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State's top court wrestles with land seizure for National Fuel pipeline plan



The late Joseph Schueckler of Clarksville, seen in 2018 on land National Fuel wants to seize for its Northern Access pipeline. (Buffalo News file photo)

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New York State's highest court heard arguments Tuesday on whether an Allegany County widow must surrender land to National Fuel for construction of a natural gas pipeline.

The pipeline would move natural gas from Pennsylvania to Canada through Western New York.

The Court of Appeals case may turn on which of two bureaucratic findings the court thinks controls the outcome.

The Federal Energy Regulatory Commission granted National Fuel a permit for the Northern Access pipeline.

But the state Department of Environmental Conservation refused to grant the company a water quality certificate allowing the pipeline to cross streams in Western New York. There are 192 stream crossings along the 97-mile route from the fracking fields of Pennsylvania – 26 miles in Pennsylvania, 71 miles in Western New York.

Pennsylvania authorities have granted National Fuel all the permits it sought, but New York has not.

FERC officials ruled the DEC's rejection of the stream crossing permit invalid because the decision came 36 days after the expiration of a deadline set in the federal Clean Water Act for the DEC to act on National Fuel's request.

The company and the DEC had agreed to an extension of the deadline, but FERC said the Clean Water Act doesn't allow extensions.

The DEC and the Sierra Club sued FERC in federal court. The case is pending before the U.S. Second Circuit Court of Appeals, with National Fuel intervening on FERC's side.

Tangled up in all the legal and regulatory issues are 200 acres in Clarksville owned by Theresa Schueckler, whose late husband, Joseph, refused to sell a slice to

National Fuel for its pipeline.

National Fuel took the Schuecklers to court early in 2017, and a State Supreme Court justice in Allegany County granted National Fuel the power to seize their land under the state's eminent domain law.

The Schuecklers appealed and in November 2018 won a 3-2 ruling by the Appellate Division, where the majority decided to ignore FERC's decision that the DEC acted too late. The three judges said National Fuel couldn't seize land for a project that hadn't been approved by the DEC.

Appearing by video, Eamon P. Joyce, National Fuel's lawyer, argued Tuesday that the Appellate Division was required to take FERC's decision into account, but Justice Eugene M. Fahey said, "I don't think you're correct."

Assuming the DEC's position blocks the project, Justice Jenny Rivera asked, "Why would the court permit eminent domain to move forward when you cannot proceed with the construction?"

Joyce argued that not having a water quality permit wouldn't prevent the construction, but he said the basis of Rivera's question was wrong because FERC has overruled the DEC.

"A FERC certificate can be both valid and ineffective, and that's what we have here," said Gary A. Abraham, Schueckler's lawyer.

"It's certainly not effective if a water quality certification has been denied by the state. The state has blocked the project," Abraham said.

Rivera said there were "all kinds of conditions" in FERC's ruling. "Some of them can't be met until there's eminent domain, so it becomes a Catch-22 and this thing can never be built," she said.

Abraham said a FERC ruling isn't good enough to show that New York's rules for allowing eminent domain have been met.

Failing that, Abraham said, "It's unconstitutional to take people's land."



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