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Clearing Up Some Pipeline Permit Questions At 3rd Circ.

by Deidre Duncan and Clare Ellis

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The Third Circuit recently issued two decisions concerning the relationship between the Natural Gas Act, or NGA, exclusive jurisdiction provision at 15 U.S.C. § 717r(d)(1) and the administrative review process for state-issued environmental permits for interstate natural gas pipeline projects. These decisions are briefly described as follows:

- In *Delaware Riverkeeper Network et al. v. Secretary of Pennsylvania Department of Environmental Protection, et al.*,¹ the court held that only “final” state agency actions are reviewable under the NGA’s exclusive jurisdiction provision. The court determined, however, that the state-issued water quality certification at issue was reviewable “final” action even though it was subject to further administrative review because, under the relevant state law, the certification had legal effect as issued and was the final action of the agency that issued it.
- In *Township of Bordentown, New Jersey et al. v. Federal Energy Regulatory Commission et al.*,² the court held that state administrative review of environmental permits issued for natural gas pipeline projects is not preempted by the NGA’s exclusive review provision, as the NGA only eliminates state court review of interstate pipeline-related state agency orders.

While these cases help to define the contours of federal appellate jurisdiction under § 717r(d)(1), they leave open several questions with respect to the timing and effect of state administrative appeals of pipeline project permits, namely whether such appeals may proceed concurrently with federal appellate review and whether and under what circumstances the state administrative process must be exhausted prior to seeking federal appellate review. These open questions are of significant consequence to the timing and progression of pipeline construction projects that rely on state authorizations issued pursuant to federal laws such as the Clean Water Act, or CWA, Clean Air Act, or CAA, and other statutes that delegate permitting authority to the states. The Third Circuit’s recent decisions indicate that the resolution of these questions will ultimately turn on the particulars of the state administrative process.

The relevant NGA provision and these two decisions are discussed in more detail below.

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NGA Exclusive Jurisdiction Provision and State Administrative Appeals

The NGA provides for original and exclusive jurisdiction in the U.S. courts of appeals over any civil action for review of a state administrative agency order or action issuing, conditioning or denying a permit or other authorization required under federal law for interstate natural gas pipeline projects subject to certification under NGA Section 7. 15 U.S.C. § 717r(d)(1). Many state laws also provide for review of such agency orders or actions via the state's administrative appeals process. Some states provide for a mandatory period of administrative review, where the permit is not effective until either this period has run with no appeal or, if an appeal is filed, until the state's administrative appeal process has concluded. Other states make administrative review of a permitting decision available but not mandatory. In these states, a permit is final as issued but may be subject to further administrative review either by the issuing agency or some other reviewing body. State laws also vary with respect to who has standing to invoke the review process, whether the permit is stayed pending review and other procedural matters.

Until recently, there was very little case law on whether conclusion of the state administrative appeal process is a prerequisite to judicial review under the NGA exclusive jurisdiction provision and how these two avenues for review of state permitting decisions relate to each other.

Delaware Riverkeeper Decision

In *Delaware Riverkeeper et al. v. Secretary of Pennsylvania Department of Environmental Protection, et al.*, the Third Circuit held — as the First Circuit did recently in *Berkshire Environmental Action Team Inc. v. Tennessee Gas Pipeline Co.* — that only “final” state agency actions are reviewable under the NGA's exclusive jurisdiction provision. Unlike the First Circuit in *Berkshire Environmental*, however, the Third Circuit held that the Pennsylvania water quality certification issued for a pipeline project was reviewable “final” action even though it was subject to further state administrative review via appeal to Pennsylvania's Environmental Hearings Board, or PAEHB. (In that case, third-party groups had filed parallel challenges to the water quality certifications issued for the Atlantic Sunrise project both in the Third Circuit under § 717r(d)(1) and before the PAEHB under state law, but the PAEHB stayed its proceedings pending a Third Circuit ruling on jurisdiction).

The court found that determining whether the decision was final required reference to the Pennsylvania procedures that produced it, but ultimately that question is answered by federal law, not state law. The court cited its previous decision in *Delaware Riverkeeper et al. v. Secretary of Pennsylvania Department of Environmental Protection, et al.*,³ on the standard for finality, in which the court stated that “[f]inal agency action ‘must mark the consummation of the agency’s decision-making process,’ ‘must not be of a merely tentative or interlocutory nature,’ and ‘must be one by which rights or obligations have been determined, or from which legal consequences will flow.’”

Important to the court's decision on this point was the fact that the water quality certification was immediately effective upon issuance, and, regardless of the availability of an appeal before the PAEHB, it was the final action of the Pennsylvania Department of Environmental Protection, or PADEP, the state environmental agency that issued it. According to the court, “[w]hether state law permits further review by the same agency that makes the initial decision or provides for an appeal to a structurally separate body is probative of whether that decision is final.” Under the Pennsylvania scheme, PAEHB is “wholly

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separate” from PADEP and an appeal to the PAEHB does not prevent PADEP’s decision from taking effect. PAEHB’s review of PADEP decisions is conducted largely *de novo*, with parties entitled to introduce new evidence and otherwise alter the case they originally made to PADEP.

Emphasizing these features of the Pennsylvania scheme, the court distinguished Berkshire Environmental — which concerned Massachusetts’ procedures for administrative review of state-issued water quality certifications — because, under the state’s procedures, a certification is issued as a “provisional order that could become final in the absence of an appeal.” The Massachusetts certification process had been characterized by the First Circuit as a “single unitary proceeding,” taking place within one agency and yielding one final decision that was only appealable under the NGA once the state administrative review process had run its course. The First Circuit reached a different result because, under Pennsylvania’s procedures, a water quality certification is final action *by PADEP* as issued and is thus reviewable under the NGA despite the state law provision for further appeal to the PAEHB.

Having confirmed jurisdiction, the Third Circuit proceeded to merits of the challenge to the Pennsylvania water quality certification. All of the arguments raised by the petitioners were rejected, as follows:

- First, the court rejected the argument that PADEP’s written policy for providing notice of water quality certification decisions was inadequate, explaining that nothing in the CWA requires a state to establish notice procedures by way of formal rulemaking;
- Second, the court rejected the argument that PADEP improperly issued its certification conditioned upon the pipeline project obtaining additional substantive permits in the future, since no construction could begin before the substantive permits are granted, allowing all interested parties to weigh in when PADEP considers applications for those permits;
- Third, the court rejected the argument that PADEP’s issuance of a conditional water quality certification violates the takings clause of the Fifth Amendment and the due process Clause of the 14th Amendment because, as a condition precedent to eminent domain proceedings under the project’s FERC-issued certificate, it was based on a “relatively restricted administrative process.” The court noted that this challenge was, in substance, a challenge to the certificate itself, which is subject to review only by a request for rehearing before FERC or by petition for review to the appropriate federal circuit court under 15 U.S.C. § 717r(a); (b);
- Finally, the court rejected the petitioners’ argument that PADEP failed to comply with its state constitutional obligation to safeguard public trust resources when it issued the water quality certification before collecting the environmental data that would be required to issue the substantive permits on which it was conditioned (for the same reasons that it rejected the petitioners’ second argument, summarized above).

Township of Bordentown Decision

The day after issuing Delaware Riverkeeper, the Third Circuit issued its ruling in Township of Bordentown in which it also took up the issue of the relationship between state administrative review of pipeline permit decisions and federal appellate review under the NGA. In Township of Bordentown, the New Jersey

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Department of Environmental Protection, or NJDEP, issued certain water permits required under the CWA and New Jersey law. Third parties requested that NJDEP grant an adjudicatory hearing, as provided under state law, to contest issuance of the permits. NJDEP denied the hearing request, stating as the sole basis for its denial its belief that the Third Circuit has “exclusive jurisdiction to review the issuance of permits regarding interstate natural gas pipeline projects” and that, accordingly, by operation of the NGA, the state administrative hearing process was preempted. The third parties challenged this determination in the Third Circuit.

In analyzing their petition, the court evaluated whether the term “civil action” in the NGA exclusive jurisdiction provision encompasses a state administrative proceeding and ultimately concluded that it does not. The court explained that the term “civil action” applies exclusively to judicial cases and that “state administrative review of interstate gas permitting decisions is not preempted by the NGA.” The purpose of the NGA’s exclusive review provision therefore is “only [to remove] from states the right for their courts to hear civil actions seeking review of interstate pipeline-related state agency orders” made pursuant to federal law.⁴ Having concluded that the NGA does not preempt the regular operation of New Jersey’s administrative review process, the court then analyzed whether the NJDEP’s erroneous interpretation violated New Jersey law — which, while it applies a deferential standard of review of state agency action akin to the federal standard, explicitly provides for no deference to the agency’s interpretation of a statute or its determination of a strictly legal issue. Finding that NJDEP’s interpretation of the NGA exclusive jurisdiction provision was unreasonable, the court remanded to NJDEP with instructions to reconsider the petitioners’ hearing request.

The third-party petitioners in Township of Bordentown also challenged the FERC order granting an NGA certificate of public convenience and necessity to the project. In rejecting these challenges, the court held, among other things, that:

- FERC’s practice of issuing certificates conditioning the start of construction on the project subsequently obtaining a state-issued water quality certification comported with CWA Section 401. According to the court, because the certificate itself does not authorize activities that would result in a discharge to waters, it is not subject to Section 401 authorization prior to issuance; and
- FERC did not improperly segment its National Environmental Policy Act analysis by considering impacts of the pipeline project at issue separately from two other projects in the same area. Because the project under review had independent utility from the other projects at issue and because FERC properly drew the line in determining the cumulative impacts that fell within the scope of its NEPA analysis, the scope of analysis was proper.

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Notes

¹ *Delaware Riverkeeper Network et al. v. Secretary of Pennsylvania Department of Environmental Protection, et al.* (Sept. 4, 2018)

<https://www.pipelinelaw.com/wp-content/uploads/sites/24/2018/09/2018.09.04-Precedential-Opinion-Denying-Petitions-for-Review.pdf>

² *Township of Bordentown, New Jersey et al. v. Federal Energy Regulatory Commission et al.* (Sept. 5, 2018)

<https://www.pipelinelaw.com/wp-content/uploads/sites/24/2018/09/Bordentown.pdf>

³ *Delaware Riverkeeper et al. v. Secretary of Pennsylvania Department of Environmental Protection, et al.*, 870 F. 3d 171 (3d Cir. 2017)

⁴ Township of Bordentown at 60.

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