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NEWSLETTER

New D.C. Circuit Decision Provides Potential Tool to Clear Landowner Litigation From Utilities' Rights-of-Way

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On July 21, 2015, the D.C. Circuit dismissed a case brought by Gunpowder Riverkeeper in an opinion that may make it harder for property owners to challenge permits granted by federal agencies under the National Environmental Policy Act (NEPA).[1] The court found that the group had not proven environmental injury separate from its economic injury. As a result, the organization was outside the "zone of interests" protected by NEPA, which protects against only environmental injury. Without reaching the merits, the court thus halted the organization at the courthouse door. This case could insulate public utilities and pipeline operators from challenges brought by property owners harmed by eminent domain or aesthetic impacts on their property.

The Legal Question: When is Economic Harm Also Environmental Harm?

The case involved a conditional permit granted by the Federal Energy Regulatory Commission (FERC) that authorized the building of a natural gas pipeline by Columbia Gas Transmission in Maryland. The permit authorized Columbia Gas to begin exercising the power of eminent domain to secure a right-of-way for a pipeline. Gunpowder Riverkeeper immediately sued on behalf of the association and its members. For their part, the members who owned property subject to eminent domain proceedings would experience diminution of property value and aesthetic enjoyment. And the association would be separately injured by the degrading of the Gunpowder River and its watershed caused by the pipeline.

Practice Areas

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The D.C. Circuit never reached the merits question of whether the permit should have been granted. Instead, the three-judge panel found by a vote of 2-1 that Gunpowder Riverkeeper had no right to appear before the court in the first place: it lacked "standing," in legal terms.

Under NEPA, a party must not only have constitutional standing but also must fall within the "zone of interests" protected by NEPA. The concept of a zone of interests is that a federal statute is designed for a particular purpose, and only plaintiffs who share that purpose can benefit from legal action. Before the D.C. Circuit opinion, the appeals courts already had split on the issue of whether economic injuries fall within NEPA's zone of interests. The Eighth Circuit, for example, has found that certain provisions of NEPA require agencies to consider the social and economic costs of permitting actions, and that a group that experiences social or economic harm from an agency decision may fall within the zone.[2] The Ninth Circuit has taken the opposite approach, finding that only a litigant who proves a persuasive environmental injury can meet the zone-of-interests test.[3]

Gunpowder Riverkeeper offers insight into the majority of cases that are a hybrid of environmental and economic harm. Suppose a permit of the Department of Energy authorizes a utility or pipeline to take private land through eminent domain, or to construct a tower that obstructs a landowner's view. Individual landowners may primarily experience economic harm from the permit. But they may also experience decreased recreational or aesthetic enjoyment of the environment. Such hybrid claims have traditionally been inside NEPA's zone-of-interests test, even under the Ninth Circuit test. That is, the landowner's economic harm is one of multiple harms, but the landowner is permitted to have mixed motives.

Importantly, *Gunpowder Riverkeeper* applies a new judicial skepticism to these hybrid claims. As the dissent pointed out, the brief, affidavits, and the administrative record all contained numerous allegations of environmental injury. But the court found these purported environmental injuries did not disguise that the principal injury was to the property rights of the litigants. And that was found to be an economic, not an environmental injury. What makes this result so surprising is that Gunpowder Riverkeeper is an avowed environmental interest group. Indeed, the group's mission is "protecting, conserving and restoring the Gunpowder River and its Watershed."[4] District courts had previously applied similar skepticism as to whether an environmental claim was really "an economic injury in disguise."[5] But not to a similarly situated environmental conservation group. The D.C. Circuit's skepticism could be a persuasive rationale for courts to restrict private landowners' ability to bring a hybrid claim against pipeline or utility line construction on or near their property.

Possible Implications for Utility Companies and Landowners

Whether this case is indeed a departure from prior case law—as opposed to a unique set of facts—will be quickly tested. Advances in the electric grid create a ripe environment for more NEPA litigation. Historically, a high percentage of these actions were authorized by state permits and governed only under state law, meaning that NEPA did not apply and the only remedy was for a landowner to seek reasonable compensation through an eminent domain action in state court.

That is no longer true. Alternative power sources are increasingly a part of an interconnected electric grid, used to plug variable customer demand, build smart grid capabilities, increase grid reliability, and lower carbon emissions. Such interconnectivity requires building of new and longer power lines operated at higher voltages to connect solar or hydropower facilities to traditional natural gas and coal power electrical grids. This demand is increasingly managed on regional (interstate or even international) exchanges and requires federal funding, federal agency oversight, or federal permits. Take, for example, the Northern Pass Transmission Line, for which an Environmental Impact Statement was released in July 2015 estimating that bringing hydroelectric power from Canada to New England would cost $1.06 billion. Typically, one would expect a large number of NEPA challenges to this transmission line. One effect of *Gunpowder Riverkeeper* may be that such challenges from one frequent challenger—private landowners within the right-of-way or who will face obstructed views—are less likely to succeed.

Other factors also have led to more federal involvement in electrical transmission. For instance, excess natural gas in some regions of the country—particularly the Northeast—requires interstate pipeline development, often bringing natural gas to traditional coal states in the Southeast where supply is lower and prices are higher. And enforcement of the North American Electric Reliability Corporation's standards for reliability—which often require backup or redundant power lines—has led to construction of new transmission lines in hard-to-reach areas, often including federal grants from the Rural Utilities Service (consequently bringing historically state actions under NEPA).

In short, *Gunpowder Riverkeeper* could impact litigation at multiple levels of the electric grid. In its aftermath, both landowners and utilities must be more strategic about crafting their litigation approach. Early strategic choices can determine whether a potential challenge to far-reaching federal licenses ever make it past first base to reach the merits.

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[1]*See Gunpowder Riverkeeper v. FERC*, No. 14-1062, 2015 WL 4450952 (D.C. Cir. July 21, 2015).

[2]*See Friends of Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1125-26 (8th Cir. 1999).

[3]*See Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 943-44 (9th Cir. 2005).

[4]*See* Gunpowder Riverkeeper, http://www.gunpowderriverkeeper.org/ (last visited July 23, 2015).

[5]*Yount v. Salazar,* No. 11-8171, 2013 WL 93372, at * (D.Ariz. Jan. 8, 2013) (*citing Cal. Forestry Ass'n v. Thomas,* 936 F.Supp. 13, 22 (D.D.C. 1996)).