
**IN THE UNITED STATES COURT OF APPEALS FOR THE
TWELFTH CIRCUIT**

Mammoth Pipeline, LLC,
Petitioner,

-v.-

C.A. No. 19-02345

Vandalia Department of Environmental Conservation
and West Vandalia Division of Natural Resources,
Respondents,

Citizens Against Pipelines,
Intervenor.

State of Franklin,
Appellant,

-v.-

D.C. No. 19-0682

Mammoth Pipeline, LLC,
Appellee,

Citizens Against Pipelines,
Intervenor.

Citizens Against Pipelines,
Petitioner,

-v.-

USDA Docket No. 17-031

U.S. Department of Agriculture,
Respondent,

Mammoth Pipeline, LLC,
Intervenor.

**OPENING BRIEF FOR PETITIONER-INTERVENOR CITIZENS
AGAINST PIPELINES**

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JURISDICTIONAL STATEMENT

This court has jurisdiction over each of the three proceedings consolidated into this case. First, Mammoth's challenges to Vandalia's and West Vandalia's denials of its water quality certification are reviewable under 15 U.S.C. § 717r(d) since both states are in the geographic jurisdiction of the Twelfth Circuit.¹ Second, given the timely appeal, this court can review *de novo* the U.S. District Court of Franklin's grant of Mammoth's application for orders of condemnation. The District Court had authority to hear the case under its federal question jurisdiction, 28 U.S.C. § 1331, because the alleged authority for the condemnation is the Natural Gas Act, 15 U.S.C. §§ 717 *et seq.*, a federal statute. Finally, this court has jurisdiction over Citizens Against Pipelines' original action pursuant to 15 U.S.C. § 717r(d)(1).

STATEMENT OF THE ISSUES PRESENTED

- (1) Did the one-year period for the Vandalia Department of Environmental Conservation to evaluate Mammoth's Clean Water Act § 401 certification request restart when Mammoth withdrew its initial request and resubmitted a new request containing far more of the details for which Vandalia DEC had asked?
- (2) Should the Army Corps of Engineers' interpretation of its own regulation regarding the amount of time within which a state must act on a CWA § 401 certification request be granted *Auer* deference, such that the West Vandalia Department of Natural Resources did not waive its certification authority when it denied Mammoth's amended request within one year?
- (3) Can the federal government delegate its constitutional power to abrogate state sovereign

¹ Subsection (2) should apply, giving jurisdiction to the D.C. Circuit, but *Competition* organizers have stipulated that Subsection (1) applies, giving jurisdiction to the Twelfth Circuit.

immunity to a private party acting in its own interest, and, if so, do the condemnation provisions in the Natural Gas Act represent such a delegation?

- (4) Does the Mineral Leasing Act grant the Secretary of Agriculture the authority to approve a pipeline right-of-way across a conservation easement designed to protect the viewshed of a National Scenic Trail administered by the Secretary of the Interior?

STATEMENT OF THE CASE

I. Procedural History

The case was consolidated from three separate actions sharing common parties and regarding the underlying issue of whether Mammoth Pipeline, LLC (“Mammoth”) possesses the authority to construct its pipeline along the proposed route.

The first action is an original action brought under the Natural Gas Act (“NGA”) 15 U.S.C. § 717r(d) challenging the independent denials of Mammoth’s Clean Water Act § 401 [33 U.S.C. § 1341(a)(1)] water quality certification requests by the Vandalia Department of Environmental Conservation (“DEC”) and the West Vandalia Department of Natural Resources (“DNR”). Mammoth asserts that each state waived its ability to deny § 401 requests because the one-year waiver period had elapsed. Citizens Against Pipelines (“CAP”), a citizen group devoted to environmental protection, intervened to contend that neither certification denial was untimely.

The second action is an appeal from orders of condemnation that the U.S. District Court of Franklin issued to Mammoth after the state of Franklin asserted its sovereign immunity and refused to sell its property to create the right-of-way Mammoth sought for its pipeline. Franklin and intervenor CAP unsuccessfully moved for reconsideration. A timely appeal and request for a stay of the District Court’s decision followed. The stay was temporarily granted.

The third and final action is also an original action. Acting pursuant to the NGA, 15 U.S.C. § 717r(d)(1), CAP challenged the Secretary of Agriculture’s decision to grant Mammoth’s pipeline a right-of-way across a federal conservation easement managed by the Department of Agriculture to protect the viewshed of the nearby Shandaliah National Scenic Trail. Mammoth intervened to affirm the Secretary’s authority to make the grant.

II. Statement of Facts

In 2016, Mammoth began planning an interstate pipeline proposal that would transport natural gas to Franklin, and applied to the Federal Energy Regulatory Commission (“FERC”) for a Certificate of Public Convenience and Necessity under § 7(c) of the NGA. The proposed pipeline would run from West Vandalia through Vandalia and into Franklin. In September 2017, FERC issued a certificate approving the Mammoth Pipeline Project. The certificate required Mammoth to satisfy various conditions before starting construction, including acquiring § 401 water quality certifications from each state through which the pipeline would pass.

On October 1, 2017, the Vandalia DEC received a § 401 certification request from Mammoth. The eighteen-page request outlined the pipeline’s general route, Mammoth’s planned stream crossing techniques, and a general construction timeline. On September 29, 2018 – within a year of the request’s submission – Vandalia DEC asked that Mammoth withdraw its initial request and resubmit a new request containing final surveyed plans for all wetland and stream crossings, which are included in most § 401 applications but were missing from Mammoth’s initial request. Mammoth withdrew its request on September 30, 2018. Vandalia DEC received a second request from Mammoth on November 1, 2018, that added the details Vandalia DEC has asked for, and was ninety-seven pages long (not counting appendices and maps) as a result. On September 28, 2019, Vandalia DEC asked that Mammoth withdraw its second request and

resubmit a new request with additional information. Mammoth refused, so Vandalia DEC denied the second request on October 31, 2019 – within a year of its submission. While the record does not list specific reasons for this denial, local environmental organizations noted that Mammoth’s proposal would cross several pristine rivers that provide much of Vandalia’s drinking water.

On January 8, 2018, the West Vandalia DNR received a § 401 certification request from Mammoth. Because the pipeline’s West Vandalia component would require filling in several large wetlands, the U.S. Army Corps of Engineers (“Army Corps”) was involved in the permitting process. West Vandalia DNR then received an amended § 401 request from Mammoth on July 8, 2018, modifying the pipeline’s proposed route through West Vandalia; Mammoth never withdrew its original request. On September 28, 2018, the Army Corps published notice in the Federal Register that West Vandalia DNR had one year from July 8, 2018 to consider Mammoth’s § 401 request. The Army Corps determined that, prior to the amendment, Mammoth’s request was missing the necessary and current information West Vandalia DNR needed, and was thus invalid. Colonel Emil Foley, a regional program director, signed off on the statement on behalf of the Army Corps. Neither the Chief of Engineers nor the Commanding General of the Army Corps knew about the statement, but its finding was not inconsistent with positions both officials had previously taken regarding a state agency’s need to have a complete certification request before the one-year waiver clock began. West Vandalia DNR denied Mammoth’s request on July 7, 2019 – within a year of its submission. West Vandalia DNR gave four independent and alternative grounds for the denial: (1) Mammoth had not shown that its proposal would comply with West Vandalia water quality standards; (2) Mammoth’s proposal would create deep water areas with unacceptably high dissolved oxygen levels; (3) Mammoth did not provide surveyed plans for all wetland and stream crossings; and

(4) interagency consultations under § 7 of the Endangered Species Act were still pending.

Mammoth Pipeline’s proposed route in Franklin crosses the “Charitable Trust Property” (“CT Property”). Based on the CT Property’s biodiversity and sensitivity, Franklin refused to grant the necessary property rights to allow Mammoth’s plan to cross the property. Upon FERC’s conditional approval of the pipeline, Mammoth was granted certain eminent domain rights under the NGA enabling it to acquire rights-of-way necessary to construct the pipeline.

Mammoth Pipeline’s proposed route would also cross through the Homestead Farm, a historic property owned by the nonprofit Homestead Preservation Trust (“Trust”). The proposed crossing would be close to the Shandaliah Trail (“Trail”), which is part of the national park system. In 2015, the National Park Service recommended a conservation easement that would prohibit development on the Homestead Farm to preserve the natural viewshed from the Trail and Park. Both the Department of the Interior (“DOI”) and the U.S. Department of Agriculture (“USDA”) are charged with administering the national trails systems. The DOI’s National Park Service administers the Shandaliah Trail, but USDA secured the conservation easement. Mammoth approached the USDA and the Trust to secure a right-of-way through the Farm for its pipeline. The Secretary of Agriculture granted the right-of-way, which would result in tree removal and disruption of pastureland, destroying the easement’s benefits for the Trail’s users.

SUMMARY OF THE ARGUMENT

This court should find that Vandalia DEC’s denial of Mammoth’s § 401 water quality certification was timely. Most courts and regulatory agencies have consistently interpreted § 401(a)(1) to mean a state agency’s one-year waiver timeline resets when an applicant withdraws and refiles a new request. The exception where a court did not reset the timeline involved a scheme where the applicant withdrew and resubmitted an identical request annually. In this case,

Mammoth withdrew its initial request and submitted an entirely new request, and Vandalia DEC denied that new request within a year. Mammoth's new request contained key details that were missing from its initial request. Furthermore, starting the waiver clock from an applicant's initial request would incentivize applicants to withhold key information right up until the waiver deadline, adversely impacting states' statutory power to enforce their water quality standards.

This court should likewise find that West Vandalia DNR's denial of Mammoth's § 401 water quality certification was timely. An Army Corps statement published in the Federal Register gave West Vandalia DNR one year to evaluate Mammoth's § 401 request from the date of its amendment changing the pipeline's route. This court should defer to the Army Corps' finding because the Army Corps' interpretation of what constitutes a "valid" § 401 request based on its own regulation satisfies each step of the five-part test the Supreme Court articulated in *Kisor v. Wilkie*, 139 S.Ct. 2400 (2019). But even if this court does not grant *Auer* deference, it should still look to the Army Corps' ruling as persuasive authority, and also consider the adverse effects that allowing a last-minute pipeline route change could have on a state's statutory power to enforce its water quality standards.

This court should reverse the District Court's decision to grant Mammoth orders of condemnation against Franklin's CT Property because the condemnation unlawfully violated Franklin's sovereign immunity. The Supreme Court's opinion in *Blatchford v. Native Village of Noatak* creates a strong presumption against the federal government's ability to delegate its power to abrogate states' sovereign immunity. Other circuit courts have applied *Blatchford* to find the power of sovereign immunity abrogation non-delegable, especially when the third party acting with the federal government's power is not doing so on the federal government's behalf. Moreover, even the federal government can delegate this power in some circumstances, it did not

do so in the NGA. Even when Congress itself abrogates states' sovereign immunity, it must do so textually and with unmistakable clarity, and pursuant to one of its grants of power that can override sovereign immunity. Even with its amendments, the NGA lacks sufficiently explicit language to abrogate Franklin's immunity. Additionally, the Supreme Court has found that the Commerce Clause, the authority for the NGA, cannot abrogate sovereign immunity. The NGA equipped Mammoth to condemn land *not* belonging to a sovereign, but the District Court's finding that it went even further was incorrect as a matter of law and should be overturned.

Based on a combined reading of the Mineral Leasing Act ("MLA") and the National Trails System Act ("NTSA"), this court should find that the Secretary of Agriculture did not have the authority to grant a right-of-way for Mammoth's pipeline across the federal conservation easement on Homestead Farm for two reasons. First, the easement constitutes "land[] of the national park system," which, per § 28 of the MLA, prevents *any* federal agency from approving a right-of-way for a natural gas pipeline across it. Shandaliah Trail, including its "corridor," is part of the national park system. The Homestead Farm easement was acquired in order to protect the viewshed of Shandaliah Trail, so it must be managed as part of the Trail's corridor. Further, even if a right-of-way could be granted, the Secretary of Agriculture was not an "appropriate agency head" per the MLA. Various authorities infer that the power to grant rights-of-way along or across a National Scenic Trail lies with a Trail's "overall administrat[or]" rather than the technical land manager at the spot where the right-of-way exists. The Secretary of the Interior is the "overall administrat[or]" of the Shandaliah Trail and thus retains authority to approve or deny rights-of-way within its corridor.

ARGUMENT

I. Standard of Review

First, if a state denies a § 401 permit, the state's interpretation of law is reviewed *de novo* per 5 U.S.C. § 706. *See AES Sparrows Point LNG v. Wilson*, 589 F.3d 721 (4th Cir. 2009). Second, this court will review the District Court's grant of Mammoth's application for orders of condemnation as a matter of law. As such, the applicable standard of review is *de novo*. Third, because this court must determine whether the agency had the statutory authority to make its decision, the USDA's approval of the right-of-way can be reviewed *de novo* per the Administrative Procedure Act. 5 U.S.C. § 706(2)(c).

II. Neither Vandalia DEC nor West Vandalia DNR waived its § 401 authority because both states' denials of Mammoth's certification requests were timely.

Vandalia DEC and West Vandalia DNR each preserved its CWA § 401 authority because each state's denial of Mammoth's water quality certification requests was timely. Natural gas pipeline projects must receive a water quality certification from each state through which the pipeline will pass as a prerequisite for FERC to approve construction. 33 U.S.C. § 1341(a)(1). If a state does not act on a request for certification "within a reasonable period of time (which shall not exceed one year)," it waives its certification authority. *Id.* Mammoth contends that the states' one-year clocks started when Mammoth first submitted its § 401 requests. However, the weight of authority suggests that if a state receives a new or revised request, the one-year clock restarts. Mammoth withdrew and resubmitted its request for certification in Vandalia and amended its request for certification in West Vandalia. Neither state waived its certification authority because each state respectively denied Mammoth's latest request within a year.

- a. Vandalia DEC did not waive its CWA § 401 authority because the one-year period for evaluating Mammoth’s certification request should have restarted when Mammoth withdrew its initial request and resubmitted a new request.**

Regulatory agencies have consistently interpreted § 401(a)(1) to mean a state agency’s one-year timeline resets when an applicant withdraws and refiles a new request. FERC issued an opinion to “reiterate that once an application is withdrawn, no matter how formulaic or perfunctory the process of withdrawal and resubmission is, the refiling of an application restarts the one-year waiver period under section 401(a)(1).” *Constitution Pipeline Company, LLC*, 162 FERC ¶ 61,014 (Jan. 11, 2018). The Army Corps has likewise interpreted the waiver timeline in § 401(a)(1) to begin only upon receiving a “valid” certification request, not just any initial request. 33 C.F.R. § 325.2(b)(1)(ii). While the Army Corps is not involved in the Vandalia DEC permit, circuits have deferred to its interpretation and it aligns with FERC’s interpretation. *See, e.g., AES Sparrows*, 589 F.3d at 729.

The Second Circuit shares the agencies’ interpretation of § 401(a)(1). In the dicta of one case, the court stated that state agencies’ concerns about being forced into a decision within a year of an applicant’s initial request were “misplaced” because if “a state deems an application incomplete, it can . . . request that the applicant withdraw and resubmit the application.” *New York State Dep’t of Env’tl. Conservation v. FERC*, 884 F.3d 450, 456 (2d Cir. 2018). That case cited a prior case where the Second Circuit noted that when a § 401 applicant withdrew and resubmitted its application at the state agency’s request, it “restart[ed] the one-year review period”. *See id.* at 456 n.35 (citing *Constitution Pipeline Company, LLC v. New York State Dep’t of Env’tl. Conservation*, 868 F.3d 87, 94 (2017)).

The D.C. Circuit recently became the first circuit to disregard FERC’s interpretation, but the facts of the present case are distinguishable from *Hoopa Valley Tribe v. FERC*, 913 F.3d

1099 (2019). In *Hoopa*, a hydroelectric project agreed with California and Oregon to annually withdraw and resubmit the exact same requests for § 401 certification to renew its licenses for its dams. *Id.* at 1101-02. Through this “scheme”, the parties intended to keep resetting the CWA’s one-year clock to avoid the states’ authority being waived while preventing FERC from proceeding with the licensing process. *Id.* The court held that the states had waived their certification authority because the hydroelectric project never submitted a new request—it just recycled the same request annually—and that the scheme had “h[eld] federal licensing hostage” for over a decade. *Id.* at 1104.

However, the D.C. Circuit recognized that a situation like Mammoth’s Vandalia request differs from their holding in *Hoopa* in two ways. First, the *Hoopa* court explicitly declined to resolve whether the one-year clock would reset where an applicant “withdr[aws] its request and submit[s] a wholly new one in its place,” instead of an exact copy. *Id.* In the present case, Vandalia DEC denied Mammoth’s initial request from October 2017 within a year, so Mammoth withdrew and resubmitted an entirely new request in November 2018. Second, the *Hoopa* court also said it “need not determine how different a request must be to constitute a ‘new request’ such that it restarts the one-year clock.” *Id.* The court’s language implies that the one-year clock would restart upon submission of a sufficiently different request. In the present case, Mammoth’s second request included far more detail about stream crossings than the first request; the second request had ninety-seven pages, quintuple the first request’s meager eighteen. Most § 401 requests include detailed final plans for all wetland and stream crossings, suggesting Mammoth’s second request was far more complete—and thus significantly different—than its first. Problem at 5. By its own admission, the court’s decision in *Hoopa* to waive California and Oregon’s § 401 certification authority has no bearing on Vandalia’s timeline in the present case.

Vandalia DEC should have had a full year to act on Mammoth's second request without waiving its authority because most authorities explicitly support such an interpretation, and none contradict it. Furthermore, a conflicting interpretation would suggest that, upon receiving an applicant's second request more than one year after their incomplete first request, a state would have already waived its authority no matter how incomplete the second request still might be. This reading of § 401 would burden a state's statutory power to ensure that any discharge into navigable waters will comply with the state's water quality standards. 33 U.S.C. § 1341(a)(1). State agencies have expressed concern that such a reading could force the state agency's hand by allowing applicants to hold off on submitting important materials until just before the one-year anniversary of the initial request. *See* Brief for Respondents at 28-29, *Millennium Pipeline Company, LLC v. Seggos*, 860 F.3d 696 (D.C. Cir. 2017) (No. 16-1415). This concern is well-founded; in one instance, a pipeline company submitted hundreds of pages of exhibits just eight days before the one-year mark from its initial application. *Id.* at 29. Likewise, while Mammoth may not have behaved in bad faith, its failure to include standard details on wetland and stream crossings caused Vandalia DEC to deny its initial request, which contributed the certification process extending past one year. Problem at 4. To mitigate these policy concerns, this court should follow other federal circuit courts' interpretation that the § 401 clock restarts when an applicant withdraws and resubmits. Thus, this court should enforce Vandalia's denial of Mammoth's request.

b. The Army Corps' interpretation of its own regulation merits Auer deference such that West Vandalia DNR did not waive its § 401 certification authority.

Mammoth's § 401 application process in West Vandalia differed from its application to Vandalia in two important ways. First, Mammoth never withdrew its § 401 certification request in West Vandalia, but rather sent an amended request modifying the pipeline's route six months

after its initial request. Second, because Mammoth’s proposed plan would have filled several large wetlands in West Vandalia, the Clean Water Act required the Army Corps’ involvement in the permitting process. 33 U.S.C. § 1344. In that capacity, the Army Corps and FERC gave notice in the Federal Register that West Vandalia DNR had one year from the date Mammoth amended its request (July 8, 2018) to act before waiving its § 401 authority. The Army Corps chose this timeline based on its own regulation:

No permit will be granted until required certification has been obtained or has been waived. A waiver may be explicit, or will be deemed to occur if the certifying agency fails or refuses to act on a request for certification within sixty days after receipt of such a request *unless the district engineer determines a shorter or longer period is reasonable for the state to act*. In determining whether or not a waiver period has commenced or waiver has occurred, the district engineer will verify that the certifying agency has received a *valid request for certification* . . . Similarly, if it appears that circumstances may reasonably require a period of time longer than sixty days, the district engineer, based on information provided by the certifying agency, *will determine a longer reasonable period of time, not to exceed one year, at which time a waiver will be deemed to occur*.

33 C.F.R. § 325.2(b)(1)(ii) (emphasis added).

The Army Corps’ decision to start the waiver period only after West Vandalia DNR received the amended request relied on its interpretation of what constitutes a “valid” request for certification per its regulation. Per the regulation, the waiver period only commences upon a valid request for certification.² The Army Corps did not consider Mammoth’s initial request “valid” because it did not contain the necessary and current information West Vandalia DNR needed to make its decision. Problem at 6. The change in the proposed pipeline’s route through West Vandalia was the only difference between Mammoth’s initial and amended requests.

² The Army Corps’ requirement that a certification request be “valid” for the waiver period to begin per 33 C.F.R. § 325.2(b)(1)(ii) is an interpretation of CWA § 401, which is silent as to whether the request must be valid. We do not believe that the legitimacy of 325.2(b)(1)(ii) itself is at issue in this case, but if it is a question, this court should grant it *Chevron* deference per the Fourth Circuit’s analysis in *AES Sparrows*, 589 F.3d 721.

Problem at 5. The issue is whether this court should defer to the Army Corps' finding that Mammoth's initial request was invalidated by the amendment that revised the route.

Courts generally defer to an agency's interpretation of its own ambiguous regulation unless that interpretation is "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). To receive *Auer* deference, an agency's interpretation of its own regulation must pass each step of the five-part test the Supreme Court articulated in *Kisor v. Wilkie*, 139 S.Ct. 2400 (2019). First, the court will defer to the agency's interpretation only if the regulation is "genuinely ambiguous, even after a court has resorted to all the standard tools of interpretation," such as text, structure, and legislative history. *Id.* at 2414-15. Second, if genuine ambiguity remains, the court should only defer to the agency's interpretation if it is "reasonable". *Id.* at 2415. Third, the agency's interpretation must be its "authoritative" or "official" position. *Id.* at 2416 (quoting *U.S. v. Mead Corp.*, 533 U.S. 218, 257–259, and n. 6 (2001) (Scalia, J., dissenting) (internal quotations marks omitted)). Fourth, the agency's interpretation must "implicate its substantive expertise" by answering questions agencies should decide, such as technical terminology and policy questions, and not questions courts should decide, such as the meaning of common legal terms or judicial procedure questions. *Id.* at 2417. Fifth, the agency must have shown "fair and considered judgment" in its interpretation. *Id.* (quoting *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012)). Applying the *Kisor* test here, this court should defer to the interpretation the Army Corps relied upon in commencing West Vandalia DNR's § 401 waiver period on July 8, 2018, and thus find that West Vandalia DNR did not waive its authority to deny Mammoth's request.

1. The Army Corps' interpretation that a § 401 certification request is not a "valid" request without the necessary and current information

for the state agency to make its decision meets Kisor’s five-part test for *Auer* deference.

The Army Corps decided that Mammoth’s initial request was not “valid” under 33 C.F.R. § 325.2(b)(1)(ii) because, in light of the subsequent route change, it had not contained the necessary and current information West Vandalia DNR needed to make its decision. This interpretation satisfies the *Kisor* five-part test for *Auer* deference.

First, the meaning of “valid” in the regulation is genuinely ambiguous. It is unclear whether West Vandalia DNR’s waiver period should run from the date of Mammoth’s initial request or amended request based on the plain language of the Army Corps regulation alone. Here, the Army Corps interpreted “valid” to mean that the request contained all necessary and current information needed by West Vandalia DNR. But there is nothing inherent in the term “valid” to suggest whether an initial request that is later amended is valid or not. No legislative history, agency guidance, or case law defines “valid” in the context of this regulation. The Black’s Law Dictionary definition of “valid” also does not resolve the ambiguity.³

Second, this court should find the Army Corps’ interpretation of 33 C.F.R. § 325.2(b)(1)(ii) reasonable. Based on the record, it is unclear to what extent Mammoth modified its proposed pipeline route in the amended request. Depending on the extent of the change, the Army Corps’ finding that the initial request lacked the necessary and current information West Vandalia DNR needed would be reasonable because the route change could have impacted the criteria West Vandalia DNR evaluates in its decision. West Vandalia DNR’s grounds for ultimately denying Mammoth’s amended request included failure to provide surveyed plans for wetland and stream crossings, an incomplete Endangered Species Act evaluation, and the creation of additional deep-water areas where dissolved oxygen would not meet West Vandalia’s

³ Black’s Law Dictionary defines “valid” as: “1. Legally sufficient; binding. 2. Meritorious.” (11th ed. 2019).

water quality standards. Problem at 5-6. A change in the pipeline's route could change which wetlands and streams the pipeline crosses, which species the pipeline impacts, and the location and nature of deep-water areas. It was reasonable for the Army Corps to not consider the initial request "valid" because the subsequent route change created uncertainty.

Third, the Army Corps' interpretation in this case represents its official position on the regulation. Colonel Foley, in his capacity as regional program director, signed off on the interpretation on behalf of the Army Corps. Both the Chief of Engineers and the Commanding General of U.S. Army Corps of Engineers were unaware of his Colonel Foley's decision. However, in *Kisor*, the Supreme Court recognized that it is a "reality of bureaucratic life" that "[n]ot everything the agency does comes from, or is even in the name of, the Secretary or his chief advisers." 139 S.Ct. at 2416. Thus, the Court has granted *Auer* deference to "official staff memoranda . . . published in the Federal Register" without official approval from the agency head. *Id.* (quoting *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555 at 566, n.9, 567, n. 10 (1980) (internal quotation marks omitted)). Similarly, in this case Colonel Foley published his interpretation in the Federal Register. This position is far more official than the sources of interpretation that the Court considers too unofficial, such as a mid-level official's speech or an informal memo summarizing a phone conversation between two employees. *Id.* at 2416-17.

Fourth, the Army Corps' interpretation here relates to its substantive expertise. In *Kisor*, the Supreme Court cited two examples where an agency's policy expertise weighs toward deference: the Transportation Security Administration's assessment of what items qualified as liquids, and analysis by a disabilities office weighing costs and benefits of an accommodation. *See id.* at 2417. Conversely, the Court's examples of issues in the "judge's bailiwick" included defining a property law term, deciding whether to award attorneys' fees, and interpreting a

judicial review provision. *See id.* In this case, the Army Corps' interpretation is more a question of policy than legal terminology. The Army Corps is involved in many § 401 certification requests, lending it the expertise to determine how long a state's review may take, and whether a state agency needs a complete and valid request before conducting a full review. The regulation gives the district engineer broad latitude to choose the appropriate waiver period based on the circumstances, recognizing that there are various considerations to make on a case-by-case basis that require an expert's analysis. 33 C.F.R. § 325.2(b)(1)(ii).

Fifth, the Army Corps showed "fair and considered judgment" in its interpretation. The Third Circuit, in finding *Auer* deference appropriate, considered an interpretation to represent "fair and considered judgment" where it had been published in the Federal Register and reaffirmed multiple times. *Wolfington v. Reconstructive Orthopaedic Associates II PC*, 935 F.3d 187, 206 (2019). Conversely, the agency interpretation was not found to be "fair and considered" when it conflicted with prior interpretations and thus created "unfair surprise" for the regulated entity. *See Kisor*, 139 S.Ct. at 2417-18; *see also Gomez v. Lynch*, 831 F.3d 652, 658 (5th Cir. 2016) (rejecting *Auer* deference when the same agency had multiple conflicting opinions). In assessing whether an agency showed "fair and considered judgment", courts also consider whether the agency provide sufficient advance notice of its regulatory interpretation. Courts have found agency interpretations were not "fair and considered" when the agency first expressed its interpretation in a brief filed for a case challenging an agency decision, suspecting that the agency's interpretation in those cases was merely a convenient litigating position. *See, e.g., Amazon.com, Inc. v. Comm'r of Internal Revenue*, 934 F.3d 976, 992 (9th Cir. 2019); *see also Radford v. Colvin*, 734 F.3d 288, 294 (4th Cir. 2013). Here, Colonel Foley's interpretation aligned with previous Army Corps interpretations requiring the certifying state agency to have a

completed certification request before the one-year waiver period began. Problem at 6-7. Colonel Foley's interpretation was also published in the Federal Register over a year before any litigation commenced. The Army Corps' gave published notice of a position it had held consistently, proving it used "fair and considered judgment" in interpreting its regulation to start the waiver period from Mammoth's amended request instead of its initial request.

2. Even if the Army Corps' interpretation is not given Auer deference, this court should still interpret the regulation as giving West Vandalia DNR one year from Mammoth's amended request.

This court should find the Army Corps' position on the waiver period worthy of *Auer* deference exclusively based on the above analysis. However, even if this court does not grant *Auer* deference, it should still look to the Army Corps' ruling as persuasive authority and consider the risks of an alternate ruling in its own review of the regulation's meaning.

If an agency's interpretation of a regulation satisfies the test in *Kisor*, the court should defer to that interpretation. *Kisor*, 139 S.Ct. at 2424 (Roberts, C.J., concurring). But if the *Kisor* test is not satisfied, that does not necessarily mean the court should rule against the agency's interpretation. Rather, the court will "exercise independent review" of the regulation's meaning, and in doing so can still give weight toward the agency's interpretation. *Kisor*, 139 S.Ct. at 2419. Justice Gorsuch, who disfavors *Auer*, would still have courts consider the agency's interpretation persuasive when the agency has shown thorough consideration, valid reasoning, and consistency in its interpretation. *Kisor*, 139 S.Ct. at 2427 (Gorsuch, J., concurring). The Army Corps published its interpretation in the Federal Register, which suggests it gave consideration to its interpretation. The Army Corps reasonably interpreted "valid" to require all necessary and current information, including the pipeline's route, as discussed *supra*. And the interpretation was consistent with previous Army Corps interpretations requiring the certifying state agency to

have a completed certification request before initiating the one-year waiver period. The Army Corps' interpretation in this case meets Justice Gorsuch's standards for granting persuasive authority even without *Auer* deference.

And even if this court entirely ignores the Army Corps' interpretation, it should still read the regulation such that the West Vandalia DNR's waiver period started one year from Mammoth's amended request. A conflicting interpretation starting the waiver clock on the original request's submission date would allow § 401 applicants to abuse the waiver rule, as discussed *supra*. If the original request started the clock and Mammoth had waited 364 days before submitting a new pipeline route instead of six months, West Vandalia DNR would have no opportunity to assess the changes' impacts on its water quality standards. Pipeline companies have attempted similar mischief in other cases. *See* Brief for Respondents at 28-29, *Millennium*, 860 F.3d 696 (discussed *supra*). This reading would contravene the state's statutory power to ensure applications meet its water quality standards. 33 U.S.C. § 1341(a)(1). In sum, this court should defer to the Army Corps under *Auer*, but even if it chooses not to, it should still affirm that the waiver period started only when Mammoth submitted its amended request.

III. The District Court erred in determining that Mammoth has the authority to condemn Franklin's CT Property in federal court because the federal government has not delegated its power to abrogate State sovereign immunity.

Mammoth does not have the authority to condemn Franklin's CT Property because neither case law nor statutes support the idea that a natural gas pipeline company can sue a nonconsenting state in federal court. This is primarily true because Congress likely does not have the constitutional authority to delegate, to any party, its exemption from state sovereign immunity under the Eleventh Amendment. However, even if this power could be delegated, there is not sufficiently explicit language to find that Congress intended to do so in the NGA.

a. Only the federal government has the power to compel a nonconsenting State to appear in federal court, and this power is non-delegable.

The federal government is vested with the power to abrogate the sovereign immunity enjoyed by states; however, there are compelling reasons to believe that this power cannot be delegated to other entities. State sovereignty is a hallmark of American constitutional federalism. When the several states ratified the Constitution, they ceded specific roles and powers to the federal government but maintained any aspects of their sovereignty not explicitly overridden by the Constitution. A fundamental aspect of this sovereignty is immunity from nonconsensual suit in federal court. *Alden v. Maine*, 527 U.S. 706, 713 (1999). While state sovereign immunity is inherent, it was strengthened and affirmed by the Eleventh Amendment, which explicitly precludes citizens of one state from suing another state in federal court. U.S. CONST. amend. XI. The federal government has the authority to abrogate this sovereign immunity because states permanently consented to its suits as part of the “plan of the [constitutional] convention.” *Port Auth. Trans—Hudson Corp. v. Feeney*, 495 U.S. 299, 310 (1990).

But just because the federal government can wield a power does not necessarily mean that it has the authority to delegate that power to another party. In fact, it mostly likely cannot. Dicta from the Supreme Court in *Blatchford v. Native Village of Noatak*, an important sovereign immunity case, unambiguously casts doubt on the validity of such a delegation. 501 U.S. 775, 785 (1991). In *Blatchford*, an incorporated Alaska Native community attempted to sue Alaska for an alleged violation of a state revenue-sharing statute. *Id.* at 778. The community asserted that Alaska was not protected from suit in part because a federal tribal jurisdiction statute, 28 U.S.C. § 1362, had abrogated Alaska’s sovereign immunity. *Id.* at 783. While the status of tribes’ statuses as separate sovereigns means that some legal issues in *Blatchford* do not apply here, the

Court’s analysis of delegation is deeply relevant: “We doubt . . . that [the Federal Government’s exemption from state sovereign immunity] *can* be delegated...” *Id.* at 785 (emphasis in original).

The Supreme Court is the ultimate authority for interpreting the Constitution’s text and structure to answer the question of whether the exemption can be delegated. This means that even though the assertion of non-delegation in *Blatchford* is articulated in non-binding dicta, there should be a strong presumption against an authority to delegate. Circuit courts post-*Blatchford* have largely aligned with this reading. In *In re PennEast Pipeline Co., LLC*—a case bearing a close factual resemblance to the one at hand—the Third Circuit applied the *Blatchford* language to invalidate, on sovereign immunity grounds, a natural gas pipeline company’s condemnation of forty-two property interests owned by New Jersey. 938 F.3d 96, 105-06 (3d Cir. 2019). However, even when there is a stronger case for delegation, courts have not permitted it. In *PennEast*, the natural gas company sued *in its own interest* under the authority it argued had been delegated from the federal government by the Natural Gas Act, but delegation has also been rejected at the circuit level when a third party sues *on behalf of the federal government*. The D.C. Circuit applied *Blatchford* to find that a “*qui tam* relator,” suing a state on behalf of the federal government, “involves just the kind of delegation that *Blatchford* so plainly questioned.” *United States ex rel. Long v. SCS Business & Technical Institute, Inc.*, 173 F.3d 870, 882 (D.C. Cir. 1999). The Fourth, Fifth, and Ninth Circuits have applied *Blatchford* in a similar fashion.⁴

There is good reason to doubt a reading of the Constitution that would permit the federal government to share its exceptional power to sue states with a vast array of other actors: sovereign immunity remains a critical bulwark against the corrosion of state autonomy. As some

⁴ *United States ex rel. Milam v. Univ. of Tex. M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 50 (4th Cir. 1992); *United States ex rel. Foulds v. Tex. Tech Univ.*, 171 F.3d 279, 294 (5th Cir. 1999); *Jachetta v. United States*, 653 F.3d 898, 912 (9th Cir. 2011).

legal scholars have observed:

[A]llowing the United States unlimited authority to delegate its law enforcement power would effectively destroy [state sovereign immunity]. Congress could simply couch any new federal statutory private right of action as a delegation of the United States's power to police and punish the underlying conduct.

Paul E. McGreal & DeeDee Baba, *Applying Coase to Qui Tam Actions Against the States*, 77 NOTRE DAME L. REV. 87, 90-91 (2001). An additional concern multiple courts fret over is that the incentives and motives for condemnation are different for private companies than for politically accountable government officials. *See e.g., PennEast, supra*, at 107; *Blatchford, supra*, at 785; *Alden, supra*, at 755-56. In sum, there are strong reasons for upholding a non-delegable interpretation of the federal exemption to state immunity inherent to preserving both federalist principles—whereby states are viewed as legitimate sovereigns—and democratic principles. The courts whose decisions were mentioned *supra* were either explicitly or implicitly acting on these reasons. Unless the Supreme Court arrives at a conclusion other than that contained in its *Blatchford* dicta, any attempt to delegate the federal government's sovereign immunity exemption should be viewed with deep suspicion.

Here, the District Court relied on a theory that allowed for the federal government to vest Mammoth with its ability to circumvent Franklin's sovereign immunity. Because this theory contradicts the Supreme Court's current jurisprudence, the decision below should be reversed.

b. Even if the federal government could delegate its power to sue States in federal court, there is no clear indication that Congress intended to do so in the Natural Gas Act (NGA).

Should this court find that there are circumstances where the federal government can delegate its power to sue states—which would create a circuit split—this would still not be a valid delegation for two reasons.

1. The NGA lacks sufficiently explicit language to constitute delegation.

In general, even when the federal government abrogates state sovereign immunity on its own accord, the bar for how clearly it has to signal its intent is quite high. In *Atascadero State Hosp. v. Scanlon*, the Court states that Congress can abrogate states' sovereign immunity "only by making its intention unmistakably clear in the language of the statute." 473 U.S. 234, 242 (1985). One reason abrogation requires such explicit authorization is that it "upsets the fundamental constitutional balance between the Federal Government and the States, placing a considerable strain on the principles of federalism." *Dellmuth v. Muth*, 491 U.S. 223, 227 (1989). In *PennEast*, the Third Circuit also recently concluded that any conceivable theory of delegation would need an authorization of "unmistakable clarity." 938 F.3d 96, 107 (3d Cir. 2019) (internal quotation marks omitted). At minimum, the standard requires that intent be articulated "without resort to nontextual arguments." *Id.*

Before discussing the theory by which the NGA delegates federal sovereign immunity exemption to certain private companies, some background is helpful. The NGA was passed in 1938 to "regulate the transportation and sale of natural gas in interstate commerce" as pertinent to the "public interest." P.L. 75-688. The NGA creates a public-private partnership whereby private companies undertake the actual planning and construction of projects that the federal government certifies as necessary and in the public interest. To ease the burden of creating a continuous right-of-way for pipelines, 15 U.S.C. § 717f(h) vests companies with a limited power to acquire necessary property interests through the "exercise of the right of eminent domain."

In concluding that the NGA explicitly signals intent to delegate, the District Court erroneously conflated the "separate and distinct" powers of the federal government to exercise eminent domain and to sue sovereign states in federal court. *PennEast*, *supra*, at 100. The federal

government has the power to abrogate state sovereign immunity as an inherent part of the “plan of the convention,” and separately possesses the power to “condemn property for its own use.” *Id.* at 104 (citing *Kohl v. United States*, 91 U.S. 367, 371, 373-74 (1875)). The *PennEast* court reasoned that when the federal government condemns state land, it is operating under a function of these two individual powers. *PennEast*, *supra*, at 104. An implication of these powers being severable is that the explicit delegation of eminent domain in the NGA does not automatically delegate the power to abrogate sovereign immunity. If ever constitutionally permitted—a dubious proposition as shown above—a separate “unmistakably clear” grant would be required for the NGA to delegate that power.

The District Court also supported its ruling by drawing an inference of statutory intent from the language added to the NGA in 2017. That language, which was taken verbatim from the Federal Power Act, 16 U.S.C. §§ 792, *et seq.*, sets aside a particular circumstance where state land is ineligible for condemnation by a company operating under NGA § 717f(h). The subsequent inference that some other types of state land would be condemnable may be fairly compelling *nontextual* evidence of some Congressional intent to abrogate sovereign immunity. But the absence of a *textual* mention of the Eleventh Amendment or sovereign immunity likely means the District Court’s inference falls below the explicitness bar prescribed by the Supreme Court. And regardless, the *Blatchford* constitutionality problem subsumes this entire inquiry.

2. Congress cannot abrogate sovereign immunity under the Commerce Clause.

The delegation theory is also disputed by the fact that Congress cannot even abrogate sovereign immunity using the source of power under which it enacted the NGA. There are limits on the types of valid exercises of Congressional power that can support a legal abrogation of a state’s sovereign immunity. Section 5 of the Fourteenth Amendment is the only Congressional

power currently recognized by the Supreme Court as strong enough to overpower a state's immunity. *PennEast, supra*, at 108 (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976)). Even more directly to the point, the Supreme Court has ruled that the power to regulate interstate commerce, U.S. CONST. art I, § 8, cl. 3., is one source of federal power that is insufficient to abrogate sovereign immunity. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 59, 72-73 (1996).

The Commerce Clause is the source of authority by which Congress passed the NGA in 1938.⁵ That only *interstate* natural gas infrastructure projects are governed by the NGA shows that no other Congressional power exists by which *all* projects could be regulated—otherwise, they would be. This means that even if Congress had abrogated sovereign immunity in very explicit, textual terms, there is precedential reason to believe that the exercise would be constitutionally fraught (in addition to the reason explained in Subsection A).

The District Court erred in permitting Mammoth to condemn a right-of-way across Franklin's CT Property for two independently dispositive reasons. First, in *Blatchford*, the Supreme Court unambiguously indicated that delegating the federal power to abrogate states' sovereign immunity protections is impermissible in any circumstance; the NGA would be no exception. Second, even if this delegation could occur, the NGA falls short of the clear textual standard required of even a direct federal abrogation of states' immunity, even accounting for the contrary inference drawn from the language of its 2017 amendment. Collectively, these decisions that make a legal justification for Mammoth's attempted condemnation so treacherous have added critical integrity to the crumbling wall protecting state sovereignty. This Court's reversal of the District Court would add another brick.

⁵ See, e.g., Glenn A. Guarino, *What Constitutes "Sale in Interstate Commerce of Natural Gas for Resale," So As to Be Subject to Regulation Under § 1(b) of Natural Gas Act (15 U.S.C.A. § 717(b))*, 73 A.L.R. FED. 804.

IV. The Mineral Leasing Act bars grant of a right-of-way across Homestead Farm because the federal property interest there must be administered under the laws applicable to the National Park System.

Applying the framework established in the NTSA to § 28 of the MLA, the Secretary of Agriculture lacked the necessary authority to approve a right-of-way across the Homestead Farm conservation easement for two reasons: (1) because it is managed as part of the Shandaliah Trail (“Trail”) corridor, the Homestead Farm easement constitutes “lands of the National Park System” and is thus exempt from the MLA’s jurisdiction; and (2) the Secretary of Agriculture was not the “appropriate agency head” to grant the right-of-way because the Secretary of the Interior is vested with that authority under the “[trail] administrator” scheme of the NTSA.

a. Mineral Leasing Act and National Trails System Act

§ 28 of the MLA authorizes the “Secretary of the Interior *or appropriate agency head*” to approve rights-of-way for pipelines traveling across “federal lands,” subsequently defined to be “all lands owned by the United States *except lands in the National Park System.*” 30 U.S.C. §§ 185(a), 185(b)(1) (emphasis added). Since this is the alleged authority by which the Secretary of Agriculture granted the right-of-way, it would have to be true both that the Homestead Farm easement does not constitute “lands in the National Park System” and that she was acting validly as an “appropriate agency head.” Analyzing the scheme of the NTSA reveals that neither is true.

The NTSA was passed in 1968 to “promote the preservation of, public access to, travel within, and enjoyment and appreciation of the open-air, outdoor areas and historic resources of the Nation ...” 16 U.S.C. § 1241(a). It established four categories of trails with different purposes and requirements. 16 U.S.C. § 1242(a). Of those, only National Scenic Trails (NSTs), National Historic Trails must be established by Act of Congress, and only NSTs like Shandaliah Trail are meant to be continuous footpaths. *Id.* at § 1244(a). While creating walking paths across

the Nation is a romantic notion, acting on it raised two practical concerns: (1) how to safeguard the portion of the trail experience (and Act's purpose) that requires protecting more than just the tread of the trail itself; and (2) how to consolidate oversight and responsibility for a class of federal interest that can meander through a patchwork of private, state, and federal properties.

The scheme Congress wrote into the NTSA to address these concerns, and how it applies to this case, corresponds neatly with the terms in need of definition from the MLA. First, the Homestead Farm easement constitutes "lands of the National Park System" because even though it contains no actual segment of the Shandaliah Trail, it is managed as viewshed protection within the trail corridor. Second, the Secretary of Agriculture is not the "appropriate agency head" to grant the right-of-way because only one of either the USDA or the DOI is the "overall administrator" of each NST, and that is DOI for the Shandaliah Trail.

b. The Homestead Farm conservation easement is part of the Shandaliah Trail corridor and thus constitutes "land[] in the National Park System."

The Trail does not run through Homestead Farm, but the federal easement there must nonetheless be managed as part of the Trail corridor, and is thus "land[] in the National Park System." 30 U.S.C. § 185(b)(1). Having an actual segment of trail running through a property is not a necessary condition for the NTSA's powers to apply to that property. Because this distinction is so material, hereinafter trail-containing properties will be called "on-trail" and nearby ones without trail will be called "off-trail." The power to acquire land, through condemnation if necessary, is the most controversial and arguably most important power included in the NTSA for which Congress needed to limit jurisdiction. Because acquisition can be jurisdictional for off-trail lands, administration of those lands can be too. Provisions in the NTSA clearly imply that land extending laterally from an NST can be acquired. § 1246(a) specifically addresses condemnation. It applies to every trail, and allows an average of up to 125

acres for every linear mile to be condemned. This clearly signals an intent for both on-trail and off-trail land to be jurisdictional, even for eminent domain. Legislative enactments for specific trails place related limits on the amount of land that can be acquired in fee (not necessarily by condemnation). For example, the federal government can acquire up to an average of “¼ mile on either side” of the Continental Divide Trail. 16 U.S.C. § 1244(a)(5). A multitude of federal court decisions confirm eminent domain jurisdiction for off-trail parcels. *See, e.g., United States v. 16.03 Acres of Land*, 26 F.3d 349 (2d Cir. 1994); *United States v. 27.93 Acres of Land*, 925 F.2d 506 (3d Cir. 1991); *United States v. 13.10 Acres of Land*, 737 Supp. 212 (S.D.N.Y. 1990). The National Park Service, which administers many NSTs, even developed its own nomenclature for such acquisitions: rights acquired for actual trail construction were “right-of-way easement[s]” while off-trail parcels were acquired by “protective easement.” STEVE ELKINTON, A GRAND EXPERIMENT: THE NATIONAL TRAILS SYSTEM AT 50 68-69 (2018).

The conservation easement on Homestead Farm is thus jurisdictional because it is located near the Shandaliah Trail and was acquired for the specific purpose of protecting its viewshed. The easement was acquired in 2015 for the precise goal of “preserv[ing] the view from the Shandaliah Trail.” Problem at 9. The acquisition was in response to a recommendation in a report published by the National Park Service, the federal agency chiefly responsible for the Shandaliah Trail. *Id.* The decision to place the easement on Homestead Farm was part of the integrated management of the Trail corridor, making it part of the national trails system. And since Shandaliah Trail is part of the national park system, the Homestead Farm easement is a “land[] in the national park system,” meaning *no* federal agency was authorized to grant the pipeline right-of-way. 30 U.S.C. § 185(b)(1). As will be articulated subsequently, the fact that the USDA actually possesses the easement poses no challenge to this conclusion.

c. The Secretary of Agriculture was not the “appropriate agency head” to grant the pipeline right-of-way because the Secretary of the Interior is the “overall administrator” of Shandaliah Trail.

Despite the Department of Agriculture’s formal possession and day-to-day supervision of the Homestead Farm conservation easement, it is not the “appropriate agency head” to grant Mammoth’s pipeline under the MLA because the Secretary of the Interior, not Agriculture, is the “overall administrator” of NSTs that are part of the national park system. Congress sought to address the coordinated management problem noted above by charging *either* the Secretary of Agriculture or the Interior with “overall administration” of each NST or NHT.

However, as federal courts have observed, other sections in the NTSA, including § 1246(a)(1)(A), imply that there are parochial “management responsibilities” distinguishable from overall administration. *See Cowpasture River Pres. Ass’n v. Forest Serv.*, 911 F.3d 150, 180-81 (4th Cir. 2018) (quoting 16 U.S.C. § 1246(a)(1)(A)). The most recent interagency memorandum of understanding regarding federal trail management solidifies this distinction:

BLM, NPS, and the USFS have become administrators of one or more National Trails, a special trail-wide role delegated to these agencies by the Secretary of Agriculture or the Interior. These agencies will be referred to collectively... as the “National Trail administering agencies.” BLM, USBR, NPS, USFS, FWS, and USACE serve as “National Trail managing agencies”

U.S. DEP’T OF THE INTERIOR ET AL., THE NATIONAL TRAILS SYSTEM MEMORANDUM OF UNDERSTANDING 2 (effective Jan. 4, 2017). This Memorandum of Understanding does not create or alter any legal entitlements or responsibilities, but it does affirm different levels of responsibilities (e.g., administration versus management) that apply in different situations. *Id.* at 17-18. Thus, for land administered by one agency but managed by another, the authority to make a given decision will depend on the applicable scope of responsibility.

Fortunately, the potentially prickly question of what exact responsibilities lie with administration versus management need not be determined here. The authority to “grant easements and rights-of-way... along any component of the national trails system” can only lie with a Trail’s administrator. 16 U.S.C. § 1248(a). As noted above, agencies outside the USDA and the DOI can manage trail segments, yet § 1248(a) only authorizes the “Secretary of Interior or the Secretary of Agriculture as the case may be” to grant easements or rights-of-way. This strongly implies that trail’s administrator, rather than its manager, has this authority. Shandaliah Trail is part of the national park system and thus administered by the Secretary of the Interior.

Moreover, § 1248(a) stipulates that easements or rights-of-way must be made “in accordance with the laws applicable to the national park system and national forest system, respectively.” Those are the only two types of applicable federal lands whose laws can apply in this case. This is not a mere restatement of the question regarding which Secretary has authority: the division within the USDA that oversees conservation easements is not part of the Forest Service. Indeed, there is no reason to believe that the Forest Service is a relevant actor in this case. The Natural Resources Conservation Service (NRCS) is the branch within the USDA that administers the Agricultural Conservation Easement Program. *See* 16 U.S.C. §§ 3865 *et seq.* It is almost certainly the division within USDA referenced in the record as possessing “expertise in securing conservation easements.” Problem at 9. It is far more logical for the laws applicable to the national park system to govern an NRCS parcel near a trail in the national park system than those applicable to the national forests: yet further evidence that the Shandaliah Trail is part of the national park system. In sum, but for the MLA’s bar on all pipeline construction in the national park system, the Secretary of the Interior, rather than the Secretary of Agriculture, would possess the authority as its administrator to grant the pipeline right-of-way.

The Secretary of Agriculture did not have the authority to grant the right-of-way for Mammoth's pipeline across the federal conservation easement on Homestead Farm. First, § 28 of the MLA forbids federal agencies from granting rights-of-way for natural gas pipelines across "lands in the national park system." Under the NTSA's scheme, lands must be part of a trail's corridor in order to be jurisdictional, but they need not contain any actual trail segment. The Homestead Farm conservation easement was acquired for the explicit purpose of protecting the Shandaliah Trail viewshed, making it, along with the rest of the Trail, a unit of the national park system protected from the reach of the MLA. Second, even if the easement was not part of the national park system, the Secretary of Agriculture still lacked authority to approve the right-of-way because she was not an "appropriate agency head." Each NST is congressionally assigned a single agency "administrat[or]" upon enactment, but courts and the agencies have differentiated this role from management responsibilities. Substantial evidence from within the NTSA indicates that trail administrators, not managers, hold the power to grant rights-of-way across or along their trails. The Secretary of the Interior administers the Shandaliah Trail corridor even in properties possessed by other agencies and thus would have the authority to grant Mammoth a right-of-way across Homestead Farm but for the MLA's bar on pipelines in national parks.

CONCLUSION

For the reasons stated above, CAP respectfully requests that this court uphold Vandalia DEC and West Vandalia DNR's respective denials of Mammoth's § 401 requests, reverse the District Court's granting Mammoth orders of condemnation against Franklin's CT Property, and find that the Secretary of Agriculture did not have the authority to grant a right-of-way for Mammoth's pipeline across the federal conservation easement on Homestead Farm.

CERTIFICATE OF SERVICE

Pursuant to *Official Rule IV*, *Team Members* representing Citizens Against Pipelines certify that our *Team* emailed the brief (PDF version) to the *West Virginia University Moot Court Board* in accordance with the *Official Rules* of the National Energy Moot Court Competition at the West Virginia University College of Law. The brief was emailed before 1:00 p.m. Eastern time, February 3, 2020.

Respectfully submitted,

Team No. 20