DEP findings aren’t final; 1st Circuit jurisdiction fails

A conditional certification granted by the Department of Environmental Protection that is still subject to an internal appeal process is not subject to immediate review by the 1st U.S. Circuit Court of Appeals jurisdiction to hear a challenge of that administrative proceeding under the Natural Gas Act, a 1st Circuit panel has ruled.

In response to a challenge of the conditional water quality certification that the DEP had issued, a gas pipeline company advanced a twofold argument: that the Natural Gas Act did not require an administrative proceeding to be “final” to end the state’s role in the approval process or, in the alternative, even if it did, the DEP’s action was sufficiently “final” to require its opponents to seek relief with the 1st Circuit.

The three-judge 1st Circuit panel disagreed on both fronts.

Despite seeking the modifier “final” in the relevant section of the Natural Gas Act, 717r(1), Judge William J. Kayatta Jr. wrote that, in the context of judicial review of an agency action, there is a long-standing strong presumption that judicial review will be available only when agency action becomes final.

“To say that silence on the subject implies no requirement of finality would be to recognize this ‘strong presumption’ only when it is of little benefit,” Kayatta wrote.

Congress, Kayatta noted, had made “nuance that was obviously unreasonable: the delay of the requested review in connection with natural gas issues.”

The 1st Circuit also rejected the suggestion that its holding would be “tantamount to imposing an exhaustion of administrative remedies requirement where one is not provided by statute.”

The pipeline company’s second argument — that the DEP’s conditional certification did, in fact, constitute final agency action — fared no better.

“An agency action is ‘final’ only where it ‘represents the culmination of the agency’s decision-making process and conclusively determines the rights and obligations of the parties with respect to the matters at issue,”’ Kayatta wrote, citing the 1st Circuit’s 2004 decision in Rhode Island v. EPA.

While the “formal document” the DEP issued may have appeared on its face to be a final action, the substance of the Massachusetts regulatory regime revealed it to be anything but, Kayatta said.

Instead, the pipeline company’s application “initiated a single, unitary proceeding, an essential part of which is the opportunity... to have an adjudicatory proceeding,” he wrote.

In that adjudicatory proceeding, the pipeline company’s application gets a fresh look, new evidence may be requested, Kayatta said, with the DEP’s preliminary findings included in the certification given no deference.

The pipeline company’s counsel, Boston attorney James L. Messenger, declined to comment while the DEP process is pending.

The pipeline company’s second argument, he said, was that while the pipeline company’s history of instituting — and succeeding — to de- relief with such actions.

Kanoff argued that while under the Natural Gas Act the appellate court would have had exclusive jurisdiction over an appeal of a final agency action, that was not where matters stood in the case.

In case they were wrong about the jurisdictional issue, Kanoff said he also prepared a substantive appeal for the 1st Circuit, which the court did not have to reach.

With the 1st Circuit’s decision, a page in the pipeline company’s playbook, if not torn out, has been significantly weakened, Kanoff said.

Fact that water quality is one of the few matters in which a role has been carved out for the states in a process otherwise subject to the federal Energy Regulatory Commission, Kanoff said.

Section 717r(2) of the Natural Gas Act, which gives the circuit courts jurisdiction to hear appeals of final agency actions, attempts to strike a balance between a desire for local control of pipeline permitting and the federal aim to prevent projects from getting bogged down in endless state court appeals.

Here, “the system ultimately worked,” Kanoff said, noting that the 1st Circuit “clarified what needed to be clarified” after an “administrative sidestep.” Now, the DEP will get to continue its review.

That’s something for which Attorney General Maura T. Healey’s office is grateful, said spokeswoman Chloe Gotis.

“We are pleased the First Circuit agreed that the federal Natural Gas Act does not short circuit MassDEP’s careful administrative review proceedings and that only the commissioner’s final water quality certification decision is subject to court review,” she said in an emailed statement.

“The court’s decision confirms the importance of role states play as the first line of defense for protecting valuable water resources in federal review of natural gas pipeline permitting decisions,” she said.

Allies in the appeal to the 1st Circuit, Kanoff acknowledged that his clients and the AG’s Office may find themselves again on opposite sides if the DEP does not significantly alter its preliminary certification in its final determination.

The pipeline company’s counsel, Boston attorney James L. Messenger, declined to comment while the DEP process is pending.

Boston environmental attorney Peter F. Durning said whether an application for a water quality certification initiates a “sink- unitary process” is “more of an open question” in Massachusetts than the 1st Circuit decision allows.

Durning noted that the DEP has a variety of different procedures, with an application for a water quality certification differing from, say, an application for a permit under the Clean Air Act.

In some circumstances, there is no statutory right to adjudicatory procedure, prompting a different view on the issue of finality, he added. The issue arises often as proponents of projects are eager to proceed, said Durning, who envisions Berkshire being cited to argue that DEP permitting processes are not “final” more generally.

While the language of the Natural Gas Act made the finality requirement “a little bit ambiguous,” Boston attorney Seth D. Jaffe said he found the 1st Circuit’s decision fairly routine. It is well established that an applicant does not have a final perspective until the adjudicatory process runs its course, he said.

Nonetheless, the decision is important, even if the outcome was predictable.

“Hard cases may make bad law, but important cases don’t necessarily have to be hard cases,” he said.

Preserving the forest

The Massachusetts DEP had issued a conditional water quality certification that the DEP’s June 29, 2016, letter contained more than 40 conditions to the project’s approval, including a requirement that its internal appeal period extend to expire before any work could begin.

By submitting their written comments, the concerned residents, known collectively as the Berkshire Environmental Action Team, gained the right to request an adjudicatory hearing, which they decided to exercise.

The pipeline company opposed the request for a hearing and filed a request for a stay of further action, seeking proceedings, first with the DEP and, when that failed, in U.S. District Court.

In Kayatta’s words, the petitioners then “hedged their bets” filing a petition with the 1st Circuit to preserve some review in the event that Tennesse Gas was correct that the DEP’s review should be curtailed while asking the court to reject their petition on the grounds that the 1st Circuit’s review was premature.

Now that the petitioners have prevailed on that issue, all sides are awaiting the DEP’s final decision.

One-year rule left for another day

Kayatta said the state’s process is “hardly unusual or contrived” but rather an expedient way to allow “unopposed actions to proceed to finality without the time and expense of full-blown proceedings, while preserving the parties’ rights to such proceedings when sought.”

In a footnote in its decision, the 1st Circuit noted that it had been left with no occasion to consider whether, because Mass- DEP did not finally act on Tennesse Gas’s application within one year, the requirement that Tennesse Gas obtain a water quality certification from the Commonwealth of Massachusetts has been waived.”

In theory, after a year had passed, Ten- nessee Gas could have, using Section 717r(2) of the Natural Gas Act, gone to the D.C. Circuit Court of Appeals and requested such relief.

Jaffe said that if the one-year time limit is indeed a hard deadline, the DEP is going to have a “very hard time ever being relieved” to proceedings initiated under the Natural Gas Act.

The DEP, which here took nearly 12 months to issue its preliminary permit, would have to shorten that timeframe to three to six months to allow enough time for the adjudicatory proceedings objectives to be met to request to run their course, Jaffe said.

As a practical matter, “the DEP has got a really hard role to fill,” he said.