

Interstate Pipeline Project: Federal Appellate Court Addresses Challenge to State Water Quality Certification



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

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The United States Court of Appeals for the 3rd Circuit (“Court”) addressed a challenge to a permit issued by the Pennsylvania Department of Environmental Protection (“DEP”) related to the proposed construction of an interstate pipeline project. See *Delaware Riverkeeper Network, et al. v. Secretary of the Pennsylvania Department of Environmental Protection, et al.*, No. 17-1533 (August 30, 2017).

The proposed interstate pipeline project (“Project”) is described as 12.9 miles of pipeline transporting natural gas via Pennsylvania.

The Federal Energy Regulatory Commission (“FERC”) was designated the lead agency as required by the Natural Gas Act of 1938 since the project was one that involved multiple states. Project approval by the FERC required that the applicant obtain any other state or federal licenses required by law.

One such license is denominated a Water Quality Certification (“WQC”) which is required by Section 401 of the Clean Water Act. See 33 U.S.C. 1341. The Court describes this provision as:

. . . a Water Quality Certification confirms that a given facility will comply with federal discharge limitations and state water quality standards.

DEP had responsibility for addressing WQCs or activities affecting the State of Pennsylvania’s waters.

To obtain a WQC from DEP applicants were required to obtain a Water Obstruction and Encroachment Permit pursuant to 25 Pa. Code Ch. 105. Such permits are referenced as “Chapter 105 permits.” They are required to give special protection to “exceptional value” wetlands. These are wetlands that are located along the drinking water supply or serve as the habitat for endangered species.

The Project would affect a total of 13 exceptional-value wetlands.

To provide a Chapter 105 permit for the project, since it affected exceptional-value wetlands, the agency was required to certify that certain state statutory requirements were met. The two relevant requirements included:

1. The project is water-dependent. A project is water-dependent when the project requires access or proximity to or siting within the wetland to fulfill the basic purposes of the project.
2. There is no practicable alternative to the proposed project that would not involve a wetland or that would have less effect on the wetland, and not have other significant adverse effects on the environment.

DEP subsequently issued a conditional WQC for the project and two Chapter 105 permits. The agency certified that the project:

. . . “[i]s water dependent” and would be “the least environmentally damaging alternative.”

The Delaware Riverkeeper Network and others (collectively “Riverkeeper”) petitioned the Court for review.

The Court initially resolved jurisdictional issues. It then addressed the challenge to DEP’s decisions which included whether:

1. DEP erred in addressing the “water dependency” question
2. DEP erred by eliminating a “compression” alternative

Riverkeeper argued that DEP should not have classified the project as water dependent. The organization contended that linear infrastructure projects (i.e., pipelines and roads) are categorically not water dependent.

In support of its objection to DEP’s finding of water dependency, Riverkeeper cited the United States Army Corps of Engineers explanation of the concept (in regards to linear infrastructure):

[T]he purpose of a residential development is to provide housing for people. Houses do not have to be located in a special aquatic site to fulfil the basic purpose of the project, i.e., providing shelter. Therefore, a residential development is not water dependent. . . . Examples of water dependent projects include, but are not limited to, dams, marinas, mooring facilities and docks. The basic purpose of these projects is to provide access to the water.

This language was cited in *Sierra Club v. Van Antwerp* 709 F. Supp. 2d 1254, 1261(S.D. Fla. 2009)(quoting United States Army Corps of Engineers Standard Operating Procedures for Regulatory Programs).

As a result, Riverkeeper deemed the pipeline projects not water dependent because, unlike a dam, marina, or dock, pipelines are not by their nature dependent on being in or near water. This is argued to be the case even if the proposed construction route would intersect a wetland or water body.

DEP conceded that Riverkeeper’s contention may be correct under federal law. However, the state agency argued that Pennsylvania law may dictate a different result.

DEP determined that the proposed project looping “needs to cross the wetland areas to access land on either side of the wetland system” because “there are no practicable crossing alternatives to avoid the crossing.” The agency’s rejection of alternatives in the project and identification of the proposed path was deemed to unavoidably cross wetlands. Therefore, DEP concluded that it was water dependent. In other words, as the Court notes, rather than treating water dependency and alternatives as two distinct inquiries, DEP combined them into one step.

The Court rejected Riverkeeper’s argument that the federal understanding of water dependency should control. Despite the similarity between the relevant federal and Pennsylvania language, it stated that DEP relied on a regulatory provision that differed from the one found in the federal scheme. This cited provision was deemed by the Court to endorse “a more flexible approach to water dependency.” It is described as a provision stating that a water dependency finding “must be based on” the unavailability of alternatives in the project’s ability to avoid or minimize the adverse impact of the . . . encroachment upon the environment.” See 25 Pa. Code § 105.14(b)(7).

The cited language was found to support DEP’s interpretation and conclusion as to water dependency (based on its finding that no alternative location, route or design could avoid adverse impacts on aquatic sites in the environment). relevant provisions were considered conflicting and the Court concluded that the meaning of “water dependent” under Pennsylvania law is ambiguous.

Next the Court addressed whether, as with a federal agency, the state agency (i.e., DEP) should receive deference in its interpretation. It concludes that such deference is appropriate and that DEP's interpretation of water dependency is reasonable.

The Court also addressed Riverkeeper's argument that despite a water dependency finding, the agency's alternative analysis was erroneous. The organization asserted that DEP was required to embrace a "compression alternative." This alternative is described as increasing the amount of natural gas transported through existing pipelines. Such an alternative would therefore avoid all impacts on wetlands and water bodies from the construction of the project.

The Court held that DEP considered the compression alternative and rejected it for reasons supported by the record.

Tennessee Gas included an alternative analysis in its DEP application. The Court noted that Gas's alternative analysis rejected the compression alternative because it would require adding a new greenfield compressor station. The environmental impacts associated with the construction of this facility were described by the company as less than the pipeline's because these areas would be allowed to re-vegetate. Despite the fact that DEP did not expressly mention compression in its alternative analysis, the Court noted the agency's review of Gas's report in its adoption of the conclusions. It concluded that DEP did not arbitrarily and capriciously disregard the compression alternative.

The Court therefore upheld DEP's decision to issue the Chapter 105 permits and deny Riverkeeper's petition.

[A copy of the opinion can be downloaded here.](#)