

The Legal Intelligencer

Recent Court Victories for Environmental Stakeholders: What Do They Mean?

By Charles J. Dennen

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In the last month, stakeholders have won significant victories in both federal and state courts regarding environmental issues that impact the commonwealth of Pennsylvania.

In one notable case, stakeholders sought to vacate an order issuing a certificate to allow the construction and operation of an interstate pipeline that would run through Pennsylvania and several other states. In another key example, stakeholders sought to intervene in litigation challenging Pennsylvania's involvement in a greenhouse gas initiative intended to lower carbon dioxide emissions by electric power plants.

The below article explores these recent decisions and the potential implications moving forward.

'New Jersey Conservation Foundation v. FERC'

In January 2023, the Federal Energy Regulatory Commission (FERC) issued a certificate allowing the Transcontinental Gas Pipe Line Company LLC (Transco) to construct and operate a pipeline running through New Jersey, New York, Delaware, Maryland and Pennsylvania. The New Jersey Conservation Foundation, New Jersey League of Conservation Voters, Aquashicola Pohopoco Watershed Association, Delaware Riverkeeper Network, Sierra Club, Food & Water Watch, Catherine Folio, and Maya van Rossum (collectively petitioners) argued that in approving the pipeline, FERC arbitrarily overlooked significant environmental consequences. In addition, Petitioners and intervenor for petitioners, New Jersey Division of Rate Counsel, contend that FERC failed to adequately consider evidence suggesting a lack of market need for the pipeline's additional capacity and New Jersey state laws mandating reductions in natural gas consumption.

In March 2021, Transco applied to FERC for a certificate to construct and operate the Regional



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Energy Access Expansion Project to expand delivery of gas by 829,400 dekatherms per day. The majority of the expanded gas delivery was earmarked for New Jersey, with the rest going to New York, Delaware, Maryland and Pennsylvania. The project would consist of building approximately 22.3 miles of 30-inch-diameter lateral gas pipeline and 13.8 miles of 42-inch-diameter loop pipeline in Pennsylvania; one new gas-fired compressor station in New Jersey; modifications to five existing compressor stations in Pennsylvania and New Jersey; and the modification and addition of other ancillary facilities. In support of its proposal, Transco submitted a market study seeking to demonstrate market need for the project.

The petitioners intervened in the proceedings before FERC and argued that: the project was not needed to serve rate payers; the project would impose unnecessary costs on rate payers; and New Jersey's current gas infrastructure is more than able to meet current and future demand.

On July 30, 2024, the U.S. Court of Appeals for the D.C. Circuit Court agreed with petitioners, finding that FERC's decision to authorize the construction and operation of the natural gas pipeline running through New Jersey, New York, Delaware, Maryland and Pennsylvania was arbitrary and capricious. As a result, FERC's order was vacated and the case was remanded to FERC.

'Shirley v. Pennsylvania Legislative Reference Bureau'

The Regional Greenhouse Gas Initiative (RGGI) is a cooperative effort among 11 northeastern and mid-Atlantic states intended to reduce carbon dioxide emissions by electric power plants. The Pennsylvania Department of Environmental Protection (Pa. DEP) developed a rulemaking package to effectuate Pennsylvania's membership in RGGI. The other states who are members in RGGI are: Connecticut; Delaware; Maine; Maryland; Massachusetts; New Hampshire; New Jersey; New York; Rhode Island; and Vermont.

Three nonprofit environmental corporations—Citizens for Pennsylvania's Future; Clean Air Council; and Sierra Club (the nonprofits)—sought to intervene in ongoing litigation in an effort to defend the RGGI regulation against challenges brought before the Commonwealth Court. The nonprofits sought to defend the regulation under the Environmental Rights Amendment of the Pennsylvania Constitution (ERA), which the Pa. DEP did not invoke in their arguments in defense of the regulation. The Commonwealth Court denied the nonprofits' motion to intervene and also issued a preliminary injunction on the basis that the RGGI is an unconstitutional tax—the injunction became permanent in November 2023.

The nonprofits appealed the denial of intervention as well as the issuance of a preliminary injunction. The Pennsylvania Supreme Court reversed the denial of intervention, finding that Pa. DEP did not adequately represent the nonprofits' interests in the litigation because Pa. DEP never invoked the ERA in support of the rulemaking package or in defense of the regulation, and thus the ERA argument was a "salient and nonfrivolous argument regarding the central question ... of whether the RGGI Regulation is an unconstitutional tax."

The nonprofits' appeal of the preliminary injunction was deemed moot as a result of the commonwealth's

grant of a permanent injunction against enforcement of Pa. DEP's rulemaking package to effectuate Pennsylvania's membership in the RGGI.

What Do Recent Wins for Environmental Stakeholders Mean?

The recent rulings by the D.C. Circuit and the Pennsylvania Supreme Court are most certainly wins for the stakeholder community. These decisions come on the heels of last year's decision by the Pennsylvania Supreme Court—in an action brought by the Clean Air Council, Delaware Riverkeeper Network, and Mountain Watershed Association against the commonwealth and Pa. DEP—that made it easier for members of the public who successfully appealed permits that allowed industrial activities resulting in harm to members of the public to more easily obtain reimbursement of legal fees incurred in challenging said permits.

Interestingly, the nonprofits in *Shirley* successfully intervened in their efforts to defend a rulemaking package promulgated by Pa. DEP, whereas the petitioners in the New Jersey Conservation Foundation case successfully argued against the issuance of a certificate to allow the construction and operation of an interstate pipeline. If nothing else, these decisions demonstrate not only the continued savvy of environmental stakeholders to identify areas ripe for challenge while utilizing the laws to both support and defend environmental laws, but courts' willingness to allow environmental stakeholders to intervene in ongoing litigation and rule in their favor, where appropriate.

These cases serve as further notice to government agencies and the regulated community alike that environmental stakeholders remain ubiquitous and are keeping a close eye on any and all environmental happenings, no matter whether it is in support of or in opposition to laws, regulations, initiatives, or industry action. In fact, these victories may only serve to embolden environmental stakeholders to involve themselves in issues they deem worthy of attention.

As a result, government agencies and the regulated community should stay alert, knowing that these environmental stakeholders are not only watching but winning.

Charles J. Dennen is a partner at Archer & Greiner in the environmental law group. He can be reached at cdennen@archerlaw.com and 856-673-3932.