

# Natural Gas Pipeline/Clean Water Act: Federal Appellate Court Addresses Challenge to 401 Certification



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

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Co-Author: Katie Hicks

The United States Court of Appeals (Fourth Circuit) (“Court”) addressed in a January 14th opinion a Virginia Section 401 certification of the proposed Atlantic Coast Pipeline. See *Appalachian Voices v. State Water Control Board*, 2019 WL 177928.

The project is described as an interstate natural gas pipeline overseen by Atlantic Coast Pipeline LLC (“Atlantic”) which will carry natural gas from West Virginia to the eastern regions of Virginia and North Carolina.

The pipeline’s reach will encompass 74 migratory fish spawning waters or their tributaries and would intersect 89 Virginia rivers and streams. This would require clearance of thousands of acres in Virginia. It will span approximately 604 miles.

Atlantic was required to apply to the Federal Energy Regulatory Commission (“FERC”) for a Certificate of Public Convenience and Necessity under the Natural Gas Act (“NGA”). It was also required to obtain a Section 404 Clean Water Act permit from the U.S. Army Corps (“Army Corps”) and a Section 401 certification from the Virginia State Water Control Board (“Board”).

The Board granted Atlantic all necessary certificates. It approved two distinct Section 401 certifications: an Upland Certification and a Wetlands and Streams certification.

Several environmental groups (collectively “Petitioners”) opposed granting the Section 401 Upland Certification. They petitioned the Court to review the Board’s decision.

The Court was charged with determining whether the Board’s decision was arbitrary and capricious. It noted that state agencies are provided some deference in the review of their decisions.

The Petitioners brought four distinct challenges to the Board’s certification.

First, Petitioners argued that by reopening the comment period prior to the certification, the State Agencies rendered the Section 401 Upland Certification arbitrary and capricious. However, the comment period was only reopened for the Wetlands and Streams Certification—not the Upland Certification—and was thus deemed not relevant to the case.

Second, they alleged that the State Agencies failed to assess the combined impacts on water quality that would result from construction activities in multiple areas.

The Court rejected this argument. It explained that because the Upland Certification is “not designed to function as a stand-alone document,” the Board’s use of other authorities’ analyses was acceptable. For example, the Board supplemented the Upland Certification with the Army Corps’ earlier analysis of cumulative impacts. The Court opined that requiring the Board to conduct comprehensive and independent research regarding the combined impacts on water quality would “be redundant and inefficient.”

Third, Petitioners argued that the State Agencies failed to conduct an adequate anti-degradation review.

Under the Clean Water Act, states have authority to promulgate water quality standards. The statute requires that state standards maintain “existing beneficial uses of navigable waters, preventing further degradation.” The Court found that because the Board relied on existing Virginia water quality standards and regulations when reviewing water quality deterioration, this review was adequate.

The Court explained that any impact on the sediment would be temporary. This eliminated the need for a separate review.

Finally, Petitioners argued that the Board failed to ensure that the water quality in karst geology regions would be protected during the pipeline’s construction. Karst geology is defined as:

“[G]eological formations of soluble limestone bedrock that creates underground water flow systems where the rocks have dissolved and created sinkholes, caves and underground springs and rivers . . . .The constitution of these areas presents additional environmental considerations for pipeline construction including, sinkhole collapse, sinkhole flooding and associated groundwater contamination.” (Emphasis added).

The Court also rejected this claim, stating Atlantic must:

1. provide a Karst Survey Report to the State prior to any land disturbing activities;
2. follow the Karst Terrain Assessment, Construction, Monitoring, and Mitigation Plan which allows for project adjustment to avoid karst terrain; and
3. plan to address any accidental spills or releases during construction on karst terrain. Further, Atlantic has a five million dollar liability to cover the cost of injury to private water supplies, which “encompasses” karst regions.

The Court found no indication that the State Agencies acted arbitrarily and capriciously.

The Section 401 Upland Certification for the pipeline was upheld.

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