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Appalachian Voices v. State Water Control Board

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***Appalachian Voices v. State Water Control Bd.*, 912 F.3d 746 (4th Cir. 2019).**

Thomas Mooney-Myers

The Virginia State Water Control Board certified the issuance of permits for the construction of a natural gas pipeline that traversed over 300 miles of Virginia in addition to other states. Local environmental groups and individuals petitioned the Fourth Circuit to review the certification under the Administrative Procedure Act. The Fourth Circuit Court of Appeals gave deference to the agency’s actions and denied the petition for review.

I. INTRODUCTION

The Virginia Department of Environmental Quality (“DEQ”), acting on behalf of the Virginia State Water Control Board (“Board” or “Respondents”), issued several certifications and permits to Atlantic Coast Pipeline, LLC (“Atlantic”) for the construction of a natural gas pipeline.¹ Included in the series of permits was a Section 401 Upland Certification (“Upland Certification”)² that addressed the environmental impacts and regulation of the upland portions of the pipeline.³

Local environmental groups and individuals (collectively “Petitioners”) challenged the issuance of the Upland Certification as arbitrary and capricious under four theories.⁴ The theories (discussed further below) revolved around the Board’s alleged failure to consider all factors in a cumulative manner as well as an alleged failure to consider technical aspects of certain geological formations.⁵

The Fourth Circuit Court of Appeals found that the Board had not acted arbitrarily and capriciously under any of the presented theories.⁶ The Fourth Circuit applied deference under its circuit specific *Ohio Valley Environmental Coal* standard,⁷ and found that while the Board had not

1. *Appalachian Voices v. State Water Control Bd.*, 912 F.3d 746 (4th Cir. 2019).

2. The Upland Certification covered the potential impacts of the natural gas pipeline on the portions of construction that were not covered under the Army Corps permit, while the Wetlands and Streams Certification covered the pipeline’s wetland, river, and stream impacts. *Id.* at 751–52.

3. *Id.* at 752.

4. *Id.*

5. *Id.* at 759; *see Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc.* 467 U.S. 837 (1984) (*Ohio Valley Environmental Coal* serves as the Fourth Circuit agency deference standard and functionally conforms to *Chevron* deference, although the Fourth Circuit prefers to cite to *Ohio Valley Environmental Coal*).

6. *Id.* at 750.

7. *Id.* at 753.

done everything possible to protect the environment, it had fulfilled all relevant requirements before issuing the Upland Certification.⁸

II. FACTUAL AND PROCEDURAL BACKGROUND

Atlantic sought to construct a natural gas pipeline to run from West Virginia through Virginia and North Carolina.⁹ Within Virginia, the proposed Atlantic Coast Pipeline (“ACP”) would cross 890 water bodies, 74 migratory fish spawning waters, and require 89 river and stream crossings for access roads.¹⁰ Before construction of the ACP could begin, Atlantic had work with the Federal Energy Regulation Commission (“FERC”), the U.S. Army Corps of Engineers (“Army Corps”), the Board, and the DEQ in order to receive permits and fulfill procedural requirements under the Natural Gas Act (“NGA”), the National Environmental Policy Act (“NEPA”), the Clean Water Act (“CWA”), and the Virginia Water Protection Program (“VWP”).¹¹

Atlantic initially applied for the necessary certifications from FERC, the Army Corps, and the DEQ in September 2015, and modified its application in March 2016.¹² FERC issued the necessary certificate to Atlantic in October 2017.¹³ The DEQ issued the Upland Certification for the pipeline water crossings in April of 2017.¹⁴ In May 2017, the DEQ clarified that the certification would involve two parts: (1) a certification for the wetland, river, and streams crossings; and (2) a certificate for the upland impacts of the ACP.¹⁵ Upon recommendation by the DEQ, the Board approved a certificate for the upland portion of the ACP in December 2017, pursuant to several mitigation plans.¹⁶

Petitioners filed two timely petitions for review on January 18, 2018.¹⁷ Within the consolidated petitions, the Petitioners contended that the issuance of the Upland Certification was arbitrary and capricious due to: (1) the reopening of the comment period on the Section 401 Certification;¹⁸ (2) the failure to assess the combined impacts of

8. *Id.* at 759.

9. *Id.* 750.

10. *Id.*

11. *Id.* at 750–51.

12. *Id.* at 751.

13. *Id.*

14. *Id.*

15. *Id.* at 751–52.

16. Included within the Upland Certification was the requirement that it “shall only be effective only following submission, review and final approval as required by law in the Karst Mitigation Plan, Annual Standards and Specifications, and Erosion and Sediment Control Plans and Storm Water Management Plans, and a report to the Board and the public by DEQ on the adequacy of these materials.” *Id.* at 752.

17. *Id.*

18. While the second comment period had not occurred when the petition was first filed in April of 2018, the Board approved a second comment period relating to the Wetlands and Streams Certification and after a presentation by the DEQ, the Board denied a motion to reevaluate the Certification. *Id.*

construction within individual watersheds; (3) the DEQ's failure to conduct an adequate antidegradation review, and (4) the State's failure to ensure protection of the karst geology regions.¹⁹ In response to the petitions, Respondents challenged Petitioners' standing.²⁰

III. ANALYSIS

The Fourth Circuit briefly addressed the threshold issue of standing before analyzing the four arguments under which the petitioners alleged the Board had acted arbitrarily and capriciously. The Fourth Circuit ultimately held that the Respondents had not acted arbitrarily or capriciously for any of the reasons the Petitioners argued.²¹ Throughout their analysis, the Fourth Circuit gave deference to the agency under the precedent of *Ohio Valley Environmental Coal*.²²

A. Standing

The Respondents argued that the Petitioners did not have standing.²³ The Fourth Circuit quickly found that Petitioners had established injury-in-fact, traceability, and redressability.²⁴ The Fourth Circuit supported this holding with a citation to *Sierra Club v. State Water Control Board*, a recent case addressing similar issues of standing within the Fourth Circuit.²⁵

B. Arbitrary and Capricious

The Petitioner's first argument alleged the reopening of the comment period was arbitrary and capricious.²⁶ The Fourth Circuit held that the reopening of the comment period did not render the Board's Upland Certification arbitrary and capricious.²⁷ The Fourth Circuit noted the Petitioners' arguments only involved the Upland Certification and the reopened comment period involved the separate Wetlands and Streams

19. *Id.*

20. *Id.*

21. *Id.* at 750.

22. *Id.* at 753 (applying deference under *Ohio Valley Env'tl. Coal v. Aracoma Coal Co.*, 556 F.3d 177, 192 (4th Cir. 2009), where they held "review under this standard is highly deferential, with a presumption in favor of finding the agency action valid," "a reviewing court must generally be at its most deferential", and "[d]eference is due where the agency has examined the relevant data and provided an explanation of its decision that includes a rational connection between the facts found and the choice made.").

23. *Id.* at 752.

24. *Id.*

25. *Id.* at 753 (citing *Sierra Club v. State Water Control Bd.*, 898 F.3d 383, 400-02 (4th Cir. 2018)).

26. *Id.* at 752.

27. *Id.* at 753.

Certification.²⁸ Therefore, the reopened comment period was not at issue in the petition and did not make the Board's actions arbitrary and capricious.²⁹

Petitioner's second argument alleged that the Upland Certification failed to assess the combined impact of construction on individual watersheds.³⁰ The Fourth Circuit also found that the Board's decision to not conduct a combined impact analysis was not arbitrary and capricious.³¹ In their analysis, the Fourth Circuit identified three reasons for their holding.³²

First, the Upland Certification was not intended as a stand-alone document.³³ It was intended to supplement the already complete analysis done by the Army Corps.³⁴ Second, the Board had broad discretion when determining the criteria by which to decide to issue the Section 401 Certification.³⁵ While Petitioners relied on a variety of case law to argue that a cumulative review was required,³⁶ the Fourth Circuit distinguished each case from the relevant facts at hand and found that none applied.³⁷ Finally, the Board's failure to consider combined effects within individual watersheds, such as the Chesapeake Bay Total Maximum Daily Load ("TMDL") was not arbitrary and capricious because consideration of the individual TMDLs "does not constitute a regulatory mandate."³⁸

Petitioner's third argument alleged that the DEQ failed to conduct an adequate antidegradation review.³⁹ Addressing this argument, the Fourth Circuit held that the Board's reliance on Virginia water quality standards to assess water quality deterioration did not render their decision arbitrary and capricious.⁴⁰ The CWA places the primary burden of

28. *Id.*

29. *Id.* (additionally holding that "[i]n any event, the Wetlands and Streams Certification was not ultimately revoked.").

30. *Id.* at 752.

31. *Id.* at 753–54.

32. *Id.*

33. *Id.* at 754.

34. *Id.*

35. *Id.*

36. Petitioners cited *Klamath-Siskiyou Wildlands Ctr. v. BLM*, 387 F.3d 989, 993 (9th Cir. 2004) and *Idaho Rivers United v. Probert*, Case No. 3:16-102, 2016 U.S. Dist. LEXIS 63767, at *32-34 to argue that the Board had to consider combined effects to not be arbitrary and capricious. Additionally, petitioners cited *Motor Vehicles Manufacturers Association v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) to argue that the Board must consider "relevant data." *Id.* at 754–55.

37. *Id.* at 755 (distinguishing *Klamath-Siskiyou Wildlands Center and Idaho Rivers United* from the facts of the current case as both involved violations under NEPA, not the CWA and also distinguishing *Motor Vehicle Manufacturers Association* because it "does not mention cumulative effects of the CWA").

38. *Id.* (holding that, under Ninth Circuit Court of Appeals precedent, TMDLs are "primarily information tools" that "did not constitute a regulatory mandate").

39. *Id.* at 752.

40. *Id.* at 755–56.

developing water quality standards on states, and requires that state standards “be sufficient to maintain existing beneficial uses of navigable waters, preventing further degradation.”⁴¹ The Fourth Circuit reviewed Virginia’s antidegradation policy, as well as the additional requirements Virginia placed on natural gas pipeline construction,⁴² and determined that the Board’s decision to forego a separate antidegradation review was not arbitrary and capricious.⁴³

The Petitioner’s fourth and final arguments alleged that the DEQ failed to adequately protect the karst geologic formations.⁴⁴ Karst geology involves limestone bedrock that allows underground movement of water and creates additional environmental concerns when pipeline construction is involved.⁴⁵ The Fourth Circuit held that the Board’s actions regarding the treatment and protection of karst terrain was not arbitrary and capricious.⁴⁶ The Fourth Circuit identified the Board’s serious consideration of karst geology, and the various specific requirements that were added to protect the karst terrain.⁴⁷ The Fourth Circuit held that reliance upon those conditions did not render the Board’s issuance of the Upland Certification arbitrary and capricious.⁴⁸

IV. CONCLUSION

The Fourth Circuit did not find the Respondents’ actions to be arbitrary and capricious under any of the theories presented by the Petitioners. While the holding acknowledged that the Board had not taken every possible step in order to protect the environment, that was not the standard by which courts determine that an action was arbitrary and capricious.⁴⁹ Basing their holding on the standard of a “clear error of judgment” and “whether the agency considered the relevant factors” and applying deference to the agency under the precedent of *Ohio Valley Environmental Coal*, the Fourth Circuit denied the petition for review.⁵⁰ The Fourth Circuit continues their pattern of deference to agencies under its Circuit specific deference precedent, and this indicates a strong preference for deference under any standard.

41. *Id.* at 756–57.

42. *Id.*

43. *Id.* at 757–58 (additionally holding that the Board had not been arbitrary and capricious in determining that the ACP project would not cause degradation because Virginia does not consider temporary sources of degradation to violate antidegradation policies).

44. *Id.* at 752.

45. Karst geology creates concerns over sinkholes and resulting groundwater contamination if a natural gas pipeline is disrupted. *Id.* at 757–58

46. *Id.*

47. The Board implemented several provisions to protect karst terrain, including assessments, monitoring, and a liability fund. *Id.* at 758

48. *Id.*

49. *Id.* at 759.

50. *Id.*