The Natural Gas Act, State Environmental Policy, and the Jurisdiction of the Federal Circuit Courts

Channing Jones*

* J.D. Candidate, Columbia Law School, Class of 2017. The author thanks Professor Michael Gerrard for his ongoing guidance, Professor Gillian Metzger for her review and feedback, and Professor Susan Kraham for her initial direction.

I. INTRODUCTION

Natural gas is booming in the United States, with a thirty-six percent increase in domestic well production between the years 2000 and 2015, and, during that same period, a seventeen percent increase in domestic consumption and a sevenfold increase in exports.[1] Due to factors such as the supply boom of natural gas enabled by hydraulic fracturing, analysts predict a significant role for natural gas in the foreseeable future.[2] These market pressures will likely drive a continued push for the build-out of natural gas infrastructure in the form of pipelines, compressor stations, storage facilities, and liquefied natural gas ("LNG") terminals (collectively, "natural gas facilities").[3] Where these facilities would transport natural gas in interstate or foreign commerce, their siting, construction, and operation are generally governed by the Natural Gas Act ("NGA" or the "Act") and fall within the regulatory jurisdiction of the Federal Energy Regulatory Commission ("FERC" or the "Commission").[4]

In some parts of the United States, natural gas project proposals commonly encounter controversy and resistance. An application to construct or expand a natural gas facility may result in scrutiny from state authorities due to environmental and safety concerns related to construction or operation.[5] Advocacy organizations and citizen groups may oppose the expansion of natural gas infrastructure on these same grounds, and out of environmental and public health concerns associated with natural gas extraction

1. *U.S Natural Gas Gross Withdrawals*, U.S. ENERGY INFO. ADMIN., http://www.eia.gov/dnav/ng/hist/n9010us2A.htm [https://perma.cc/9RJS-LLW9] (last updated Nov. 30, 2016); *U.S Natural Gas Total Consumption*, U.S. ENERGY INFO. ADMIN., http://www.eia.gov/dnav/ng/hist/n9140us2A.htm [https://perma.cc/E8UQ-LVYL] (last updated Nov. 30, 2016); *U.S Natural Gas Exports*, U.S. ENERGY INFO. ADMIN., http://www.eia.gov/dnav/ng/hist/n9130us2A.htm [https://perma.cc/MU29-L64Y] (last updated Nov. 30, 2016).

2. *See, e.g.*, U.S. ENERGY INFO. ADMIN., ANNUAL ENERGY OUTLOOK 2015 WITH PROJECTIONS TO 2040, at 15, 20, 24, E-11 (2015).

3. LNG is produced by cooling natural gas to an extreme low temperature, yielding a liquid hundreds of times more compact than the gaseous volume. Liquefaction enables, among other things, overseas shipment.

4. *See* 15 U.S.C. § 717(b) (2012); 42 U.S.C. § 7172(a)(1) (2012). The Natural Gas Act is codified at 15 U.S.C. §§ 717–717z. In general, FERC's jurisdiction begins after the gas extraction and gathering stages and ends at the point gas enters a local distribution system, or up to a point of export. Where not otherwise noted, the reader should assume that any natural gas "facilities" or "projects" discussed in this Note are within FERC's jurisdiction.

5. *See, e.g.*, Islander E. Pipeline Co. v. Conn. Dep't of Envtl. Prot., 482 F.3d 79 (2d Cir. 2006).

and combustion.[6] Others opposing new or expanded facilities may include business competitors[7] or affected landowners.[8] These sources of opposition indicate a considerable amount of future litigation as proposals to construct or expand natural gas facilities grow with supply and demand pressures.

One area this litigation may center around is the limited but sometimes decisive range of authority states hold to regulate natural gas facilities with respect to certain environmental matters, chiefly in certifying state water quality standards compliance under section 401 of the Clean Water Act ("CWA").[9] Indeed, litigation has already arisen in connection with section 401 certification of natural gas facilities.[10]

Yet a threshold jurisdictional question remains largely unanswered by the federal courts, except superficially.[11] During the 109th Congress, the NGA was amended by the Energy Policy Act of 2005 ("EPAct"),[12] including through the addition of section 19(d) to the NGA. This section vests the federal circuit courts with "original and exclusive jurisdiction" over most challenges to orders, actions, or alleged failures to act by state agencies "acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval . . . required under Federal law" for natural gas facilities under FERC's jurisdiction.[13] The precise scope of this conferral is ambiguous. Specifically, which state actions are undertaken "pursuant to" and "required under" federal law?[14]

6. *See, e.g.*, *Beyond Natural Gas Campaign*, SIERRA CLUB, http://content.sierraclub.org/naturalgas [https://perma.cc/QDL5-6S8M] (last visited Oct. 15, 2016).

7. *See, e.g.*, NE Hub Partners, L.P. v. CNG Transmission Corp., 239 F.3d 333 (3d Cir. 2001).

8. *See, e.g.*, HALT PENNEAST, http://www.haltpenneast.org [https://perma.cc/NFC7-5NAZ] (last visited Oct. 15, 2016).

9. 33 U.S.C. § 1341 (2012); *see infra* notes 46–55 and accompanying text (discussing section 401 of the Clean Water Act).

10. *See infra* note 68 (listing cases).

11. *See* Del. Riverkeeper Network v. Sec'y Penn. Dep't of Envtl. Prot., 833 F.3d 360, 370–73 (3d Cir. 2016) (addressing the jurisdictional question according to section 19(d) of the NGA but not according to underlying federal question jurisdiction doctrines); *see also infra* Part IV (addressing the jurisdictional question under section 19(d) of the NGA); *infra* Part V (addressing the question according to underlying federal courts doctrines).

12. Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594.

13. 15 U.S.C. § 717r(d)(1) (2012) (orders and actions); *id.* § 717r(d)(2) (alleged failures to act).

14. One scholar has described "the lack of doctrines to determine whether the state laws and regulations that states enact to implement federal statutory schemes have the status of

How is this bounded by the "arising under" jurisdiction of the federal courts? And how do possible jurisdictional scenarios affect the range of challenges to state water quality certification for natural gas projects that should go to federal circuit court under section 19(d)?

This Note takes the position that, under section 19(d), federal circuit courts may validly exercise jurisdiction over challenges to state water quality certification for natural gas projects where brought on federal law grounds, or where sufficiently involving federal questions. But jurisdiction should not be proper in federal court for claims arising under state law—such as "arbitrary and capricious" challenges—even though state water quality certification operates as part of the cooperative federal program of the Clean Water Act. Nevertheless, this Note predicts that, if and when faced with the question, courts may likely construe section 19(d) as a broad grant of original federal question jurisdiction that applies to all challenges to state actions delegated under a federal scheme, including water quality certification under the CWA, even in the absence of patently federal law claims.

This matter holds practical implications for litigants—whether proponents or opponents of proposed facilities—in crafting litigation strategies and filing with appropriate fora. It also has implications for state authorities in making and implementing policy, and understanding where and how state agency actions concerning natural gas facilities will be reviewable. Meanwhile, these issues raise broader theoretical questions regarding the jurisdiction of federal courts in adjudicating disputes arising out of cooperative programs between the federal government and the states.

II. THE NATURAL GAS ACT AND THE CLEAN WATER ACT

The Natural Gas Act regulates "the transportation of natural gas and the sale thereof in interstate and foreign commerce."[15] FERC is charged with administering the NGA,[16] including through the issuance of "certificates of public convenience and necessity"

'federal' or 'state' law," as a "prominent puzzle." Abbe R. Gluck, *Our (National) Federalism*, 123 YALE L.J. 1996, 2001 (2014).

15. 15 U.S.C. § 717(a).

16. 42 U.S.C. § 7172(a)(1)(C)–(F) (2012).

required for the construction, extension, acquisition, or operation of transportation facilities including pipelines, compressor stations, and storage facilities under section 7 of the Act,[17] as well as through the approval of applications for the "siting, construction, expansion, or operation" of LNG facilities under section 3 of the Act.[18] Natural gas facility approvals are made contingent upon compliance with the NGA,[19] with FERC's extensive application process,[20] with environmental review and mitigation requirements as provided in FERC regulations,[21] and with other project-specific conditions FERC may set within its discretion.[22] FERC serves as the lead agency in preparing environmental impact statements and environmental assessments for proposed projects pursuant to the National Environmental Policy Act ("NEPA").[23] The Commission then issues authorization orders for approved projects, conditional in part upon compliance with specified environmental conditions.[24]

As discussed below, states play a limited but sometimes pivotal role in considering and conditioning permits necessary for pipeline and other natural gas facility applications before FERC, chiefly through state water quality certification authority under section 401 of the CWA.[25] With Section 19(d) of the NGA, Congress appears to have sought to funnel judicial review of such state determinations into the federal circuit courts.[26]

17. *See generally* 15 U.S.C. § 717f.

18. *See id.* § 717b(e)(1).

19. *See id.* § 717f(e); 18 C.F.R. §§ 153.4, 157.8 (2016).

20. *See* 18 C.F.R. pts. 153, 156, 157.

21. *See id.* pt. 380 (FERC regulations implementing the National Environmental Policy Act).

22. For transportation facility certificates under section 7, FERC may attach "such reasonable terms and conditions as the public convenience and necessity may require." 15 U.S.C. § 717f(e). For LNG terminal approvals under section 3, FERC may apply "such terms and conditions as the Commission find [sic] necessary or appropriate." *Id.* § 717b(e)(3)(A); *see also* Distrigas Corp. v. Fed. Power Comm'n, 495 F.2d 1057, 1064 (D.C. Cir. 1974) (finding that FERC's predecessor could apply section 7 requirements to section 3 projects within its discretion).

23. 15 U.S.C. § 717n(b)(1).

24. FERC decisions, environmental review documents, and other docket items are available on FERC's website, https://www.ferc.gov.

25. *See generally* Joan M. Darby et al., *The Role of FERC and the States in Approving and Siting Interstate Natural Gas Facilities and LNG Terminals After the Energy Policy Act of 2005—Consultation, Preemption and Cooperative Federalism*, 6 TEX. J. OIL, GAS, & ENERGY L. 335, 339–53 (2011) (describing the natural gas facility approval process).

26. *See supra* Part IV.

A. State Environmental Regulation of Natural Gas Facilities

1. Generally

The NGA broadly preempts state regulation of commerce in natural gas within the Act's purview,[27] including with respect to environmental and related matters such as health, safety, and land use.[28] For example, because the Act provides for environmental review coordinated by FERC, a state may not impose its own environmental review requirements on construction of a natural gas facility under FERC's jurisdiction.[29] Nor may a local government impose its own zoning laws on such facilities.[30] The Commission and the courts recognize that some state laws governing the operations of natural gas companies are beyond the scope of NGA regulation, although neither FERC orders nor judicial opinions have clearly demarcated the boundaries of NGA preemption.[31]

27. Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 305 (1988). Intrastate and local distribution of natural gas is excluded from the scope of the NGA, and therefore may be subject to state regulation. *See* 15 U.S.C. § 717(b).

28. *See, e.g.*, Islander E. Pipeline Co. v. Blumenthal, 478 F. Supp. 2d 289, 295 (D. Conn. 2007) (holding Connecticut's imposition of the Structures, Dredging and Fill Act permits to be preempted) (citing *Schneidewind*, 485 U.S. at 300–01); N. Nat. Gas Co. v. Iowa Util. Bd., 377 F.3d 817, 821–23 (8th Cir. 2004) (preempting state land restoration rules and finding it "undeniable that Congress delegated authority to the FERC to regulate a wide range of environmental issues relating to pipeline facilities").

29. Nat'l Fuel Gas Supply Corp. v. Pub. Serv. Comm'n, 894 F.2d 571, 579 (2d Cir. 1990) ("Because FERC has authority to consider environmental issues, states may not engage in concurrent site-specific environmental review.").

30. Algonquin LNG v. Loqa, 79 F. Supp. 2d 49, 53 (D.R.I. 2000) (holding preempted "any provisions of the Providence Zoning Ordinance, any building or other codes administered by the City of Providence, and any licensing or certification requirements that are contingent upon approval pursuant to them . . . insofar as they purport to apply to the FERC-approved modifications to [a] natural gas facility").

31. *See, e.g.*, Rockies Exp. Pipeline LLC v. Ind. State Nat. Res. Comm'n, No. 1:08-cv-1651-RLY-DML, 2010 WL 3882513, at *5 (S.D. Ind. Sept. 28, 2010) ("[T]his court is not suggesting . . . that all state and local regulations that have even a tangential effect on a gas pipeline construction project are preempted."); Kern River Gas Transmission Co. v. Clark Cty., Nev., 757 F. Supp. 1110, 1115 (D. Nev. 1990) (stating that "[w]hile some permits which do not target concerns already exhaustively reached by the Natural Gas Act may properly be the subject of [local] action, [local governments] cannot require [a natural gas company] to meet additional safety standards" beyond those "required by the federal licensing scheme"); Texas E. Transmission, LP, 121 FERC ¶ 61,003, 61,015 (2007) ("[W]hile the Commission's exclusive jurisdiction preempts local and state regulations to the extent they impose requirements above federal requirements or delay construction, this does not exempt [a natural gas company] from having to apply for state or local permits that target other concerns.").

There are some situations in which a state has clear jurisdiction to regulate some antecedent component of a project over which FERC otherwise holds jurisdiction, and may thereby exercise indirect control—for example, where a state-regulated power line connects to a FERC-regulated natural gas facility.[32] But FERC is guarded and unspecific about the precise scope of NGA preemption: the Commission routinely requires applicants seeking NGA project approval to consult with state authorities,[33] and often "encourage[es]" applicants to cooperate with state law requirements[34]—but maintains that state and local governments may not impose requirements that would "prohibit or unreasonably delay" FERC-approved projects.[35] Meanwhile, in conducting NEPA review for a project, FERC will often presume applicant compliance with state law, including permitting requirements, for the purpose of assessing environmental impacts.[36] Natural gas companies also

32. *E.g.*, Cent. N.Y. Oil & Gas Co., 134 FERC ¶ 61,035, 61,129 (2011).

33. *E.g.*, Transcon. Gas Pipe Line Co., 145 FERC ¶ 61,152, 61,775 (2013) ("[The natural gas company] shall consult with the Virginia Department of Game and Inland Fisheries to determine appropriate mussel survey protocols[.]"); *see also N. Nat. Gas Co.*, 377 F.3d at 824 (holding that FERC decisions to require cooperation with state and local authorities "do[] not change the preemptive effect of the NGA as enacted by Congress"). The NGA itself also provides for certain non-binding state involvement. For instance, in the authorization process for LNG terminals under section 3, the Act provides that FERC must consult with states regarding certain state and local safety, land use, and environmental considerations. 15 U.S.C. § 717b-1 (2012).

34. *E.g.*, Dominion Transmission, Inc., 153 FERC ¶ 61,203 (2015).

35. FERC customarily includes a variation of the following boilerplate language in its conditional authorization orders under sections 3 and 7 of the NGA:

> Any state or local permits issued with respect to the jurisdictional facilities authorized herein must be consistent with the conditions of this certificate. We encourage cooperation between interstate pipelines and local authorities. However, this does not mean that state and local agencies, through application of state or local laws, may prohibit or unreasonably delay the construction or operation of facilities approved by this Commission.

Id. Perhaps unhelpfully for parties seeking clarity, FERC has also, in multiple instances, ambiguously stated that the existence of concurrent state requirements "does not necessarily make it unreasonable for an applicant to comply with both the Commission's and another agency's requirements," *e.g.*, Weaver's Cove Energy, 114 FERC ¶ 61,058, 61,185 (2006), and that "[a] rule of reason must govern both the State's and local authorities' exercise of their power and an applicant's *bona fide* attempts to comply with State and local requirements," *e.g.*, Maritimes & NE Pipeline, LLC, 81 FERC ¶ 61,166, 61,731 (1997). These statements do not specify whether the line of reasonableness is also the line of preemption.

36. In environmental review documents, FERC often uses "would" statements or passive voice to assume state law compliance for the purpose of impact assessment, without setting forth such compliance as binding. *See, e.g.*, FED. ENERGY REGULATORY COMM'N, FINAL ENVIRONMENTAL IMPACT STATEMENT: JORDAN COVE ENERGY AND PACIFIC CONNECTOR GAS PIPELINE PROJECT, at 1-58 (2015) [hereinafter JORDAN COVE FEIS] (stating that the applicant

often electively comply with state permitting laws.[37] Furthermore, for certain matters (commonly, waterbody crossings), FERC sometimes uses its condition-setting authority in issuing NGA certifications to require that natural gas companies comply with state laws where not otherwise required by the NGA or federal law, including by obtaining certain permits or approvals from state or local authorities.[38] Although they would otherwise be preempted, such state requirements are given effect by virtue of FERC's condition-setting authority under the NGA.[39]

While the NGA generally preempts state regulation of natural gas facilities within FERC's jurisdiction, the Act is not considered to supersede federal environmental laws, and accordingly, environmental conditions set forth in FERC authorization orders customarily include a requirement that natural gas companies

"*would* apply to the [state agency] for a license for temporary use of surface waters during pipeline construction and testing" (emphasis added)).

37. *E.g.*, Tenn. Gas Pipeline Co., 139 FERC ¶ 61,161, 62,188 (2012) (noting that the pipeline company had "commit[ted] to comply with all New Jersey [Department of Environmental Protection] permit requirements to protect the natural environment and enjoyment of public parkland").

38. *E.g.*, Rockies Exp. Pipeline LLC v. Ind. State Nat. Res. Comm'n, No. 1:08-cv-1651-RLY-JMS, 2009 WL 3060216, at *1 (S.D. Ind. Sept. 23, 2009) (noting that FERC had required a natural gas company to obtain a state flood control permit); E. Shore Nat. Gas Co., 132 FERC ¶ 61,204, 62,066 (2010) (stating that the natural gas company "must obtain additional state and local stream crossing permits prior to construction"); ANR Pipeline Co., 103 FERC ¶ 61,297, 62,165 (2003) (providing that a natural gas company could use a particular stream crossing technique "if prior to construction it file[d] with [FERC] written approval from the appropriate state agency"); NE Hub Partners, L.P., 83 FERC ¶ 61,043, 61,184 (1998) ("NE Hub must comply with the State of Pennsylvania's drilling regulations."). State approval requirements may also be set forth in a NEPA review document. *E.g.*, JORDAN COVE FEIS, *supra* note 36, at ES-13 ("[W]e recommend that [the pipeline company] . . . document approval of the revised [traffic] plan by the Oregon Department of Transportation, Coos County, and the City of North Bend."). These recommendations are then commonly incorporated into a corresponding FERC conditional authorization order for the proposed facility, usually in an appendix enumerating "environmental conditions" necessary for final project authorization. *See, e.g.*, Perryville Gas Storage LLC, 130 FERC ¶ 61,065, 61,363 app. A (2010).

39. *See* NE Hub Partners, L.P. v. CNG Transmission Corp., 239 F.3d 333, 346 n.13 (3d Cir. 2001) (describing FERC-required compliance with state regulations as essentially reversing preemption of certain state law requirements); *cf.* First Iowa Hydro-Elec. Coop. v. Fed. Power Comm'n, 328 U.S. 152, 167 (1946) (stating that under the Federal Power Act, FERC's predecessor could require "compliance with any of the requirements for a State permit . . . that the Commission considers appropriate to effect the purposes of a federal license"); U.S. Telecom. Ass'n v. FCC, 359 F.3d 554, 567 (D.C. Cir. 2004) (stating that the federal agency could condition approval under the Federal Telecommunications Act on a decision of a state or local agency "so long as there is a reasonable connection between the outside entity's decision and the federal agency's determination").

demonstrate receipt of "all applicable authorizations required under federal law."[40] Such required federal law authorizations may include permits or other approvals from federal agencies, including where states may have an advisory role, such as under the Endangered Species Act or the National Historic Preservation Act.[41] Relevant here, some approvals typically required under federal law for natural gas facilities are those made by state entities, including under the CWA, the Clean Air Act ("CAA"), and the Coastal Zone Management Act ("CZMA").[42] These federal laws and various others, frequently pollution control laws, are commonly referred to as "cooperative federalism" statutes because Congress has provided for certain roles within these schemes for the states should they opt in, such as standard-setting or permitting authority.[43] Congress may employ cooperative federalism for a

40. *E.g.*, Dominion Transmission, 153 FERC ¶ 61,203 (2015).

41. *See, e.g.*, FED. ENERGY REGULATORY COMM'N, FINAL ENVIRONMENTAL IMPACT STATEMENT: ALGONQUIN INCREMENTAL MARKET PROJECT 1-7 (2015) [hereinafter ALGONQUIN FEIS].

42. Among its numerous provisions, EPAct amended section 3 of the NGA to revise the LNG facility approval process and to add an explicit savings clause, codified as follows: "Except as specifically provided in this chapter [the NGA], nothing in this chapter affects the rights of States under . . . the Coastal Zone Management Act . . . ; . . . the Clean Air Act . . . ; or . . . the [Clean Water] Act . . . ." 15 U.S.C. § 717b(d) (2012). It is not clear whether the savings clause should be understood as generally applicable throughout the NGA (as codified), or just with respect to provisions of section 3 of the NGA amended by EPAct in 2005. The source of the ambiguity is that EPAct used the term "this Act" rather than "this chapter" in the savings clause enacted by Congress and printed in the statutes at large. Energy Policy Act of 2005, PUB. L. NO. 109-58, sec. 311(c)(2), § 3(d). "[T]his Act" could reasonably be interpreted to have referred either to the NGA (the Natural Gas *Act*) or to EPAct (the Energy Policy *Act*). If by "Act" Congress referred to the NGA as a chapter in the U.S. Code, then the codified version is correct, and the section 3 savings clause applies throughout the NGA. If "this Act" referred to EPAct, then the section 3 savings clause only applies to those provisions of the NGA added with EPAct—i.e., the new provisions concerning LNG authorization under section 3 of the NGA. Research has not revealed that the Office of the Law Revision Counsel made any comment on its decision to construe "this Act" as referring to the NGA rather than EPAct when codifying the savings clause. At least one court has construed the savings clause as applying throughout the NGA, though without having recognized the ambiguity in the legislative history. *See* Del. Riverkeeper Network v. Sec'y Penn. Dep't of Envtl. Prot., 833 F.3d 360, 368, 371–72 (3d Cir. 2016). In any event, before and after EPAct, FERC and the courts have understood state powers under federal law to be generally unaffected by the NGA, notwithstanding the enumeration of only three statutes in the savings clause. *See, e.g.*, Islander E. Pipeline Co. v. Conn. Dep't of Envtl. Prot., 482 F.3d 79, 84 (2d Cir. 2006) (quoting Islander E. Pipeline Co., 102 FERC ¶ 61,054, 61,130 (2003)) ("While state and local permits are preempted under the NGA, state authorizations required under federal law are not.").

43. Outside the pollution control context, Medicaid is a prominent example of a cooperative federalism arrangement.

number of reasons, including political expediency, federalist values, budgetary considerations, policy flexibility, or deferral to local expertise and traditional areas of state regulation.[44] It is not disputed that state actions under cooperative federal programs such as the CWA are—as actions under federal law—outside the scope of the NGA's preemptive effect on state law regulation, and are binding for the purpose of obtaining authorization for natural gas facilities under sections 3 and 7 of the NGA.[45]

2. Section 401 Certification

Section 401 of the Clean Water Act chiefly enters into NGA project authorization due to the inevitable discharge of dredged or fill material into surface waters during the construction of pipelines, LNG terminals, and other gas facilities.[46]

Under the CWA's cooperative scheme, states set water quality standards for specific bodies of water, subject to U.S. Environmental Protection Agency ("EPA") guidance and approval.[47] EPA then delegates to states the implementation of the National Pollutant Discharge Elimination System ("NPDES") program, through which states issue and enforce NPDES permits—subject to EPA review—for point source discharges of pollutants into waters of the United States.[48] As a default, NPDES permits impose pollution limits in accordance with EPA-developed technology-based standards.[49] Where technology-based standards are not sufficiently protective of state water quality standards, permitting authorities must adjust pollution limits to maintain the standards.[50] Furthermore, states may generally regulate water quality more stringently than required by the CWA.[51]

44. *See* Adam Babich, *The Supremacy Clause, Cooperative Federalism, and the Full Federal Regulatory Purpose*, 64 ADMIN. L. REV. 1, 31 (2012); Gluck, *supra* note 14, at 1999; Aziz Z. Huq, *The Negotiated Structural Constitution*, 114 COLUM. L. REV. 1595, 1641 (2014).

45. *See supra* note 42.

46. *See, e.g.*, ALGONQUIN FEIS, *supra* note 41, at 1-13, app. I.

47. 33 U.S.C. § 1313 (2012) (providing for state development and EPA review of water quality standards as necessary to protect state-specified "designated uses" of given waterways); *id.* § 1314(a) (directing EPA to develop "water quality criteria" as guidance to states).

48. *Id.* § 1342. NPDES permits often go by other names under the various state programs.

49. *See id.* § 1316(b).

50. *Id.* §§ 1311(b), 1312(a).

51. *Id.* § 1370.

Meanwhile, a separate permitting program under section 404 of the CWA applies to the discharge of dredged or fill material into waters of the United States.[52] This permitting program is administered primarily by the U.S. Army Corps of Engineers ("Army Corps"), but through section 401 of the CWA, states can play a pivotal role in section 404 permitting, and in the NGA approval process more broadly. Under section 401, applicants for federal "license[s] or permit[s]" for activities that "may result in any discharge into the navigable waters" must receive state certification that such discharges will comply with various provisions of the Clean Water Act, including state water quality standards.[53] States may also impose conditions on applicants' federally permitted activities through section 401 certification, including discharge limitations and other standards under the CWA, and "any other appropriate requirement[s] of State law."[54] It is not settled what the scope of "other appropriate" state law requirements may include, though the Supreme Court has held that a state may at least impose conditions through a section 401 certification such to bring a federally permitted activity into compliance with state water quality standards.[55]

Section 401 gives states a considerable source of authority in the licensing natural gas facilities, because any federal license or permit required for a natural gas infrastructure project—whether a CWA section 404 permit from the Corps, or an NGA certificate from FERC—will trigger the section 401 certification requirement if the permitted activity will involve an applicable discharge. Indeed, section 401 arises in practically all FERC-regulated pipeline or LNG facility construction, because such construction activity almost certainly results in the discharge of dredged or fill material into surface waters.

3. Other Sources of State Authority Under Federal Law

Aside from water quality certification under section 401 of the Clean Water Act, states hold other authority under cooperative federal programs for the issuance of permits or approvals that may be necessary for natural gas projects. Because these sources of

52. *See id.* § 1344.
53. *Id.* § 1341(a).
54. *Id.* § 1341(d).
55. PUD No. 1 of Jefferson Cty. v. Wash. Dep't of Ecology, 511 U.S. 700, 713 (1994).

authority are unlikely, as a practical matter, to be decisive in the approval of natural gas facilities, they are not the focus of this Note.[56] However, analogous principles would govern the application of section 19(d) to judicial review of state agency issuance of, conditioning of, denial of, or failure to act upon any such other approvals, as would be the case as discussed herein for section 401 certification.

As noted, the CWA, CAA, and CZMA are the chief cooperative programs that arise in connection with NGA projects. Beyond section 401 certification, the Clean Water Act factors into NGA project authorization due to stormwater runoff generated at construction sites and discharges associated with pressurized "hydrostatic" pipeline testing,[57] requiring state-issued NPDES permits.[58] The Clean Air Act enters into NGA approvals to the extent that certain natural gas facilities—in particular, compressor stations and LNG terminals—may emit threshold levels of certain air pollutants such to require state-issued CAA permits.[59] In this way, both NPDES (CWA) and CAA permitting actions could be

56. *See infra* note 68 (listing cases brought to date under section 19(d) in connection with section 401 certification).

57. *See, e.g.*, ALGONQUIN FEIS, *supra* note 41, at 4-49–4-59.

58. *See supra* note 48 and accompanying text (discussing NPDES permitting for point source discharges).

59. Under the CAA, states are charged with the development and enforcement of State Implementation Plans ("SIPs") as means to achieve and maintain national ambient air quality standards ("NAAQS") set by EPA. 42 U.S.C. § 7410(a)(1)–(2) (2012) (providing for state development, enforcement, and revision of SIPs); *id.* § 7409 (providing for EPA development of NAAQS). In turn, EPA reviews and approves SIPs on the bases of, among other things, enforceability and consistency with the achievement of NAAQS. *Id.* § 7410(a)(3)(B). Stationary pollution sources may individually be subject to some federal requirements, such as technology-based emission control standards. *E.g.*, *id.* § 7411 (requiring EPA to adopt national "new source performance standards" for certain new or modified stationary emission sources); *id.* § 7412 (requiring EPA to adopt national emission standards for sources of hazardous air pollutants). However, states themselves develop some stationary source technology-based standards within federal parameters. *See, e.g.*, *id.* § 7479(c) (giving states authority to determine "best available control technology" for sources under the CAA "Prevention of Significant Deterioration" program). States also have substantial freedom in the development of SIPs, and they may impose air quality or emission standards more stringent than those promulgated by EPA. *Id.* § 7416. Under Title V of the CAA, states then administer a comprehensive permitting program, subject to EPA review, for the operation of stationary sources of air pollution in compliance with federal- and state-set CAA requirements. *Id.* §§ 7661–7661f.

EPA has also recently finalized new regulations for methane and volatile organic compound emissions; the rules would cover various facilities in the natural gas industry, including compressor stations. Final Rule: Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources, 81 Fed. Reg. 35,824 (June 3, 2016).

subject to challenge under section 19(d) of the NGA. State authority under the CZMA, however—while it can play a key role in natural gas facility authorization—is specifically exempted from the exclusive jurisdiction of federal circuit courts under section 19(d).[60]

Further, as noted, FERC has broad flexibility to impose conditions on natural gas projects through its section 3 and 7 approval authority, including compliance with state permitting requirements.[61] Where so required for an NGA project applicant by a FERC-imposed condition, a state permit is "required under" federal law, in that FERC, which holds federal regulatory authority, has made it conditional for NGA approval; such a permit is also issued "pursuant to" federal law, in that without the FERC requirement, it would be preempted.[62] Such FERC-imposed state permitting actions may therefore potentially be within the scope of section 19(d).

Beyond these identified sources of state authority under federal law, nothing should preclude similar authority under other cooperative federal schemes from applying to NGA projects.[63] While section 401 certification under the CWA is the focus of this Note, to the extent that a NPDES permit, a CAA permit, any other FERC-required state permit, or any other state approval provided under federal law may be required for a particular NGA authorization, the analysis herein should be applicable to determining whether a given challenge to state action would fall within the scope of section 19(d) review. Connections are drawn in the footnotes to the discussion below, where noteworthy, between the analysis herein and the analogous applicability of section 19(d)

60. 15 U.S.C. § 717r(d)(1) (2012) (providing for circuit court review of "an order or action of a . . . State administrative agency acting pursuant to Federal law . . . other than the [CZMA]"). The CZMA independently provides for federal administrative review of relevant state CZMA actions. 16 U.S.C. § 1456(c)(3)(A) (2012); 15 C.F.R. §§ 930.120–930.131 (2016). For an overview of the CZMA role in NGA approvals, see generally Darby et al., *supra* note 25, at 351–53.

61. *See supra* notes 38–39 and accompanying text.

62. *See supra* note 39 and accompanying text. In this way, a FERC-imposed state law compliance requirement is a form of cooperative federalism, in that the NGA allows FERC to use its discretion to essentially delegate certain permitting authority back to the states (where it would otherwise be preempted), similar to the way EPA may delegate NPDES permitting authority to states under the CWA.

63. *See supra* notes 40–45 and accompanying text (discussing the consensus that the NGA does not generally supersede other federal laws).

to challenges to state action that might arise in these contexts outside water quality certification.

B. Judicial Review Under Section 19(d)

In theory, a range of legal actions could be brought seeking judicial review of a state agency's water quality certification decision under section 401 of the CWA with respect to a proposed natural gas project. For example, a petitioner might challenge a state agency's decision as unsound, i.e., as arbitrary and capricious. A challenger might also claim that a state agency's issuance, conditioning, or denial of a section 401 certification is in violation of federal law—for example, that the state has exceeded its authority under the CWA. Or a challenger might claim that a CWA certification decision is in violation of state law—for example, that the issuance of a certification is contrary to state water quality standards provided by state regulations. A petitioner might also bring an action challenging a state's failure to act on a requested water quality certification. Previously, most of these challenges would have been brought in state court.[64]

Evidently due to difficulties faced by some natural gas projects in obtaining requisite state approval, Congress added section 19(d) to the NGA as part of EPAct in 2005.[65] Section 19(d)(1) gives exclusive jurisdiction to the federal circuit courts for judicial review of determinations made by state agencies "acting pursuant to Federal law" on approvals "required under Federal law" with respect to applicable gas infrastructure:

> The United States Court of Appeals for the circuit in which a facility subject to [section 3 or section 7] is proposed to be constructed, expanded, or operated shall have original and exclusive jurisdiction over any civil action for the review of an order or action of a . . . State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval . . . required under Federal law[.][66]

64. *See infra* notes 90–94.

65. *See* Islander E. Pipeline Co. v. Conn. Dep't of Envtl. Prot., 482 F.3d 79, 85 (2d Cir. 2006) (discussing the legislative history of EPAct).

66. 15 U.S.C. § 717r(d)(1) (2012). Section 19(d) also provides for review of federal agency permitting actions.

Section 19(d)(2) uses similar language to give the D.C. Circuit exclusive jurisdiction over the review of alleged state agency inaction with respect to these same state approvals.[67]

In enacting section 19(d) of the NGA, what boundary did Congress imagine between those state determinations undertaken "pursuant to" and "required under" federal law, versus those determinations made under state law, such to define the exclusive jurisdiction of the circuit courts? Does this include state water quality certification under the CWA? Moreover, did Congress—and *can* Congress—actually vest jurisdiction in the federal curcuit courts to entertain all legal challenges to state actions, such as water quality certification, pertaining to NGA facilities? As of this Note's writing, a handful of challenges have been fully litigated in circuit court pursuant to section 19(d).[68] Just one of these court decisions to date has addressed the threshold question raised here concerning the subject matter jurisdiction of the circuit courts over 401 certification decisions. In doing so, the Third Circuit assessed the applicability of section 19(d) only according to the statutory text and intent of the NGA, and not according to underlying federal courts doctrines.[69] The proceeding analysis endeavors to do both.

III. GOVERNING FEDERAL COURTS DOCTRINES

In analyzing the scope of section 19(d), guiding principles derive from the jurisprudence governing congressional grants of exclusive jurisdiction to the federal courts, congressional grants of original jurisdiction to the federal courts, and Congress's existing default grant of federal question jurisdiction. These doctrines are examined in turn.

67. *Id.* § 717r(d)(2).

68. Del. Riverkeeper Network v. Sec'y Penn. Dep't of Envtl. Prot., 833 F.3d 360 (3d Cir. 2016) (under 19(d)(1)); AES Sparrows Point LNG v. Wilson, 589 F.3d 721 (4th Cir. 2009) (under 19(d)(1)); Islander E. Pipeline Co. v. McCarthy, 525 F.3d 141 (2d Cir. 2008) (under 19(d)(1)); Islander E. Pipeline Co. v. Conn. Dep't of Envtl. Prot., 482 F.3d 79 (2d Cir. 2006) (under 19(d)(1)); Dominion Transmission, Inc. v. Summers, 723 F.3d 238 (D.C. Cir. 2013) (under 19(d)(2)); Weaver's Cove Energy, LLC v. R.I. Dep't of Envtl. Mgmt., 524 F.3d 1330 (D.C. Cir. 2008) (under 19(d)(2)).

69. *See Del. Riverkeeper v. Sec'y*, 833 F.3d at 370–73.

A. Exclusive Jurisdiction

As a general rule, claims arising under state law must be brought in state court, except where a federal court may properly exercise diversity or supplemental jurisdiction.[70] Meanwhile, federal law claims may generally be brought in either state or federal court.[71] Where validly provided by Congress, however, specified federal courts may hold exclusive jurisdiction over specified subject matter, so long as those courts would otherwise be permitted to exercise jurisdiction over that subject matter.[72] For example, under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), Congress has provided that regulations promulgated pursuant to that statute may only be challenged in the D.C. Circuit, while most other controversies arising under the statute must be brought in federal district court.[73] For such a divestment of concurrent state court jurisdiction to be found by the courts, there must be some affirmative act by Congress, whether explicit (as with CERCLA) or implicit.[74]

Section 19(d) of the NGA creates an unmistakable grant of exclusive jurisdiction, providing explicitly in section 19(d)(1) that "[t]he United States Court of Appeals for the circuit in which a

70. *See* 28 U.S.C. § 1332 (2012) (diversity jurisdiction); *id.* § 1367 (supplemental jurisdiction). The proceeding analysis assumes that neither diversity nor supplemental jurisdiction are applicable. One question beyond the scope of this Note is whether federal circuit courts may exercise supplemental jurisdiction over claims that would otherwise belong in state court when accompanying related claims that do fall within section 19(d). Textually, the answer should be "no"; the express language of 28 U.S.C. § 1367 keys supplemental jurisdiction to a *district* court's original jurisdiction over related claims. However, this result would run contrary to the purpose of section 19(d) to streamline NGA project challenges into federal court.

71. *See* Tafflin v. Levitt, 493 U.S. 455 (1990) (standing for the default presumption that state courts may exercise concurrent jurisdiction over federal law claims); Testa v. Katt, 330 U.S. 386 (1947) (standing for the default presumption that state courts must hear federal law claims).

72. *See* Claflin v. Houseman, 93 U.S. 130, 135–36 (1876) ("[T]he general principle [is] that, where jurisdiction may be conferred on the United States courts, it may be made exclusive where not so by the Constitution itself[.]"); *see also* Int'l Longshoremen's Ass'n, AFL-CIO v. Davis, 476 U.S. 380, 388 (1986) ("It is clearly within Congress' powers to establish an exclusive federal forum to adjudicate issues of federal law in a particular area that Congress has the authority to regulate under the Constitution.").

73. 42 U.S.C. § 9613(a)–(b) (2012).

74. Yellow Freight Sys., Inc. v. Donnelly, 494 U.S. 820, 823 (1990); Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 (1981) (stating that a grant of exclusive jurisdiction may be found "by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests").

facility . . . is proposed to be constructed, expanded, or operated *shall have original and exclusive jurisdiction*" over challenges to state agency permitting decisions made "pursuant to Federal law" and "required under Federal law"; and providing similarly in section 19(d)(2) that "[t]he United States Court of Appeals for the District of Columbia *shall have original and exclusive jurisdiction*" to review alleged agency inaction with respect to the same approvals.[75] Less clear are the particular boundaries of these exclusive jurisdictional grants—i.e., what is meant by the language "pursuant to" and "required under Federal law."

B. Constitutional Arising Under Jurisdiction

A largely unquestioned but perennially fuzzy doctrine defines the constitutional limits of the subject matter "arising under" federal law over which Congress may give the federal courts jurisdiction. This type of jurisdiction is known as "arising under" or "federal question" jurisdiction, and is governed by Article III of the U.S. Constitution.[76] Federal circuit and district courts may only exercise jurisdiction as provided by Congress, although the outer bounds of what "arises under" federal law are still subject to notable ambiguity.[77] Nevertheless, it will be important to understand how section 19(d) of the NGA may run up against this limit.

The leading constitutional case on arising under jurisdiction is *Osborn v. Bank of the United States* (1824), which declared that Congress may give federal courts jurisdiction where a federal law issue "forms an ingredient" of a claim, "although other questions of fact or of law may be involved" in that claim.[78] Specifically, *Osborn* found that federal courts validly held original jurisdiction over matters involving the Bank of the United States, on the grounds that the bank was chartered by federal law. Although the precise applicability of *Osborn*'s holding remains elusive, the theoretical validity of *Osborn*'s threshold "federal ingredient" requirement (as

75. 15 U.S.C. § 717r(d) (2012) (emphasis added).

76. *See generally* RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 784–806 (7th ed. 2015) (discussing the scope of federal question jurisdiction under the U.S. Constitution). Except briefly in 1801, no freestanding grant of federal question jurisdiction existed until 1875, codified today at 28 U.S.C. § 1331. The constitutional doctrine has its roots in an era when Congress made only specific targeted grants of federal question jurisdiction; Article III governed the scope of those grants.

77. *See id.* at 296, 792–806.

78. Osborn v. Bank of the U.S., 22 U.S. 738, 823 (1824).

it is known) is generally unquestioned as the standard for jurisdiction under Article III.[79]

A more recent case to emerge out of the *Osborn* line is *Verlinden B.V. v. Central Bank of Nigeria* (1983), which held that a threshold jurisdictional question under federal law could create a "federal ingredient" such to allow jurisdiction by the federal courts even over substantively state law matters.[80] Another relevant case related to the *Osborn* line is *Textile Workers Union of America v. Lincoln Mills of Alabama* (1957), which held that a jurisdictional grant to the federal courts over what appeared to be a body of state law matters, was itself a grant of power to the federal courts to fashion federal common law; any cause of action would therefore necessarily arise under this federal (judge-made) law.[81] Notably, *Verlinden* involved the contractual liability of a foreign sovereign, and *Lincoln Mills* involved the enforcement of a collective bargaining agreement under the Taft-Hartley Act—both issues of distinct national interest.

The application of *Osborn* and its progeny has been limited. One way to understand these cases is to characterize them as attempts by the Court to stretch arising under jurisdiction around state law issues of significant federal interest (national banking, foreign relations, collective bargaining) by latching onto some colorable "federal ingredient." In doing so, the Court has avoided recognizing the notion of "protective jurisdiction," a theory advanced by some scholars that Congress may constitutionally grant arising under jurisdiction wherever federal interests are sufficient, notwithstanding the absence of federal law claims.[82] No Supreme Court majority opinion has actively recognized the validity of protective jurisdiction,[83] so it is not considered here as a feasible basis for defining the scope of NGA section 19(d). However, the *Osborn* line will be revisited below.

79. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 290 (6th ed. 2012).

80. Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 493–94 (1983). The jurisdictional question was whether an exception to the Foreign Sovereign Immunities Act would apply.

81. Textile Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448, 450–51, 457 (1957).

82. *See generally* FALLON ET AL., *supra* note 76, at 800–06. There are nuances among the protective jurisdiction theories advanced by various scholars.

83. *But see Lincoln Mills*, 353 U.S. at 460 (Burton, J., concurring) ("[T]he constitutionality of [the jurisdictional grant] can be upheld as a congressional grant to Federal District Courts of what has been called 'protective jurisdiction.'").

C. Statutory Arising Under Jurisdiction

It is also necessary to the proceeding analysis to understand the narrower statutory limit that may be operating on federal question jurisdiction with respect to section 19(d) of the NGA. The default statutory grant of federal question jurisdiction is located at 28 U.S.C. § 1331 ("§ 1331"); it establishes subject matter jurisdiction for the federal courts over "all civil actions arising under the Constitution, laws, or treaties of the United States."[84] Unless otherwise provided by Congress, the federal courts exercise federal question jurisdiction within the bounds of § 1331. In its "well-pleaded complaint" doctrine, the Supreme Court has interpreted § 1331 to be more limited than the Article III "federal ingredient" threshold: *statutory* federal question jurisdiction extends just to any claim arising under a cause of action created by federal law. This is known as the "cause-of-action" test; a leading case here is *American Well Works Co. v. Layne & Bowler Co.*[85]

Expanding on this doctrine, a recent Supreme Court decision, *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, grafted a "federal element" test onto the cause-of-action test.[86] Under the federal element test, federal question jurisdiction under § 1331 is not limited to a federal cause of action, but may also exist for a claim arising under state law but necessarily involving a substantial, disputed, and stated federal law element, where strong federal interests outweigh any intrusion upon the state.[87] In the wake of *Grable & Sons*, the Court has been cautious in acknowledging federal question jurisdiction over these state law claims entwined with necessary federal questions, placing a particular emphasis on the strength of federal interests at stake.[88] Where used herein and not otherwise specified, references to the "cause-of-action" test should be understood as including both the

84. While the relevant language of Article III, section 2 is substantially similar to the corresponding language of 28 U.S.C. § 1331, the Supreme Court has construed § 1331 as a narrower jurisdictional grant limited by the cause-of-action test. Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804, 807–08 (1986).

85. Am. Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916) ("A suit arises under the law that creates the cause of action.").

86. Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308 (2005).

87. *Id.*

88. The Supreme Court has characterized the *Grable & Sons* "federal element" exception as a "special and small category" of federal question jurisdiction under § 1331. Empire Healthchoice Assur., Inc. v. McVeigh, 547 U.S. 677, 699 (2006).

baseline *American Well Works* cause-of-action test and the recent (but limited) addendum of the *Grable & Sons* federal element test.

In sum, Congress holds the authority to grant the federal courts jurisdiction over subject matter involving any federal ingredient, and also to make otherwise valid jurisdiction exclusive to the federal courts or some subset thereof. The default federal question statute, § 1331, allows the federal courts to exercise jurisdiction only over a federal cause of action or over a state law claim with a sufficient federal element. It is therefore critical to understand whether section 19(d) operates as an independent jurisdictional grant subject only to the bounds of Article III, or just as a conferral of exclusive jurisdiction over subject matter otherwise within the bounds of § 1331. This matter is taken up in Part V, following a discussion of the intended meaning of secion 19(d)'s language.

IV. INTENDED SCOPE OF SECTION 19(D)

It is not immediately apparent whether water quality certification under section 401 of the CWA—which may be decisive to a natural gas project—is undertaken "pursuant to," or is "required under," federal law within the meaning of section 19(d) of the NGA, such to fall within what Congress sought to establish as the exclusive jurisdiction of the federal circuit courts.[89] When a state implements a cooperative federalism scheme such as the CWA, does it create state law, or federal law? Relatedly, which types of legal claims with respect to 401 certification may be considered to arise under federal law, versus state law, such to allow federal circuit courts to validly assert subject matter jurisdiction?

A. Underlying Jurisdictional Structure

First, before analyzing the intended effect of section 19(d) on state water quality certification challenges, it is necessary to

89. For states with specialized review processes for applicable permits, there is also some ambiguity under section 19(d) as to when a state permitting determination should be considered final and available for circuit court review. *Compare* Del. Riverkeeper Network v. Commonwealth, No. 2012-196-M, 2013 WL 604393, at *14–15 (Pa. Envtl. Hearing Bd. Feb. 1, 2013) (characterizing state Environmental Hearing Board ("EHB") review as extension of permitting process), *with* Tenn. Gas Pipeline Co. v. Del. Riverkeeper Network, 921 F. Supp. 2d 381, 388–92 (M.D. Pa. 2013) (characterizing EHB review as beyond agency action contemplated by section 19(d) of the NGA, and therefore preempted).

understand in which fora such challenges would otherwise be brought.

For state water quality certification under the CWA, EPA regulations expressly provide that challenges to section 401 decisions must be brought via state court proceedings.[90] Courts have recognized this requirement except in a few cases—for example, where a state certification process was alleged to be in violation of section 401 itself.[91] For these reasons, absent section 19(d) of the NGA, a challenge to a water quality certification decision for a natural gas project would likely be declined by the federal courts under prevailing practice, except perhaps for a narrow set of federal law claims.[92]

90. 40 C.F.R. § 124.55(e) (2016); *see also* Cook Inletkeeper v. EPA, 400 F. App'x 239, 242 (9th Cir. 2010) (rejecting a 401 certification challenge brought in federal court). Prior to the enactment of EPAct and its subsequent suit in the Second Circuit, *see* Islander E. Pipeline Co. v. Conn. Dep't of Envtl. Prot., 482 F.3d 79, 88 (2d Cir. 2006), the Islander East Pipeline Company had filed a challenge to Connecticut's section 401 denial in state court, *see* Islander E. Pipeline Co. v. Envtl. Prot. Comm'r, No. HHD–CV–04–4022253–S (Conn. Super. Ct. filed June 21, 2004).

91. *See* Alcoa Power Generating Inc. v. FERC, 643 F.3d 963, 971 (D.C. Cir. 2011). Presumably a constitutional challenge to a certification decision would also be entertained by a federal court. *See* U. S. Steel Corp. v. Train, 556 F.2d 822, 836 (7th Cir. 1977) (stating in dicta that a challenge to "the validity of the state [section 401] standards under the United States Constitution" could properly be put before a federal district court).

92. As discussed above, beyond section 401 certification, state-issued NPDES and CAA permits may also be required for NGA projects. *See supra* notes 57–59 and accompanying text. For NPDES permitting, EPA regulations require that states administering the NPDES program must provide for judicial review comparable to that available "in federal court [for] a federally-issued NPDES permit." 40 C.F.R. § 123.30 (2016). While the regulations do not preclude concurrent federal jurisdiction, federal courts have generally viewed state NPDES permitting decisions as matters of state law committed by Congress to the purview of the state courts, even in the presence of disputed federal questions. *E.g.*, Am. Paper Inst., Inc. v. EPA, 890 F.2d 869, 875 (7th Cir. 1989) ("Congress spread across the record clear and convincing evidence of legislative intent to preclude federal review of state-issued permits."); Rose Acre Farms, Inc. v. N.C. Dep't of Env't & Nat. Res., No. 5:14 Civ. 147-D, 2015 WL 4603950, at *4–6 (E.D.N.C. July 30, 2015) (collecting cases and finding that state NPDES permit review would "upset the congressionally-determined balance between federal and state courts"); Penn. Mun. Auth. Ass'n v. Horinko, 292 F. Supp. 2d 95, 110 (D.D.C. 2003) (holding that "the proper venue for relief . . . is state court" for a claim that a state permit program violated EPA rules). For these reasons, a substantive challenge to a state NPDES permitting decision would likely be declined by the federal courts under prevailing practice absent section 19(d). For example, an applicant would be unable to bring a federal court challenge to a state-issued stormwater construction permit on the grounds that its terms are overly restrictive.

In contrast, Title V of the CAA provides for a bifurcated system of judicial review for challenges brought against state permitting decisions. Specifically, the CAA provides that states must allow for state court judicial review of Title V permits, and also that review is available before EPA, whose decisions are in turn reviewable in federal circuit court. 42

It is not clear under existing jurisprudence how state laws implementing cooperative statutes should generally be treated under the *American Well Works* cause-of-action test. Courts have generally avoided characterizing the state implementation of cooperative federalism programs as either "state law" or "federal law," whether for the purpose of determining jurisdiction or otherwise.[93] The general bar on federal court jurisdiction over CWA section 401 challenges appears consistent with the § 1331 cause-of-action test requiring that a federal cause of action (or at least a sufficiently compelling federal element) must exist for federal jurisdiction.[94] However, in addressing jurisdiction over section 401 cases, federal courts have not invoked § 1331.

B. Targeting of Section 19(d)

Of the various state determinations that may come into play for an NGA project, was water quality certification among those Congress intended to funnel into federal circuit court review with section 19(d) as made "pursuant to" and "required under" federal law? The text and history suggest so.

While is it clear that section 19(d) grants exclusive jurisdiction, it is less clear whether it also seeks to create new federal question jurisdiction for the federal courts, as opposed to granting

U.S.C. §§ 7661a(b)(6), 7661d(b)(2) (2012). Absent section 19(d), a challenge to the issuance, denial, or conditions of a Title V permit for a natural gas facility could therefore be brought in either a federal or state forum. *See, e.g.*, Dayton Power & Light Co. v. Jones, 748 N.E.2d 1171, 1173 (Ohio Ct. App. 2000) (state court review of a Title V permit); Sierra Club v. Johnson, 541 F.3d 1257 (11th Cir. 2008) (circuit court review of an EPA decision as to a petition challenging a Title V permit). Federal circuit court review in this situation would be review of the EPA determination as to the underlying state action, and not direct review of the state action itself.

As for a state law permit required by a FERC order, such as a stream crossing or flood control permit, a challenge to a state decision would likely need to be brought in state court according to the cause-of-action test, absent some federal cause of action under the *American Well Works* line or an adequate federal element under *Grable & Sons*. This is because a cause of action to challenge such a decision would ordinarily derive from some state law allowing judicial review of state agency action. A federal court could, however, exercise arising under jurisdiction pursuant to 28 U.S.C. § 1331 for a claim that the permitting decision violated federal law—for example, that the decision violated due process under the U.S. Constitution, or that it was preempted by the NGA. A federal court could also exercise jurisdiction over a challenge to FERC's decision to include such a state permitting requirement in an NGA approval order.

93. See *infra* notes 119–126 and accompanying text for further discussion.

94. The CWA does not contain any express federal cause of action for those aggrieved by state agency determinations.

exclusivity to the federal courts over already-jurisdictional subject matter. The ambiguity derives from section 19(d)'s unusual stance as a jurisdictional provision in a substantive statute, applying to overlapping federal schemes (such as the CWA) that may already internally provide for jurisdiction in the event of judicial review (such as EPA regulations providing for section 401 review in state court). Typically, § 1331 federal question jurisdiction and the presumption of state court concurrency provide a default jurisdictional framework for any federal cause of action.[95] A substantive statute may then contain its own jurisdictional provisions that provide internally for any departures from that presumption. However, section 19(d) of the NGA is atypical; it is a jurisdictional provision that is located in one substantive statute, but that grants exclusive jurisdiction over a nebulous group of claims otherwise arising under different substantive statutes.[96] Hence there is ambiguity as to whether section 19(d) intends to establish federal question jurisdiction where it would not otherwise exist in those other statutes—e.g., over challenges to state water quality certification decisions.

The narrower understanding—that EPAct simply sought to establish exclusive circuit court jurisdiction over already-jurisdictional federal subject matter—would mean that section 19(d) challenges to 401 certification could only allege certain state agency violations of federal law: for example, that a water quality certification decision was not made in accordance with section 401 of the CWA, or that the agency action violated the U.S. Constitution. As discussed above, challenges to water quality certification decisions may likely not otherwise be brought in federal court.

There are certain advantages to this narrow approach, judicial administrability prominent among them. Where any federal court

95. Title 28, part 4 of the U.S. Code also sets forth various grants of jurisdiction to different federal courts for specific types of subject matter. *See, e.g.*, 28 U.S.C. § 1334 (2012) (for bankruptcy proceedings, providing that "the district courts shall have original and exclusive jurisdiction of all cases under title 11").

96. *See* 15 U.S.C. § 717r(d)(1) (2012) (giving the circuit courts exclusive jurisdiction over "any civil action for the review of" an applicable state agency determination); *id.* § 717r(d)(2) (giving the D.C. Circuit exclusive jurisdiction over "any civil action for the review of" a state agency's alleged failure to act with respect to a required determination). The federal Administrative Procedure Act ("APA") is another example of a statute with trans-substantive jurisdictional provisions, *see* Pub. L. No. 79-404 (1946), although the APA is not itself a substantive statute like the NGA.

would otherwise have original federal question jurisdiction over a challenge, the federal circuit courts would now have original and exclusive jurisdiction. Such a reading would also accord with a principle that frequently carries the day in federalism jurisprudence, known as the "clear statement" rule: the proposition that Congress must be explicit wherever it intends to take power from the states.[97] Here, interpreting section 19(d) as a grant of exclusive jurisdiction, but not as new arising under jurisdiction, would prevent any shift to the federal courts of subject matter otherwise committed to the state courts, such as state law challenges (e.g., "arbitrary and capricious" challenges) to determinations under section 401 of the CWA. The clear statement rule counsels this federalist reading where the nature of the jurisdictional grant is ambiguous.

However, key indicators can be found in the section 19(d) text itself in favor of finding an intent for underlying federal question jurisdiction that would give the circuit courts the ability to review challenges applicable to NGA projects that would formerly have gone to state court. Specifically, section 19(d)'s use of the phrase "*original* and exclusive jurisdiction" may be read to imply an actual subject matter grant, insofar as the section 19(d) language addresses both originality and exclusivity.[98] Furthermore, it would have been simple for Congress to have more clearly indicated that it was only providing for exclusive jurisdiction over already-jurisdictional subject matter.

A finding of an underlying subject matter grant is also supported by the structure of section 15 of the NGA, which directs FERC to coordinate the section 3 and section 7 project approval and permitting processes under applicable federal laws.[99] As part of its coordination responsibilities, section 15(d) directs FERC to "maintain a complete consolidated record of all decisions made or actions taken . . . with respect to *any* Federal authorization," including by a "State administrative agency or officer acting under delegated Federal authority."[100] This record-keeping scope would seem to broadly include any state action under a cooperative statute. Section 15(d) further specifies that this consolidated

97. *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 461 (1991).
98. 15 U.S.C. § 717r(d)(1)–(2).
99. *Id.* § 717n.
100. *Id.* § 717n(d) (emphasis added).

record is then to be the record for judicial review under section 19(d) for review "of decisions made or actions taken of . . . State administrative agencies and officials."[101] Nothing in the text or structure of this provision appears to contemplate that any state-made federal authorizations that are included within the scope of FERC recordkeeping under section 15(d)—including state determinations under section 401 of the CWA—are not among those determinations that may then be the subject of section 19(d) review. Significantly, with EPAct, Congress added the recordkeeping provisions of section 15(d) at the same time as the judicial review provisions of section 19(d).[102]

The legislative history, while limited, is also instructive. By all accounts, with EPAct and section 19(d) specifically, Congress was motivated to address state permitting and certification obstacles routinely faced by natural gas companies. In particular, section 19(d)(2) was aimed to prevent state agencies from stalling on approval decisions as scheduled by FERC under section 15, and section 19(d)(1) was aimed at streamlining the process of challenging such decisions.[103] This purpose would be best advanced by configuring the federal circuit courts as one-stop-shops to resolve a maximum number of NGA project disputes. Specifically, EPAct's history suggests that the legislation was partially motivated by the permitting woes experienced by the Islander East Pipeline Company in securing Connecticut's approval for a pipeline across Long Island Sound, including with Connecticut's denial of a water quality certification the year prior to EPAct's enactment.[104] It follows that Congress intended section 19(d) to target those CWA approvals whose review would otherwise have been subject to state court proceedings, as Islander East's water quality certification had been.

101. *Id.* § 717n(d)(2).

102. *See* Energy Policy Act of 2005, Pub. L. No. 109-58, sec. 313.

103. *See* Reg'l Energy Reliability & Sec.: DOE Auth. to Energize the Cross Sound Cable: Hearing Before the H. Subcomm.on Energy & Air Quality, 108th Cong. 8 (2004) (statement of Rep. Barton); Nat. Gas Symposium: Symposium Before the S. Comm. on Energy & Nat. Res., 109th Cong. 41 (2005) (statement of Mark Robinson, Director, Office of Energy Projects, FERC).

104. *See* Islander E. Pipeline Co. v. Conn. Dep't of Envtl. Prot., 482 F.3d 79, 85–88 (2d Cir. 2006) (discussing the legislative history). Under section 19(d) review, the Second Circuit ultimately upheld the Connecticut Department of Environmental Protection's section 401 denial in *Islander East Pipeline Co. v. McCarthy.* 525 F.3d 141 (2d Cir. 2008).

The finding of an underlying subject matter grant is also consistent with the language of section 19(d). Water quality certification is made "pursuant to" federal law insofar as it is provided for in the Clean Water Act. Put another way, absent section 401, a state would have no authority to enjoin federal actions on the basis of its water quality standards. Furthermore, section 401 certification is "required under" federal law where applicable, and is not superseded by the NGA.[105]

In summary, the text and the history of section 19(d) point to a reading of the provision that intends to encompass all challenges to state determinations under cooperative federalism programs—including state water quality certification under the CWA, even though most 401 certification challenges would otherwise not be subject to federal court jurisdiction absent section 19(d). As of this Note's writing, the single circuit court decision to have directly addressed this issue reached the same conclusion: that water quality certification occurs "pursuant to" and as "required under" federal law.[106] In so deciding, the Third Circuit placed a particular emphasis on the operation of section 401 within the *federal* CWA scheme.[107] But the court did not address the underlying question:

105. *See supra* notes 46–55 and accompanying text. This reasoning is also applicable for state-issued NPDES permits, because absent state administration of section 402 of the CWA, EPA would step in to administer the NPDES program by default. 33 U.S.C. § 1342(a)–(c); *supra* note 48 and accompanying text. It also follows that challenges to state-issued CAA permits, which may otherwise be challenged through a federal process, would also fall within the intent and text of section 19(d). *See supra* note 92. States administer CAA permits "pursuant to" federal law, and such permits are "required under" federal law for applicable air emissions sources. *See generally* 42 U.S.C. §§ 7661–7661f (2012).

Perhaps less clear is whether, with section 19(d), Congress intended to capture challenges to purely state law permits, otherwise preempted by the NGA but included by FERC as environmental conditions in authorization orders. But the text of section 19(d) supports the inclusion of such permitting decisions as reviewable in circuit court. Even if governed by state law standards, such permits are issued "pursuant to" federal law in that, absent their inclusion by FERC as environmental conditions, they would be preempted and invalid. Federal law thus supplies their force. Furthermore, such permits are "required under" federal law where made conditions in FERC authorizations. This approach is also consistent with the purpose of section 19(d) to streamline and federalize review of state permitting decisions for natural gas projects.

106. Del. Riverkeeper Network v. Sec'y Penn. Dep't of Envtl. Prot., 833 F.3d 360, 370–73 (3d Cir. 2016). The Third Circuit also supported its conclusion in part on implications drawn from the NGA savings clause. *See id.* at 368, 371–72. Although this author agrees with the court that section 19(d) was intended to apply to section 401 certification, there is reason to believe that the savings clause should be read narrowly, as limited to the provisions concerning LNG siting added by EPAct to section 3 of the NGA. *See supra* note 42.

107. *Del. Riverkeeper v. Sec'y*, 833 F.3d at 371.

whether Congress, in spite of its intent, actually did (or *can*) provide for federal question jurisdiction over all challenges to state water quality certification of natural gas projects (or likewise, over challenges to other applicable state approvals under federal law).

V. LIMITS OF SECTION 19(D)

As set forth above, section 19(d) of the NGA likely seeks to bring all challenges to water quality certification decisions within the purview of circuit court review where applicable to natural gas projects under sections 3 or 7 of the NGA. However, as described in Part III, there are both constitutional and statutory limits on federal court jurisdiction. Does section 19(d) exceed these limits? The answer depends in part on whether section 19(d) should be understood as limited by title 28, § 1331 of the U.S. Code, or by Article III of the U.S. Constitution. This Note takes the position that section 19(d) should not be understood as going to the constitutional boundaries of subject matter jurisdiction; the limits of § 1331 should instead apply, placing challenges to section 401 certification outside circuit court review when they fail the cause-of-action test.

A. 19(d) as a Grant Within § 1331

One way to understand section 19(d) is as a grant of jurisdiction issued within the bounds of § 1331, i.e., as limited by the cause-of-action test. Recall that § 1331 is governed by the *American Well Works* standard that a claim must be based on a federal law cause of action in order to fall within the original jurisdiction of the federal courts. This is subject to the narrow *Grable & Sons* "federal element" exception that federal courts may exercise original jurisdiction over substantial and disputed federal law issues nevertheless arising under state law causes of action, so long as federal court jurisdiction does not upset the federal-state balance.[108]

This Note takes the view that even where state law implements a federal cooperative scheme, a claim facially arising under state-promulgated law should be treated as state law.[109] Under this approach, in spite of section 19(d), a challenge arising under state

108. *See supra* notes 84–88 and accompanying text.
109. *See infra* notes 119–131 and accompanying text.

law concerning section 401 certification for a natural gas project would still need to be brought in state court, absent a sufficient federal element under *Grable & Sons*. Otherwise the challenge would not fall within § 1331.[110] For example, a claim that a section 401 certification was issued in violation of a state's water quality standards would ordinarily arise solely under a state's own laws; as would a claim that a section 401 certification was arbitrary and capricious in violation of state administrative procedures. If section 19(d) only goes to the limits of § 1331, a state law claim would belong in state court.[111]

Under this approach, some 401 certification challenges would still reach federal circuit court under section 19(d): even though a state-issued decision as to water quality certification may not ordinarily be challenged in federal court, a cause of action arising under federal law would suffice under *American Well Works* to bring such a challenge via section 19(d) and within § 1331. For example, a citizen group would be able to challenge a section 401 certification for a natural gas facility in circuit court on the grounds that the state's water quality standards are insufficiently stringent under the CWA. In this case, a federal cause of action should be available against an officer of a state agency through *Ex Parte Young* on the basis of alleged federal law violations by the state agency.[112]

110. *Cf.* Massachusetts v. Philip Morris Inc., 942 F. Supp. 690, 692–96 (D. Mass. 1996) (declining removal jurisdiction over a claim brought originally in state court under a cause of action created by a state statute implementing Medicaid).

111. This same reasoning would apply to challenges brought against other state approvals required under federal law for NGA projects, such as NPDES permits, CAA permits, and any other state permits required by FERC. *See supra* note 105.

112. The *Ex Parte Young* doctrine generally provides a cause of action for claims against state officials for injunctive relief against alleged federal law violations in official actions. *See* Ex parte Young, 209 U.S. 123 (1908). In theory, section 19(d) could also be construed as implying a right of action to bring challenges against applicable state determinations alleged to be in violation of *any* law, state or federal. However, the Supreme Court is reluctant to find an implied right of action absent a clear indication of congressional intent to create such a right. *See, e.g.*, Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979) ("[O]ur task is limited solely to determining whether Congress intended to create the private right of action[.]"). Further, the text of section 19 of the NGA does not support an implied right of action against state agencies. Section 19(d) declares that the circuit courts "shall have original and exclusive jurisdiction" over challenges to state actions, but does not purport to create any cause of action for such review. 15 U.S.C. § 717r(d)(1)–(2). Meanwhile, section 19(b) *does* create such a cause of action for challenges to FERC orders, providing that an aggrieved party may "obtain a review of such order" in circuit court. *Id.* § 717r(b). Read together, section 19(b) clearly creates a cause of action for aggrieved parties to challenge FERC orders, while section 19(d) simply *assigns* jurisdiction for whatever challenges may otherwise be brought against state permitting actions according to underlying causes of

Besides challenges brought under federal causes of action, *Grable & Sons* might also establish federal question jurisdiction under § 1331. For example, if a state's water quality standards relied upon federal EPA-issued water quality criteria whose meaning was in material dispute, this might create a substantial and necessary federal law question within § 1331 that would be appropriate for circuit court review under section 19(d).

Notably, a likely basis for a challenge to state water quality certification for a natural gas project would be that the state agency's judgment was unsound in issuing, conditioning, or denying the approval in question—i.e., that the agency acted in an arbitrary or capricious manner, or that its decision was unsupported by available evidence. A challenge on "arbitrary and capricious" type grounds may be brought as a federal cause of action under the federal Administrative Procedure Act ("APA"), but only against a federal agency; state agencies are not subject to the APA.[113] Therefore, a challenge against a state agency action as "arbitrary and capricious" (or under a similar standard) would need to be brought under an analogous state administrative law cause of action.[114] And under § 1331, the federal courts would ordinarily be unable to exercise jurisdiction over such a state law challenge. Therefore, if section 19(d) is interpreted as bounded by § 1331, an "arbitrary and capricious" or similar challenge to a state agency permitting decision for an NGA project would not fall within section 19(d), and would belong in the state courts.[115]

action. As noted, *Ex Parte Young* provides a federal cause of action for injunctive relief against a state officer alleged to be in violation of federal law.

113. 5 U.S.C. §§ 706(2), 701(b)(1) (2012).

114. In New York, for example, an "Article 78" challenge may brought against a state agency on the grounds that a determination was "arbitrary and capricious" or, where a hearing has occurred, was not "supported by substantial evidence." N.Y.C.P.L.R. § 7803 (McKinney 2003).

115. As of this Note's writing, the four existing circuit court decisions under section 19(d)(1) of the NGA have all decided "arbitrary and capricious" challenges to state agency denials of water quality certification. Evidently these courts did not see any overstep in exercising jurisdiction over such claims via section 19(d). In *Islander East Pipeline Co. v. Connecticut Department of Environmental Protection*, the Second Circuit applied an APA-based "arbitrary and capricious" standard to a section 401 denial by the Connecticut Department of Environmental Protection ("CTDEP") for a pipeline across Long Island Sound. 482 F.3d 79, 94–95 (2d Cir. 2006). Confusingly, the court described its application of the "arbitrary and capricious" standard in terms of both the APA and state law, citing to the APA but stating that it would review the agency determination "under the more deferential arbitrary-and-capricious standard of review usually accorded state administrative bodies' assessments of state law principles." *Id.* The court acknowledged that the APA applies only to federal

To summarize: When read as bounded by § 1331, section 19(d)(1) of the NGA allows for circuit court review of water quality certification for natural gas projects *only* where a federal cause of action is facially present, or where a necessary federal question is sufficient to satisfy *Grable & Sons*. A challenge under a state law cause of action—such as an arbitrary and capricious challenge—would still belong in state court.

Section 19(d)(2)—pertaining to challenges to state agency *in*action on necessary permits—should be treated similarly. Pursuant to that subsection, "[t]he failure of an agency to take action on a permit required under Federal law . . . in accordance with the Commission schedule established pursuant to [section 15(c) of the NGA] shall be considered inconsistent with Federal law," allowing the reviewing circuit court to "remand the proceeding to the agency to take appropriate action."[116] Because a challenge against a state agency for a failure to act would ordinarily be brought under state administrative procedure laws, such a challenge would lack a federal cause of action and therefore fail the cause-of-action test; it would belong in state court.[117] In some cases, it may be that a section 19(d)(2) challenge could be characterized as bearing a federal element under *Grable & Sons*, should there be a substantial and necessary question concerning the enforcement of a FERC-created approval schedule under

agencies only, but adopted the "arbitrary and capricious" standard because it had been used in similar challenges to state actions under the Telecommunications Act. *Id.* at 94–95. In this way, the Second Circuit seems to have implicitly forged a cause of action under federal common law—using a state law standard—to challenge agency action as arbitrary and capricious under section 19(d). Two years later in *Islander East Pipeline Co. v. McCarthy*, the Second Circuit again applied an "arbitrary and capricious" standard in the challenge to a new water quality certification denial from CTDEP for the same proposed facility. 525 F.3d 141, 150–65 (2d Cir. 2008). In *AES Sparrows Point LNG v. Wilson*, the Fourth Circuit applied an "arbitrary and capricious" standard for a water quality certification denial from Maryland, professedly under the APA rather than state law. 589 F.3d 721, 727, 733 (4th Cir. 2009). In Delaware Riverkeeper Network v. Secretary Pennsylvania Department of Environmental Protection, the Third Circuit cited *Islander East v. Connecticut Department* in applying the arbitrary and capricious standard for "state action taken pursuant to federal law." 833 F.3d 360, 377 (3d Cir. 2016).

116. 15 U.S.C. § 717r(d)(2)–(3); *see also id.* § 717n(c) ("The Commission shall establish a schedule for all Federal authorizations.").

117. Such a state administrative law claim would be analogous to a federal claim under the APA, which creates a right of action to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). As with section 19(d)(1), section 19(d)(2) should not be read as internally creating its own implied right of action under federal law. *See supra* note 112.

section 15(c) of the NGA. But because the application of the federal element test has been significantly cabined by the Supreme Court, *Grable & Sons* should not give rise to section 19(d) review except in especially compelling circumstances.[118]

As a sidebar, and without going too far down a rabbit role, the law is nowhere near settled—indeed, it has rarely been addressed—as to whether the state implementation of cooperative statutes amounts to "federal" or to "state" law for the purpose of federal question jurisdiction.[119] Scholarship in the area has been limited,[120] and where legal academics have taken a position or touched upon the issue in passing, they have adopted differing views.[121] Moreover, judges have only rarely taken a direct look at how the state/federal law line should be drawn under § 1331 where

118. *See supra* note 88 and accompanying text. A separate question, beyond the scope of this Note, is whether it is constitutional under the Supreme Court's anti-commandeering doctrine for the NGA to allow FERC to require state agencies to act on applicable permit applications under section 15(c) of the NGA, subject to D.C. Circuit compulsion to act under section 19(d)(2). *See* New York v. United States, 505 U.S. 144 (1992) (holding that Congress may not compel states to regulate). Commonly under cooperative schemes, a state is directed to either take certain action or waive authority to do so—but it is not permissible for Congress to require a state to act. Judicially enforceable FERC schedules may push up against this limit.

119. It may be that this question has been avoided because cooperative schemes are ill-suited for existing federalism-based doctrines, such as the cause-of-action test, that are based on a clear state-federal law dichotomy.

120. Abbe R. Gluck asserts that "the vast expanse of writing about interactive federalism mostly has been devoted to functional inquiries about the merits of state-federal interconnectedness, or descriptive efforts illustrating those connections in particular subject-matter areas." Gluck, *supra* note 14, at 2000.

121. *See, e.g.*, Jessica Bulman-Pozen, *Federalism As A Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459, 506 (2012) ("[T]here is not a clear line between state administration of state law and state administration of federal law but rather a continuum."); Ronald J. Krotoszynski, Jr., *Cooperative Federalism, the New Formalism, and the Separation of Powers Revisited: Free Enterprise Fund and the Problem of Presidential Oversight of State-Government Officers Enforcing Federal Law*, 61 DUKE L.J. 1599, 1661 (2012) ("[S]tates are enforcing state law in the heavy shadow of comprehensive federal oversight."); *id.* at 1663 ("[W]hen states act as agents of the federal government, they are administering federal law."); Ernest A. Young, *Stalking the Yeti: Protective Jurisdiction, Foreign Affairs Removal, and Complete Preemption*, 95 CAL. L. REV. 1775, 1787 (2007) (stating that certain state regulations under the CAA are "a matter of state law"); Roderick M. Hills, Jr., *Federalism in Constitutional Context*, 22 HARV. J.L. & PUB. POL'Y 181, 184 (1998) ("[T]he federal government can allow *state or local law* to displace federal regulation that would otherwise preempt such *non-federal law* if the *non-federal law* meets the standards established by Congress" (emphasis added).); *id.* at 182 ("[N]on-federal governments serve as agencies of the federal government by enforcing federal law with administrative actions and by promulgating regulations to fill the gaps in federal statutes.").

claims arise under state laws implementing cooperative federal statutes.[122]

Outside of the cooperative federalism context, it is not ordinarily difficult to distinguish between state and federal law causes of action for the purpose of applying the cause-of-action test. The respective bodies of law are created separately by state legislatures and Congress, or by state and federal judges. Cooperative federalism throws off this two-track system by creating an often complicated relationship between state and federal law, depending on the particular scheme. To name a few common arrangements: some federal statutes compel state lawmaking through Congress's spending power, with varying levels of flexibility;[123] some allow states to engage in certain lawmaking or decision-making, often subject to federal approval;[124] and some permit the integration of additional state standards into federal frameworks.[125] Yet while the distinction between state and federal law is essential to delineating the bounds of federal question jurisdiction, the line has not been well-established in the case of cooperative federalism programs,[126] including the one primarily at issue here: the Clean Water Act.

122. The District of Massachusetts considered the issue in the context of Medicaid, where Massachusetts brought a claim under its own laws implementing Medicaid, a cooperative federalism program:

> In the present case, . . . the maxim [that a claim "arises under the law that creates the cause of action"] is unhelpful because it begs the question which law has "create[d] the cause of action." The complaint describes its causes of action as creatures of state law, while the defendants contend that [Medicaid] effectively created a cause of action to recover Medicaid payments from liable third parties by commanding participating States to pursue such recoveries.

Massachusetts v. Philip Morris Inc., 942 F. Supp. 690, 693–94 (D. Mass. 1996). The court went on to decline jurisdiction because the claim arose under a state cause of action and involved no federal law questions, rejecting the defendants' "ethereal" argument that jurisdiction under § 1331 exists where there is "a federal spirit that animates the action." *Id.* at 694; *see also* New York v. Lutheran Ctr. for the Aging, Inc., 957 F. Supp. 393 (E.D.N.Y. 1997) (declining § 1331 jurisdiction over an action alleging a violation of state law in connection with Medicaid benefits) (citing *Philip Morris*).

123. *E.g.*, 42 U.S.C. § 1396a(a)(10) (2012) (conditioning federal Medicaid funding).

124. *E.g.*, *id.* § 7410(a)(3)(B) (providing for EPA approval of SIPs under the CAA).

125. *E.g.*, 33 U.S.C. § 1370 (2012) (allowing states to regulate water quality more stringently than as required by the CWA).

126. *See* Gluck, *supra* note 14, at 1997 ("Current doctrine is not at all keyed in to the ways in which a very great deal of state sovereign power—including . . . state-court jurisdiction—is exercised as part of federal statutory implementation, and so current doctrine does nothing to protect or effectuate that state authority."). In *National Federation of Independent Business v. Sebelius*, the Supreme Court held that Congress cannot use its spending power to coerce states into implementing federal programs. *See* 132 S. Ct. 2566, 2601–08 (2012). Insofar as

This Section has assumed that state laws implementing cooperative federalism statutes should be considered state law for the purpose of determining the jurisdiction of the federal courts. As an alternative approach in contrast to this Note's position, it is not implausible to understand state regulation under the cooperative federalism statutes essentially as an extension of federal law.[127] Under this view, a claim arising out of the water quality certification process under section 401 of the CWA would more likely fall within the bounds of § 1331, and would accordingly fall within section 19(d) of the NGA—either because a cause of action under state water quality laws would be construed as federal, or because state water quality regulations would be construed as a federal law element under *Grable & Sons*. However, this Note declines to adopt such a view for several key reasons.

First, and most fundamentally, state statutes and regulations are still "state law" in a literal sense, even where implementing a federally organized program. That Congress empowered states to implement federal programs through their own laws was Congress' choice. Second, as discussed above, outside the NGA context courts generally regard state permitting decisions under the Clean Water Act as committed to review in state proceedings. It would be incongruous to maintain that state permitting agencies are nonetheless administering federal law and subject to federal jurisdiction for the purpose of section 19(d) of the NGA.[128] Third, most state regulation under cooperative schemes like the CWA is given significant latitude, and is subject to EPA review only for

this reasoning in *Sebelius* relied upon the "anti-commandeering" notion that the federal government cannot force states to implement federal law, at least one scholar has conjectured that "some members of the Court view state laws enacted under cooperative federalism programs as federal law, at least for some purposes." Leah M. Litman, *Taking Care of Federal Law*, 101 VA. L. REV. 1289, 1318 n.154 (2015).

127. *Cf.* Concerned Citizens of Bridesburg v. Phila. Water Dep't, 843 F.2d 679, 681 (3d Cir. 1988) (treating Pennsylvania air pollution regulations under the CAA as a basis for federal question jurisdiction). A whole new dimension is added when state laws implementing federal statutes have interstate effects. In *Arkansas v. Oklahoma*, the Supreme Court held that one state's water quality standards constituted federal law "at least insofar as they affect the issuance of a permit in another State," concluding that this approach "accord[ed] with the [Clean Water] Act's purpose of authorizing the EPA to create and manage a uniform system of interstate water pollution regulation." 503 U.S. 91, 110 (1992). That opinion did seek to delineate federal from state law for the purpose of determining federal question jurisdiction.

128. *See* Gluck, *supra* note 14, at 2000 (arguing that "[w]hen Congress calls on states to implement federal law, states act in their sovereign capacities to do so").

compliance with minimum requirements.[129] While federal law may set up a framework and create some minimum requirements, it remains that the details of, for example, water quality standards, fall largely within the policy discretion of the states themselves.[130] The very choice to participate in a cooperative scheme is a policy decision up to a state, and the federal government may not require a state to opt in.[131] State legislatures and agencies are therefore not tools of Congress in implementing cooperative federalism programs; they are participants in these programs, and the laws they create under these programs (whether subject to minimum EPA standards or not) should be regarded as state laws.

B. 19(d) as a Grant Beyond § 1331

Looking outside the bounds of § 1331, a more expansive view of section 19(d)'s reach may be justified on constitutional grounds, under a reading that section 19(d) gives the federal circuit courts jurisdiction over review of applicable state permitting decisions to the outer bounds permitted by Article III, according to the *Osborn* "federal ingredient" test.[132] Under this approach, any state determination (or failure to act) pursuant to a cooperative federalism scheme could plausibly be seen as containing a federal ingredient by virtue of being part of that scheme, allowing Congress to vest the federal courts with arising under jurisdiction. This approach is sweeping and simple at first blush. As long as a challenge to state water quality certification undertaken pursuant to section 401 of the CWA can be characterized as involving a "federal ingredient"—even where a challenge would be brought as

129. *See generally supra* notes 46–54 and accompanying text.

130. *Cf.* Oberlander v. Perales, 740 F.2d 116, 119 (2d Cir. 1984) (declining to exercise jurisdiction over a claim arising under a state Medicaid implementation statute, stating that "there is no authority anywhere supporting the proposition that a state Medicaid regulation becomes a federal law merely by virtue of its inclusion in a state plan required by federal law").

131. *See* New York v. United States, 505 U.S. 144, 174–77 (1992) (holding that Congress cannot "commandeer[] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program" (internal quotation marks and citation omitted)); Printz v. United States, 521 U.S. 898 (1997) (extending *New York v. United States* to prohibit congressional commandeering of state executive branch officers). States may not regulate under the CWA less stringently than federal law requires, but not because they are being directed by federal law; it is because if the states do not regulate sufficiently, the federal government will step in and regulate instead.

132. *See supra* notes 78–79 and accompanying text.

a state law claim, such as an "arbitrary and capricious" challenge—section 19(d) would apply.

Consider, for example, where a state incorporates water flow requirements into a section 401 certification in connection with fill activity taking place in the course of pipeline construction, pursuant to state authority to impose "appropriate requirement[s] of State law" under section 401.[133] If a pipeline company wishes to challenge the water flow condition as arbitrary and capricious, is there a federal ingredient in the water flow requirement simply by virtue of being part of the state implementation of the CWA? The reasoning of *Osborn* suggests that where, as here, some shadow of a federal law is involved at all, a federal question could exist under the Article III.

An argument for expansive jurisdiction can also be made under *Verlinden*, where a question arising under a federal jurisdictional statute provided the requisite federal ingredient needed for Article III jurisdiction.[134] Analogously, for an action brought under section 19(d) of the NGA, there may always be a threshold question: Is the state determination at issue pursuant to and required under federal law? This would be a federal question under the NGA: a federal ingredient. However, *Verlinden*'s reasoning should not be applied broadly, in that it would seem to give Congress virtually limitless ability to create arising under jurisdiction through the creation of threshold jurisdictional provisions. Rather, both *Osborn* and *Verlinden* can be distinguished from natural gas project licensing in that these two cases involved issues of special national sensitivity: the politically controversial national bank, and litigation against foreign sovereigns. While gas transportation infrastructure is surely important to national interests and bears a particular interstate dynamic, it does not carry the same sort of sensitivity as the issues present in *Osborn* and *Verlinden*.

A third analogy may be drawn to *Lincoln Mills*, where the subject matter at issue—collective bargaining—can be seen as on a similar

133. *Cf.* PUD No. 1 of Jefferson Cty. v. Wash. Dep't of Ecology, 511 U.S. 700, 713–721 (1994) (holding that a state could impose stream flow requirements in a section 401 certification of a hydroelectric project). Recall that *PUD No. 1* did not resolve the exact extent to which states may impose state law requirements through section 401 certifications, holding only that states may at least do so as necessary to protect water quality standards. *See supra* note 55 and accompanying text.

134. *See supra* note 80 and accompanying text.

plane as natural gas regulation: of national interest, though not of particular national sensitivity.[135] Drawing on *Lincoln Mills*, section 19(d) may analogously be viewed as a jurisdictional grant over all federally-required natural gas permitting matters, accompanied by a lawmaking grant to the federal courts to fashion federal common law over such matters. There is some appeal to this notion, in that it obviates some of the thornier questions about differentiating state law and federal law discussed above. Construing section 19(d) as a lawmaking grant as well as a jurisdiction grant would turn all applicable issues into federal common law for the purpose of resolving the NGA dispute. This would include legal claims based on alleged state agency violations of what would otherwise be state law, e.g., state water quality standards. It would also include administrative law claims such as "arbitrary and capricious" challenges, or allegations of failures to act under section 19(d)(2). Indeed, in making federal common law, there is a presumption that federal courts will simply adopt state law standards, considering interests of effective administration and uniformity.[136]

However, simple but strong considerations counsel against adopting a *Lincoln Mills* approach for section 19(d). Chiefly, grants of federal common lawmaking power have been rare, and limited to a few restricted spheres.[137] A court should be wary in finding an implicit grant of federal common lawmaking power that also expands the jurisdiction of the federal courts while wresting jurisdiction from the state courts.

As a further strike against the application here of either *Osborn*, *Verlinden*, or *Lincoln Mills*, the Supreme Court's "clear statement" principle suggests that, where ambiguous, congressional action should be construed against an encroachment on states' rights.[138] Under section 19(d) of the NGA, which establishes circuit court jurisdiction over certain determinations made "pursuant to Federal law," it is far from clear that Congress intended to force states to yield jurisdiction over state law claims arising under cooperative programs.

135. *See supra* note 81 and accompanying text.

136. *See* United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979).

137. *See* Boyle v. United Techs. Corp., 487 U.S. 500, 518 (1988) (Brennan, J., dissenting) (stating that "federal common law can displace state law in few and restricted instances" (internal quotation marks omitted)).

138. *See supra* note 97 and accompanying text.

VI. CONCLUSION AND IMPLICATIONS

In seeking FERC authorization for natural gas projects under the NGA, applicants routinely face state approval processes required under federal law, chiefly water quality certification under section 401 of the CWA. Absent section 19(d) of the NGA, a challenge to a state determination under section 401 would generally need to be brought in state court. With section 19(d), the scope of challenges diverted to the federal circuit courts depends on the construction of section 19(d).

There are defensible arguments both for construing section 19(d) as a jurisdictional grant to the limits of § 1331, and for construing it as going to the limits of the Constitution. The more limited grant under the cause-of-action test would be more consistent with federalism doctrines that operate against construing ambiguous statutes in a way that encroaches on traditional state powers. A limited grant would also be more consistent with the federal environmental statutes themselves, which contemplate strong state roles. But because the cause-of-action test relies on clear distinctions between what is "federal" and "state" law, this § 1331-based approach leaves the gaping question: Where is the line between federal and state law in cooperative federalism regimes? This Note takes the position that this line should be a formal one, and that state law implementing the CWA is still state law. Accordingly, a challenge would only fall within the original and exclusive jurisdiction of the circuit courts where brought as a federal law challenge or where a necessary federal element is raised per *Grable & Sons*.

Nevertheless, as long as it remains unresolved whether state law that implements federal law is, in fact, state law or federal law, it seems more likely that a court would avoid this question—which would have wide implications for the myriad cooperative federalism programs—by construing section 19(d) as an underlying subject matter jurisdiction grant that goes beyond § 1331. As noted, the applications of cases like *Verlinden* and *Lincoln Mills* have been narrow. However, by applying *Osborn*'s federal ingredient test, a court could conclude that the existence of a particular state determination in the context of a cooperative federal scheme supplies the federal ingredient that allows Congress to grant arising

under jurisdiction.[139] Under this approach, any challenge to state agency action or inaction in the course of section 401 certification for a section 3 or section 7 project would go to the circuit courts. This approach would also be consistent with Congress's intent under EPAct to streamline the review process for state determinations applicable to NGA projects. For these reasons, it seems more likely that a court would adopt this "federal ingredient" approach if and when faced with the question, in spite of the merits of a more limited § 1331-based reading.

For litigants in prospective cases—those wishing to challenge or defend state agency approvals, conditions, or denials for natural gas projects—this Note should help establish expectations as to where jurisdiction would be proper. The analysis of this Note may also provide a starting point for litigants seeking to assert jurisdiction in a desired forum (or conversely, to challenge jurisdiction in an undesired forum).

Some litigants may prefer to challenge agency action in state court for strategic reasons. For example, a pipeline company may wish to challenge unfavorable terms of a section 401 certification in a state court system known to grant such permitting decisions little deference; or a fishermen's association may wish to challenge a section 401 certification of an LNG terminal in expectation that a state judge will be more sympathetic to local economic interests than a federal judge; or a party desiring a quick or a slow decision may prefer whichever court system tends to operate at the desired pace. In general, a state agency would likely prefer to be subject to suit in state court over federal court.

Under a § 1331-based (cause-of-action test) interpretation of section 19(d), to end up in state court, plaintiffs would need to bring their challenges as state law claims, alleging, for instance, that a permitting decision was arbitrary under state administrative law standards, or that it violated state water quality standards. Under a more probable Article III (federal ingredient) reading of section 19(d), however, plaintiffs would unlikely be able to bring any challenges to state agency determinations in state court for NGA projects.

139. Viewed another way, a court could reason that to the extent state powers under the CWA are not preempted by the NGA, it is *because* such powers live within these federal schemes—and as such, any state approvals under the CWA are both "required under" and "pursuant to" federal law.

Some litigants, in contrast, may prefer federal court. For example, a natural gas company may expect federal courts to be tilted in favor of interstate energy development interests over local concerns, or an environmental group may expect a particular circuit court to be a sympathetic forum for environmental interests. Under an Article III reading of section 19(d), such plaintiffs would be free to rely upon whatever their most meritorious claims would be, whether framed as state or federal law issues, because the suit would necessarily go to federal circuit court. Under the § 1331 reading of section 19(d), to activate the exclusive jurisdiction of the circuit courts, the challenger would need to bring a federal law claim, or present a necessary federal question in satisfaction of *Grable & Sons*.

For judges, the primary implication of this Note is that, with an expected rise in litigation over natural gas infrastructure, the jurisdictional question presented by section 19(d) will likely arise sooner or later. Construing section 19(d) to its constitutional limits seems more consistent with congressional purpose, and it avoids messy questions about the line between state and federal law in cooperative statutory schemes, and the related line between state and federal court jurisdiction. Yet whatever Congress intended with section 19(d) is a separate question from what section 19(d) actually does. Expansive jurisdictional grants to the federal courts are rare and ill-defined, supporting a more limited § 1331 reading. Federalism principles also counsel against encroaching on state powers without a "clear statement" from Congress. Furthermore, it is arguably long-due for the judiciary to develop consistent doctrines governing federal court jurisdiction over the state implementation of cooperative statutes.[140]

140. Aside from questions as to the proper fora for particular claims, important corollary issues also remain largely unaddressed, such as the standard of review in either state or federal court for state agency decisions pursuant to cooperative programs, or the proper statutory interpretation canons to use for state laws implementing cooperative programs. *See* Gluck, *supra* note 14, at 2036–37.