

Guest Column: Third Circuit Expands NJDEP Authority Under the Natural Gas Act By William F. Harrison and Kelly Brennan, [Genova Burns](#)

In a recent precedential opinion Delaware Riverkeeper Network v. Sec'y Pennsylvania Dep't of Env'tl. Prot., No. 15-2122, 2016 WL 4174045 (3d Cir. Aug. 8, 2016), the Third Circuit upheld permits issued by New Jersey Department of Environmental Protection (NJDEP) and Pennsylvania Department of Environmental Protection (PADEP) pursuant to the Clean Water Act. Transcontinental Gas Pipe Line Company, LLC (Transco) had obtained conditional approval from the Federal Energy Regulatory Commission (FERC) to expand its Leidy Line, an interstate natural gas pipeline. Transco requested various permits from NJDEP and PADEP to comply with conditions of FERC's order permitting the expansion and the provisions of the Natural Gas Act ("NGA"), 15 U.S.C. § 717 et seq. Following their issuance, the permits were appealed by multiple environmental groups. While the permits were upheld by the Court, the decision significantly broadened the authority of NJDEP to review projects that are subject to the NGA.

Under the NGA, most state and local permitting is preempted by FERC review of a pipeline project. However, the NGA also states that no states' rights granted by the Federal Water Pollution Control Act (the 'Clean Water Act') shall be affected. 15 U.S.C. § 717(b). Section 401 of the Clean Water Act authorizes states to issue Water Quality Certifications. Section 404 of the Clean Water Act establishes a wetlands permitting program which has been largely delegated to New Jersey. The NGA clearly exempts the water quality certification and wetlands permit reviews by NJDEP from being preempted by FERC. In addition to the Freshwater Wetlands Individual Permit and Water Quality Certification issued by NJDEP in the case, NJDEP also issued a Flood Hazard Area Individual Permit. The Third Circuit determined that since the Flood Hazard Area Individual Permit is, in effect, a set of conditions on the Freshwater Wetlands Individual Permit, it also was not preempted by the NGA. The same rationale was used to justify the conditions to protect threatened and endangered species that were contained in the Freshwater Wetlands Individual Permit that was issued.

NJDEP and PADEP initially challenged the authority of the Third Circuit to review their permitting decisions. The Third Circuit determined under the Natural Gas Act, it had authority to review the permits because the permits were issued pursuant to the Clean Water Act. The Court also found that the case was not moot despite construction being nearly complete because the state agencies may monitor the mitigation after completion. Rejecting NJDEP and PADEP claims of sovereign immunity, the Third Circuit explained that the states waived this immunity by voluntarily participating in the regulatory schemes of the Natural Gas Act and the Clean Water Act.