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Clean Water Act Challenges To Pipeline Projects

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Pipeline development in the United States has become increasingly contentious in recent years, with environmental, landowner and in some cases state opposition expanding and taking new forms. Among the evolving areas of conflict is Section 401 of the Clean Water Act (CWA).

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Section 401 provides that a federal agency cannot issue a permit or license for an activity that may result in a discharge to waters of the United States until the state where the discharge would originate has granted or waived certification that the discharge would comply with (among other things) state water quality standards.

The state of New York has recently denied Section 401 certifications for three major pipeline projects, provoking litigation in the federal courts of appeals. On Sept. 15, 2017, the Federal Energy Regulatory Commission issued an order declaring one of these denials was void because the state missed the CWA's one-year deadline and thus waived certification.

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The state likely will challenge this order in court, with important implications for current and future projects. The state has also indicated that it will deem "denied" future CWA applications where FERC does not adequately consider project-specific greenhouse gas effects. Meanwhile, environmental groups have brought suits challenging several state approvals of CWA Section 401 certifications — with courts rejecting some of the challenges, and at least one state deciding to take the certification back for further bolstering.

This two-part article provides a brief overview of the relevant legal framework, an analysis of the recent court and FERC decisions and an outlook on future developments. Effective navigation of these issues — located at the nexus of energy and environmental law — will continue to play a critical and growing role in the development of current and future pipeline projects.

CWA Section 401 and FERC Natural Gas Act Regulation: A Quick Refresher

The Natural Gas Act of 1938 (NGA) gives the Federal Energy Regulatory Commission exclusive jurisdiction over pipelines that transport natural gas in U.S. interstate commerce.

These pipelines are subject to FERC regulation under Section 7 of the NGA, which provides that no one shall construct interstate natural gas pipeline facilities unless FERC has first granted a “certificate of public convenience and necessity." Thus, before building an interstate natural gas pipeline, the developer must initiate a certificate proceeding at FERC and demonstrate to the commission that the pipeline’s public benefits outweigh its potential adverse consequences.

The commission evaluates competitive transportation alternatives, the cost of facilities and resulting rates for transportation, the terms and conditions of the pipeline’s tariff, the possibility of overbuilding or subsidization by existing customers, market support for the project and the applicant's responsibility for unsubscribed capacity, among other non-environmental factors.

This evaluation is primarily an economic test, but if FERC finds that the economic benefits of the pipeline outweigh any adverse effects on economic interests, the commission then considers whether any other adverse impacts (including environmental impacts) can be mitigated or would somehow weigh against approval. FERC mitigates such impacts by imposing certificate order conditions, including a condition requiring the pipeline to comply with existing federal environmental laws and obtain necessary permits from other agencies acting under federal law.

While the NGA generally preempts conflicting state regulation of interstate natural gas facilities, Congress amended the NGA through the Energy Policy Act of 2005 (EPAct 2005) to clarify that the NGA does not limit state participation in the environmental regulation of such facilities under three federal statutes: the Coastal Zone Management Act (CZMA), the Clean Air Act (CAA) and the CWA.

Nor does the NGA prevent states from providing safety and environmental impact information to FERC, which FERC must consider in its certificate order and must document in compliance with the National Environmental Policy Act (NEPA).

Pipeline construction can implicate various CWA requirements, including CWA Section 404 permits for discharge of dredge or fill material into waters of the United States (which, typically, the US Army Corps of Engineers must issue) and point source pollutant discharge permits under Section 402.

Additionally, CWA Section 401 requires an applicant for a federal license or permit to conduct any activity that “may result in any discharge” into waters of the United States (such as pipeline stream crossings) to obtain “a certification from the State in which the discharge ... will originate ... that any such discharge will comply with,” among other requirements, the state’s water quality standards approved under the CWA.

Importantly, Section 401 sets a deadline for state action. If a state agency from which an applicant for a federal permit “fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after the receipt of such request, the certification requirement ... shall be waived with respect to such Federal application.”

The intersection of (and potential for tension between) FERC-NGA and state environmental permitting was a key focus of Congress when it amended the NGA in EPAct 2005. As noted, the NGA and the commission’s historic approach to analysis of pipeline development projects focuses primarily on enhancing competition and protecting consumer economic interests.

By contrast, states implementing the CWA and other federal environmental statutes do not necessarily

consider or balance economic factors when considering substantive environmental permits. And, although FERC's consideration of an application to build or expand an interstate pipeline often constitutes a "federal action significantly affecting the quality of the human environment" — thereby requiring FERC to document the appropriate level of environmental review under NEPA — NEPA's requirements are procedural and not substantive in nature.

This tension was evident in 2005, when a series of liquefied natural gas import projects and associated pipeline expansions, some controversial, were pending before FERC and state agencies. In response to delays — arguably caused by certain states' denials or failures to act — Congress amended the NGA to designate FERC as the lead agency for purposes of coordination of all federal authorizations and compliance with NEPA.

Congress also tasked FERC with setting a schedule for environmental review and maintaining a consolidated record of all actions taken under federal law (which includes state actions pursuant to the CWA). Additionally, Congress amended the NGA to address judicial review of federal or state action or inaction relating to pipeline permitting.

Prior to EPAct 2005, sponsors of energy infrastructure projects generally could challenge state permitting decisions under federal statutes (like the CWA) only through state courts. Congress enacted Section 19(d) of the NGA to address the delay often associated with such litigation.

Specifically, Section 19(d)(1) provides that the US Court of Appeals for the circuit in which the pipeline is proposed has jurisdiction over any suit seeking review of an order or action of a federal agency other than FERC, or a state agency "acting pursuant to Federal law" (other than the CZMA) to "issue, condition, or deny any permit, license, concurrence, or approval required under Federal law."

Section 19(d)(2), in turn, gives the D.C. Circuit jurisdiction over any suit for an "alleged failure to act" by a federal agency other than FERC, or a state agency acting pursuant to federal law (other than the CZMA), to issue, condition or deny any federally required permit. Key to this regime, however, was the preservation of the states' substantive authority over environmental permitting under the CWA, CAA and CZMA, as discussed above.

The underlying tension between economic and environmental regulation therefore remains, providing fertile ground for litigation, particularly in those regions of the country where there is opposition to pipeline development.

Pipeline development in the United States has become increasingly contentious, with environmental, landowner and state opposition expanding and taking new forms. Among the evolving areas of conflict is Section 401 of the Clean Water Act (CWA), which provides that a federal agency cannot issue a permit or license for an activity that may result in a discharge to waters of the United States until the state where the discharge would originate has granted or waived certification that the discharge would comply with (among other things) state water quality standards.

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projects. The state has also indicated that it will deem "denied" future CWA applications where FERC does not adequately consider project-specific greenhouse gas effects. Meanwhile, environmental groups have brought suits challenging several state approvals of CWA Section 401 certifications — with courts rejecting some of the challenges, and at least one state deciding to take the certification back for further bolstering.

The first part of this article offered a brief overview of the relevant legal framework. This installment will provide an analysis of recent court and FERC decisions and an outlook on future developments. Effective navigation of these issues — located at the nexus of energy and environmental law — will continue to play a critical and growing role in the development of current and future pipeline projects.

Recent Cases and Developments

A slew of recent decisions have addressed challenges to state decisions under CWA Section 401, setting important precedents for pipeline permitting. These cases include industry challenges to high-profile Section 401 certification denials by the state of New York, and environmental group challenges to state Section 401 grants by other states.

The Valley Lateral CWA denial

Perhaps the most notable of these decisions involves Millennium Pipeline's Valley Lateral project, which involved a proposed 7.8-mile extension of an existing line in New York to serve a new gas-powered power plant.

Millennium applied for a Section 401 certification on Nov. 23, 2015. FERC set an Aug. 7, 2016, deadline for decisions on federal authorizations. The New York State Department of Environmental Conservation (NYSDEC) issued several "notices of incomplete application" to Millennium, requesting further information.

On Nov. 9, 2016, FERC issued an order approving the Valley Lateral, but conditioning start of construction on Millennium's receipt of outstanding authorizations under applicable federal law or evidence of waiver thereof. Millennium sued in the D.C. Circuit in late 2016, seeking to compel the state to act on its request.

The court rejected the suit, holding that Millennium lacked standing — because if NYSDEC exceeded the one-year deadline to act on the certification request, as Millennium argued, Millennium's recourse was to ask FERC to find that the agency waived the certification requirement (the Millennium decision). On July 21, 2017, Millennium filed a request with FERC seeking authorization to begin construction and requesting that FERC find that the NYSDEC had waived CWA certification.

On Aug. 30, 2017, while that request was pending, NYSDEC sought to reopen the NEPA record for the project and "conditionally denied" Millennium's Section 401 certification on the basis that the NEPA record did not comply with an Aug. 22, 2017, decision by the D.C. Circuit in which the court held that FERC must further assess downstream greenhouse gas (GHG) impacts of power plants to be served by the Southeast Market Pipelines (SMP) project, vacated the SMP Certificate and remanded back to FERC (the SMP decision).

But what does FERC's treatment of GHG impacts have to do with the NYSDEC's decision as to whether to certify the pipeline's compliance with state water quality standards? NYSDEC referred to its own

regulations, finding that NYSDEC can deny certification where FERC's NEPA environmental record does not meet state law standards for environmental review, or based on a change in applicable law or regulations. NYSDEC, thus, concluded that the Section 401 certification is "deemed denied" unless FERC reopens the record to adequately address NYSDEC's GHG concerns.

NYSDEC's decision would be ripe for challenge in court. However, before further action could be taken, FERC issued a declaratory order on Sept. 15, 2017, finding that NYSDEC waived certification because NYSDEC had not acted within one year of receipt of Millennium's application.

FERC interpreted the phrase "receipt" in the CWA to mean the date of receipt of Millennium's application, without crediting NYSDEC's several "notices of incomplete application." FERC's order did not address NYSDEC's substantive GHG arguments or authorize construction, noting that these issues would be addressed in a separate order, which it has yet to issue.

Millennium has since requested an extension of time to complete the construction and make the facilities available for service, which FERC granted on Oct. 6, 2017.

The Constitution Pipeline CWA denial

NYSDEC has also issued two other high-profile denials of Section 401 certifications in the last two years — each leading to follow-on court challenges.

In April 2016, NYSDEC denied a Section 401 certification requested by Constitution Pipeline — a proposed 121-mile pipeline in Pennsylvania and New York. Constitution challenged the denial in the US Court of Appeals for the Second Circuit on grounds that the state had waived certification or, alternatively, that its denial was an unlawful attempt to impose a preferred route.

The Second Circuit upheld NYSDEC's decision to deny the CWA Section 401 certification, and dismissed Constitution's failure-to-act claims, citing the D.C. Circuit's exclusive jurisdiction over such claims pursuant to NGA Section 19(d)(2) (the Constitution decision). Constitution has sought rehearing en banc, noting that the decision, if allowed to stand, will have a significant impact on other pipeline projects.

The Northern Access Pipeline CWA denial

In April 2017, NYSDEC denied a Section 401 certification for National Fuel's Northern Access Pipeline, a proposed 97-mile interstate transmission line in Pennsylvania and New York.

National Fuel originally challenged NYSDEC's decision in the Second Circuit, but later sought to compel action at FERC, noting "[b]ecause the District of Columbia Circuit will not address waiver under Millennium, and because …[] applicants cannot raise waiver arguments in their home circuits per Constitution, it is imperative for the Commission to address [these] arguments regarding waiver."

Oral argument in the Second Circuit case is set for November. FERC has yet to act on National Fuel's rehearing request.

The Third Circuit CWA approvals

By contrast, the Pennsylvania Department of Environmental Protection (PADEP) and New Jersey Department of Environmental Protection (NJDEP) have in recent years issued a number of CWA

authorizations (Section 404 permits and Section 401 certifications) for pipeline projects in Pennsylvania and New Jersey. But these approvals have been routinely challenged by environmental groups.

The first notable challenge involved Transcontinental Gas Pipe Line's Leidy Southeast Expansion project. In an Aug. 8, 2016, decision, the Third Circuit rejected Delaware Riverkeeper's CWA challenges on the merits, finding that the CWA certifications and permits were validly issued pursuant to Federal law.

Further, the decision confirmed the Third Circuit's jurisdiction over challenges under Section 19(d) of the NGA, clarifying that its jurisdiction applies even if certifications require additional state-law approvals, and finding further that the states had waived sovereign immunity from suit through their participation in the CWA and NGA regulatory schemes (the Transco decision).

Environmental groups continue to challenge pipeline CWA certifications and related approvals in the Third Circuit. In a recent order upholding CWA approvals related to another project, the court recounted its precedent to date, while noting a series of pending cases before it that raise new issues, such as whether NGA Section 19(d) requires exhaustion of administrative remedies under Pennsylvania state law before the agency's action is subject to court review.

This issue was addressed by the First Circuit in Berkshire Environmental Action Team Inc., a case involving review of a CWA Section 401 approval issued by the Massachusetts Department of Environmental Protection, in which the First Circuit determined that judicial review under NGA Section 19(d)(1) is limited to review of a final state administrative action. The Third Circuit may address this issue soon.

The Mountain Valley Pipeline voluntary remand

Moving to the Fourth Circuit, in March 2017, the West Virginia Department of Environmental Protection (WVDEP) issued a CWA Section 401 certification for the proposed 300-mile Mountain Valley Pipeline.

However, after the Sierra Club challenged that decision in the Fourth Circuit, WVDEP filed a motion with the court seeking to vacate and remand the certification for further analysis.

What's Next?

These cases highlight the evolving challenges facing regulators and pipeline developers as they navigate the interaction between the NGA, NEPA, state law and the CWA — and Section 401 in particular. Developers will want to continue building support at the state level where possible, while also focusing on creating a strong administrative record demonstrating permitting deadlines and continuing coordination with agencies and stakeholders.

Great care should be exercised in procedural interactions with state and federal agencies — all of which can affect any subsequent litigation. And state administrative appeals processes related to CWA authorizations should be considered when preparing permitting timelines.

The outcome of a future court challenge to FERC's Valley Lateral waiver finding — specifically the commission's determination that the one-year deadline for issuing a CWA certification decision is triggered by the state agency's receipt of the request — will have important consequences for developers, investors, stakeholders and agencies seeking to determine the chronological parameters for

future CWA Section 401 certification processes.

At the same time, the Second Circuit's decision in Constitution and the Third Circuit's decision in Transco suggest that, at least in some instances, state agencies may continue to receive deference on Section 401 decisions, whether approvals or disapprovals.

An order upholding FERC's Valley Lateral waiver finding could render moot any challenge to NYSDEC's decision to premise its denial of Section 401 certification on alleged flaws in FERC's analysis of GHG effects. But given FERC's indication that it will issue an order on this subject, and the possibility that other states may adopt this approach, additional litigation is certain to follow.

It seems likely that FERC will seek to close out its proceedings on the SMP remand before addressing other CWA- or GHG-related challenges, because any resulting order would dispose of a mounting number of challenges based on that opinion. FERC's remand proceeding is underway, and a draft NEPA supplement has been issued for comment.

FERC is contemporaneously requesting panel rehearing of the court's decision to vacate the SMP Certificate given the effect this loss of authority would have on these facilities — an issue of significant importance outside the CWA context as well.

The legal and regulatory playing field likely will continue to evolve as these cases move through FERC, the courts and state agencies. Expect state and federal officials to modify procedures and laws in ways designed to accomplish their respective economic and environmental goals.

These developments underscore the confluence of energy and environmental law in pipeline development — as well as the critical importance of sophisticated legal counsel that integrates expertise in energy policy, FERC regulation, state and federal environmental permitting and review, and litigation.

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