



# New York Court of Appeals Clarifies That FERC Certificate Satisfies Eminent Domain Procedure Law Article 2 Public Hearing and Notice Requirements Despite Water Quality Certification Denial

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On June 25, 2020, the New York Court of Appeals, in a 4-2 decision, held that a Certificate of Public Convenience and Necessity (“Certificate”) issued by the Federal Energy Regulatory Commission (“FERC”) to National Fuel Gas Supply Corporation (“NFG”) exempts NFG from the public notice and hearing requirements set forth in Article 2 of the New York Eminent Domain Procedure Law (“EDPL”) despite the New York State Department of Environmental Conservation’s (“DEC”) denial of the NFG’s Clean Water Act (“CWA”) Section 401 Water Quality Certification (“WQC”).<sup>[1]</sup>

## The Dispute

FERC issued NFG a Certificate in 2017 for its Northern Access Project, an approximately 99-mile long pipeline project between Pennsylvania and New York. Later that year, NFG commenced an eminent domain proceeding against Joseph and Theresa Schuekler pursuant to the EDPL, seeking a 50-foot wide permanent easement over property owned by the Schueklers. The Schueklers opposed NFG’s EDPL petition arguing that the Certificate, which was conditioned upon NFG’s receipt of all authorizations required under federal law, was invalidated by DEC’s denial of NFG’s application for a CWA WQC.

## Eminent Domain Procedure Law

Prior to exercising its power of eminent domain, a condemnor must satisfy the hearing and findings requirements set forth in EDPL Article 2, which are intended to ensure that the condemnor has made a “reasoned determination that the condemnation will serve a valid public purpose.”<sup>[2]</sup> EDPL requires a public hearing to “review the public use to be served by a proposed public project and the impact on the environment and residents of the locality.”<sup>[3]</sup> Section 204 of the EDPL requires the condemnor to render findings regarding the project, including (i) its public use benefit or purpose, (ii) approximate location, (iii) impact on environment and nearby residents, and (iv) other factors that the condemnor considers relevant.<sup>[4]</sup> Condemnors are exempted

from EDPL Article 2 requirements when:

*pursuant to other state, federal, or local law or regulation it considers and submits factors similar to those enumerated in [EDPL 204(B)], to a state, federal or local governmental agency, board or commission before proceeding with the acquisition and obtains a license, a permit, a certificate of public convenience or necessity or other similar approval from such agency, board, or commission*<sup>[5]</sup>

As such, an interstate natural gas pipeline project developer that receives a FERC Certificate is typically exempt from the notice and hearing requirements of EDPL Article 2 when exercising eminent domain powers to obtain property rights for such project.

## NY Appeal Court Holds that the Article 2 EDPL Exemption Is Not Negated by DEC's Denial of CWA Section 401 WQC

Here, the Schuecklers argued that since the Certificate conditioned NFG's construction of the project on receipt of all necessary authorizations required by federal law, the certificate was rendered ineffective by DEC's denial of the CWA WQC.<sup>[6]</sup> The Court of Appeals was not persuaded by that argument. The Court concluded that although the Certificate included a number of "pre-construction conditions that might affect the ultimate completion of the project – these conditions cannot reasonably be understood to render the certificate provisional for purposes of eminent domain...inasmuch as they are not conditions precedent to the validity of the certificate itself."<sup>[7]</sup> The Court explained that the purpose of EDPL 206(A) "is not to ensure that a project has 'final unconditional approval'...but rather, to make certain that there has been sufficient review of the project's public purpose and approval thereof by a governmental agency."<sup>[8]</sup> Thus, unless the terms of the FERC Certificate held by an interstate natural gas pipeline company condition the exercise of eminent domain or the Certificate is stayed or revoked by FERC or a federal court, such gas company is excused from compliance with EDPL Article 2 and can commence eminent domain proceedings in state court. As a result, the Court reversed the order of the Appellate Division Fourth Department and reinstated the order of the Supreme Court Allegany County, holding that NFG was exempt from the requirements of EDPL Article 2.

## Conclusion

This decision is significant for interstate natural gas pipeline companies because it allows them to obtain property rights through eminent domain without the public notice and hearing requirements of EDPL Article 2 while its applications for other federal or state authorizations remain pending or, as in the case of NFG, one or more of those authorizations have been denied and are still being pursued by the developer. Moreover, since some conditions of a FERC Certificate cannot be satisfied until the developer acquires possession of the land and given the lengthy timeframe required for obtaining property rights, this decision provides important clarification with respect to the exercise of eminent domain for FERC-certified pipeline projects.

If you have any questions regarding the New York Eminent Domain Procedures Law, please contact Robert Sorge, Angela Cascione or Brendan Mooney via email at [rsorge@cullenllp.com](mailto:rsorge@cullenllp.com), [acascione@cullenllp.com](mailto:acascione@cullenllp.com), or [bmooney@cullenllp.com](mailto:bmooney@cullenllp.com).

Please note that this is a general overview of developments in the law and does not constitute legal advice. Nothing herein creates an attorney-client relationship between the sender and recipient.

## Footnotes

[1] Natl. Fuel Gas Supply Corp. v Schueckler, 2020 NY Slip Op 03563, June 25, 2020.

[2] Id. at 2.

[3] EDPL §201.

[4] Id. at §204(B).

[5] Id. at §206(A).

[6] Natl. Fuel Gas Supply Corp. v Schueckler, 2020 NY Slip Op 03563 at 4.

[7] Id. at 6.

[8] Id.

## Practices

- Energy, Renewables and Utilities

## Attorneys

- Robert J. Sorge
- Angela N. Cascione
- Brendan J. Mooney