

THE DAILY RECORD

Monday, June 17, 2019 / Volume III / Number 116 / \$2.00 • Western New York's trusted source for legal and real estate news

Environmental LAW

NYS Department of Environmental Conservation continues fight against National Fuel's northern access pipeline project

Over the last decade, development of shale gas through hydraulic fracturing has blossomed in Pennsylvania. The shale gas boom has led gas companies, including National Fuel Gas Supply Co. from New York, to explore and expand opportunities south of the New York border. Production of natural gas from Pennsylvania sources has led to the need to ship the gas to market. Several years ago, National Fuel proposed a Northern Access Pipeline Project of about 100 miles to bring the gas to Buffalo and link up with a Canadian pipeline under the Niagara River. In order to develop the pipeline, National Fuel applied to the Federal Energy Regulatory Commission (FERC) for a federal permit.

Corresponding to the pipeline permit, National Fuel sought a Clean Water Act (CWA) water quality certificate for the pipeline from DEC. The proposed pipeline route runs through Allegheny, Cattaraugus and Erie counties and includes 192 creek and stream crossings. Not surprisingly, after having refused to permit hydraulic fracturing in New York in 2015 following its protracted environmental impact review process, DEC took a similar dim view of a pipeline project that sought to take advantage of the natural gas produced in Pennsylvania through that method.

In March 2016, National Fuel and its subsidiary, Empire Pipeline, requested the water quality certification from DEC. Under the CWA, the DEC had one year to act on the request, but DEC did not act until April 7, 2017, by deny-



By **GEORGE S. VAN NEST**
Daily Record
Columnist

ing the request. The DEC asserted that the agency and applicant agreed in January 2017 that the application date was revised to April 8, 2016, making the denial timely. FERC granted National Fuel a certificate of public convenience and necessity to construct the pipeline on Feb. 3, 2017, in Pennsylvania and New York. However, under Section 401 of the CWA, the company was required to obtain state water quality certificates from both states prior to proceeding with construction of the pipeline. The Pennsylvania Department of Environmental Protection granted a state water quality certification on Feb. 11, 2018.

As a regulatory agency, FERC ruled that DEC was 44 days late in 2017 when it denied the water quality certification for the Northern Access Pipeline. In 2018, FERC determined that the CWA does not permit an agreement to alter the application date and rejected DEC's request for a rehearing. Earlier this month DEC appealed FERC's denial of the rehearing to the U.S. Second Circuit Court of Appeals.

This is the second time that the parties will be before the Second Circuit regarding the Northern Access pipeline. Following DEC's April 2017 denial, National Fuel petitioned the Second Cir-

cuit for review of the decision under the Natural Gas Act. In a Feb. 5, 2019, unpublished summary order, the Second Circuit reversed DEC's denial of a water quality certification for the pipeline and remanded it back to the state for further elaboration.

In its decision, the Court first determined that DEC complied with the requirements of the federal law, namely the CWA. In a second element of its decision, the Court considered with the DEC's decision was arbitrary and capricious, the standard of review set forth under the Administrative Procedure Act. Applying the arbitrary and capricious standard, the Court determined that "[a]lthough this is a close case, the Denial Letter here insufficiently explains any rational connection between the facts found and choices made."

Significantly, the Court found that DEC did not provide any citations to the record considered in making the agency decision, to specific projects, or to studies DEC may have considered in reaching its conclusion. In addition, the Second Circuit found that DEC based its decision on factors beyond National Fuel's proposal, including stream crossing methods that were not proposed by National Fuel and identified incorrect project features as part of the determination. Finally, although DEC was free to disagree with FERC's findings regarding potential impacts on water quality, the agency should have addressed evidence in the record underlying FERC's water quality findings.

The Court held that “[b]ecause the Department did not sufficiently articulate the basis for its conclusions, on appeal we cannot evaluate the Department’s conclusions and decide whether they are arbitrary and capricious.” Consequently, the Court vacated the decision of DEC and remanded it for DEC “to more clearly articulate its basis for denial and how that basis is connected to information in the existing administrative record.” Despite the Court’s acknowledgment that arbitrary and capricious review is narrow and judges

lack expertise on matters for which the agency determination rely, the holding and discussion is somewhat striking in the extent to which the DEC failed to substantiate its denial of the water quality certification for the pipeline.

After an adverse decision on the substance of the DEC’s decision, the instant appeal by DEC seeking a rehearing on the timeliness of the agency’s denial may face similar challenges at the Second Circuit. It appears that DEC and the State of New York are committed to fighting the Northern Access Pipeline at

every level through regulatory agency and court determinations. Although National Fuel has identified a proposed date of 2022 to open the pipeline, it will remain to be seen whether the regulatory and court proceedings are concluded in a time and manner that will allow for that to take place.

George S. Van Nest is a partner in Underberg & Kessler LLP’s Litigation Practice Group and chair of the Firm’s Environmental Practice Group. He focuses his practice in the areas of environmental law, construction, and commercial litigation.