

DELAYED PIPELINE CONSTRUCTION IN APPALACHIA

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Agenda

- Federal Condemnation Under the Natural Gas Act
- Condemnation Practice and Procedure
- Overview of Pipeline Projects in Appalachia
- Challenges to Pipeline Projects

Federal Condemnation Under the Natural Gas Act

- Natural Gas Act regulates interstate transportation, sale, and use of natural gas
- FERC is the agency responsible for issuance of certificates and public convenience and necessity, a necessary element to obtain right of eminent domain under Natural Gas Act

Issuance of FERC Certificate

- Application to FERC
- Issuance of FERC Certificate following thorough review and determination that proposed project is if determined it “is or will be required by the present or future public convenience and necessity”
- Review of FERC Certificate
 - Seek re-hearing before FERC
 - Petition for review with Court of Appeals
 - Seeking stay of FERC Certificate

Elements Necessary for Condemnation

- Courts look to the following three elements in evaluating the right to condemn under the Natural Gas Act:
 - whether the party seeking to condemn holds a certificate of public convenience and necessity from FERC;
 - whether the property interests sought, *i.e.*, the easement, right-of-way, land or other property, are necessary to the operation of the pipeline system; and
 - whether the condemnor has been unable to acquire the necessary property interests by agreement from the landowner

Necessity of Easements Condemned

- As to the second element necessary to condemn, the “necessary” element is satisfied by looking to the FERC certificate.

Inability to Acquire Property Condemned By Agreement

- Some courts hold that negotiations to acquire the property must be done in “good faith”
- The majority of courts hold that “good faith” negotiations are not required, the parties must only be unable to agree

Pipeline Projects in Appalachia

Mountain Valley Pipeline Project (the “MVP Project”)

- 303.5-mile natural gas pipeline with three compressor stations, and associated facilities along a route from Wetzel County, West Virginia, to Pittsylvania County, Virginia.
- October 2015: MVP submits application to FERC
- October 13, 2017: FERC issues MVP its FERC Certificate

Pipeline Projects in Appalachia

Atlantic Coast Pipeline Project (the “ACP Project”)

- 600-mile pipeline that will transport natural gas from Harrison County, West Virginia to the eastern portions of Virginia and North Carolina, as well as three compressor stations.
- After a nearly three-year review process, FERC approved the ACP Project and issued it a certificate of public convenience and necessity on October 13, 2017.

Constitutional Challenges

- *Orus Ashby Berkley, et al. v. Mountain Valley Pipeline, LLC, et al.*, 894 F.3d 624 (4th Cir. 2018)
 - Challenges constitutionality of certain provisions of the NGA
 - District Court held that it lacked jurisdiction to hear issues which were the subject of the review process under the NGA
 - Fourth Circuit affirmed

Challenge to Agency Action

- *Sierra Club, et al. v. United States Department of the Interior, et al.*, 899 F.3d 260 (4th Cir. 2018)
 - Petition challenging agency action regarding necessary approvals for the ACP Project:
 - United States Fish and Wildlife Service's issuance of an Incidental Take Statement of five species
 - United States National Park Service's issuance of right-of-way for pipeline through Blue Ridge parkway

Challenges to Agency Action

- *Sierra Club, et al v. State Water Control Board, et al.*, 898 F.3d 383(4th Cir. 2018)
 - Challenge to Virginia’s certification under Section 401 of the Clean Water Act for the MVP Project
 - Fourth Circuit denied petition for review, holding it was arbitrary and capricious

Collateral Attacks on FERC Certificates

- Opponents have used collateral attacks on the FERC Certificate as a method to delay pipeline construction.
- In general, courts have held that collateral attacks on the FERC certificate obtained by the condemnor are not permissible.
- To challenge a FERC certificate, a landowner must seek rehearing with the FERC and then may appeal the decision in a court of appeals, outlined in section 717r of the Natural Gas Act.
- A district court can only review “whether...the certificate of public convenience and necessity is ‘facially valid’...and...the property sought to be condemned is within the scope of the certificate.”

Challenges to Immediate Access

- Courts have granted immediate possession and access upon consideration of safety concerns, construction schedules, and compliance with environmental regulations or restrictions.
- Opponents have recently objected to immediate access on the basis that it is not expressly addressed in the Natural Gas Act.

Challenges to Immediate Access

- Seeking Stay Pending Rehearing at FERC
 - This was rejected by district courts related to the MVP Project; courts held that the NGA provides a remedy to affected landowners because FERC or the Court of Appeals may issue a stay of a certificate issued by FERC, which neither had done in this case

Challenges to Immediate Access

- Challenging Constitutionality of Immediate Access
 - In opposition to motions for immediate access related to the MVP Project, landowners argued that it violated separation-of-powers principles because Congress did not provide for quick-take authority
 - District court rejected this argument and noted that Fourth Circuit precedent holds that condemnor may take possession before just compensation is paid

Challenges to Immediate Access

- In order to succeed in obtaining a preliminary injunction, a plaintiff must establish that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.”
- In district court proceedings related to the MVP Project, landowner-defendants asserted various challenges in an attempt to knock out one or more of the elements necessary to succeed in obtaining a preliminary injunction.

Challenges to Immediate Access

- Irreparable harm
 - In district court proceedings related to the MVP Project, courts rejected arguments raised by landowners:
 - that economic harm was not enough;
 - that MVP's harms were “self-inflicted”

Challenges to Immediate Access

- Balance of the Equities
 - In district court proceedings, landowners argued that MVP's early access would significantly burden their properties and outweighed any harm to MVP.
 - Court held that harm would occur no matter when the pipeline project was constructed, and that harm stemmed from FERC Certificate, not immediate access