

Zoning/Natural Gas Act: Federal District Court Addresses Preemption Issue



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

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Co-Author: Luke E. Vance

The United States District Court for the Western District of Virginia (“the Court”) addressed in a March 9th opinion a preemption issue involving an interstate pipeline. See *Atlantic Coast Pipeline v. Nelson Co. Bd. Of Supervisors, et al.*, 2020 WL 1151073.

The issue was whether Nelson County’s denial of Atlantic Coast Pipeline, LLC’s (“Atlantic Coast”) request to construct a gas pipeline was preempted by the Natural Gas Act (“NGA”).

In October 2017 Atlantic Coast received federal authorization pursuant to the NGA to construct an interstate natural gas pipeline that would span 604.5 miles through Virginia and surrounding states. Twenty-seven miles of the pipeline would run through Nelson County, Virginia.

Atlantic Coast was required by the NGA to obtain a Certificate of Public Convenience and Necessity (“CPCN”) from the Federal Energy Regulatory Commission (“FERC”). FERC’s environmental review of the proposed project resulted in an 866-page Environmental Impact Statement (“EIS”). It concluded that the pipeline project would not result in a significant impact on floodplains or a measurable increase of future flood events.

Atlantic Coast was also required to obtain a permit from the U.S. Army Corps of Engineers (“Corps”). Authorization was received from the Corps through a nationwide permit (part of the Clean Water Act 404 program). A general condition of the permit required that the activity comply with any applicable FEMA-approved state or local floodplain management requirements.

The Nelson County Board of Supervisors (“Nelson County”) amended its zoning ordinances to prohibit structures that produce, use, store, or transport hazardous materials or fuel storage, and other similar improvements and uses from being located in any area classified by FEMA as a special flood hazard area. Approximately 3.5 miles of the pipeline and 1 mile of the access roads would cross areas designated as special flood hazard areas.

Atlantic Coast filed a petition with Nelson County for a zoning permit for its pipeline in October of 2017. The Nelson County Board of Zoning Appeals denied Atlantic Coast’s petition. Nelson County found that Atlantic failed or refused to provide plans demonstrating that it had adequate erosion plans for certain stream crossings.

The issue before the Court was whether Atlantic's CPCN preempted Nelson County's Floodplain Regulations as applied to the pipeline. The Court addressed this issue by assessing conflict preemption and the impact of the Corps permitting scheme.

Atlantic Coast argued that Nelson County's Flood Plain Regulations conflicted with FERC's authority. The Floodplain Regulations were deemed an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. It further argued that both FERC and Nelson County considered the same issue and simply reached different results. Consequently, Atlantic Coast argued the federal policy goals preempt the state goals.

The Court agreed with Atlantic Coast. It found the CPCN rejected the prospect that conflicting state or local laws may be used to block construction of a FERC-approved pipeline authorized by a CPCN. Further, the Court stated that one locality having the ability to halt a FERC-approved project would conflict with the CPCN's plain text and NGA's fundamental purpose of assuring adequate and reliable supply of gas at reasonable prices. The Court stated that even if Nelson County was correct that its Floodplain Regulations were somehow empowered by the National Flood Insurance Act, the National Flood Insurance Act was not one of the three included in the NGA's savings clause.

The Court concluded that Nelson County reached an opposite conclusion as the FERC based on essentially the same environmental considerations. This made denial of Atlantic Coast's variance application a significant obstacle to FERC's determination that public convenience and necessity require that the pipeline be constructed. Thus, as they applied to the Atlantic Coast's pipeline, the Floodplain Regulations were preempted by the NGA.

Next, the Court determined that its conclusion that Nelson County's Floodplain Regulations were preempted was not changed by the Corps' permitting scheme. The Corps' permitting framework provides for some local regulation of interstate natural gas pipelines. However, that is only for FEMA-approved local regulations.

Nelson County based its Floodplain Regulations on a FEMA model provision. Still it made a critical change regarding what constitutes a critical facility. This alteration, which was material to defining Atlantic Coast as a critical facility, caused the regulations to not be FEMA-approved.

Nelson County's Floodplain Regulations were not FEMA-approved. Therefore, they were preempted. The Court granted Atlantic Coast's motion for partial judgment on the pleadings and denied Nelson County's motion for summary judgment.

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