

The Sheppard Mullin Six

Natural Gas Pipeline Development

Here are six key items to be aware of today with respect to natural gas pipeline development.

1. State-sovereignty – The U.S. Court of Appeals for the Third Circuit recently found that the Natural Gas Act (“NGA”) does not inhibit or preclude state sovereign immunity with respect to pipeline condemnation actions and does not give natural gas pipelines the right to condemn property owned by states. This will arguably impose additional obstacles to pipeline development on state-owned land and may allow states to “veto” pipelines that must traverse such land.
2. The Appalachian Trail – The U.S. Supreme Court recently ruled in favor of a pipeline project that would cross the Appalachian Trail. The Supreme Court ruled that, contrary to opponents’ arguments, the U.S. Forest Service had the authority to authorize the proposed pipeline to cross the Appalachian Trail because it was in a national forest. However, lengthy and costly legal proceedings ultimately resulted in the developer cancelling the project.
3. Stays Pending Rehearing – The Federal Energy Regulatory Commission (“FERC”) recently promulgated a regulation precluding the construction of certificated natural gas pipeline facilities while requests for rehearing of such certificate authorizations are pending before FERC. The new regulation effectively halts construction until FERC rules on any timely filed request(s) for rehearing or no request for rehearing is timely filed, thus arguably providing opponents of new natural gas pipelines another tool to delay or stymie the construction of such facilities.
4. Tolling Orders – The U.S. Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) recently determined in a pipeline certificate proceeding that FERC lacks authority to issue tolling orders solely for the purpose of avoiding denial of rehearing based on the lapse of 30 days and thereby deferring judicial review. In light of the ruling, litigants in FERC NGA proceedings will have at most a 30-day wait before they may appeal a FERC decision to a court, but the court nonetheless highlighted certain procedural mechanisms FERC has to garner additional time to rule on a request for rehearing if necessary.
5. Nationwide Permit 12 Program Appealed – The Trump Administration recently asked the Supreme Court to review a determination by a lower court to halt the Nationwide Permit 12 program, which allows construction of new pipeline facilities over certain bodies of water on a blanket basis if certain criteria are met. The Supreme Court rejected the Administration’s request as it related to one particular pipeline, but allowed the Nationwide Permit 12 program to continue in other pipeline proceedings.
6. Gas Export/Import Projects – Recently, the U.S. Court of Appeals for the District of Columbia Circuit held that (i) FERC appropriately reviewed an application to construct an intrastate pipeline and export point facilities under Section 3 of the NGA because the portion of the pipeline that was not an export facility was an intrastate pipeline, and (ii) a National Environmental Policy Act review was not required where the majority of the project was not regulated by the federal government. This ruling may make it easier for pipelines seeking to import and/or export gas to construct new facilities without additional federal involvement over the portion of the project not at the border apart from DOE export authorization and Presidential approval.

Key Contacts: Interstate Natural Gas Pipeline Development



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