

Marcellus Shale Update: Trump v. Cuomo - The Battle of the Pipelines

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President Trump joined the pipeline battle last week by issuing two Executive Orders aiming at limiting the power of state officials to determine federal policy. One Order calls on the Environmental Protection Agency to streamline its process for awarding oil and gas permits and to expand the ability of the nation's railroads to transport liquid natural gas. The other Order limits to the President personally the right to "issue, deny or amend" permits for infrastructure projects that cross international boundaries of the United States. Not surprisingly, the environmental community is appalled, and certain governors have blasted the Executive Orders as being a usurpation of state power by the federal government.

As discussed innumerable times on this blog, the permitting issue in the first Order revolves around something known as a Section 401 State Certification of Water Quality. This is a certification under the Federal Clean Water Act from a state confirming that any interstate pipeline that may result into a "discharge" into "navigable waters" within its boundaries will comply with the Clean Water Act.

Initially after enactment of this legislation, many states did not pay close attention to Section 401. They either did not act on requests for certification for more than a year, in which case the state's authority to act was deemed waived, or trusted the applicable federal agency. This includes pipeline projects for which FERC, the Federal Energy Regulatory Commission, retains primary jurisdiction.

Enter New York Governor Andrew Cuomo. Cuomo was terrified of the power and influence of the New York State environmental community. Without really raising any specific good faith environmental objections, in 2016 Governor Cuomo ordered his New York Department of Environmental Conservation to deny the issuing of the Section 401 Certification for the Constitution Pipeline. This pipeline is a proposed 165 mile link running from the Marcellus Shale gas fields in Northeastern Pennsylvania to the Southern Tier of New York State. There, the Constitution would connect into another larger pipeline called the Tennessee Pipeline which led into New England.

Without this link, natural gas from the most prolific gas fields in the world now has no way of being transported to New England. Just five hours away from the Marcellus, Boston instead relies on natural gas imported over the ocean from Trinidad and Tobago, and at times from Russia. In effect what Governor Cuomo did was dictate energy policy not just for his own state but for all of New England as well.

Since Cuomo's action, other governors have emulated his refusal, turning energy policy into a hodge podge of conflicting local policies and chaos. Using Section 401, Massachusetts, Vermont, Michigan and others have blocked the permitting of interstate pipelines coming within their borders, insisting against all evidence that the energy shortfall from denial of pipeline access can be made up with so-called "renewables". Those on the ground who have to deal with the real world implications of this situation understand its ramifications. Consolidated Edison, the franchise power company in Westchester County New York, already was recently forced to declare a moratorium on new gas hookups as there is no available supply. The needed gas is just two hours away in Northeast Pennsylvania, but Governor Cuomo won't let it arrive.

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While there are bound to be judicial challenges, President Trump's Executive Order is the first step in the federal pushback against what actually can be seen as a state usurpation of an inherent federal power. Pipelines cross state boundaries. Thus, they are classic examples of Interstate Commerce. Constitutionally, that should be a matter of federal and not local concern or jurisdiction.

From a purely legal standpoint, however, the President's Executive Order may not work. It clearly raises innumerable legal issues about federalism, executive authority, environmental enforcement and numerous other legal concepts – many still untested in the courts. Also, it gives no real explanation for how a mere Order from the Executive Branch can override a federal statute, which clearly refers to the "licensing or permitting agency... from the State."

Despite all of these uncertainties, however, the Order really had to happen – if for no other reason than to highlight the debate and the substantial energy dilemma that now exists in the Northeast as a result of the absence of rational and cohesive energy laws and policies throughout the nation. Within all of our laws there is an implied element of good faith. Nowhere does the Clean Water Act assume or provide that a state can purposely refuse to issue these types of permits for any reason based on that state's unilateral policy decision. In reality, without ultimate federal control, the entire system could and likely will collapse. That certainly was never the intent of Congress in enacting Section 401.

While advocates of a "green revolution" intend to fight the President tooth and nail, their objections in the end will defeat their own cause unless they realize that we all are in this together. The Green New Deal talks about eliminating fossil fuels by 2030. However, even if this were scientifically possible (which it really isn't without massive use of nuclear power that many reject for other reasons), Alexandria Ocasio-Cortez, Ed Markey and their supporters offer no way of constructing the infrastructure needed to move, and especially store, renewable energy given the current system, available technology and the current level of state environmental rejection.

Although it almost doesn't seem possible, the noise level over national environmental and energy policy will be ramped up following President Trump's Executive Order. Each side will raise the specter of the apocalypse should the other side prevail. What really matters though, is what kind of system can be restored that retains federal control over interstate energy transmission, respects local concerns about environmental protection, pays due regard to the need to combat climate change, and guards against grandstanding politicians who will use whatever means they can to leverage local platforms as a way to assert control over all of our lives.

ATTORNEYS MENTIONED

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