

When States Fail To Act On Federal Pipeline Permits

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A major impetus for passage of the Energy Policy Act in the summer of 2005 (EPAct 2005) was to address concerns related to individual states' ability to exert power over and delay natural gas pipeline and LNG terminal projects authorized by the Federal Energy Regulatory Commission pursuant to the Natural Gas Act (NGA).[1]

EPAct 2005 did not eliminate state power in the federal regulatory process, however. Instead, states retained authority to review and decide a number of issues, including federal Clean Water Act (CWA) and Clean Air Act (CAA) permit applications.[2] This retained authority continues to enable state agencies that oppose greater natural gas infrastructure development to delay or effectively halt otherwise federally approved projects.

These issues have been placed squarely before federal courts of appeal as infrastructure developers look to advance dozens of natural gas pipeline projects to facilitate the transportation of natural gas, in particular in the Marcellus and Utica Basins. In some instances, state agencies have exercised their authority under federal statutes to reject permit applications outright.

Recent examples include the New York State Department of Environmental Conservation's (NYSDEC) rejection of Water Quality Certifications (WQC) under the CWA for the Constitution Pipeline and for National Fuel Gas Supply Company's Northern Access 2016 Project.[3] Both rejections currently are on appeal.

In other instances, state agencies simply have failed to act on permit applications, leaving open questions regarding applicants' recourse in the face of agency inaction. Two very recent decisions by the U.S. Court of Appeals for the D.C. Circuit related to FERC-authorized pipeline projects — the Valley Lateral Project and the Broad Run Expansion Project — address state agency inaction in reviewing associated CWA and CAA permit applications.[4]

While these two cases, discussed in greater detail below, leave key questions unanswered, they nonetheless offer critical insights for project developers considering legal and regulatory strategies for dealing with state agency delays, and make clear the need for companies seeking to build interstate energy infrastructure to engage with state and local agencies early in the application process.



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The Valley Lateral Project

The Millennium Pipeline Company LLC Valley Lateral project is a small project involving the construction of only 7.8 miles of 16-inch diameter pipeline and appurtenant facilities in Orange County, New York.[5] On Nov. 9, 2016, FERC issued Millennium a certificate of public convenience and necessity for Valley Lateral.[6] However, because Valley Lateral would traverse streams, Millennium also needed to obtain a WQC under the federal CWA from NYSDEC.

NYSDEC received Millennium's formal WQC application on Nov. 23, 2015.[7] Under the CWA, agencies must act on a request for certification "within a reasonable period of time," not to exceed one year.[8] If an agency fails to act within one year, then the permit is deemed waived and construction may commence without such permit.[9]

While the CWA references receipt of a certification request as the trigger for the one-year clock, it does not specify whether such request must first be affirmatively deemed complete by the receiving agency.[10] Millennium contended that the one-year period began on the date it filed its WQC application and that NYSDEC therefore had until no later than Nov. 23, 2016, to render a decision.[11]

Because NYSDEC did not do so, Millennium contends that NYSDEC waived its ability to review the WQC application and that the WQC is no longer necessary.[12] In contrast, NYSDEC's position has been that the one-year clock starts only upon receipt of a "completed" application, not a "materially deficient" one as it alleged Millennium's to be.[13]

On Dec. 5, 2016, Millennium filed a petition for review with the D.C. Circuit under the NGA requesting that the court either declare the permit waived or direct NYSDEC to approve the WQC.[14] In the alternative, Millennium asked the court to direct NYSDEC to take final action within seven days of the court's decision.[15]

Without addressing the question of whether Millennium's application was sufficient to trigger the one-year timeline under the CWA, the court concluded that it did not have jurisdiction to address Millennium's request because Millennium lacked standing.[16] The court explained that if Millennium were correct and NYSDEC did, in fact, waive its power to issue a decision, then Millennium no longer had a cognizable injury as a result of NYSDEC's inaction because Millennium no longer needs the WQC.[17]

The court's conclusion suggests that Section 19(d) of the NGA, which allows for judicial review of a cooperating agency's failure to act,[18] only applies if both the agency has failed to act within the statutory period and such failure does not constitute waiver under the relevant federal statute. Rather than file a petition for judicial review as expressly provided for under the NGA,[19] the court thus determined that the appropriate course of action is for Millennium to proceed directly to FERC and seek notice to proceed with construction.[20]

Millennium's FERC certificate contains a standard condition that, prior to beginning construction, a project applicant must demonstrate to FERC that it has either: (1) obtained all required federal authorizations; or (2) demonstrated evidence of waiver thereof.[21] Accordingly, the D.C. Circuit explained that Millennium should confirm to FERC that the CWA-prescribed deadline has elapsed, resulting in a waiver, after which FERC can authorize construction.[22]

Two weeks after the court's decision, NYSDEC issued a determination that Millennium's application was

materially complete and that it has begun its review, which in NYSDEC's view triggers the start of the one-year review period under the CWA.[23] As of this writing, Millennium had not sought further FERC review regarding NYSDEC's power to act, though in a press statement Millennium announced its intention to do so.[24]

The Broad Run Expansion Project

The Tennessee Gas Pipeline LLC (TGP) Broad Run project is a collection of infrastructure improvements and new construction along the eastern United States.[25] One of those projects is the construction of a compressor station in Joelton, Tennessee. On Sept. 6, 2016, FERC issued TGP a certificate of public convenience and necessity for Broad Run.[26]

However, under the CAA, Broad Run also must obtain city and county permits before commencing construction. Under the CAA, agencies must "approve or disapprove a completed application ... and ... issue or deny the permit, within 18 months after the date of receipt thereof[.]"[27]

The county agency confirmed that it received TGP's CAA permit application on Feb. 2, 2015.[28] In TGP's view, this means that the county had until no later than Aug. 2, 2016, to render a decision on its application.[29] After a delay of six months beyond that 18-month deadline, TGP filed a petition for review under the NGA with the D.C. Circuit, requesting that the court order the county to issue a final permit decision in earnest.[30]

In support of its argument, TGP asserted that the county's own regulations require it to notify an applicant of any deficiencies within 60 days of its initial application and that, in the absence of such notice, the application is deemed complete as of filing.[31] The county admitted that it did not provide such notice,[32] but contended that TGP's application was nonetheless materially incomplete, and that the CAA is explicit that the review window begins once an application is "complete." [33]

A week after its Millennium Pipeline decision, the D.C. Circuit issued an unpublished order granting TGP's petition for review.[34] Although the opinion is non-precedential except as to the parties, the analysis provided is instructive, particularly given the court's Millennium Pipeline decision just six days prior.

The court first noted that since the CAA explicitly states that the 18-month review window applies to a "completed" application, there was no ambiguity around whether the clock started on the date of submission or the date the application was deemed complete. The only question was whether the application filed on Feb. 2, 2015, was, in fact, "complete."

The court concluded that because the county failed to advise of any deficiencies within 60 days of receipt of the application as required by its own regulations, TGP's application was deemed complete by operation of law as of Feb. 2, 2015. The county had thus failed to act within the CAA-prescribed 18-month period.[35]

The court further noted that, unlike the CWA, the CAA does not provide that an agency's failure to act within the prescribed time period waives the permitting requirement.[36] As a result, the failure to act was causing TGP continuing injury and the court had the power to remand to the county to remedy the harm by taking action on the pending application.

Implications

The D.C. Circuit's Millennium Pipeline decision makes clear that a pipeline developer must proceed to FERC after it believes the CWA-mandated deadline has lapsed. In this instance, the project developer will need FERC to agree that the WQC has been waived in order to authorize construction.

However, without clarity on when the one-year period begins to run, FERC may be hesitant to make such a determination. Doing so will require the agency to interpret the CWA — a statute that FERC itself does not have delegated authority to administer.

Consequently, the agency likely will balance its desire to assure the needed infrastructure interstate natural gas pipeline development against the potential that its decision could be overturned on appeal. This is further complicated in Valley Lateral's case because FERC will specifically need to disregard NYSDEC's recent, and potentially post-waiver, determination of a complete application.

With this framework in mind, it is interesting to consider the course of National Fuel's NYSDEC proceeding for the Northern Access 2016 Project. As noted above, on April 7, 2017, NYSDEC denied a WQC application for National Fuel's Northern Access 2016 Project.[37] National Fuel applied for its WQC on Feb. 28, 2016.[38] Assuming that the review clock began on Feb. 28, 2016, National Fuel could have sought a determination of waiver from FERC anytime after that date.

National Fuel requested rehearing at FERC the following week and alleged that NYSDEC had waived its ability to issue a decision on the WQC application, but it also entered into an agreement with NYSDEC that NYSDEC could have until April 7, 2017, to issue a decision.[39] National Fuel perhaps did so based on the ultimately incorrect assumption that it would receive the permit.

When it did not receive a permit by the April 7 agreed deadline, National Fuel filed a petition for review with the D.C. Circuit requesting review of NYSDEC's denial and, later, filed a second petition for review with the court seeking review of its FERC order, which is conditioned upon the receipt of a WQC from NYSDEC.[40]

These proceedings are ongoing, and even if National Fuel eventually is able to begin construction, significant harm already has been done — National Fuel announced recently that the Northern Access 2016 Project will be delayed by over a year as a result of NYSDEC's denial.[41] In fact, National Fuel could be entirely foreclosed from beginning construction if it ultimately is unsuccessful in obtaining its WQC from NYSDEC.

With respect to state permits under the CAA, a key fact in the Broad Run case was the agency's regulations specifying a deadline by which the agency must notify an applicant that its filing is deficient. Consequently, while there was clarity in that case, interstate natural gas pipeline developers would be wise to confirm whether similar regulations exist in the jurisdictions from which they will require CAA permits. State agencies also may be more diligent in notifying pipeline developers about deficiencies in applications in order to toll the CAA's 18-month decisional clock.

These uncertainties with state agency permitting timelines can present serious legal and commercial risks for project developers. While judicial precedent or agency guidance will clarify these process issues, one way to eliminate these risks for interstate natural gas pipeline developers is to seek legislative changes to the CWA and CAA, and state regulations implementing these federal acts, to force state agencies acting under the two statutes to deem an application complete by a date certain.

Conclusion

As state agencies continue to exercise their federally delegated authority in a way that delays FERC-approved projects, project developers must think strategically about the proper approach with state and federal agencies to ensure minimal impacts on their proposed construction schedule and commercial in-service date.

As demonstrated by the cases described above and NYSDEC's denial of the WQC for Constitution Pipeline, which remains on appeal, failure to do so could result in delays in project permitting and increased litigation risk. Outlining multiple approaches and engaging early with relevant state agencies can help minimize those risks.

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[1] Jacob Dweck, David Wochner & Michael Brooks, Liquefied Natural Gas (LNG) Litigation after the Energy Policy Act of 2005: State Powers in LNG Terminal Siting, 27 Energy L.J. 473, 474 (2006). For a greater discussion of the reasons behind the EAct 2005, see generally *id.*

[2] *Id.* at 474.

[3] DEC Statement Regarding Water Quality Certificates for the Proposed Northern Access Pipeline, NYSDEC, (Apr. 8, 2017), <http://www.dec.ny.gov/press/109767.html> (last visited July 13, 2017); New York State Department of Environment [sic] Conservation Denies Water Quality Certificate for Constitution Pipeline, NYSDEC, (Apr. 22, 2016), <http://www.dec.ny.gov/press/105941.html> (last visited July 13, 2017).

[4] *Tennessee Gas Pipeline Co. v. Paul et al.*, No. 17-1048, slip op. (D.C. Cir. June 29, 2017); *Millennium Pipeline Co. v. Seggos et al.*, No. 16-1415, slip op. (D.C. Cir. June 23, 2017).

[5] For more information on the Project, see the Valley Lateral FERC Docket, CP16-17.

[6] *Millennium Pipeline Co. LLC*, 157 F.E.R.C. ¶ 61,096 (2016), order denying stay, 158 F.E.R.C. ¶ 61,086 (2017).

[7] In the Valley Lateral briefs, Millennium asserts that it filed its application on Nov. 20, 2015. Opening Brief for Petitioner at 3 & n.2, *Millennium Pipeline Co.*, No. 16-1415. NYSDEC does not agree with this assertion, but it concedes that it received Millennium's application on Nov. 23, 2015. Accordingly, both parties operate as though Nov. 23, 2015, was the date Millennium's application began. Opening Brief for Petitioner at 3 & n.2, *Millennium Pipeline Co.*, No. 16-1415; Brief for Respondents at 6, *Millennium Pipeline Co.*, No. 16-1415.

[8] 33 U.S.C. § 1341(a)(1) (2017).

[9] See *id.* See also *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 965 (D.C. Cir. 2011) (quoting §

1341(a)(1)).

[10] 33 U.S.C. § 1341(a)(1).

[11] Opening Brief for Petitioner at 3 & n.2, Millennium Pipeline Co., No. 16-1415.

[12] *Id.* at 4.

[13] Brief for Respondents at 14-15, Millennium Pipeline Co., No. 16-1415.

[14] See generally Petition for Review, Millennium Pipeline Co., No. 16-1415. The NGA, which establishes FERC's jurisdiction over the siting, construction and operation of interstate natural gas pipelines, provides that if a federal or state administrative agency fails to issue a decision according to the applicable schedule, an applicant may file a civil action in the D.C. Circuit seeking to compel the applicable agency to act. 15 U.S.C. § 717r(d)(2) (2017).

[15] Opening Brief for Petitioner at 30, Millennium Pipeline Co., No. 16-1415.

[16] Millennium Pipeline Co., No. 16-1415, slip op. at 2.

[17] *Id.*

[18] 15 U.S.C. § 717r(d)(2).

[19] *Id.* Millennium Pipeline highlights a timing conundrum for applicants seeking judicial review of claimed agency inaction under the CWA — if an applicant seeks to compel agency action before the CWA's one-year deadline has run, the court is unlikely to find that the applicant has standing because the claim will not yet be ripe; however, if the applicant waits for the one-year period to run, the court is similarly unlikely to find that the applicant has standing because the state agency will be deemed to have waived the WQC requirement by operation of law and the applicant therefore will not have suffered injury in fact.

[20] Millennium Pipeline Co., No. 16-1415, slip op. at 6, 9.

[21] Millennium Pipeline Co. LLC, 157 F.E.R.C. ¶ 61,096 at P 56 (2016)

[22] Millennium Pipeline Co., No. 16-1415, slip op. at 6, 9.

[23] See Valley Lateral's FERC Docket, CP16-17, "Notice of Complete Application from the New York State Department of Environmental Conservation under CP16-17," July 6, 2017.

[24] After Court Ruling, Millennium May Turn to FERC, *Platts Gas Daily*, July 10, 2017, at 5.

[25] For more information on the Project, see the Broad Run FERC Docket, CP15-77.

[26] Tennessee Gas Pipeline Co. LLC, 156 F.E.R.C. ¶ 61,157 (2016), order denying stay, 157 F.E.R.C. ¶ 61,154 (2016).

[27] 42 U.S.C. § 7661b(c) (2017).

[28] Brief of Respondents at 5, *Tennessee Gas Pipeline Co. v. Paul et al.*, No. 17-1048 (D.C. Cir. June 29, 2017).

[29] Opening Brief for Petitioner at 27, *Tennessee Gas Pipeline Co.*, No. 17-1048.

[30] See generally Petition for Review, *Tennessee Gas Pipeline Co.*, No. 17-1048; 15 U.S.C. § 717r(d)(2) (2017).

[31] Opening Brief for Petitioner at 12-13, *Tennessee Gas Pipeline Co.*, No. 17-1048.

[32] See Brief of Respondents at 19-20, *Tennessee Gas Pipeline Co.*, No. 17-1048.

[33] See Brief of Respondents at 5-6, 18-20, *Tennessee Gas Pipeline Co.*, No. 17-1048. The county also argued that TGP waived its right to rely on the county's 60-day window regulation because TGP did not seek the Feb. 2, 2015, version of its application to be the version upon which the county renders a decision. *Id.* at 19-20.

[34] *Tennessee Gas Pipeline Co.*, No. 17-1048 slip op. (D.C. Cir. June 29, 2017). Ironically, on June 23, 2017, after oral argument, but before the court had issued a decision, the county issued the CAA permit to TGP for the Broad Run Project. Joint Response of Petitioners at 1-2, No. 17-1048. TGP has since asked FERC for notice to proceed with construction at CS 563 in August 2017. *Id.* at 2. The parties notified the court of the issuance of the permit on July 10, 2017. *Id.*

[35] *Tennessee Gas Pipeline Co.*, slip. op. at 2-3.

[36] See 42 U.S.C. § 7661b(c).

[37] DEC Statement Regarding Water Quality Certificates for the Proposed Northern Access Pipeline, NYSDEC, (Apr. 8, 2017), <http://www.dec.ny.gov/press/109767.html> (last visited July 13, 2017).

[38] "Joint Application for Permits: Northern Access 2016 Project National Fuel Gas Supply Corp. and Empire State Pipeline, Inc.," <http://www.natfuel.com/supply/NorthernAccess2016/nydec.aspx>.

[39] National Fuel Provides Update on Northern Access Project and Fiscal First Quarter Production Results, BusinessWire, Jan. 25, 2017, <http://www.businesswire.com/news/home/20170125005706/en/National-Fuel-Update-Northern-Access-Project-Fiscal>.

[40] *National Fuel Gas Supply Corp. et al. v. FERC, et al.*, No. 17-1143 (D.C. Cir.), appeal filed June 1, 2017; *National Fuel Gas Supply Corp. et al. v. FERC, et al.*, No. 17-1164 (D.C. Cir.), appeal filed Apr. 21, 2017.

[41] Bill Holland, Spurned by New York, National Fuel delays Northern Access project until 2020, SNL Daily, May 11, 2017, <https://www.investorvillage.com/smbd.asp?mb=4620&mn=1612&pt=msg&mid=17151013>.