

Client Alert

February 2012

Second Circuit Stays Construction of Pipeline For Failure to Examine Environmental Impacts of Marcellus Drilling

In what could be a significant precedential decision, on February 17, 2012, the U.S. Court of Appeals for the Second Circuit granted an emergency temporary stay of construction activity on a proposed interstate pipeline and related pipeline facilities in Pennsylvania, serving the Marcellus Shale. Under review is a petition brought by the 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. Further argument to determine whether the stay will continue is scheduled before the Second Circuit on February 28, 2012.

The Sierra Club and Earthjustice challenged the Commission’s November 14, 2011, issuance of a certificate of public convenience and necessity to Central New York Oil and Gas Company (“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. The environmental groups specifically challenge the Commission’s environmental analysis and compliance with the NEPA.

The Commission issued an environmental assessment (“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 environmental impact statement (“EIS”) was required. The EA recognized that Marcellus Shale development is occurring in several Pennsylvania counties, but explained that the widespread nature and uncertain timing of gas well drilling relative to construction of the project made it difficult to identify and quantify cumulative impacts. Therefore, the EA did not include a quantitative analysis of the “cumulative impacts” of Marcellus Shale in northeastern Pennsylvania and beyond.

The Sierra Club and Earthjustice filed a request for rehearing of the Commission’s CPCN for the project, arguing that the Commission should have prepared an EIS and considered impacts from shale gas development. 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 their request for a rehearing. The very next day, the Sierra Club and Earthjustice filed an emergency motion for stay pending review of the Commission’s order before the Second Circuit.

Hunton & Williams attorneys are available to discuss the implications of this case and decision with you. It is rare that a circuit court issues a stay of a FERC certificate for a natural gas pipeline. The environmental groups are aggressively seeking ways to gain a federal hook into any project even tenuously affiliated with Marcellus Shale and fracking. The scope and duration of the stay will likely depend upon further proceedings before the Second Circuit, beginning with an argument scheduled for February 28, 2012.

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