

Natural Gas Pipeline Expansion: D.C. Court of Appeals Reviews Federal Energy Regulatory Commission's Approval



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

06/19/2017

Co-Author: Mary Kate Thompson

The District of Columbia Circuit Court of Appeals addressed the Federal Energy Regulatory Commission's ("Commission") approval of a pipeline expansion project (the "Leidy Project") by Transco (the "Company") in a May 23rd decision. See *Delaware Riverkeeper Network v. FERC*, 2017 WL 2231097.

The Petitioners, the Delaware Riverkeeper Network's ("Riverkeeper") objection to the Commission's decision involved the:

Natural Gas Act ("NGA"), Clean Water Act ("CWA"), and National Environmental Policy Act ("NEPA").

The NGA required the acquisition of a Certificate of Public Convenience and Necessity from the Commission prior to construction of an extension to the natural gas facility. Section 401 of the CWA requires an applicant for a federal license or permit which may result in a discharge into jurisdictional waters to obtain a certificate from the state in which the discharge will originate. Riverkeeper argued that the Commission violated the CWA by granting the Certificate of Public Convenience and Necessity before receiving the § 401 certification from Pennsylvania.

The Court determined that the NGA Certificate of Public Convenience and Necessity was a "federal license or permit" subject to section 401 of the CWA. However, it found that the Commission did not violate Section 401 because it granted the Leidy Project a Certificate of Convenience and Necessity. The basis for this conclusion was the Commission's granting of a subsequent conditional approval. The conditional approval did not authorize activity which might result in a discharge in navigable waters in the absence of a § 401 certification.

Riverkeeper also argued that the Commission violated NEPA by misclassifying wetlands.

Riverkeeper identified 3.8 acres of wetlands that it claimed the Commission misidentified. It cited as an example the classifying of an area as non-forested, or Palustrine Emergent, when the area was "clearly forested."

The Court found that even if true Riverkeeper failed to explain how this misclassification caused the commission's mitigation plan to be significantly deficient. At most this misclassification was deemed to mean some small areas of wetlands would have a longer re-vegetation process; while others would have a shorter re-vegetation process.

The Court concluded that the alleged error was not significant. The Commission was held to have taken the requisite “hard look” necessary under NEPA.

Finally, Riverkeeper argued that the Commission failed to disclose information about safety. The alleged failure was argued to result in the project being treated differently than similarly situated projects. Therefore, the decision was argued to be arbitrary and capricious.

The Court concluded the record reflected that the company responded adequately to all of Riverkeeper’s queries. Moreover, the Court found that the Commission had not treated this project differently from a similarly situated project, the Northeast Upgrade Project. The Commission found that the Northeast Upgrade Project was not hydraulically feasible because its gas flow velocity would exceed 40 feet per second. However, the Leidy Project differed from the Northeast Upgrade Project because it proposed adding looping of 42-inch diameter pipeline. The Leidy Project simply added compression to an existing 24-inch pipeline. Because the situations were not similarly situated, the determination that the Leidy Project’s gas flow velocity of 60-61 feet per second was feasible was not arbitrary and capricious.

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