



D.C. Circuit Upholds Conditional Certificates for Natural Gas Pipelines

MAY 24, 2017

Emily Pitlick Mallen

On May 23, 2017, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) issued [*Delaware Riverkeeper Network v. FERC*](#) (*Riverkeeper*). The decision upholds the Federal Energy Regulatory Commission's (FERC) practice of issuing conditional certificates to natural gas pipelines under section 7 of the Natural Gas Act (NGA), prior to a pipeline applicant's receipt of a Clean Water Act (CWA) 401 certification.

Riverkeeper rejected the Delaware Riverkeeper Network's (DRN) argument that FERC's conditional approval of the Transcontinental Gas Pipe Line Company, LLC (Transco) Leidy Southeast Project (Leidy Project) violated the CWA's sequencing requirement. The CWA prohibits federal agencies from authorizing any activity that "may result in any discharge into the navigable waters," before a CWA section 401 certification has been issued by the state in which the discharge may occur. The court considered whether FERC acted unlawfully when it issued the certificate before Transco obtained a CWA section 401 certification from Pennsylvania. It ultimately held that FERC did not violate any sequencing requirements because the conditional approval was merely the pipeline's "first step" towards obtaining construction approval. In fact, the certificate explicitly conditioned Transco's construction approval on the pipeline obtaining a CWA section 401 approval from Pennsylvania. Therefore, absent a Notice to Proceed with construction activity, FERC's conditional certificate provided Transco with no authority to proceed with activity that could result in a discharge or violate the CWA.

Riverkeeper also upheld FERC's environmental analysis of the Leidy Project under the National Environmental Policy Act (NEPA), which the court explained is a procedural statute that serves an informational function but does not mandate particular results. DRN had argued that FERC's wetlands analysis violated NEPA by failing to follow the Pennsylvania or "Cowardin" wetlands classification systems. The court held that FERC took the requisite "hard look" at the impact of the Leidy Project on the environment, evidenced by the fact that it disclosed and applied its methodology for evaluating and classifying wetlands, and met NEPA's informational requirements. The court also found that DRN failed to substantiate additional arguments that FERC's gas flow analysis of the Leidy Project was technically deficient or violated NEPA.

Riverkeeper notes that FERC's interpretation of the CWA, with respect to issuing a certificate prior to Pennsylvania issuing the 401 certification, deserves no agency deference because the U.S. Environmental Protection Agency, as opposed to FERC, is the agency charged with administering that statute. Therefore, it reviewed FERC's compliance with the CWA *de novo*. However, the case could be read as acknowledging the broad authority FERC has to administer the NGA. *Riverkeeper's* holding clarifies that FERC has sufficient flexibility to consider and certificate a project in several stages, including the issuance of a conditional certificate prior to a Notice to Proceed with tree felling or construction. The court also paid FERC's NEPA review considerable deference by reiterating its prior refusals to "flyspeck" FERC's NEPA findings in search of minor procedural deficiencies. Without suggesting that FERC engaged in this type of behavior, the court explained it would not require precise compliance with NEPA procedures when evaluating allegations of agency error.

Riverkeeper now joins a series of recent D.C. Circuit decisions that rejected environmental groups' attempts to quash energy infrastructure projects using allegations of procedural deficiencies. To make its point, the court cites to several of its recent precedents, including *Sierra Club v. FERC* (2016) (holding that FERC's decisions were not deficient under NEPA because the challenged activity, increased commodity exports of liquefied natural gas, was regulated by the U.S. Department of Energy and not FERC); *Myersville Citizens for a Rural Community, Inc. v. FERC* (2015) (holding that FERC's alternatives

analysis was sufficient to satisfy NEPA and that FERC's consideration of the project's negative impacts was adequate under NEPA); and *Gunpowder Riverkeeper v. FERC* (2015) (limiting relief under NEPA to environmental, as opposed to economic, harm). The court also distinguished *Riverkeeper* from a 2014 proceeding of the same name (*2014 Riverkeeper*) in which the court reversed and remanded a FERC order that granted a different pipeline a NGA section 7 certificate. *2014 Riverkeeper* found that FERC violated NEPA and its regulations by failing to review connected, cumulative, or similar actions when its environmental review neglected other pipeline projects in the same general vicinity and sponsored by the same pipeline operator. The *2014 Riverkeeper* decision marks the only successful appellate challenge by an environmental group of a FERC certificate order on NEPA grounds. The case has already been distinguished repeatedly in later D.C. Circuit decisions, including the three described above. By distinguishing it again, *Riverkeeper* suggests either that the holding in the *2014 Riverkeeper* case is the exception and not the rule, or that FERC is doing a better job at NEPA compliance.

Equally important to the questions the *Riverkeeper* case did answer, are the questions it did not answer. For example, the court refused to consider whether letter orders authorizing pre-construction tree-felling prior to the CWA section 401 certification impermissibly approved activity that could result in a discharge into navigable waters. The court determined that Transco's letter orders for the Leidy Project were not appropriately before it on review because they had not been independently challenged by DRN. However, pipeline applicants and regulators should be aware that future legal challenges to notices to proceed are possible if the challenger follows proper appellate procedures.

For more information

Van Ness Feldman's nationally recognized Pipeline and LNG Practice is experienced in addressing complex legal and federal policy questions that often arise in the development and operation of natural gas pipelines. For additional information, please contact the authors of this alert or any member of the firm's [Pipeline and LNG](#) practice group at (202) 298-1800.

Follow us on Twitter [@VanNessFeldman](#)

© 2017 Van Ness Feldman, LLP. All Rights Reserved. This document has been prepared by Van Ness Feldman for informational purposes only and is not a legal opinion, does not provide legal advice for any purpose, and neither creates nor constitutes evidence of an attorney-client relationship.