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Pipeline Ruling Gives Attorneys Guidance on FERC Reviews

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Energy and environmental lawyers across the state said a recent ruling by the U.S. Court of Appeals for the Second Circuit allowing the construction of a 39-mile long, 30-inch wide natural gas pipeline through Northern Pennsylvania to proceed provides some guidance as to the Federal Energy Regulatory Commission's standard of review.

A number of environmental activist groups had opposed FERC's order granting Central New York Oil and Gas Co. permission to build the pipeline, known as the MARC I, claiming FERC did not examine closely enough the possible environmental impact of the project.

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According to the Environmental Protection Agency, an environmental impact statement, or EIS, is a detailed statement on the possible environmental effects of a proposed project.

In *Coalition*, FERC conducted an environmental assessment, or EA, which is meant to help determine whether an EIS is necessary. The agency ultimately issued a finding of no significant impact, or FONSI, eliminating the need for an EIS.

A three-judge panel of the Second Circuit ruled that, through the EA, FERC adequately considered the possible environmental impact the MARC I project could have.

Elizabeth U. Witmer, a partner at [Saul Ewing](#) whose practice includes representing energy companies in siting pipeline facilities and who was not involved in the case, said the ruling is of interest to energy and environmental attorneys because it offers another example of the type of project for which an EA is sufficient.

"It is important because it confirmed what FERC had been consistently doing," she said, explaining that the ruling "confirms that projects of the size and scope of MARC I" will typically only require EAs to proceed.

Witmer said it's been a long time since FERC's ability to decide the appropriate level of environmental review has been challenged and that, while it appeared to her that MARC I was the type of project that required only an EA, the possibility of a court changing the standard was something she closely monitored.

Steve Saunders, a Scranton-based oil and gas lawyer who focuses his practice on representing landowners, said the Second Circuit's ruling was not unusual because challenging FERC is always a difficult proposition.

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"The burden of proof for parties objecting to FERC is so high that it's pretty unusual to find a circuit court that would overturn the federal agency in one of these kinds of cases," Saunders, who was not involved in *Coalition*, said.

a Peckville, Pa.-based energy and environmental lawyer who represents landowners in pipeline disputes, added that FERC has broad discretion with regard to environmental assessments, pointing to the U.S. Supreme Court's 1989 decision in *Robertson v. Methow Valley Citizens Council*, which the Second Circuit cited in its opinion.

The *Robertson* court held that the National Environmental Policy Act "merely prohibits uninformed — rather than unwise — agency action."

"They can make poor, unwise decisions as long as they have facts in front of them," he said. "That really gives you some perspective of what you're dealing with here and that's why it's so important to get the facts in front of them so they don't just arbitrarily or capriciously make a decision."

In February, the Coalition for Responsible Growth and Resource Conservation, Damascus Citizens for Sustainability and Sierra Club filed an emergency motion for a stay of construction pending the court's review of the November 2011 certificate order FERC issued granting Central New York Oil permission to begin building the MARC I.

The petitioners alleged FERC "failed to take a hard look at cumulative impacts" on the environment in its EA.

"The pipeline would slice through intact forest and special protection waters of the Endless Mountains, where the abundance and species richness of bird species are among the highest in the state," the petitioners said in their motion.

"Construction activities will involve the felling of hundreds of thousands of mature trees and encroachment on more than 100 waterways, many of which provide habitat for wild trout. Without a stay of construction, including tree clearing, trees will be removed and irreparable damage will be done, even before petitioners' claims can be heard."

The petitioners said that, regardless of whether FERC should have issued an EIS, the agency failed to consider in its EA "past, present, and reasonably foreseeable future actions" as mandated by Title 40, Section 1508.7 of the Code of Federal Regulations.

"Because FERC failed even to collect data about the impacts of past, present, and reasonably foreseeable shale gas and infrastructure development, notwithstanding the numerous resources available for that purpose identified by both petitioners and the U.S. Environmental Protection Agency, petitioners carry their burden of showing that they are likely to succeed on the merits of their challenge to the sufficiency of the EA," the petitioners said in their motion.

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But in a ruling issued last week, a Second Circuit panel — Judges Ralph K. Winter, Denny Chin and Christopher F. Droney — said the "296-page EA thoroughly considered the issues."

The panel said in its opinion, which was signed by clerk of court Catherine O'Hagan Wolfe, that FERC's certificate order "carefully considered the concerns" raised by members of the public who submitted comments and that the agency's subsequent order denying petitioners' request for a rehearing on the certificate order further explained why FERC decided an EIS was not appropriate in this case.

Witmer said not all pipeline projects are created equal and there may be unique environmental circumstances surrounding one that are not a consideration with regard to another.

For example, she noted, there are some pipelines in New York that, while much shorter than the MARC I, run underwater and therefore required different environmental analyses prior to their construction.

"In this case, since MARC I was going through Northeastern Pennsylvania, that's a fairly well-studied area, so many of the environmental impacts that were identified by FERC were already known," she said.

Saunders, meanwhile, said that if the petitioners don't appeal the Second Circuit's ruling, they'll have little recourse to stop the MARC I project from proceeding.

"Once approval is granted [by FERC] and appeals are exhausted, there's virtually nothing you can do to challenge it unless the pipeline company is not building in compliance with the approval they've received," he said.

Clark agreed, saying that even if the petitioners did choose to appeal, a rehearing is highly unlikely and a grant of certiorari by the Supreme Court nearly unfathomable.

"I'd be extremely surprised if this thing didn't go full speed ahead at this point," he said.

Representatives for both the coalition and FERC did not respond to requests for comment on the ruling.

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(Copies of the seven-page opinion in *Coalition for Responsible Growth and Resource Conservation v. FERC*, PICS No. 12-1191, are available from Pennsylvania Law Weekly. Please call the [Pennsylvania Instant Case Service](#) at 800-276-PICS to order or for information.)

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