

# FERC Natural Gas Pipeline Projects in a Changing Landscape

John F. Stoviak

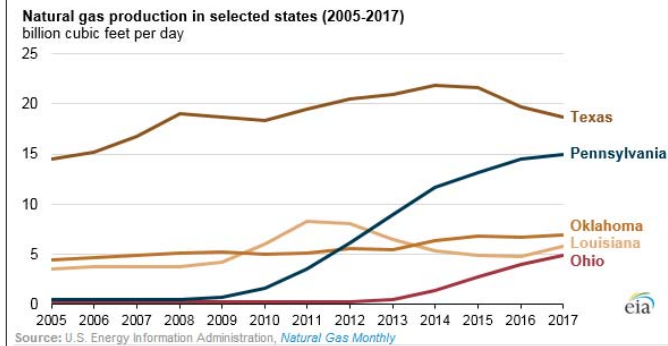
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## Pennsylvania at the Epicenter

Pennsylvania's natural gas production continues to increase



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## Pa. natural gas boom falls in Russia's crosshairs as gas-rich nation amplifies discord in American politics, energy sector

MIKE WERESCHAGIN | MWERESCHAGIN@CAUCUSPA.COM Jun 6, 2018 12



The Atlantic Sunrise gas pipeline is bored under Main Street west of Conowingo. In this aerial photo taken April 18, 2018. RICHARD HERTZLER | Staff Photographer

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## Challenges to Pipeline Projects

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#### Authorities release names of 21 protesters arrested after blocking start of Atlantic Sunrise gas pipeline construction

AD CRABLE and LINDSEY BLEST | Staff Writers Oct 17, 2017 12



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# FEDERAL REGULATION OF PIPELINE SAFETY

## 1. Federal Energy Regulatory Commission ("FERC")

- Independent Agency Regulates Interstate Transmission of Natural Gas
- Reviews Applications for Construction and Operation of Interstate Natural Gas Pipelines under Authority of Section 7 of Natural Gas Act ("NGA")
- Companies Need to Obtain A Certificate of Public Convenience and Necessity from FERC

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# FEDERAL REGULATION OF PIPELINE SAFETY CONT.

## 2. US Department of Transportation Pipeline and Hazardous Materials Safety Administration ("PHMSA")

- PHMSA Is A US DOT Agency
- Develops and Enforces Regulations for Safe, Reliable and Environmentally Sound Operation of Pipelines
- PHMSA's Office of Pipeline Safety Inspect Pipelines to Determine Operator Compliance with Safety Regulations
- States Can Assume Safety Authority Over Interstate Pipeline Through Agreements and Certifications with PHMSA

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## CONSIDERATION OF POTENTIAL ENVIRONMENTAL IMPACTS

- National Environmental Policy Act (“NEPA”)
- Scope of NEPA Analysis
  - Environmental Impact Statement (“EIS”) or
  - Environmental Assessment (“EA”)
- Guided by NEPA Regulations

*40 CFR § 1508.25(a) Delaware Riverkeeper Network v FERC, 753 F.3d241, 252 (D.C. Cir. 2018)*

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- FERC Acts as Quarterback Getting Input from Other Agencies
  - ARMY Corps Of Engineers
  - Bureau of Land Management
  - US Forest Service

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## COURTS ASSESSMENT OF POTENTIAL CLIMATE CHANGE IMPACTS

- *City of Boston Delegation v. FERC*, 897 F.3d 241 (D.C. Cir. 2018)
- *Sierra Club v. FERC*, 867 F.3d 31357 (DC Cir. 2017)
- *Dominion Transmission*, 163 FERC ¶ 61.128 CP14-497-001 (Order Denying Rehearing)

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## ARE NPDES PERMITS REQUIRED FOR DISCHARGE OF STORMWATER ASSOCIATED WITH CONSTRUCTION ACTIVITIES OF INTERSTATE NATURAL GAS PIPES?

- *Clean Water Act Exemption*
- *Ninth Circuit Decision in NRDC v. EPA*, 526 3d 591 (9<sup>th</sup> Cir. 2008)
- *Sierra Club v. State Water Control Board*, 898 F.3d 383 (4<sup>th</sup> Cir. 2018)

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## CONTOURS OF JUDICIAL REVIEW

- **Energy Policy Act 2005**
  - **Exclusive and Original Jurisdiction in Federal Appellate Courts**
  - **Avoid Sequential Reviews & Delays & Streamline Review**
  - ***Delaware Riverkeeper Network v. Secretary Pennsylvania Department of Environmental Protection*, 833 F.3d 360 (3d Cir. 2016)**

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## FINALITY OF STATE AGENCY ACTION

- **Delaware Riverkeeper Network v. Secretary Pennsylvania Department of Environmental Protection, 903 F3d 65 (3d Cir. 2018)**
- **Berkshire Environmental Action Team , Inc. v. Tennessee Gas Pipeline Company, LLC , 851 F3d 105 (1<sup>st</sup> Cir. 2017)**

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## EXHAUSTION OF ADMINISTRATIVE REMEDIES

- *Tennessee Gas Pipeline v. Delaware Riverkeeper Network*, 921 F. Supp. 381 (M.D. Pa. 2013)
- *Township of Bordentown v. FERC*, 903 F3d 234, 271, n.25 (3d Cir. 2018)

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## STANDARD OF REVIEW

- Is Action Inconsistent with Federal Law Governing Such Action?
  - Did Agency Comply with Requirements of Relevant Law
  - Are Findings and Conclusions of Agency Arbitrary and Capricious?
  - *Islander East v. Connecticut DEP*, 482 F. 3d 79
  - *Delaware Riverkeeper Network v. US Army Corps of Engineers*, 869 F. 3d 148 (3d Cir. 2017)

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## OTHER STATUTORY AVENUES TO CHALLENGE PROJECT OUTSIDE NGA

- Religious Freedom Restoration Act (“RFRA”)
  - *Adorers of the Blood of Christ v. FERC*, 897 F.3d 187 (3d Cir. 2018)
- Preemption
  - *Delaware Riverkeeper Network v. PA DEP*, 833 F3d 360, 372 (3d Cir. 2016)
  - Algonquin Transmission

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## STATE 401 WATER QUALITY CERTIFICATIONS

- Clean Water Act – Section 404 and Section 401
- Timing for Action
- *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, (D.C. Cir. 2014)
- Can 401 Certification Be Conditioned on Applicants’ Receipt of Other Permits?  
YES
- *Delaware Riverkeeper Network v. Pa. DEP* 833 F. 3d 360, 385-86 (3d Cir. 2016)

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