

Natural Gas Pipeline/Clean Water Act: Federal Appellate Court Addresses Challenge to New York Denial of 401 Certification



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The United States Court of Appeals for the Second Circuit (“Court”) addressed in a February 5th Summary Order (“Order”) the New York State Department of Environmental Conservation’s (“NYDEC”) denial of a Section 401 Clean Water Act Water Quality Certification. See *Natural Fuel Gas Supply Corporation v. New York State Department of Environmental Conservation*, No. 17-1164-cv.

The water quality certification was required because of Natural Fuel Gas Supply Corporation’s (“NFGSC”) Federal Energy Regulatory Commission (“FERC”) application to construct a natural gas pipeline.

NFGSC applied to the FERC for a Certificate of Public Convenience pursuant to the Natural Gas Act to build and operate a natural gas pipeline (“Pipeline”) in Northwestern Pennsylvania and Western New York.

The Pipeline was approved. However, the applicant also had to obtain Section 401 Clean Water Act water quality certifications from Pennsylvania and New York. The Pennsylvania Department of Environmental Protection granted the required water quality certification. NYDEC denied the state water quality certification. As a result, NFGSC appealed to the Court.

Section 401 of the Clean Water Act prohibits federal agencies from issuing permits or licenses that result in exceedances of water quality standards, or other applicable authorities, of the state. This provision of the Clean Water Act requires an applicant for a federal license or permit to provide a certification that any discharges from the facility will comply with applicable state water quality standards. If not provided, the federal permit or license may not be granted. Further, states can impose certain conditions upon federal permits or licenses as a prerequisite to granting the permit or license.

The Court notes that a review pursuant to the Natural Gas Act is a two-step process. The first step involves a de novo review as to whether the state agency complied with the requirements of the relevant federal law. Second, if there is a determination that the state complied with federal law, there is an analysis of the state agency’s factual determinations under the arbitrary-and-capricious standard of review.

NFGSC argued on appeal that the NYDEC:

. . . applied the wrong legal standard by requiring certainty rather than a ‘reasonable assurance’ of compliance.

The argument was based on the contention that the water quality certification denial letter required the agency “to certify that a project meets State water quality standards.” This was deemed by NFGSC to require it to provide “absolute certainty” that the pipeline would comply with State water quality standards. The appropriate standard was argued to be one that would simply require “reasonable assurance” that a violation would not occur.

NYDEC agreed that the reasonable assurance standard is applicable. It further argued that its denial letter applied this standard and instead NFGSC simply failed to demonstrate that the project would satisfy New York’s water quality standards for turbidity.

The Court subsequently assessed the issue under step two of the analysis. Using the arbitrary-and-capricious standard the denial letter was deemed to insufficiently explain any rational connection between facts found and choices made in regards to the water quality certification. It noted:

We reach this conclusion mindful of the fact that Article III judges lack the expertise upon which we presume agency determinations rely. Although an expert on riparian disturbance might read the Denial Letter and infer a connection between the facts in the record and the Department’s ultimate decision to deny the permit, we cannot with a sufficient degree of assurance conclude that was the case. Specifically, there are no record citations in the Denial Letter and there are no citations to specific projects or studies the Department may have considered.

Also noted was NYDEC’s reliance on consideration of facts outside of NFGSC’s proposal, referencing:

- Permanent culverts
- Wet crossings
- Intake pits

These references were deemed by the Court to demonstrate a misunderstanding of the record or determinations made with respect to other pipeline projects.

The Court also noted that while the NYDEC was not required to adopt the FERC’s water quality findings, there was no indication the state agency addressed evidence in the record that supported those findings.

The Court vacates NYDEC’s decision and remands it back to the state agencies with instructions for it to “more clearly articulate its basis for the denial and how that basis is connected to information in the existing administrative record.”

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