BEFORE THE ENVIRONMENTAL REVIEW APPEALS COMMISSION
STATE OF OHIO

SUSTAINABLE MEDINA COUNTY,	:	Case No. ERAC 16-6883
Appellant,	:	
v.	:	
CRAIG BUTLER, DIRECTOR OF ENVIRONMENTAL PROTECTION,	:	
and	:	
WADSWORTH COMPRESSOR STATION,	:	
Appellees.	:	

RULING ON APPELLEE WADSWORTH COMPRESSOR STATION'S MOTION TO DISMISS

Rendered on November 9, 2017

Terry J. Lodge for Appellant Sustainable Medina County

Michael DeWine, Attorney General, *Cameron F. Simmons*, *Casey L. Chapman*, and *John L. Schriver* for Appellee Craig Butler, Director of Environmental Protection

Frank L. Merrill and *Elyse H. Akhbari* for Appellee Wadsworth Compressor Station

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{¶1} This matter comes before the Environmental Review Appeals Commission ("Commission, "ERAC") upon a Notice of Appeal filed by Appellant Sustainable Medina County ("SMC," "Sustainable") on October 11, 2016. Appellant challenges the September 9, 2016 issuance of Permit to Install and Operate ("PTIO") No. P0119280 by Appellee Craig Butler, Director of Environmental Protection ("Director," "Ohio EPA," "Agency") to Appellee Wadsworth Compressor Station ("Wadsworth"). Case File Item A.

{¶2} On August 4, 2017, Appellee Wadsworth Compressor Station filed a Motion to Dismiss ("Motion"). Appellant filed a Response on August 22, 2017. Wadsworth filed a Reply on August 28, 2017. Case File Items T, V, W.

{¶3} Based upon a review of the pleadings and the relevant statutes, regulations, and case law, the Commission issues the following Findings of Fact, Conclusions of Law, and Final Order GRANTING Wadsworth's Motion to Dismiss.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Procedural Background

{¶4} Appellant Sustainable Medina County is an unincorporated association with at least four members who residing in Medina County, Ohio. Case File Item A.

{¶5} The Wadsworth Compressor Station is one of four compressor stations to be constructed in conjunction with the NEXUS pipeline project, which will include approximately 250 miles of natural gas transmission pipeline through Ohio and Michigan. Case File Item T.

{¶6} On September 9, 2016, the Director issued Air Pollution PTIO No. P0119280 to the Wadsworth Compressor Station. The Director issued the PTIO under Ohio Administrative Code ("Adm.Code") Chapter 3745-31, pursuant to Ohio's implementation of the federal Clean Air Act. See Case File Items T, V.

{¶7} On October 11, 2016, SMC filed a Notice of Appeal, challenging the Director's issuance of the PTIO. Case File Item A.

II. The Commission's Jurisdiction under R.C. 3745.04/3745.07 and Summary of the Parties' Arguments

{¶8} The Commission's jurisdiction is set forth generally in Ohio Revised Code ("R.C.") 3745.04 and 3745.07. Specifically, the Commission maintains exclusive jurisdiction over appeals from certain "actions" of the Director. R.C. 3745.04 and 3745.07.

{¶9} The term "action" is defined in R.C. 3745.04(A):

> As used in this section, 'action' or 'act' includes the adoption, modification, or repeal of a rule or standard, the issuance, modification, or revocation of any lawful order other than an emergency order, and the *issuance*, denial, modification, or revocation of a license, *permit*, lease, variance, or certificate, or the approval or disapproval of plans and specifications pursuant to law or rules adopted thereunder.

(Emphasis added).

{¶10} In this appeal, SMC challenges the Director's issuance of a PTIO, and ordinarily, such action would fall within the Commission's jurisdiction under R.C. 3745.04 and/or 3745.07.

{¶11} Nonetheless, Wadsworth argues the Commission lacks jurisdiction over this appeal because the federal Natural Gas Act ("NGA") vests original and exclusive jurisdiction over such appeals in the federal Courts of Appeals. Case File Item T.

{¶12} In support, Wadsworth cites 15 U.S.C. 717r(d)(1), which outlines judicial review under the NGA as follows:

> (d) Judicial review.
>
> (1) In general. The United States Court of Appeals for the circuit in which a facility subject to section 3 or section 7 [15 USCS § 717b or 717f] 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.).

(Emphasis added).

{¶13} Wadsworth asserts the Director's issuance of the PTIO is (1) an "action" (2) of a state administrative agency, (3) acting pursuant to federal law, (4) to issue a permit. Thus, Wadsworth concludes 15 U.S.C. 717r vests original and exclusive jurisdiction in the United States Courts of Appeals. Case File Item T.

{¶14} In response, SMC contends the Director's issuance of the PTIO is not an "action" within the meaning of 15 U.S.C. 717r(d)(1). Specifically, SMC argues the NGA's judicial review provision contains a finality requirement, and its act of appealing the Director's issuance of the PTIO to ERAC rendered the PTIO "non-final" for purposes of the NGA. Case File Item V.

{¶15} Sustainable also argues that Wadsworth's interpretation of the NGA's judicial review provision would deprive SMC of its due process rights. Case File Item V.

III. Discussion

A. Preemption Doctrine

{¶16} Wadsworth argues that to the extent NGA's judicial review provision conflicts with the Commission's jurisdiction set out in R.C. 3745.04 and 3745.07, the NGA's judicial review provision governs. When reviewing potential conflicts between state and federal laws, courts typically first turn to the preemption doctrine. The preemption doctrine originates from the Supremacy Clause of the United States Constitution, and it is well-settled the Commission lacks jurisdiction to resolve constitutional issues. See *Sierra Club, et al. v. Koncelik, et al.*, ERAC Nos. 256002-256006 (Feb. 29, 2012).

{¶17} Here, however, the resolution of any conflict between the NGA's judicial review provision and the scope of the Commission's jurisdiction under R.C. 3745.04 and 3745.07 does *not* require application of the preemption doctrine. *Tenn. Gas Pipeline Co., LLC v. Del. Riverkeeper Network*, 921 F.Supp.2d 381 (M.D.Penn. 2013) ("Del. Riverkeeper").

{¶18} In *Del. Riverkeeper*, the Pennsylvania Department of Environmental Protection ("PA DEP") issued three water quality related permits to Tennessee Gas

Pipeline Co., LLC ("TGPC") in conjunction with its pipeline project. *Id.* at 384. The Delaware Riverkeeper Network ("DRN") appealed the permits to the Pennsylvania Environmental Hearing Board ("PA EHB"), and TGPC subsequently sought an injunction from the U.S. District Court for the Middle District of Pennsylvania preventing DRN from pursuing its appeals. *Id.* at 383-85.

{¶19} Although TGPC characterized its case as turning on the issue of preemption, the court noted that PA DEP issued the permits pursuant to its federally-delegated authority under the federal Clean Water Act. *Id.* at 386. Thus, the court found that "the case involve[d] the intersection of the NGA and [Clean Water Act] and harmonizing the application of the two *federal* statutes to the fullest extent possible." *Id.*

{¶20} Similarly, here, it is undisputed that the Director issued the PTIO pursuant to his federally-delegated authority under the Clean Air Act. Thus, as in *Del. Riverkeeper*, the issue of jurisdiction in this appeal involves the intersection of two federal statutes and does not turn on the issue of preemption.

B. Analysis of the NGA's Judicial Review Provision and the Director's Issuance of the PTIO

{¶21} Pursuant to 15 U.S.C. 717r(d)(1), the United States Courts of Appeals have original and exclusive jurisdiction over civil actions for the review of (1) an "action" or "order," (2) of a state administrative agency, (3) acting pursuant to federal law, (4) to issue a permit. The Commission finds the Director's issuance of the PTIO satisfies all four elements. Therefore, original and exclusive jurisdiction over this appeal lies in the United States Courts of Appeals.

{¶22} The NGA's judicial review provision requires an "action" or "order" of a state agency. 15 U.S.C. 717r(d)(1) The statute does not, however, define those terms.

{¶23} In analyzing the "action" or "order" requirement, courts are split as to whether the NGA's judicial review provision requires finality. In *Del. Riverkeeper*, for example, the District Court for the Middle District of Pennsylvania found "[the NGA] does not mandate that judicial review wait until a *final* agency decision has been rendered." *Del. Riverkeeper*, 921 F.Supp.2d at 931 (emphasis in original).[1] Conversely, the First Circuit Court of Appeals recently found "ample reason to stick to the strong presumption restricting our review to *final* agency action of a type that is customarily subject to judicial review." *Berkshire Envt'l. Action Team, Inc. v. Tenn. Gas Pipeline Co., LLC*, 851 F.3d 105 (1st Cir. 2017) (emphasis added) ("Berkshire").

{¶24} The Commission finds the First Circuit's rationale in *Berkshire* persuasive.

{¶25} In *Berkshire*, the Massachusetts Department of Environmental Protection ("Mass. DEP") issued a conditional water quality certification to TGPC. *Berkshire*, at 108. The letter granting conditional certification contained numerous limitations, including one limitation prohibiting TGPC from conducting any work until "the expiration of the Appeal Period set forth below and any proceedings that may result from an appeal." *Id.* Significantly, under Massachusetts law, the terms "Appeal Period" and "proceedings" referred to adjudicatory proceedings that would take place entirely within Mass. DEP. *Id.* Because the Berkshire Environmental Action Team requested an adjudicatory hearing and TGPC was thus prohibited from conducting any work until the conclusion of the Mass. DEP proceedings, the First Circuit found the conditional certification letter did not

[1] The Third Circuit Court of Appeals has not addressed whether 15 U.S.C. 717r(d)(1) permits review of non-final actions. See *Del Riverkeeper Network v. PA DEP*, 3rd Cir. No. 17-1533, 2017 U.S. App. LEXIS 16619 (Aug. 30, 2017).

constitute a "final" action and therefore was not ripe for review under the NGA. *Id.* at 111-13.

{¶26} In discussing its rationale for finding a finality requirement, the court explained that the purpose of the NGA's judicial review provision is to streamline the review process for permits issued in conjunction with natural gas pipeline projects:

> The very fact that Congress has granted us the unusual ability to review directly (and on an expedited basis) action by a state agency can itself be seen as further evidence that Congress sought to reduce the potential for the use of delay to block natural gas projects. Certainly nothing in the legislative history of § 717r(d)(1) belies that perception. A Congress that placed so much emphasis upon avoiding delay in the adjudication of requests for certification of this type would not likely have intended to authorize the delay that interlocutory reviews of every state agency action, final or not, would inevitably engender.

Id. at 109-10 (internal citations omitted).

{¶27} Moreover, the court distinguished the finality requirement from the judicial doctrine of exhaustion of administrative remedies, instructing:

> Finding that a statute requires finality is different from finding that it requires exhaustion. '[T]he judicial doctrine of exhaustion of administrative remedies is conceptionally distinct from the doctrine of finality': whereas exhaustion 'refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate,' finality 'is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury.'

Id. at 111, quoting *Darby v. Cisneros*, 509 U.S. 134, 113 S.Ct. 2539, 125 L.Ed.2d 126 (1985).

{¶28} Thus, the First Circuit found the NGA establishes a streamlined system whereby litigants proceed directly to the federal courts of appeals, bypassing conventional state administrative and judicial review processes, which vary widely and could be used to cause undue delay to natural gas pipeline projects. That is, the NGA eliminates the requirement that a litigant exhaust state remedies before obtaining review in federal court. Regarding finality, however, the First District found that allowing interlocutory

challenges to agency actions would serve only to *increase* the likelihood of delay. Thus, the court concluded Congress would have intended the NGA's judicial review provision to apply only to appeals of *final* agency actions.

{¶29} The Commission also finds the procedural facts in *Berkshire* distinguishable from those in *Del. Riverkeeper*. As discussed above, at issue in *Berkshire* was a pending adjudicatory proceeding before Mass. DEP—the *same* agency which had granted conditional approval of the water quality certification.

{¶30} Conversely, in *Del. Riverkeeper*, the pending state administrative action was before PA EHB—a *separate* state agency from the agency that had issued the permits. Thus, in finding that "[the NGA] does not mandate that judicial review wait until a *final* agency decision has been rendered," the court in *Del. Riverkeeper* was referring to the finality of the overall review process, including the EHB appeal, rather than the PA DEP issuance itself. See *Del. Riverkeeper*, at 390-93. Significantly, the action appears to have been final with respect to PA DEP. *Id.*

{¶31} Accordingly, based upon a review of relevant case law, the Commission finds the NGA's judicial review provision contains a finality requirement and that the requirement applies to the "action" or "order" *of the issuing agency*–in this case, Ohio EPA.

{¶32} Here, regarding the finality of Director's issuance of the PTIO, the parties do not dispute that his issuance represents the final decision of Ohio EPA. No adjudication hearing is available before the Agency and any review of the PTIO's issuance will occur outside Ohio EPA.

{¶33} Further, the Commission notes that although ERAC proceedings are administrative, the Commission essentially stands in the place of the courts of common

pleas for appeals from certain actions of Ohio EPA. See generally, R.C. 3745.04 and 3745.07. As in *Del. Riverkeeper*, the quasi-judicial nature of ERAC proceedings suggests such appeals are not part of the traditional, internal agency decision-making procedure, but rather, a portion of a larger, external review process.

{¶34} Accordingly, the Commission concludes the Director's issuance of the PTIO was final and constitutes an "action" or "order" within the meaning of the NGA's judicial review provision.

{¶35} Regarding the remaining prongs of the judicial review provision, the NGA expressly contains a "carve out" for permits issued pursuant to the Clean Air Act. 15 U.S.C. 717b(d)(2). Although both *Berkshire* and *Del. Riverkeeper* involved actions related to the states' authority under the Clean Water Act, the parties here do not dispute that the Director acted pursuant to his federally-delegated authority under the Clean Air Act in issuing the PTIO. Thus, because the Director issued the PTIO pursuant to his federally-delegated authority under the Clean Air Act, the Commission finds that his action was "pursuant to federal law" within the meaning of the NGA's judicial review provision.

{¶36} Finally, the parties do not dispute that Ohio EPA is a "state agency" or that the PTIO is a "permit" within the meaning of the NGA.

{¶37} Having found that the Director's issuance of the PTIO was (1) an "action," (2) of a state administrative agency, (3) acting pursuant to federal law, (4) to issue a permit, the Commission finds that original and exclusive jurisdiction over any civil action for the review of said issuance lies in the United States Court of Appeals for the circuit in which the facility is proposed to be constructed.

C. Due Process

{¶38} As a final matter, the Commission will address SMC's due process argument. Sustainable contends that Wadsworth's interpretation of the NGA would effectively deprive SMC of its due process rights. The Commission finds SMC's due process claim acts as a collateral attack on the judicial review provision of the NGA itself.

{¶39} It is well-settled that the Commission lacks jurisdiction to adjudicate such collateral challenges. *Williams Co. Alliance v. Butler, et al.*, ERAC No. 15-6849 (May 11, 2016), citing *Lund v. PLAA, et al.*, ERAC No. 13-016726 (Dec. 19, 2013). Accordingly, SMC's due process argument is not well-taken.

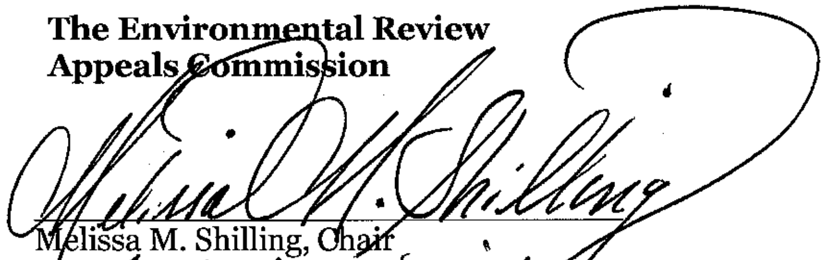
FINAL ORDER

{¶40} For the foregoing reasons, the Commission hereby GRANTS Appellee Wadsworth's Motion to Dismiss and ORDERS that the above-captioned appeal be DISMISSED.

{¶41} In accordance with Ohio Adm.Code 3746-13-01, the Commission informs the parties:

> Any party adversely affected by an order of the commission may appeal to the court of appeals of Franklin County, or, if the appeal arises from an alleged violation of a law or regulation, to the court of appeals of the district in which the violation was alleged to have occurred. The party so appealing shall file with the commission a notice of appeal designating the order from which an appeal is being taken. A copy of such notice shall also be filed by the appellant with the court, and a copy shall be sent by certified mail to the director or other statutory agency. Such notices shall be filed and mailed within thirty days after the date upon which appellant received notice from the commission of the issuance of the order. No appeal bond shall be required to make an appeal effective.

The Environmental Review Appeals Commission



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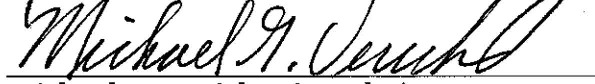

Michael G. Verich, Vice-Chair

Entered into the Journal of the Commission this 9th day of November 2017.

Copies Sent to:

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