Court Rulings Stymie Pipeline Projects

By Emily B. Thomas

DENVER—With soaring growth in natural gas and natural gas liquids production, the Appalachian and Mid-Atlantic regions arguably have held the most urgent need for large-scale transmission capacity development. Specifically, producers have faced the quandary of how to develop the infrastructure necessary to transport the backlogged surplus of gas from the Marcellus and Utica shale plays to the numerous population centers along the East Coast as well as markets in other regions.

The Mountain Valley Pipeline (MVP) project has garnered much of the attention when it comes to meeting this goal, as well as the controversy. The ballad of the MVP underscores the legal challenges facing pipeline projects in the region. As the designated project website states, “With a vast supply of natural gas from Marcellus and Utica shale production, MVP is expected to provide up to 2 million dekatherms per day of firm transmission capacity to markets in the Mid- and South Atlantic regions of the United States.”

The MVP project was proposed as an interstate natural gas pipeline system that would span 303 miles from northwestern West Virginia to southern Virginia. The MVP is being constructed and owned by Mountain Valley Pipeline LLC, which is composed of five partners, with EQT Midstream Partners holding the largest interest, WGL Midstream 10 percent, and RGC Midstream 1 percent.

The Federal Energy Regulatory Commission opened its docket for this project on Oct. 27, 2014. In 2016, when the MVP project was picking up steam, it promised to meet the need for transmission capacity to the Mid-Atlantic and Appalachian regions by linking existing infrastructure and corporate presence along the route. According to a Jan. 22, 2016, press release from MVP LLC:

“With the rapid development and vast supply of natural gas in the Appalachian region, the strategic design of the MVP will extend from the Equitrans transmission system in Wetzel County, W.V., to Transcontinental Gas Pipeline Company’s (Trancco) Zone 5 compressor station 165 in Pittsylvania County, Va. The MVP is expected to provide at least 2 million dekatherms per day of firm transmission capacity and has secured commitments at 20-year terms for this amount, which will support communities along the route, as well as the growing demand markets of the Mid-Atlantic and Southeast regions of the United States.”

MVP LLC proceeded to acquire FERC authorization and garnered the necessary permits, including those from the U.S. Army Corps of Engineers and the Bureau of Land Management. Construction of the pipeline began in October 2017.

Legal Onslaught

These early “on-the-ground” successes quickly were met with an onslaught of legal challenges, leading to appellate proceedings in both the D.C. and Fourth Circuit Courts of Appeals. Through these battles, environmental groups have racked up some headline-grabbing victories in the Fourth Circuit related to the permits.

First, on July 27, 2018, the Fourth Circuit addressed petitions seeking review of the BLM’s decision granting a right of way through federal land for construction and operation of the MVP project and the decision of the U.S. Forest Service to amend the Jefferson National Forest Land Resource Management Plan to accommodate the right of way and pipeline construction (Sierra Club Inc. et al v. U.S. Forest Service).

The Fourth Circuit held that aspects of the Forest Service’s decision failed to comply with its obligations under the National Environmental Policy Act and National Forest Management Act. Specifically, the Forest Service originally had expressed concerns with the estimated containment value of the project. Yet, the Forest Service later adopted FERC’s environmental impact statement and approved the project permit, even though these concerns were purportedly not addressed. The court held this fell short of the “independent review” the Forest Service was required to conduct before adopting FERC’s EIS.

Additionally, the court found BLM failed to comply with the Mineral Leasing Act by not looking closely enough at alternatives that would make greater use of existing rights of way.

Thus, the court vacated both the Forest Service and the BLM’s decisions.

This ruling was an unfortunate loss for the MVP project. However, because it only related to the portion of the project that runs through federal lands (roughly...
in these times with well-organized environmental and landowner opposition to energy infrastructure development supporting fossil fuels.”

In the meantime, the most significant assault facing the MVP project is still outstanding. In the D.C. Circuit, environmental groups are attacking the FERC certification of the project as a whole. So far, although the environmentalists have had success reversing permit approvals in the Fourth Circuit, they have not been as fortunate in the D.C. Circuit. On Aug. 30, the court denied a motion to stay pipeline construction while it reviews this appeal. Thus, construction will continue as the D.C. Circuit litigation moves forward. This is a positive outcome for the MVP project, as it is unknown how long it will take for this litigation to resolve.

Overall, according to Bloomberg estimates, these various legal and regulatory obstacles could delay the MVP project for as long as a year, while increasing cost estimates by almost an additional $1 billion. Moreover, the longer the project is delayed, the greater the risk that shippers on the project may exercise opt-out rights that shippers commonly include in their agreements with pipeline project developers.

**Stymied In Courts**

Notably, although these rulings on the MVP project have sent periodic ripples of concern through Wall Street and the media, they are only the most recent examples of how East Coast pipeline projects are being stymied in the courts.

For example, the Mariner East 1 and Mariner East 2 pipeline project in Pennsylvania has made great strides toward completion, but only after facing legal turmoil of its own. The project is helmed by Sunoco Pipeline LP, a subsidiary of Energy Transfer Partners, LP.

According to the company, the Mariner East project transports NGLs from the Marcellus and Utica in western Pennsylvania, West Virginia and eastern Ohio to destinations in Pennsylvania, including Sunoco’s Marcus Hook Industrial Complex on the Delaware River, where the NGLs are processed, stored and distributed to local, national and export markets.

The first phase of the project, Mariner East 1, consisted of interstate and intrastate propane and ethane service and commenced operations in the fourth quarter of 2014 and the first quarter of 2016, respectively. The second phase, Mariner East 2, was designed to expand total take-away capacity to 345,000 bbl/d for interstate and intrastate propane, ethane and butane, and initially was expected to commence operations in the third quarter 2017.

However, this major project has hit snags that have delayed the completion of Mariner East 2. The Pennsylvania DEP suspended completion on Jan. 3, 2018, and fined Sunoco Logistics Partners in relation to the project. Additionally, the Pennsylvania Public Utility Commission resolved in September a complaint regarding a shut-off valve that had held up the pipeline.

Although the project is near completion, it is still the subject of a class action in the Eastern District of Pennsylvania. This litigation, arising out of landowner claims of property damage during the pipeline construction, would not halt or affect construction (March et. al. v. Sunoco Pipeline LP et. al.).

Similarly, in September, environmental groups brought Fourth Circuit challenges
to revised permits that the U.S. Department of Interior granted to the proposed 600-mile Atlantic Coast gas pipeline project.

This underground natural gas pipeline will originate in West Virginia, travel through Virginia with a lateral extending to Chesapeake, Va., and then continue south into eastern North Carolina, ending in Robeson County. The project, led by Dominion Energy Inc., will service five of the largest public utilities in the region: Dominion Energy, Duke Energy, Piedmont Natural Gas, Virginia Natural Gas, and Public Service Company of North Carolina.

Though each of these projects has faced different legal and regulatory obstacles, they all share the common thread of assaults on projects practically from their inception, in spite of the apparent need for the end product.

The pattern also underscores a tension between the current push from the Trump administration to “fast track” the approval of extensive infrastructure projects, and taking the legal steps necessary to withstand the seemingly guaranteed court challenges that such large-scale endeavors are facing from environmentalist and landowner groups alike.

Therefore, now more than ever, it is vital for developers to buttress their permitting and project activities with careful legal and regulatory planning, with the assumption that litigation may be waiting around the corner, regardless of public or governmental support for a project.

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