

Speaker 1: Welcome to Eagle environment of insights podcast.

Speaker 2: You're listening to another episode of empire environmental, a mini series of legal environmental insights. This is Steve Russo. I am here with my colleague Zachary knob, who is a shareholder [00:00:30] in GTS Albany office. I am a head of the New York environmental practice in the New York city office. And today we're going to be talking about pipeline projects in new York's state and local approvals, and also some recent developments at the federal level that have tried to lessen the potential for these local approvals to stop, um, interstate pipeline projects. So Zach, how are you doing today? Want to provide our listeners with a bit of background on your practice?

Speaker 3: [00:01:00] I'm a shareholder in Greenburg, trout, rigs, uh, environmental and energy practices. And, uh, I came to, to Greenberg from state government where I held a number of positions in, in governor Cuomo's administration, uh, including, uh, working on his energy and environmental portfolio and, uh, deputy counsel for the governor.

Speaker 2: So you really had a ringside seat Zack at the fact that there's [00:01:30] been a number of interstate pipeline projects that have, um, sought to traverse New York that have fallen on the Shoals of the water quality certification, which we're going to get into what that is, but it's essentially a creature of the federal clean water act that requires a state sign off for these projects. And, um, the constitution pipeline. I think you were there when that happened. There's been other pipeline projects that have failed. And of course, very recently there's been a denial of what's known as the Northeastern supply [00:02:00] enhancement or Nessie project, um, that was intended to bring natural gas to downstate New York, which was also denied a water quality water quality certification from New York state, um, which essentially has, uh, stopped the project in its tracks. So what do you think is going on in New York state Zack?

Speaker 3: Well, a ringside seat is a good way to put it, Steve. Uh, they were certainly contentious pipeline projects. And I remember back in the day when, [00:02:30] you know, water quality certificates were really mostly a box that you checked on a permit application in, in recent years, they've been latched onto, by a number of environmental groups that are concerned about natural gas pipelines and New York has really been at the, a big battleground for this area between the, the environmentalist's and companies seeking to put in [00:03:00] this natural gas infrastructure, the water quality certificates come out of, as you mentioned, the clean water act, uh, which requires that for any federally licensed or permitted project that may result into a discharge into waters of the United States, the states have to issue these water quality certificates to, to ensure that the discharge complies with the applicable water quality standards in a given state.

Speaker 3: Uh, so, [00:03:30] you know, the, the statute gives states a, a reasonable time, but not to exceed a year, uh, to issue these water quality certificates. And usually states would use that one year to try to work out with, uh, with a company, how its project could comply with the applicable water quality standards. Um, but you know, in, in recent years and because of some recent court decisions, uh, [00:04:00] that instead of, for example, pushing the pause button and trying to be able to negotiate how the project could reach compliance, uh, states have kind of been forced into denying the projects,

uh, in order to, to meet the requirements and not waive their ability to issue or deny the, the water quality certificate.

Speaker 2: Well, it's interesting that you mentioned that it used [00:04:30] to be kind of non-controversial and I'm in a prior episode of this podcast, we talked to our colleague Howard Nelson from the DC office about the federal energy regulatory commission process and gas pipelines. And the fact is the design of federal law is essentially to, because these things are interstate pipelines to kind of have a one-stop shop in front of FERC, and really the only local approvals for most of these major pipeline projects is this water quality certification. And [00:05:00] given that natural gas has become politicized as part of the fight over climate change and fossil fuels in general, uh, it's become a major pressure point as you noted, and maybe to felt kind of in between a rock and a hard place when it comes to issuing these water quality certifications. But a lot of people also think that politics is behind most of this and that they're just ginning up supposedly water quality basis for things that are pretty standard [00:05:30] and can be mitigated and addressed. And that really what this is about as a broader policy to promote renewables and at the expense of, um, natural gas supply and really squeeze natural gas supply because of the concern that it could freeze out other energy sources. What do you think about that?

Speaker 3: Well, it, it's interesting and that brings in the, the recent EPA rule that tries to address that, that very issue. [00:06:00] Um, you know, the, the EPA looking at this, uh, apparently had some concerns that states were abusing their ability to either withhold certification for projects or delay those, the issuance of those certifications for a long time, uh, and effectively kill projects that, uh, should otherwise be granted a certification. The new EPA rules sets the sets of [00:06:30] the timelines, uh, for these projects, uh, specifies as case law has that, uh, you know, you, you start the clock running from the submission of the application. So states can no longer, uh, do things like, uh, consistently, uh, extend out the, the time that time period cannot be told. Um, and it also limits the scope of state's review to [00:07:00] just those, uh, areas that directly address water quality requirements. Now, there are obviously some other concerns that may be driving state decision-making on, on this issue. Uh, you, you see it in the recent Nessie pipeline decision from the New York state department of environmental conservation, where they go into great detail in the decision about [00:07:30] the potential climate impacts of encouraging fossil fuel infrastructure, although they ultimately do deny it on a water quality basis. So, you know, query whether the, the limitation on, on the scope is going to actually high the state's hands in this respect, but there's, that's interesting.

Speaker 2: I want to just, I want to just explore that though a little bit, Zach, which is I really, so, so you're saying this nest, I found this Nessie decision [00:08:00] very interesting, and it certainly got a lot of press, even though the bulk of the decision was based on potential water quality impacts from this pipeline. Uh, there was, uh, there was this piece of it where they talked about this relatively new statute enacted in New York state called the climate leadership and community protection act, um, cl CPA, which has very ambitious, renewable energy goals in the state through, in the CLC CPA, kind of near the [00:08:30] end of their water quality certification and said, in addition, we have these goals and we

think this interstate project, um, pipeline gas pipeline could be antithetical to meeting these goals because we're going to have this additional supply I, for one, and I think a lot of other people thought that's a dubious ground to put into a water quality certification decision, which really is a creature of the federal clean water act and seems to be limited to water quality issues, not [00:09:00] other broad state initiatives. So, um, I thought it was interesting thing and an almost problematic that they added that. And then it could crowd out the fact that they added these other water quality issues. And it seems like exactly the kind of thing that EPA was trying to say, you can't do. What are you,

Speaker 3: I think that's, I think I agree with that. And I think that's exactly what EPA was, was trying to get at. If you look at the clean water act, it [00:09:30] does limit the reasons that a state can deny this to, and it references, uh, several sections of the clean water act that relate to, uh, uh, industrial discharges, municipal discharges, et cetera, suggesting that really there, there has to be a direct nexus to, uh, a, at least a discharge, uh, into the waters of the United States in order [00:10:00] to be able to deny the certificate. In other words, they, you, you can't do it. Uh, I state can't do it just based on the potential, say for greenhouse gas emissions, uh, when there's no nexus to a discharge into the water. Of course, when you're talking about pipelines as, as you know, especially in a state like New York that has fairly stringent water quality standards, [00:10:30] uh, it's very difficult to construct a project like that without at least some potential for violations of water quality.

Speaker 2: Yeah. And we're starting to stray into technical areas where you and I are not the most proficient, but they decision talked a lot about the mixing zone and technical issues. Um, but what I, and, and I don't really know much about that as you know, a former colleague of mine said, I didn't go to that school, but the fact of the matter is [00:11:00] I do think maybe other types of projects could have those same type of sedimentation mixing zone issues, but they're the type of projects that state my one. So perhaps they threw in that CLC CPA reference, um, because they're concerned in the future that they could have a similar project, a similar impact, but a different kind of project, perhaps maybe a power line to a renewable project, um, where they want to come out differently. I'd say that's the cynic in me, but perhaps that [00:11:30] was what motivated and putting in that additional stuff.

Speaker 3: That's a, that's a very good point. And if, if the EPA rules survives the inevitable challenges that I think we're going to see from states, uh, you know, I wonder whether states are going to want to put that into these water quality certificate denials, um, you, especially where it could expose them to overturning the denial if it's challenged in court,

Speaker 2: [00:12:00] Right? I mean, a court could say, well, look, we're just going to rely on the water quality part of this. But when you add in the other stuff, there is, there is always a risk that a court could look beyond the, beyond it and say, the technical water thing is just a subterfuge. This other stuff is really what was driving the decision. Clearly the DEC thought and the state of New York thought there was a justified justification for that, but here's what I'm getting, or I'm confused. Zack, it seems like the one, the clean water

act already based already had circumscribed [00:12:30] the discretion in a water quality certification. So what the heck does this EPA rule really even do? Does it do anything that wasn't already in the law?

Speaker 3: Well, I, you know, I think it does a couple of things and what it does do, that's not in the law is also what exposes this rule to potential challenge. And I think we probably will see states that have been active in, in managing their water quality certificates, challenge. [00:13:00] The rule, keep in mind, the, this rule really came out of the sort of cooperative federalism model that underlies the CWA and some other environment, environmental, uh, laws and regulations at the federal level. And the idea was to give states of a fairly broad ability to review projects, um, in one Supreme court case PUD number one of Jefferson county, [00:13:30] uh, versus Washington department of ecology, uh, the court looked at whether a state could impose minimum stream flows on a hydroelectric dam. The, the court, uh, essentially said that the state can look at the entirety of the project and that it was appropriate to impose those minimum stream flows in, in this hydroelectric project.

Speaker 3: Uh, what EPA did looking at the, looking at the clean [00:14:00] water act. They interpreted this a little bit differently with respect to the rule and they, they limited the 401 certification review and action to assuring that the discharge is from a point source into a water of the United States. Now, what does that do that limits what the states can really look at? It limits the scope of it instead of looking at the entirety of the project and the potential impact [00:14:30] that could have on water quality, it limited it limits it just to the discharge from a point source to the waters of the United States. And, you know, that seems to be, uh, different than what the Supreme court had determined in PUD. Number one. So there there's that,

Speaker 2: It seems again, you know, it's like deja vu all over again, Zach, I mean it, with the proposed NEPA regulations, CEQ the council [00:15:00] on environmental quality out of the white house also issued these proposed basically interpreted regulations that attempted to interpret a statute at points potentially at odds with case law here, it looks like maybe EPA tried to do the same thing and at odds with United States Supreme court case law, which I'm not so sure how well that will go for them.

Speaker 3: I think that's right. And it's questionable whether the, the agency has that ability. The other thing that's [00:15:30] a little bit puzzling to me in this, in this rule is the, the time period. So in, in the clean water act, as you know, there, they, there's a reasonable time period for states to act. And it says not to exceed one year EPA in this rule seems to be saying, well, the, the, the licensing agencies may be able to, uh, make it less than a year, depending on the type of project that it is. And they really leave it up, I think, to the [00:16:00] licensing agencies to do that. So for example, FERC could, could come out with a rule that says, well, you know, we really don't think you need a year to get to a decision on a water quality certificate for a pipeline. So, you know, you've got six months state and if you don't do it by then, you've waived it. And that's what, uh, we, as the licensing agency determined as a reasonable period of time, I'm not sure that interpretation is flows naturally [00:16:30] from the statutory language. Let's put it that way. And so it's be legislating

Speaker 2: By the executive branch and certainly sometimes federal courts are very, they guard that and make sure that that doesn't happen. So, yeah, that's definitely going to be plenty for courts to look at here, which gets the meta. My thought about that again, in this attempt to sort of streamline something or, or bring clarity, the agencies may just be making things murkier and create less clarity and [00:17:00] more risk, um, on these projects. So are they clearly the intent is to sort of help these interstate, um, pipeline projects and limit the discretion of a state agencies, but I'm not sure that it's actually going to succeed. It'll re I will have to see what the case law goes. And, um, and then also the fact of the matter is in the end, the states can still look to use a water quality basis to deny a lot of these projects, how the extent, how [00:17:30] far they can go as you talked about, can they limit it to just a point source?

Speaker 2: I go beyond that I guess, remains to be seen as the case law shakes out, but for a lot of these projects, and I said this on the podcast with Howard Nelson, it's just, you know, having a lack of clarity, having risks on these things and not knowing, um, where the law takes you or what you need to do sometimes is, is more problematic than just getting through the process. Although I will say in this case, states are stopping interstate pipeline projects. I don't think [00:18:00] it was intended to have these states stop these large interstate pipeline projects based on their own view of climate policy or energy policy. It seems like energy policy, um, on this level should be set at the federal level. I don't, you know, I don't know, I guess we'll have to say,

Speaker 3: I think it's, it's certainly questionable whether that was the intent of laws, like the natural gas act and, and other other laws that preempted state law and left these water quality certificates to allow [00:18:30] states to, to manage, uh, how the water quality impacts of the projects happen. Um, and you know, it may not have been the intent of the law, but that's how states have, have handled it. At least some of the states that have been active in managing these water quality certificates, uh, and states that have seen large pipeline projects that may have some significant public opposition

Speaker 2: [00:19:00] In New York. You certainly saw people. Um, I shouldn't say people use the decisions very much hued to the water quality line in, in denying a lot of these projects, maybe there was a subtext and we saw a little more than subtext as we talked about in the NSC decision, but typically they are pretty much bounded by water quality. So I just wonder whether even if this regulation survives, whether it's really going to do what was intended,

Speaker 3: I think what states will [00:19:30] do is simply rely on a technical water quality potential for an exceedance or a violation. And that's all that they'll, they'll need to do to be able to deny the certificates. And I think one of the potentially unfortunate results of, of, uh, a rule that limits states' abilities and it kind of contradicts that underlying concept of cooperative federalism [00:20:00] is that, uh, states will, instead of working with the project sponsor to try to come to some sort of resolution that's acceptable to everyone, we'll have a little bit more of a knee jerk reaction and just deny the project based on an ostensible water quality violation, uh, or potential for violation, or exceedance rather than try to come up with a, uh, acceptable path forward. Of course, [00:20:30] as you said, if states are using this in a way that is, uh, politically motivated or abusive in some

way, maybe at the end of the day, they would never get there. And you know, it, it's not gonna, it's sort of six of half a dozen of the other in terms of the outcome, but, uh, I think for some projects, this, this could be detrimental and could create more risk than it. It, uh, curtails.

Speaker 2: Sure. All [00:21:00] right. One last thought. So one way that if, if states really got out of hand and took this too far, would be a legislative change to the clean water act, get rid of the water quality certification entirely. You think there's a risk and you think that's a possibility. I know what I think, but what do you think?

Speaker 3: Well, I think that there would be a lot of pushback from states if the, the congressional delegations started to get behind doing that. Uh, you know, I, I don't know if it's, uh, [00:21:30] something that's politically viable in, in Washington.

Speaker 2: I don't think with divided government. I agree with you with, with, with, uh, with, with, with divided government, the Democrats in charge of the house, the Republicans in the Senate. I don't think you'll, you'll see that. I think, um, you'd have to have the abuse would have to go much further, I think right now, um, I don't think, I don't think there'd be a stomach in the democratic party to pull the water quality certification and you're, and even some Republicans might not like it when they heard from [00:22:00] their governors about wanting, wanting to continue to have this. So I think that would be a much more effective approach with that, less of the downside of this regulatory change. But I think they went with the regulations because they were highly unlikely to get the legislative change,

Speaker 3: Fully agree. And, you know, it's interesting at the, at the end of the day, this is really an issue of states' rights and the ability of states to self-govern. Um, you [00:22:30] know, traditionally that's been, uh, an idea that, that, uh, both conservatives and liberals have been able to get behind. So changing it, I think would be a tough row to hoe

Speaker 2: Okay. On that note of violent agreement, Zach, I'd like to thank you. This has been a interesting conversation. I'm sure there's going to be more and we end Zach and I will be back to discuss other interesting thorny issues on the environmental and energy front ear on empire environmental. [00:23:00] Thanks again, Zach.

Speaker 1: [inaudible].