Crossing Standards.

3. Proposed Mitigation Measures Do Not Meet MassDEP Requirements.

MassDEP wrongly relies upon the proposed mitigation as further support for its issuance of the Certification. MassDEP Brief at 35, 45, 48, 50. Tennessee Gas's "Final Compensatory Wetland Mitigation Plan" describes the listed construction impacts as "temporary indirect" impacts, totaling 12.41 acres.[28] A.3223-3224. The Project, which proposes clearing and excavating in a forested wetland to install new pipeline, then replacing the excavated soils and re-vegetating the disturbed area, results in a substantial and permanent change. Moreover, a majority of the impacted wetlands within the Massachusetts Loop portion of the Project "provide forested wetland habitat and are located in relatively large, contiguous tracts." A.3228. The wetland replication area approved by the Certification (*e.g.*, an approximately 0.5 acre shrubby wet meadow between an isolated wet meadow and a small wet meadow area adjacent to a forested wetland) is inadequate for a relatively large, contiguous tract of forest. A.3228; A.3261. MassDEP's failure to properly impose meaningful mitigation measure is arbitrary and capricious.

[28] As discussed above, those impacts were mischaracterized: the assessment of adverse impacts mischaracterized direct impacts as indirect impacts, and permanent impacts as temporary impacts. Furthermore, the Tennessee Gas failed to identify or evaluate the types and scope of indirect impacts. A.3224.

III. CONCLUSION

The Citizens respectfully request that their appeal be dismissed without prejudice as premature or, alternatively, that this Court stay the Citizens' appeal pending a final decision from MassDEP. In the event the Court does not dismiss or stay the appeal, then the Citizens respectfully request that the Certification be rescinded or remanded, and that the Court award any other relief the Court deems just and equitable.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because this brief contains 6,962 words.

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 a proportionally spaced typeface using Word 2013 in Times New Roman style, font-size 14.

/s/ Richard A. Kanoff

Attorney for Petitioners
Dated: November 28, 2016

CERTIFICATE OF SERVICE

I hereby certify, pursuant to Fed. R. App. P. 25(d), that on November 28, 2016, the foregoing Petitioners' Brief was filed through the CM/ECF system and copies will be served electronically through the CM/ECF system on all parties or their counsel of record who are registered as ECF filers [and by electronic mail on non-registered ECF filers as indicated by "*"] as follows:

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ADDENDUM

20

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VIA HAND DELIVERY & E-MAIL

November 14, 2016

Bridget Munster, Case Administrator
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RE: In the Matter of Tennessee Gas Pipeline Company, LLC
OADR Docket No. WET 2016-020
Water Quality Cert. Transmittal No. X265051
DEP Wetlands File Nos. 087-0610 and 278-0130
Petitioners' Direct Case

Dear Ms. Munster:

Please find the following documents enclosed for filing in the above-referenced matter:

1. Petitioners' Pre-Hearing Memorandum of Law;
2. Pre-Filed Direct Testimony of Matthew Schweisberg;
3. Pre-Filed Direct Testimony of Jean Atwater-Williams;
4. Pre-Filed Direct Testimony of Ronald M. Bernard;
5. Pre-Filed Direct Testimony of Heather Morrical;
6. Pre-Filed Direct Testimony of Jane Winn, Executive Director of the Berkshire Environmental Action Team, Inc.; and
7. Certificate of Service

Thank you for your attention to this matter.

Sincerely,

Luke H. Legere

Enclosures

cc: Service List (via e-mail)