IN THE UNITED STATES COURT OF APPEALS FOR THE
TWELFTH CIRCUIT

Mammoth Pipeline, LLC,

Petitioner,

v.

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

Respondents,

Citizens Against Pipelines,

Intervenor.

State of Franklin,

Appellant,

v.

Mammoth Pipeline, LLC,

Appellee,

Citizens Against Pipelines,

Intervenor.

Citizens Against Pipelines,

Petitioner,

v.

U.S. Department of Agriculture,

Respondent,

Mammoth Pipeline, LLC,

Intervenor.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF FRANKLIN,
PETITION FOR REVIEW OF ORDER OF U.S. DEPARTMENT OF AGRICULTURE, AND PETITION FOR
REVIEW OF ORDERS OF VANDALIA DEPARTMENTAL CONSERVATION AND WEST VANDALIA
DIVISION OF NATURAL RESOURCES

BRIEF FOR INTERVENOR

Team 2
Counsel for Intervenor
Citizens Against Pipelines
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JURISDICTIONAL STATEMENT

This Court has original and exclusive jurisdiction over the action brought by Mammoth Pipeline, LLC (Mammoth) to review the denial of state water quality certifications by the Vandalia Department of Environmental Conservation (VDEC) and the West Vandalia Division of Natural Resources (WVDNR) under Section 19(d)(1) of the Natural Gas Act. 15 U.S.C. § 717r(d)(1) (2018). VDEC denied Mammoth’s request for water quality certification October 31, 2019, and WVDNR denied Mammoth’s request July 7, 2019. Mammoth filed its action for review on December 1, 2019.

The U.S. District Court for Franklin had jurisdiction over the condemnation action by Mammoth pursuant to Section 7(h) of the Natural Gas Act. 15 U.S.C. § 717f(h) (2018). The district court entered a final judgment September 30, 2019. Franklin timely filed an appeal to this Court, which was joined by Citizens Against Pipelines as intervenor. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

This Court has jurisdiction to hear Citizens Against Pipelines’ challenge to the Secretary of Agriculture’s right-of-way authority pursuant to Section 19(d)(1) of the Natural Gas Act. 15 U.S.C. § 717r(d)(1) (2018). Motion to consolidate all pending actions was filed by Citizens Against Pipelines, VDEC, WVDNR, the State of Franklin, and Mammoth, and granted by this Court December 21, 2018. The motion was unopposed by the Secretary of Agriculture and all parties have waived any defects in jurisdiction to the extent possible.
STATEMENT OF THE ISSUES PRESENTED

Four questions are presented:

1. Whether Vandalia DEC waived its CWA § 401 authority when it asked Mammoth to withdraw and resubmit its request for water quality certification over a period of time greater than one year.

2. Whether 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 is worthy of Auer deference so that West Vandalia DNR did not waive its § 401 certification authority.

3. Whether Mammoth is precluded from condemning the land in the State of Franklin because of Franklin’s Eleventh Amendment sovereign immunity.

4. Whether the Secretary of Agriculture had authority to grant Mammoth a right-of-way across the Homestead Farm.

STATEMENT OF THE CASE

A. Mammoth’s § 401 Certification Requests

The Mammoth Pipeline Project (“the Project”) involves the construction of an interstate natural gas pipeline which would span 362 miles across the States of Franklin, Vandalia, and West Vandalia, at an estimated cost of $4.4 billion. R. at 3. The Project would cross various water bodies throughout the States of Franklin, Vandalia, and West Vandalia and therefore required Clean Water Act § 401 water quality certifications from each state in order to begin construction. Mammoth first applied for § 401 certification from Vandalia DEC since the longest section of the Project would be located in Vandalia. R. at 4. Mammoth filed an 18-page certification request with Vandalia DEC on October 1, 2017. Id. Instead of denying the certification request — which was within its authority — Vandalia DEC made a good faith effort to work with Mammoth by requesting that Mammoth withdraw and resubmit their certification request with additional information needed to make an informed decision. Id. Mammoth withdrew their request on
September 30, 2018 and submitted a new 97-page request which was received by Vandalia DEC on November 1, 2018. Id. Vandalia DEC asked Mammoth to withdraw and resubmit the application again on September 28, 2019 due to a lack of information. Id. Mammoth refused to provide the additional information requested by Vandalia DEC, which led Vandalia DEC to deny the certification request on October 31, 2019. Id.

A portion of the Project located in West Vandalia would require filling several large wetlands. R. at 5. This activity requires a Clean Water Act § 404 fill permit from the United States Army Corps of Engineers ("USACE") and they therefore were involved in the § 401 certification in West Vandalia along with the West Vandalia Division of Natural Resources ("West Vandalia DNR"). Id. Mammoth’s § 401 request was received by the West Vandalia DNR on January 8, 2018. Id. Problems in Vandalia forced Mammoth to amend the proposed route in the certification request with West Vandalia DNR on July 8, 2018. Id. West Vandalia DNR denied Mammoth’s § 401 request on July 7, 2019 for various stated reasons. R. at 5–6.

Mammoth filed suit in this Court on December 1, 2019 challenging the timeliness of its Clean Water Act § 401 water quality certification requests in Vandalia and West Vandalia. R. at 12. In its suit, Mammoth alleged that both Vandalia DEC and West Vandalia DNR waived their § 401 authority because the denials were outside of the one-year statutory period. Id. Citizens Against Pipelines filed an intervention in the suit to argue that the denials were not untimely. Id.

B. Mammoth’s Attempted Condemnation of Land in the State of Franklin

Under Mammoth’s proposed route, the pipeline would cross a state-owned portion of land in Franklin known as the Charitable Trust Property ("CT Property"). R. at 7. This property was gifted to Franklin in the 1990s and is very sensitive wildlife habitat. Id. Franklin manages the property with the intent on preserving its natural state for the use of its biodiversity and ecosystem
services. *Id.* The CT Property is not available to the public for recreational uses and contains several federally listed threatened or endangered species. *Id.* Due to the sensitivity of the property, Franklin refused to grant a right-of-way to Mammoth for their pipeline to cross the CT Property. *Id.*

Mammoth’s certification for public convenience and necessity from FERC included eminent domain rights under the Natural Gas Act so that Mammoth could acquire rights-of-way for the pipeline. *Id.* Mammoth filed a condemnation action and an action for preliminary injunctive relief on May 30, 2019 in the U.S. District Court of Franklin to acquire a right-of-way across the CT Property. R. at 12. The State of Franklin moved for dismissal, claiming their Eleventh Amendment sovereign immunity barred the condemnation action. *Id.* Citizens Against Pipelines also intervened in the suit on Franklin’s behalf, arguing that the power to override a state’s sovereign immunity cannot be delegated under the Natural Gas Act. *Id.* The district court denied Franklin’s motion to dismiss and granted Mammoth an order of condemnation and preliminary injunctive relief on September 30, 2019. *Id.* The district court similarly denied a motion for reconsideration by Franklin and CAP. *Id.* Franklin, joined by CAP again as intervenor, appealed to this Court, along with a motion to stay the district court’s order pending appeal and to expedite the appeal, which was partly granted by this Court December 1, 2019. R. at 13.

**C. National Trail Property**

A portion of the Project pipeline is planned to pass near the Shandaliah Trail and Shandaliah National Park. R. at 8–9. Although the pipeline will not cross the trail itself, it is planned to cross a nearby property known locally as the Homestead Farm, which is owned by a preservation trust which maintains the historic farm buildings located on the land. R. at 9. At the request of the National Park Service, which administers the Shandaliah Trail and the national park,
the U.S. Department of Agriculture (with experience managing similar trails and conservation easements in the western part of the United States) negotiated a conservation easement over the Homestead Farm property for the purpose of protecting the viewshed from the Shandaliah Trail. Id. Mammoth negotiated a right-of-way for its pipeline across the Homestead Farm property with the Department of Agriculture, along with the trust owning the property. R. at 9–10.

Citizens Against Pipelines filed suit in this Court on December 1, 2019 against the U.S. Department of Agriculture to challenge the authority of the Secretary of Agriculture to approve a right-or-way for the Project to cross the Homestead Farm. R. at 13. CAP argues that only the Secretary of the Interior has the authority to grant the right-of-way across the Homestead Farm as the agency charged with administering the Shandaliah Trail. Id. Mammoth intervened to argue that the Secretary of Agriculture had the authority to grant the right-of-way under the Mineral Leasing Act. Id.

These lawsuits were all combined as a result of a joint motion filed by Mammoth, CAP, Vandalia DEC, West Vandalia DNR, and Franklin to have the actions consolidated. R. at 13. The USDA did not object and this Court granted the motion on December 21, 2019. Id.

SUMMARY OF THE ARGUMENT

A. Mammoth’s Water Quality Certification Requests

This Court is presented with similar questions in the first two issues and should resolve them uniformly. The threshold issue in the state water quality certifications is whether a project proponent’s submission of a § 401 certification request and subsequent amendment or addition of new information in the request constitutes a new request for purposes of the statutory timeline. This Court can come to that equitable conclusion by finding that Mammoth’s withdrawal and
subsequent submission of a new request constituted a new request for purposes of the allotted statutory timeline. This Court can also arrive at the same conclusion by providing Auer deference to the Corps’ decision which stated that an amended request constitutes a new request, thus renewing the statutory timeline allotted to the state.

Neither the Clean Water Act nor jurisprudence have answered this vital question. However, the Supreme Court has recognized that states have broad authority to consider the full impacts of activity likely to result in discharge in waters within the state. *North Carolina v. FERC* also recognized Congressional intent to place the burden of requesting a state water quality certification on the license applicant. 112 F.3d 1175 (D.C. Cir. 1997). Providing Auer deference, which is applicable to an ambiguous regulation where the agency’s interpretation is not plainly erroneous or inconsistent with the regulation, will allow this court to resolve both issues equitably. *Auer v. Robbins*, 519 U.S. 452 (1997).

**B. Franklin’s Sovereign Immunity from Condemnation**

A state’s Eleventh Amendment sovereign immunity prevents it from being sued by a private individual like Mammoth without the state’s consent. While the Natural Gas Act delegates to licensees the federal power of eminent domain, that power is distinct from the federal power to sue a state or authorize others to breach a state’s sovereign immunity. The Natural Gas Act does not delegate the federal power to sue a state, and as an exercise of Commerce Clause power it cannot authorize private parties to breach a state’s sovereign immunity. The federal government’s own power to sue a state cannot be delegated to a private party because the states did not consent to being sued by parties other than the federal government and sister states in the constitutional structure.
C. National Trail Property

The conservation easement over the Homestead Farm property was acquired by the Department of Agriculture acting as agent for the National Park Service. As a appurtenant easement to the Shandaliah Trail and Shandaliah National Park, the conservation easement is a non-fee component of the Shandaliah Trail itself, and therefore is subject to the primary administration of the Secretary of the Interior. Even if the Department of Agriculture maintains management over the conservation easement, management of trail segments or underlying land is distinct from overall administration of the Shandaliah Trail, which is assigned to the Secretary of the Interior by the National Trails System Act. Therefore, only the Secretary of the Interior could have lawfully granted a pipeline right-of-way over the Homestead Farm easement property.

ARGUMENT

I. Vandalia DEC maintained its CWA § 401 authority by acting on Mammoth’s § 401 certification request within one year after receipt of the request.

This Court should find that the denial of Mammoth’s § 401 water quality certification by the Vandalia Department of Environment Conservation (“DEC”) was timely made. States are provided with a statutory period of one year to act on a certification request by granting, denying, or waiving the request. 33 U.S.C. § 1341(a)(1) (2018). A state waives the certification requirement be expressly doing so or by failing to act on the request within the statutory period. Id. The waiver provision is intended to “insure that sheer inactivity by the State . . . will not frustrate the Federal application.” H.R. REP. NO. 91-940, at 55 (1970) (Conf. Rep.), as reprinted in 1970 U.S.C.C.A.N. 2712, 2741. Vandalia DEC acted on Mammoth’s first certification request by reviewing the information provided and requesting more information within the one-year statutory period. R. at 4.
Mammoth’s withdrawal of their original request and submittal of a new certification request containing over five times as much information as the previous request constitutes a new request for purposes of the statutory period. Vandalia DEC then acted within the new statutory period by making a timely denial of the request, within one year of receipt of the second certification request. *Id.*

States are granted broad authority under § 401 to consider the full impacts of the proposal as they are charged with “assur[ing] that the activity will be conducted in a manner which will not violate applicable water quality standards.” 40 C.F.R. § 121.2 (2019); see also *PUD No. 1 v. Wash. Dep’t of Ecology*, 511 U.S. 700, 704 (1994). Assuring that water quality standards will not be compromised encompasses the need to work jointly with project proponents to ensure that the state has enough information about the project to make an informed decision. This also places a burden on project proponents such as Mammoth to provide the necessary information.

The issue here is whether the withdrawal and resubmission of a new water quality certification request containing additional information should be deemed a new request, thereby renewing the one-year statutory timeline granted to states to act on a request for certification. Vandalia DEC is required to provide the same standard of water quality assurance on every request. When Mammoth submitted its initial 18-page certification request, it surely knew that Vandalia DEC would not have sufficient information to make an informed decision on the proposed $4.4 billion project, where the longest part would run though Vandalia. R. at 4. If this court finds that withdrawing and resubmitting a certification request with additional information does not restart the statutory period allotted to states, then project proponents could easily exploit the statutory period by submitting incomplete certification requests specifically intending to game the system.
A. Vandalia DEC is allotted one year from the receipt of Mammoth’s certification request to act on the request.

Natural gas companies such as Mammoth who wish to engage in the construction, extension, or acquisition of facilities to transport or sell natural gas in interstate commerce are required to submit an application to the Federal Energy Regulatory Commission (“FERC”) for a certificate of public convenience and necessity. 15 U.S.C. § 717f(c)(1)(A) (2018). The FERC must issue such a certificate if it finds “that the applicant is able and willing properly to do the acts and to perform the service proposed . . . .” § 717f(e). The FERC issued Mammoth a certificate of public convenience and necessity on September 1, 2017. R. at 4. When granting a certificate to an applicant, the FERC is authorized to attach “reasonable terms and conditions as the public convenience and necessity may require.” 15 U.S.C. § 717f(e). The FERC did so in Mammoth’s case by conditioning the certificate on the satisfaction of water quality certifications in each state through which the pipeline would pass. R. at 4. Regardless of these conditions, however, the Natural Gas Act also expressly recognizes states’ rights in administering their water quality standards under the CWA before construction can begin. 15 U.S.C. § 717b(d)(3).

Section 401 of the CWA requires that any “applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originated or will originate.” 33 U.S.C. § 1341(a)(1) (2018). When a pipeline proponent applies for § 401 certification, states “conduct [their] own review of a pipeline’s likely effects on . . . waterbodies and whether those effects would comply with the State’s water quality standards.” Millennium Pipeline Co., L.L.C. v Seggos, 288 F. Supp. 3d 530, 535 (N.D.N.Y. 2017) (quoting Constitution Pipeline Co., LLC v. N.Y. State Dep’t of Env’t. Conservation, 868 F.3d 87, 100–01 (2d Cir. 2017)).
The CWA grants states “a reasonable period of time (which shall not exceed one year) after receipt of such request” to act on the request for certification. 33 U.S.C. § 1341(a)(1). States which exceed this statutory period waive the certification requirements. Id. Waiver of the one-year statutory period can occur by a state expressly waiving its authority or when a state fails to act on the request for certification. 40 C.F.R. § 121.16 (2019). The relevant statutes are unclear, however, as to whether the withdrawal of a request for certification and subsequent submission of a new request for certification containing additional information renews the statutory period allotted to states to act on the request. For the following reasons, this court should find that it does.

1. **The statutory timeline begins when the request is received.**

The one-year statutory period granted to states to act on a request for certification under the CWA begins after the state receives the request from the project proponent. *N.Y. State Dep’t of Envtl. Conservation v. FERC*, 884 F.3d 450, 455 (2d Cir. 2018). This ruling preserves the purpose of the waiver provision which is to “limit the amount of time that a State could delay a federal licensing proceeding without making a decision on the certification request.” *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011). Vandalia DEC received Mammoth’s initial 18-page request for certification on October 1, 2017, which initiated the statutory period for that request on the same day. R. at 4. Vandalia DEC would then have until October 1, 2018, to act on that 18-page request for certification.

Prior to October 1, 2018, Vandalia DEC determined that there was insufficient information in Mammoth’s initial 18-page request to determine whether the water quality standards in the state would be compromised. Id. The request did not contain enough detail regarding the streams that would be crossed, the schedule for crossing the streams, and the location of the crossing. Id. The cost of the project illustrates that Mammoth undoubtedly had the resources available to submit a
proper request for certification containing adequate information needed for Vandalia DEC to make an informed decision in the initial request. However, they chose not to do so.

2. **Mammoth’s withdrawal of its request and submission of a new request renewed the statutory timeline allotted to Vandalia DEC.**

On September 29, 2018, Vandalia DEC asked Mammoth to withdraw their certification request and resubmit a new request with the additional information needed so that Vandalia DEC could make an informed decision relative to state water quality standards. Mammoth complied with Vandalia DEC’s request by withdrawing their 18-page request for certification on September 30, 2018 and submitting a new request containing 97 pages on November 1, 2018. R. at 4. In determining the current issue, this Court must recognize Congress’s goal to “preserve” the state’s primary authority over state water quality decisions. *Bershire Envt’l Action Team, Inc. v. Tenn. Gas Pipeline Co.*, 851 F.3d 105, 113 (1st Cir. 2017). If this court finds that the submission of a new certification request does not renew the statutory timeline, then project proponents suffer no harm in submitting insufficient requests for certification only to trigger the one-year statutory period.

States are granted up to one year to “act on a request for certification.” 33 U.S.C. § 1341(a)(1) (2018) (emphasis added). The words *a* and *an* are indefinite articles and are sometimes used in the English language to refer to a person or thing that is not identified or specified or is the same. *A*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2020). A threshold question in the current issue is whether the two certification requests submitted to Vandalia DEC by Mammoth constitute a, or the same, certification request. The plain language of the statute seems to suggest that the withdrawal and subsequent submittal of an application containing additional information is a new application for purposes of the statutory period. Additionally, Vandalia DEC’s request of additional information and Mammoth’s production of it in the form of a new request demonstrated
the type of working relationship between a certifying authority and project proponent potentially allowed, which the FERC also supported. *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1105 (D.C. Cir. 2019), *cert. denied*, No. 19-257, 2019 WL 6689876 (Dec. 9, 2019); *see also* *N.Y. State Dep’t of Env’tl. Conservation v. FERC*, 884 F.3d 450, 455–56 (2d Cir. 2018) (citing *Constitution Pipeline Co., LLC v. N.Y. State Dep’t of Env’tl. Conservation*, 868 F.3d 87, 94 (2d Cir. 2017)). As a practical matter, Mammoth’s initial 18-page request on October 1, 2017 can hardly be regarded as the same request as its 97-page request submitted on November 1, 2018. Therefore, this court should find that a new one-year statutory period applied.

**B. Vandalia DEC is given broad authority to make certification decisions in order to ensure that its water quality standards will not be compromised.**

States are given broad authority to determine the full impacts of the discharged activity. *PUD No. 1 v. Wash. Dep’t of Ecology*, 511 U.S. 700, 711 (1994). A state must receive adequate information in order to make an informed decision on the impacts of the discharged activity. A state’s decision to request that the project proponent withdraw and resubmit a new certification request with the additional information is within the state’s discretion. This provides states with a reasonable amount of time to act on the new information in the request. This course of action also indicates that the state is *acting on* the request for certification, thus satisfying Congress’s intent in enacting the waiver provision. *Alcoa Power Generating, Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011).

1. **Vandalia DEC’s request that Mammoth withdraw and resubmit a new certification request containing additional information needed to make an informed decision is within its rights under the Clean Water Act.**

The United States Court of Appeals for the District of Columbia Circuit held that withdrawal and resubmission of *the same* certification requests for purposes of “circumvent[ing]
a congressionally granted authority over the licensing, conditioning, and developing of a hydropower project” does not act to renew the allotted one-year timeline provided to states. *Hoopa Valley Tribe*, 913 F.3d at 1104. The court declined to rule on whether the withdrawal and resubmission of “a wholly new” request constitutes “a ‘new request’ such that it restarts the one-year clock.” *Id.*

The project in *Hoopa Valley Tribe* involved several hydropower dams which were originally licensed to a predecessor of PacifiCorp in 1954. *Id.* at 1101. The federal license expired in 2006 and PacifiCorp, who “continued to operate the Project on annual interim licenses pending the broader licensing process,” sought to decommission the lower dams since bringing them to modern environmental standards would not be cost-effective. *Id.* PacifiCorp filed for relicensing with the FERC in 2004 and included their proposal to relicense the upper dams while decommissioning the lower dams. *Id.* Parties who would be affected by the dams’ closure began settlement negotiations in 2008 which were finalized in the Klamath Hydroelectric Settlement Agreement (KHSA) in 2010. *Id.* The States and PacifiCorp specifically “agreed to defer the one-year statutory limit for Section 401 approval by annually withdrawing-and-resubmitting the water quality requests that serve as the pre-requisite to FERC’s overarching review” in order to circumvent the FERC’s overarching review. *Id.*

The withdrawal and resubmission scheme agreed to in the KHSA was specifically intended to circumvent the FERC’s authority in reviewing PacifiCorp’s federal license. Neither the California State Water Resources Control Board nor the Oregon Department of Environmental Quality had any intention of ever evaluating the merits of the application. The Court noted that the agreement “serve[d] to circumvent a congressionally granted authority over the licensing, conditioning, and developing of a hydropower project.” *Id.* at 1104. This contrasts with the present
matter as no agreement existed to circumvent FERC’s authority in approving the pipeline project. Unlike the states involved in *Hoopa Valley Tribe*, Vandalia DEC reviewed the request and specifically asked for more information. This attempt by Vandalia DEC to make an informed decision should not be viewed as the same type of scheme as in *Hoopa*. Therefore, the withdrawal and resubmission of a new request containing additional information should constitute a new request, thus renewing the statutory timeline.

2. **Because the burden is on the applicant, Mammoth should not be rewarded with a waiver by providing insufficient information in its initial application.**

   “The language [of Section 401] clearly expresses a congressional intent to place the burden of requesting a state water quality certification on the license applicant.” *North Carolina v. FERC*, 112 F.3d 1175, 1184 (D.C. Cir. 1997). This congressional intent places on license applicants an obligation not to submit a request for certification unless all the necessary information is in the request. The disparity of information provided in Mammoth’s initial 18-page request for certification on October 1, 2017 and its 97-page request for certification on November 1, 2018 highlights the need for states to be provided with a new statutory timeline when a request is withdrawn and a subsequent request containing additional information is submitted. This burden must be judicially recognized with a finding that the withdrawal and resubmission of a certification request containing additional information renews the one-year statutory timeline.

II. **The doctrine of *Auer* deference compels this court to defer to the Army Corps of Engineers’ interpretation of their own regulation.**

   Congress has specifically charged the Army Corps of Engineers with the issuance of permits for the “discharge into navigable waters.” 33 U.S.C. § 1344 (2018). The Corps is undoubtedly a subject matter expert regarding issuance of permits under the Clean Water Act in the waters of the United States. Great deference should be given to their interpretation of their
regulations not only because the Corps is a leading expert in their field, but also because jurisprudence compels this court to do so unless the regulation is unambiguous, or the interpretation is plainly erroneous or inconsistent with the regulation. See, e.g., Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945); Auer v. Robbins, 519 U.S. 452, 457 (1997). The issue here is whether the Corps’ interpretation of their own regulation satisfies the test for providing deference to an agency’s interpretation of their own regulation. This Court should find that it does.

Furthermore, while Auer has been contested in recent years, the Supreme Court denied overruling Auer and Seminole Rock in the June 26, 2019, decision of Kisor v. Wilkie. 139 S. Ct. 2400, 2409 (2019).

The Supreme Court held that the “ultimate criterion” in determining the meaning of an administrative agency’s regulation is the agency’s interpretation of that regulation. Seminole Rock, 325 U.S. at 414. There is a legion of cases recognizing and applying deference to agency interpretations of statutes, regulations, and rules. See Kisor, 139 S. Ct. at 2411–12 (collecting cases). Deference to administrative agencies has even occurred in the nineteenth century, well before the decision of Seminole Rock. Kisor, 139 S. Ct. at 2412 (citing United States v. Eaton, 169 U.S. 331, 343 (1898). While the Supreme Court has narrowed the scope of when deference is to be applied to the agency since the decision in Seminole Rock, this Court must defer to the agency’s interpretation as long as the interpretation fits within those parameters.

A. The Corps regulation is genuinely ambiguous.

In deciding Auer, the Supreme Court operated on the presumption that “Congress would generally want the agency to play the primary role in resolving regulatory ambiguities.” Kisor, 139 S. Ct. at 2409. The regulation which the agency interprets must be genuinely ambiguous for Auer deference to apply. Id. A regulation is ambiguous when it is susceptible to multiple
interpretations. Id. at 2410. The “subject matter of a rule ‘may be so specialized and varying in nature as to be impossible’ — or at any rate, impracticable — to capture in its every detail.” Id. (citing SEC v. Chenery Corp., 332 U.S. 194, 203 (1947)). The regulation in this case missed a detail which led to the need for appropriate interpretation by the Corps.

The regulation governs the issuance of Mammoth’s § 401 and § 404 permits in West Vandalia and states in relevant part that, “[i]n 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.” 33 C.F.R. § 325.2(b)(1)(ii) (2019) (emphasis added). This language in the regulation does not specify what constitutes a valid request for verification. Similar to the first issue before this court, there is a need to determine whether a modification to the original request for certification constitutes a new “valid” request, such that the applicable timeline would renew from that point. The Corps could have interpreted their regulation to mean that the request was valid when West Vandalia received the first request only. This would mean that any amendment to a request would not act to renew the statutory timeline. The Corps could have also interpreted their regulation to mean that a valid request occurs upon submittal and whenever a request for certification is amended. This interpretation would renew the statutory timeline provided to the states. The Corps reasonably chose the latter interpretation as it was more equitable. Doing so would also result in a more informed decision about the project’s effects on the water quality within the state.

The Corps’ interpretation of the regulation meets the ambiguity test for providing deference since the regulation is genuinely ambiguous. The regulation is not “plainly permissive” because it does not specify or even insinuate as to what constitutes a valid request. Christensen v. Harris Cty., 529 U.S. 576, 588 (2000). Therefore, providing deference to the Corps interpretation would
not “permit the agency, under the guise of interpreting a regulation, to create *de facto* a new
regulation.” *Id.* The Corps’ interpretation also falls “within the bounds of a reasonable
interpretation.” *Id.* (citing *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013)).

**B. The Corps interpretation is not plainly erroneous or inconsistent with the regulation.**

*Auer* deference is not applied to an agency’s interpretation when the interpretation is
“plainly erroneous and inconsistent with the regulation.” *Seminole Rock*, 325 U.S. at 414; *see also,*
Furthermore, “[t]he power of an administrative agency to administer a congressionally created . .
. program necessarily requires the formulation of policy and the making of rules to fill any gap
left, implicitly or explicitly, by Congress.” *Chevron*, U.S.A., Inc. v. *NRDC, Inc.*, 467 U.S. 837, 843
valid request means an unmodified request. Unfortunately, in drafting their own regulations, the
Corps was silent in this detail as well.

The relevant section of the regulation states that, “[i]n determining whether or not a waiver
period has commenced, or a waiver has occurred, the district engineer will verify that the certifying
agency has received a valid request for certification.” 33 C.F.R. § 325.2(b)(1)(ii) (2019) (emphasis
added). The Supreme Court found that “an agency’s interpretation of a statute or regulation that
conflicts with a prior interpretation is ‘entitled to considerably less deference’ than a consistently
*Cardoza-Fonseca*, 480 U.S. 421, 446 (1987)). The Corps interpretation of this regulation has been
one consistently held by the Corps. R at 7. This interpretation is consistent with a reasonable view
of that regulation as well because it does not conflict with the text in the regulation. The Corps’
interpretation is not erroneous because the interpretation that the submission of an amended request constitutes a “valid request” therefore renewing the timeline is not an erroneous reading of the regulation.

Furthermore, since the Corps has held this interpretation in the past, providing deference would not act to “undermine the principle that agencies should provide regulated parties ‘fair warning of the conduct [a regulation] prohibits or requires.’” Christopher v. SmithKline Beecham Corp, 567 U.S. 142, 156 (2012) (citing Gates & Fox Co. v. Occupational Safety and Health Review Comm’n, 790 F.2d 154 (D.C. Cir. 1986)). The consistency of the Corps application of the regulation in question shows that Mammoth should have been on notice as to the interpretation that would be used and would not be unfairly surprised.

III. The State of Franklin’s sovereign immunity precludes Mammoth from exercising rights of eminent domain against state-owned property.

There has been an often contentious history of interaction between state and local governments and those entities proceeding with the construction of interstate energy projects with the benefit of federal licenses and powers. One of the most important of these federal powers used by licensees is the power to override the wishes of individual property owners through condemnation when no peaceable agreement can be obtained through negotiation. Specific to interstate natural gas pipelines such as that contemplated in this case is a section of the Natural Gas Act ("NGA") which authorizes licensed pipeline developers to utilize federal eminent domain power to acquire rights-of-way when unable to do so through other means. 15 U.S.C. § 717f(h) (2018). While this exercise of eminent domain may have been considered necessary by Congress to allow for the effective development of pipelines essential to the interstate transportation of natural gas resources, it cannot operate to allow pipeline developers to complete avoid constitutional limitations, such as a state's sovereign immunity.
A. The Natural Gas Act does not delegate the power for a pipeline company to condemn state-owned property for its own use, even when otherwise delegated power of eminent domain.

1. The federal power to condemn state property is a function of two separate powers, the federal power of eminent domain, and the federal power to sue states as an exemption from Eleventh Amendment sovereign immunity.

While Mammoth asserts that the eminent domain powers granted in Section 7(h) of the NGA allow it to condemn even state-owned property, such as that owned by the State of Franklin and at issue here, such a condemnation would require more power than simply that conferred by the NGA. The Third Circuit recently took up this very question and determined that, "it is essential at the outset to distinguish between the two powers at issue here: the federal government's eminent domain power and its exemption from Eleventh Amendment immunity." In re PennEast Pipeline Co., 938 F.3d 96, 104 (3d Cir. 2019).

There is little disagreement on the power of the federal government to condemn property for public use when required. The right of eminent domain, exercised through the condemnation process, is a fundamental aspect of any sovereign power, and does not require express delegation or mention in the Constitution. Boom Co. v. Patterson, 98 U.S. 403, 406 (1878). Even so, various rights expressly granted to the federal government in the U.S. Constitution can only be fully exercised if the federal government also has power to acquire land within the states; thus the federal government's sovereign eminent domain power may also be exercised within the states, despite their own retained sovereignty. Kohl v. United States, 91 U.S. 367, 371–72 (1875). In addition, the Takings Clause of the Fifth Amendment of the Constitution implies directly that such takings via eminent domain are a power of the federal government. Id. at 372–73. This clause is merely a recognition of a preexisting sovereign power rather than a grant of a new power. United States v. Carmack, 329 U.S. 230, 241–42 (1946).
It is also well-accepted that the federal government may delegate its eminent domain power to others, as the NGA specifically purports to do in Section 7(h). 15 U.S.C. § 717f(h) (2018). The ability of a sovereign state to condemn property to transfer it to a private party is clear, so long as the requirement of public use is met. *Kelo v. City of New London*, 545 U.S. 469, 477 (2005). Therefore, delegating the same authority to that private party in advance (rather than having the sovereign condemn the property and then convey it to the private person) makes matters more efficient without offending in any way the rights of the owner of the property being condemned. The specific delegation of eminent domain power encapsulated within Section 7(h) of the NGA has been specifically approved by courts as a constitutional exercise of Congress's commerce powers. *See Thatcher v. Tenn. Gas Transmission Co.*, 180 F.2d 644, 647 (5th Cir. 1950). The more general power of Congress in its regulation of interstate commerce to delegate eminent domain to a private corporation is a much older and well-established idea. *Id.* (citing *Luxton v. N. River Bridge Co.*, 153 U.S. 525 (1894); *Cherokee Nation v. S. Kan. Ry. Co.*, 135 U.S. 641 (1890)).

However, delegation of the federal power of eminent domain does not inherently bring with it the power to exercise that eminent domain right against a sovereign state. The individual states are immune from suit by private parties, as exemplified by the Eleventh Amendment to the U.S. Constitution. While the amendment itself refers specifically to suits brought in federal court by citizens of another state, or citizens or subjects of a foreign state, a state's immunity from suit is not limited merely to those circumstances. *See Hans v. Louisiana*, 134 U.S. 1 (1890). Immunity from suit by a state is, like the power of eminent domain, an aspect of the state's sovereignty and retained by that state in the federal constitutional structure. *Alden v. Maine*, 527 U.S. 706, 713 (1999). This is an idea as old as the Constitution and predates the passing of the Eleventh
Amendment. "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.” *Nevada v. Hall*, 440 U.S. 410, 436 (1979) (quoting THE FEDERALIST NO. 81, 508 (Alexander Hamilton)). While this sovereign immunity is broader than the text of the Eleventh Amendment itself implies, it is commonly referred to by courts as "Eleventh Amendment immunity." *See Alden*, 527 U.S. at 713.

2. While the Natural Gas Act delegates to certain qualified pipeline builders federal power of eminent domain, it does not include the separate federal power to sue states.

While the NGA may properly delegate the federal power of eminent domain, that power cannot be exercised against a sovereign state without also having the power to breach that state's Eleventh Amendment immunity. There are effectively only two cases when a state's Eleventh Amendment immunity does not apply: when that immunity has been waived by consent of the state, and when Congress has constitutionally abrogated the immunity of the states in order to expressly allow private persons to hale those states into court. As to the first of these situations, there is no information in the record that the State of Franklin has expressly waived its Eleventh Amendment Immunity or agreed to subject itself to suit in federal court. Consent was given by all of the states to suit by their sister states and by the federal government as part of the constitutional federal structure, whether the state is one of the original members of the union or was later admitted on an equal footing with the other states. *See United States v. Texas*, 143 U.S. 621, 646 (1892). This implied federal consent is part of what allows the federal government to exercise its own eminent domain power directly over property owned by a state. *See Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 534 (1941). This implied consent to suit by states in the federal system does not extend in any way to private parties, however, and the Eleventh
Amendment exists specifically to address the idea that the constitution may allow private parties to pull a non-consenting state into court. *Alden v. Maine*, 527 U.S. 706, 755–56 (1999).

While private parties do not normally have the power to sue a non-consenting state, it is possible in limited cases for Congress to abrogate a state's sovereign immunity to suit for specific purposes by way of legislation. This is normally done through Congress acting under their enforcement powers granted in the Fourteenth Amendment. U.S. CONST. amend. XIV, § 5; *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). The NGA, specifically including the grant of eminent domain authority, is not a legislative act passed in pursuance of Congress's Fourteenth Amendment enforcement powers, however, but an exercise of Congress's power to regulate interstate commerce. *Thatcher v. Tenn. Gas Transmission Co.*, 180 F.2d 644, 647–48 (5th Cir. 1950). Congress does not have the power under the Interstate Commerce Clause or any other section of Article I of the Constitution to abrogate state sovereign immunity. *Seminole Tribe v. Florida*, 517 U.S. 44, 72–73 (1996). Therefore, Congress cannot abrogate the State of Franklin's Eleventh Amendment immunity through the NGA and cannot directly authorize a private party to sue the State of Franklin.

**B. The federal power to sue a state in federal court cannot be delegated to a private party, regardless of the intent or language of the Natural Gas Act.**

It may be considered a separate question as to whether Congress can *delegate* the federal government's own power to sue a state, in the same way that the NGA delegates the federal government's eminent domain authority. Authorizing by statute an individual to act in their own capacity is not the same as delegating the government's own power to that individual so they may act in effect as an agent of the sovereign. Although the Supreme Court has not definitively addressed the issue of delegation of the federal power to sue a state, they have expressed significant doubt that such a delegation is even possible. *Blatchford v. Native Vill. of Noatak*, 501
U.S. 775, 785 (1991). This same doubt has been expressed by lower courts, as well, although also without reaching a required resolution of the question. See, e.g., In re PennEast Pipeline Co., 938 F.3d 96, 111 (3d Cir. 2019).

The Supreme Court has recognized, however, the fundamental difference between a suit instituted by the government and a suit instituted by a private individual, and importance of the political accountability of the government in its actions. Alden v. Maine, 527 U.S. 706, 755–56 (1999). That lack of accountability counsels strongly against "a broad delegation to private persons to sue nonconsenting States." Id. at 756. The purpose of the suit is not as important as the structural concerns inherent in an adjudication between sovereigns. "[E]ven consent to suit by the United States for a particular person's benefit is not consent to suit by that person himself." Blatchford, 501 U.S. at 785. And, "the position of a licensee is distinguishable from that of the United States with respect to furthering of the national interest." Pub. Util. Dist. No. 1 v. City of Seattle, 382 F.2d 666, 669 (9th Cir. 1967). While the sovereign power of eminent domain may be delegable, the power to directly impair another sovereign's rights should not be delegable to third parties. If the United States wishes to provide for the condemnation of a state's public lands, it must do so directly and through its own actions, with all the procedural and political controls that such action might entail.

Even if the power to hale a non-consenting state into court were either delegable or could be provided through abrogation of the state's sovereign immunity, such an ability would have to be expressly provided for. Any intent by Congress to abrogate a state's sovereign immunity must be communicated with "unmistakeable clarity." Blatchford, 501 U.S. at 785. There is no such clear abrogation in the text of the Natural Gas Act. And while section 7(h) of the NGA seems clear in its delegation of the federal power of eminent domain, there is no express attempt at
delegation of the federal power to sue a sovereign state. See 15 U.S.C. 717f(h) (2018). The only applicable language in the NGA could be the second part of section 7(h), added as part of a 2017 amendment, which adds prohibitions and procedural requirements should a licensee under the NGA attempt to condemn lands "owned by a State or political subdivision thereof and were part of or included within any public park, recreation area or wildlife refuge established under State or local law." Id. While this language certainly seems to anticipate that a licensee might attempt to exercise eminent domain powers against state-owned property, such an assumption is not equivalent to a clear delegation of the power to do so. It merely provides for a situation which might arise, primarily by making such an exercise of eminent domain prohibited or more difficult.

An examination of the history of this particular amended language will also reveal that it derives from a presumption that Congress could abrogate a state's sovereign immunity under the NGA, rather than constitutionally delegate the power to private individuals to do so directly. The language in question here in section 7(h) of the NGA is taken from identical language in Section 21 of the Federal Power Act ("FPA"). 16 U.S.C. 814 (2018). That language was added to the FPA in a 1992 amendment as part of the Energy Policy Act of 1992. P.L. 102-486, 106 Stat. 2776, 3009 (1992). The specific language amending 16 U.S.C. 814 to prevent condemnation of public park lands was initially added to the overall act (in a previous form and wording) as part of what was commonly referred to in debates as the "Miller Amendment" in the House of Representatives. H.Amdt. 569 to H.R. 776. Records of the floor debates show that the primary concern motivating the addition of this provision was the use by FPA licensees of eminent domain to condemn the property of cities or counties which had already been put to public use as parks or other public spaces, without any regard for the wishes of those local governments. See 138 CONG. REC. 12,694–711 (1992). Two factors make these same concerns inapplicable within the context of the
NGA as compared to the FPA, where eminent domain is used in support of federally-licensed hydropower projects. First of all, hydropower projects under the FPA most often involve navigable waters of the United States, over which the federal government "has dominion, to the exclusion of the States." *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 334 (1958) (collecting cases, cites omitted). No such federal right of navigation is involved in most projects under the NGA. In addition, when the corresponding Miller Amendment was made to the FPA in 1992, Congress and federal hydropower licensees were operating under a Supreme Court decision stating explicitly that Congress could abrogate a state's sovereign immunity through exercise of its Commerce Clause power, allowing such exercise of eminent domain against public lands under the FPA. *See Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), *overruled by Seminole Tribe v. Florida*, 517 U.S. 44 (1996). As noted, that doctrine was overruled by the Supreme Court only a few years later, in 1996, at which point it was established that Congress could not abrogate state sovereign immunity under either the NGA or FPA. *See Seminole Tribe*, 517 U.S. at 72–73.

With such different concerns applying under the FPA, and the Commerce Clause abrogation question having been definitively settled in 1996, why would Congress include this language in the NGA in 2017 if they did not intend that licensees have the ability to condemn state-owned land? After all, courts should not interpret language in a statute in such a way as to render it meaningless or surplus. *See Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 166 (2004). In the case of Section 7(h) of the NGA, though, the additional language is not without effect even when it cannot lawfully apply to property held by the fifty states. By its own terms, the word "State" in the NGA also includes the District of Columbia and territories of the United States, where concerns of Eleventh Amendment immunity do not apply. 15 U.S.C. § 717a(4) (2018). In addition, the amendment language covers not only the property of "State[s]" but also
that owned by political subdivisions of the same. *Id.* at § 717f(h). Unlike an agency or "arm" of the State, political subdivisions and municipal corporations do not enjoy the benefits of sovereign immunity. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 70 (1989). Therefore there are numerous properties which would still benefit from the terms of the "Miller Amendment" when added to the NGA, even without its necessity for protecting property vested in a state, and no need to consider the additional 2017 language to be pointless or surplusage by this interpretation.

**IV. The Secretary of Agriculture did not have appropriate statutory authority to grant a pipeline right-of-way over the Homestead Farm property.**

In addition to implicating federalism concerns by seeking to condemn state property, Mammoth has also run into issues attempting to obtain a pipeline right-of-way from the federal government itself. As a portion of Mammoth's proposed pipeline would cross the Homestead Farm property, over which the United States holds a conservation easement, Mammoth attempted to secure a right-of-way from the property owner as well as the Department of Agriculture. However, the granting of rights-of-way over federal lands, whether for gas pipeline or other purposes, is strictly governed by federal laws. The most contentious point here is which of those federal laws properly applies in this circumstance, and therefore which federal department or agency is authorized to grant the right-of-way that Mammoth seeks.

**A. The conservation easement over the Homestead Farm is a constituent part of the Shandaliah Trail, and is therefore not federal land under the Mineral Leasing Act.**

Although the United States Department of Agriculture ("USDA") negotiated and holds as grantee the conservation easement over the Homestead Farm property, that mere fact does not make the Homestead Farm subject to the sole jurisdiction or administration of the USDA or the Secretary of Agriculture. The record is clear that the conservation easement was obtained at the request of and on the recommendation of the National Park Service. *R.* at 9. The conservation
Easement was sought by the National Park Service specifically as a means of preserving the viewshed from the Shandaliah Trail and the Shandaliah National Park. *Id.* No other purpose is given for obtaining the conservation easement, and none should be needed, since the Homestead Farm is already owned by and being preserved by a preservation trust. *Id.* Therefore, the conservation easement over the Homestead Farm property exists solely for the benefit of those portions of the Shandaliah Trail and Shandaliah National Park from which the Homestead Farm is visible. Unlike many conservation easements, which may be considered easements in gross, the Homestead Farm conservation easement is therefore an appurtenant easement. See Federico Cheever & Nancy A. McLaughlin, *An Introduction to Conservation Easements in the United States: A Simple Concept and a Complicated Mosaic of Law*, 1 J.L. PROP. & SOC'Y 107, 134–35 (2014).

An easement is appurtenant when the rights and obligations of that easement "are tied to ownership or occupancy of a particular unit or parcel of land." *Restatement (Third) of Prop.: Servitudes* § 1.5(1) (AM. LAW INST. 1998). In addition, there is a presumption that an easement is appurtenant as opposed to in gross. *Id.* at § 4.5(2). The fact that the Secretary of the Interior or the National Park Service are not a party to the conservation easement does not negate the fact that the easement creates benefits appurtenant to the park and trail property. *Id.* at § 2.6(2); see also *id.* at § 2.6 cmt. e, illus. 5. As a general rule, appurtenant benefits may not be severed from the dominant estate, and thus the government's interest in the conservation easement cannot exist independently of the park and trail property. *See id.* at § 5.6. As a non-fee interest which is a component part of the Shandaliah Trail property, the conservation easement must be considered as part of the National Park System unit which includes the trail, regardless of which entity manages and enforces the conservation easement. The Park Service's own regulations reinforce
this conclusion, stating that they apply to, "[o]ther lands and waters over which the United States holds a less-than-fee interest, to the extent necessary to fulfill the purpose of the National Park Service administered interest . . . ." 36 C.F.R. § 1.2(a)(5) (2018). As a component part of the Shandaliah Trail segment, the conservation easement must therefore be considered as part of the National Park System. "The [National Park] System shall include any area of land and water administered by the Secretary [of the Interior], acting through the Director [of the National Park Service], for park, monument, historic, parkway, recreational, or other purposes." 54 U.S.C. § 100501 (Supp. 2014); see also 54 U.S.C. § 100102 (Supp. 2014) (for defined terms). The Shandaliah National Trail was specifically created as a national trail under the administration of the Secretary of the Interior, delegated to the National Park Service. R. at 9; see also, e.g., 16 U.S.C. § 1244(a)(1) (2018) (for similar language creating the Appalachian National Scenic Trail under the administration of the Secretary of the Interior).

While Mammoth purports to have acquired a pipeline right-of-way across the Homestead Farm property under provisions of the Mineral Leasing Act ("MLA"), the MLA cannot apply in this instance. The right-of-way provisions of the MLA apply only to "any Federal lands" as defined in the act. 30 U.S.C. § 185(a) (2018). The MLA defines "Federal lands" to mean, "all lands owned by the United States except lands in the National Park System, lands held in trust for an Indian or Indian tribe, and lands on the Outer Continental Shelf." § 185(b)(1) (emphasis added). Since the conservation easement is a component part of National Park System lands, as discussed above, the Mineral Leasing Act simply does not apply in this case. The same outcome would obtain if the USDA had attempted to grant a right-of-way across the Shandaliah National Trail itself. For lands of a national scenic trail, the authority to grant pipeline or other rights-of-way is governed by the National Trails System Act. 16 U.S.C. §§ 1241–1251 (2018). The Secretary of
the Interior is granted the authorization to grant easements and rights-of-way over "any component of the national trails system in accordance with the laws applicable to the national park system" when the trail involved is one over which the Secretary of the Interior is named administrator. §1248(a).

B. While the USDA may hold and manage the conservation easement, it is not the agency charged with overall administration of the Shandaliah Trail under the National Trails System Act.

To be fair, a national scenic trail may cross a variety of federal lands, under the management of an array of different federal agencies, in addition to those lands controlled by state or local governments, or even private parties. For those federally managed lands underlying a national scenic trail, the National Trails System Act does not transfer any management authority from the agencies legislatively appointed to manage those parcels. 16 U.S.C. § 1246(a)(1)(A) (2018). The Act does distinguish, however, between federal agencies with management responsibilities over specific lands, and "[t]he Secretary charged with the overall administration of a trail." See, e.g., id. (emphasis added). As mentioned above, the Secretary of the Interior is the Secretary charged with overall administration of the Shandaliah Trail. R. at 9.

The distinction between levels of administration and management is critical to determining which agency has authority under the National Trails System Act to grant a pipeline right-of-way over the Homestead Farm. The section of the National Trails System Act authorizing grants of rights-of-way supplies that authority only to "[t]he Secretary of the Interior or the Secretary of the Agriculture as the case may be . . . in accordance with the laws applicable to the national park system and the national forest system, respectively." 16 U.S.C. § 1248(a) (2018). This grant of authority is only to the Secretary with overall administration responsibilities for the trail in question, regardless of whether the underlying lands may fall within a national park or national
forest, or in an area under the jurisdiction of another federal agency entirely. See Cowpasture River Pres. Ass'n v. Forest Serv., 911 F.3d 150, 181 (4th Cir. 2018), cert. granted, 140 S. Ct. 36 (2019). Since the conservation easement over the Homestead Farm is appurtenant to the Shandaliah Trail and Shandaliah National Park, and cannot exist independently of that property, the Secretary of the Interior (acting through the National Park Service) has both overall administration responsibility for the trail and management responsibility for the underlying national park lands. The USDA or Secretary of Agriculture can only have been acting here as an agent of the Secretary of the Interior and did not assume administration authority over the Shandaliah Trail as a result. The National Trails System Act specifically contemplates limited exchanges of management authority for specific trail segments between the appropriate Secretaries, 16 U.S.C. § 1246(a)(1)(B) (2018), although the record here does not disclose whether any such joint memorandum of agreement exists, or what its terms and conditions are if so. Therefore, this court must rely on the default rules of the National Trails System Act, which authorize only the Secretary of the Interior to grant rights-of-way over lands covered by the Act with respect to the Shandaliah Trail.

CONCLUSION

For the foregoing reasons, this Court should affirm the denials of § 401 water quality certification by Vandalia DEC and West Vandalia DNR, reverse the decision of the district court granting the condemnation of land in Franklin, and vacate the right-of-way granted by the Secretary of Agriculture as being beyond the Secretary’s statutory authority to grant.
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. 2