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Decisions in Pennsylvania and the Fourth Circuit Should Pave Way for Pipeline Development

*By Frank L. Tamulonis III and Margaret A. Hill**

By deciding against local interests opposing pipeline development, two recent cases should facilitate pipeline development, at least in the Fourth Circuit and in Pennsylvania. The authors of this article explain the decisions and the implications.

Two recent decisions, one from the U.S. Court of Appeals for the Fourth Circuit and one from Pennsylvania's Commonwealth Court, rejected arguments from pipeline opponents that, if accepted, would have bolstered local efforts to stymie pipeline development.

ORUS ASHBY BERKLEY, ET AL. v. MOUNTAIN VALLEY PIPELINE, LLC

In *Orus Ashby Berkley, et al. v. Mountain Valley Pipeline, LLC*, landowners challenged Mountain Valley Pipeline, LLC's ("MVP") eminent domain authority for the construction of a Federal Energy Regulatory Commission ("FERC")-regulated pipeline designed to transport natural gas from West Virginia to Virginia.¹

Landowners launched a challenge against MVP and FERC, arguing that Congress's delegation of eminent domain authority to FERC and pipeline developers under the Natural Gas Act ("NGA") was overly broad and unconstitutional, and that FERC's standard to determine whether land is being taken for "public use" does not pass muster under the Fifth Amendment. On December 11, 2017, the district court ruled that the court lacked jurisdiction to consider the constitutional arguments, reasoning that the NGA makes clear that any challenges to FERC orders must be first reheard by FERC, and then can only be challenged in a federal court of appeals.² The plaintiff landowners appealed that decision, which is still pending.

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¹ See 2017 U.S. Dist. LEXIS 202907 (W.D. Va. Dec. 11, 2017).

² *Id.*

Meanwhile, the same judge issued an opinion in a different case affirming MVP's right to construct the pipeline using eminent domain powers granted to it by FERC-issued certificates.³ As a result of that decision, Plaintiffs in *Berkley* filed an Emergency Motion for Order under the All Writs Act seeking to stop MVP from taking any action pursuant to the January 31 decision until the constitutional arguments currently under appeal are decided. The landowner plaintiffs argued that if MVP is permitted to take immediate possession of their property, they will be unable to have their constitutional claims litigated before their properties are irreparably harmed. On February 15, 2018, the Fourth Circuit issued a one-page order denying the landowner's emergency motion, thus permitting MVP to exercise eminent domain for pipeline construction.⁴

DELAWARE RIVERKEEPER NETWORK, ET AL. v. SUNOCO PIPELINE L.P.

In Pennsylvania, the Commonwealth Court recently affirmed a decision by the Chester County trial court dismissing a suit brought by landowners and the Delaware Riverkeeper Network contending that the construction of the Sunoco Pipeline L.P.'s ("Sunoco") Mariner East 2 pipeline ("ME2") violates a West Goshen Township zoning ordinance.⁵

Mariner East 2 is a 351-mile pipeline designed to bring natural gas liquids ("NGLs"), namely propane, ethane, and butane, from the Marcellus and Utica basins in western Pennsylvania, West Virginia, and Ohio to the Marcus Hook Industrial Complex on the Delaware River. ME2 will be constructed predominately in an existing right-of-way previously secured for the Mariner East 1 pipeline.

In 2014, West Goshen Township, located in Chester County, Pennsylvania, enacted a zoning ordinance that restricts gas and liquid pipelines to areas zoned for industrial use, provided a conditional use permit is first obtained. Plaintiffs sought injunctive relief prohibiting ME2 construction, contending that the siting of the pipeline in areas other than those zoned for industrial purposes violates the zoning ordinance. In support, Plaintiffs argued that (1) Sunoco is not a public utility facility regulated by the Public Utility Commission ("PUC"); (2) the ordinance is not preempted by the PUC's authority; (3) the Environmental Rights Amendment ("ERA") establishes the Township's consti-

³ See *Mountain Valley Pipeline, LLC v. Easements to Construct, Operate and Maintain a Natural Gas Pipeline*, U.S. Dist. LEXIS 15724 (W.D.Va. Jan. 31, 2018).

⁴ See Docket No. 18-1042 (4th Cir., Order Issued Feb. 15, 2018).

⁵ See *Delaware Riverkeeper Network, et al. v. Sunoco Pipeline L.P.*, 2018 Pa. Commw. LEXIS 74 (Pa. Cmwlth. Ct., Feb. 20, 2018).

tutional obligation to regulate matters of health, safety, and welfare, such as the siting of the ME2 pipeline; and (4) Sunoco's placement of the pipeline violates substantive due process.

In affirming the trial court's decision, the Commonwealth Court rejected each argument. First, as a threshold matter, the court cited to its 2016 en banc decision in *In Re Sunoco Pipeline, L.P.*,⁶ which conclusively established that Sunoco is a public utility corporation regulated by the PUC. Second, the court held that the ordinance, insofar as it applies to public utility pipelines, was preempted by the Public Utility Code. The court cited to multiple decisions indicating that the General Assembly intended the PUC to occupy the field of public utility regulation. The court further found that the ordinance is preempted because it conflicts with Public Utility Code, which establishes a policy of statewide regulation of public utility services and facilities. Third, the court rejected Plaintiffs' ERA argument, stating that the ERA, established in 1971, was not intended to trump the long-standing, pre-existing policy of statewide jurisdiction of public utility statutes, which were first enacted in 1913. Finally, the court rejected Plaintiffs' substantive due process claim, reasoning that such claims are designed to challenge the legitimacy of a legislative enactment, not a private party's compliance with an ordinance, such as Sunoco's decision not to comply with the ordinance at issue here.

Judge Brobson concurred in the opinion, noting his concern whether Pennsylvanians are the primary and paramount beneficiaries of the ME2 pipeline, but conceding that the issue has been settled in Sunoco's favor. Judge Brobson, however, departed from the majority's dismissal of the suit, preferring instead to remand the matter to the trial court so that it could be transferred to the PUC.

CONCLUSION

By deciding against local interests opposing pipeline development, these two cases should facilitate pipeline development for projects granted eminent domain authority, at least in the Fourth Circuit and in Pennsylvania. That said, opposition to pipeline development remains stiff, and decisions that impact pipeline development are issued on a weekly (if not daily) basis from various state and federal courts, the PUC, the Pennsylvania Environmental Hearing Board, FERC, and state and federal environmental regulatory agencies. For example, on May 15, 2018, in *Sierra Club, et al. v. DOI et al.*,⁷ the same Fourth Circuit vacated an incidental take statement issued by the U.S. Fish and Wildlife Service for the Atlantic Coast Pipeline. The incidental take statement

⁶ 143 A.3d 1000 (Pa. Cmwlth. 2016), appeal denied, 164 A.3d 485 (Pa. 2016).

⁷ No. 18-1082 (4th Cir. May 15, 2018).

authorized the Atlantic Coast Pipeline project, which runs from West Virginia to North Carolina, to affect or “take” certain threatened or endangered species during construction. Vacating the statement strips the project’s ability to impact threatened or endangered species during construction, resulting in a halt of construction in certain areas. Thus, whereas the legal battle challenging domain authority appears to be closing, other legal battles challenging pipelines may be opening.