

Client Alert

February 2012

Second Circuit Denies Stay of Construction of Pipeline

On February 28, 2012, the U.S. Court of Appeals for the Second Circuit lifted an emergency temporary stay of construction activity the court had granted a week earlier on a proposed interstate pipeline and related pipeline facilities in Pennsylvania, serving the Marcellus Shale. The court initially stayed construction pending review of a petition brought by Sierra Club and Earthjustice alleging that the Federal Energy Regulatory Commission (“Commission” or “FERC”) failed to adequately review environmental impacts to Marcellus Shale drilling activity under its National Environmental Policy Act (“NEPA”) analysis. But upon further review of a supplemental response filed by the Central New York Oil and Gas Company (“CNYOG”), the Second Circuit denied the environmentalists’ request for a stay. Although a stay was avoided, this case underscores how the environmental groups are aggressively seeking ways to gain a federal hook into any project even tenuously affiliated with Marcellus Shale and fracking. Central to the court’s ruling was the fact that FERC had given careful consideration to cumulative effects in the environmental assessment (“EA”) for the project. Therefore, it is critical that NEPA analyses of pipeline projects and ancillary features include careful cumulative effects analyses.

Sierra Club and Earthjustice challenged the Commission’s November 14, 2011, issuance of a certificate of public convenience and necessity to CNYOG under Section 7(c) of the Natural Gas Act (“NGA”) to construct and operate a pipeline and related pipeline facilities in Pennsylvania. The pipeline would provide access to interstate markets for natural gas produced from the Marcellus Shale. Sierra Club and Earthjustice filed a request for rehearing of the Commission’s Certificate of Public Convenience and Necessity for the project, challenging the Commission’s environmental analysis and compliance with the NEPA. Specifically, the groups alleged that the Commission should have prepared an environmental impact statement (“EIS”) and considered impacts from shale gas development.

The Commission issued an EA, which approved the project with appropriate mitigation measures and concluded that the project would not constitute a major federal action significantly affecting the quality of the human environment. Thus, the Commission determined that no EIS was required. The environmental groups alleged that the EA did not include a quantitative analysis of the “cumulative impacts” of Marcellus Shale in northeastern Pennsylvania and beyond. But, as CNYOG explained in its supplemental filing before the Second Circuit, the EA contained an analytical cumulative impacts evaluation that evaluated the cumulative effects of the project and Marcellus Shale development and was fully compliant with the requirements of NEPA. The environmental groups also challenged the adequacy of the alternatives analysis for failure to identify any alternative that would not involve the construction of a new corridor through areas untouched by gas development or pipeline construction.

On February 13, 2012, the Commission denied the environmental groups’ request for rehearing. The very next day, Sierra Club and Earthjustice filed an emergency motion for stay pending review of the Commission’s order before the Second Circuit. Although the Second Circuit initially granted this motion, a week later the court, having reviewed CNYOG’s supplemental filing, denied the motion for a stay, which may be a sign that the court believes there is a lesser probability than might have initially appeared that the environmental groups will prevail.

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