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Reconsidering How the Environmental Hearing Board Fits

By David G. Mandelbaum | March 5, 2025 | The Legal Intelligencer

In January, the Pennsylvania Supreme Court issued an opinion that may require environmental practitioners to reconsider how they think about the Environmental Hearing Board. *Cole v. Pennsylvania Department of Environmental Protection*, No. 21 EAP 2023 (Pa. Jan. 22, 2025), holds that the Natural Gas Act does not preempt EHB jurisdiction over a third-party appeal from issuance of a permit to construct—known as a "plan approval"—under the Air Pollution Control Act for a compressor station on a gas pipeline. That holding seems to conflict with a decision of the U.S. Court of Appeals for the Third Circuit in related litigation, *Delaware Riverkeeper Network v. Secretary of the Department of Environmental Protection*, 903 F.3d 65 (3d Cir. 2018). The federal court saw an EHB appeal as a challenge to a final action of the regulator, the DEP. However, our supreme court disagreed, holding that the EHB appeal is just part and parcel of a single regulatory process beginning with the DEP, but not culminating until after an EHB adjudication. That is new.

The Natural Gas Act, 15 U.S.C. Sections 717-717z, establishes a federal regulatory scheme governing, among other things, transmission lines for natural gas. It calls upon the Federal Regulatory Commission to make regulatory decisions, even under state law, governing pipelines. The general idea is that natural gas pipelines are nationally important and should not be impeded by a series of state or local regulatory decisions; they should all be centralized in a single FERC proceeding.

However, Section 3 of the Natural Gas Act preserves state regulation when the state takes regulatory actions mandated by the Coastal Zone Management Act, the Clean Water Act, or the Clean Air Act. Those federal statutes, among other things, require states to certify that a proposed activity will be consistent with a coastal zone management plan, will not cause an exceedance of state water quality standards, or will not cause exceedances of ambient air quality standards.

Section 19 of the Natural Gas Act does go on nevertheless to displace state judicial review of state regulatory actions:

The U.S. Court of Appeals for the circuit in which a facility subject to Section 717b of this title or Section 717f of this title is proposed to be constructed, expanded, or operated shall have original and exclusive jurisdiction over any civil action for the review of an order or action of a federal agency (other than the commission) or state administrative agency acting pursuant to federal law to issue, condition, or deny any permit, license, concurrence, or approval (hereinafter collectively referred to as "permit") required under federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.).

So if an EHB appeal from grant or denial of a water quality certification under the Clean Water Act or issuance of a plan approval that satisfies the Clean Air Act counts as a "civil action for the review of an

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order or action of a … state administrative agency," then the federal court of appeals, and not the EHB, has "original and exclusive jurisdiction" over it.

Many states provide for an adjudicatory hearing on "appeal" from an adverse decision by a regulatory agency, even a hearing based upon a de novo record, much like Pennsylvania does under the Environmental Hearing Board Act. However, in most jurisdictions the hearing officer or administrative law judge prepares a recommended decision that must go to the head of the regulatory agency before it becomes final. Massachusetts, for example, has such a procedure for many environmental permits. A disappointed person with standing may request a de novo hearing before an administrative law judge who will then recommend a final decision to the Secretary of Environmental Protection. The U.S. Court of Appeals for the First Circuit held that that Massachusetts appeal to the Office of Administrative Dispute Resolution did not constitute a civil action challenging the issuance of a water quality certification by MassDEP for purposes of section 19 of the Natural Gas Act. See *Berkshire Environmental Action Team v. Tennessee Gas Pipeline*, 851 F.3d 105 (1st Cir. 2017). That court reasoned that MassDEP did not take a final action until the secretary acted on the ALJ's recommended decision.

The the Third Circuit in *Riverkeeper* held that Pennsylvania's procedure differed because an action of the PADEP is "final" when taken. A disappointed party may then appeal to the EHB, which is a separate agency from the DEP. The EHB issues an adjudication in that appeal that the DEP secretary does not review. Therefore, the *Riverkeeper* court held that it had exclusive jurisdiction over what would otherwise be an appeal to the EHB from an action of the DEP.

Cole, in turn, rejects that reasoning. It holds that an EHB appeal is part of an integrated administrative process for, in that case, the grant or denial of a plan approval. There is no final action to review until the EHB renders its adjudication, and therefore Section 19 of the Natural Gas Act does not vest jurisdiction in the federal court of appeals. Moreover, the Pennsylvania court held that an EHB appeal is not a "civil action" and therefore Section 19 did not apply at all.

Note that the federal court of appeals cannot mimic an EHB appeal because the court of appeals has no procedure to make a de novo record. The EHB would allow fact and expert discovery, oral testimony, and evidence never offered to the DEP in the underlying proceeding.

This decision sets up a perplexing problem for litigants over natural gas pipelines. In the federal courts, unless the court of appeals reverses *Riverkeeper*, challenges to DEP actions must be brought exclusively in the court of appeals. But in the state courts, the EHB appeal remains available. Any issues not raised in that appeal would be waived, and that appeal must be brought within 30 days of the DEP's final action.

More generally, however, *Cole* suggests a difference way of thinking about the EHB. If the EHB is part of a single integrated administrative process with the DEP, then what is the nature of the EHB's adjudication? Perhaps that adjudication, and not any DEP action, is the permit or approval. Alternatively, if the DEP must be the agency that issues permits or approvals, must the EHB in each case remand an action to the DEP? How would one enforce the mandate in such a remand? Further, does this view require any settlement by agreement and withdrawal of an appeal or by consent adjudication to remand the action to the DEP? And what of those actions where the EHB is the decisionmaker in the first instance, such as certain penalty actions or claims for natural resource damages?

The EHB offers a lot of benefits to Pennsylvania's practice. It provides a de novo check on all DEP action while at the same time allowing an informality in DEP record-making because a formal evidentiary record

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is always available on appeal. But it is also puzzling: a tribunal that reviews DEP actions de novo, but on a deferential standard. *Cole* may add new difficult pieces to that puzzle.

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