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ONE J

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I. Introduction

The following is an update on Virginia legislative activity and case law relating to oil, gas and mineral law from August 1, 2017 to July 31, 2018.

II. Legislative and Regulatory Developments

The following is a discussion of notable legislation:

A. Senate Bill 698

Senate Bill 698 (“SB 698”)—An Act to amend the Code of Virginia by adding a section numbered 62.1-44.15:58.1, relating to erosion and sediment control; inspections; natural gas pipelines; stop work instructions; emergency.

SB 698 authorizes the Department to conduct inspections of the land-disturbing activities of “interstate and intrastate natural gas pipeline companies that have approved annual standards and specifications pursuant to Virginia Code § 62.1-44.15:55,¹ related to construction of natural gas pipelines, to determine (a) compliance with such standards and specifications, (b) compliance with “site-specific plans,” and (c) if there “have been or are likely to be adverse impacts to water quality as a result of such land-disturbing activities.”² If the Department determines there has been “substantial adverse impact” to water quality or that such impact will occur, it may issue a stop work instruction, “without advance notice or hearing, requiring that all or part of such land-disturbing activities . . . be stopped until corrective measures specified” in the instruction have been completed and approved by the Department.³ Any person violating a stop work instruction may be compelled in a proceeding by injunction, mandamus, or other appropriate remedy.⁴

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B. Senate Bill 699

Senate Bill 699 (“SB 699”)—An Act to amend the Code of Virginia by adding a section numbered 62.1-44.15:37.1, relating to stormwater

1. VA. CODE ANN. § 62.1-44.15:55 (West 2018) (Regulated land-disturbing activities; submission and approval of erosion and sediment control plan.)

2. S.B. 698, 2018 Gen. Assem., Reg. Sess. (Va. 2018) (codified as VA. CODE § 62.1-44.15:58.1).

3. *Id.*

4. *Id.*

management; inspections; natural gas pipelines; stop work instructions; emergency.

SB 699 authorizes the Department to conduct inspections of the land-disturbing activities of “interstate and intrastate natural gas pipeline companies that have approved annual standards and specifications pursuant to Virginia Code § 62.1-44.15:31,⁵ related to construction of natural gas pipelines, to determine (a) compliance with such standards and specifications, (b) compliance with “site-specific plans,” and (c) if there “have been or are likely to be adverse impacts to water quality as a result of such land-disturbing activities.”⁶ If the Department determines there has been “substantial adverse impact” to water quality or that such impact will occur, it may issue a stop work instruction, “without advance notice or hearing, requiring that all or part of such land-disturbing activities . . . be stopped until corrective measures specified” in the instruction have been completed and approved by the Department.⁷ Any person violating a stop work instruction may be compelled in a proceeding by injunction, mandamus, or other appropriate remedy.⁸

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C. Senate Bill 950

Senate Bill 950 (“SB 950”)—An Act to amend and reenact §§ 62.1-44.15:20 and 62.1-44.15:21 of the Code of Virginia by adding in Chapter 3.1 of Title 62.1 an article numbered 2.6, consisting of sections numbered 62.1-44.15:80 through 62.1-44.15:84, relating to interstate natural gas pipelines; Department of Environmental Quality review; upland construction.

Virginia Code § 62.1-44.15:20 prohibits excavation, drainage, filling or dumping, flooding, alteration, degradation, consumption or recreational use of wetlands absent a Virginia Water Protection Permit.⁹ SB 950 amended Virginia Code § 62.1-44.15:20 to require both a Virginia Water Protection

5. VA. CODE ANN. § 62.1-44.15:31 (West 2018) (Annual standards and specifications for state agencies, federal entities, and other specified entities).

6. S.B. 699, 2018 Gen. Assem., Reg. Sess. (Va. 2018) (codified as VA. CODE § 62.1-44.15:37.1).

7. *Id.*

8. *Id.*

9. VA. CODE ANN. § 62.1-44.15:20 (West 2018). Water Protection Permits are issued if the Board determines the proposed activity is consistent with the provisions of the Clean Water Act and the State Water Control Law and “will protect instream beneficial uses.”” *Id.* at § 62.1-44.15:20(B).

Permit and a certification issued pursuant to Article 2.6 (§ 62.1-44.15:80 *et seq.*) for natural gas pipelines that have been certified for public convenience and necessity before being consistent with the Clean Water Act.¹⁰

Virginia Code § 62.1-44.15:21 states that permits shall address avoidance/minimization of wetland impacts and will be issued only if the board finds that “the effect of the impact, together with other existing or proposed impacts to wetlands, will not cause or contribute to a significant impairment of state waters or fish and wildlife services.”¹¹ The permits contain requirements for compensating impacts on wetlands, such as: (a) wetland creation/restoration, (b) contributions to the Wetland and Stream replacement fund, or (c) contributions to a “Board-approved fund dedicated to achieving no net loss of wetland acreage and functions.”¹² The Board is authorized to issue general permits for appropriate wetland activities and will include terms and conditions deemed necessary to protect state waters, fish, and wildlife resources from adverse effects.¹³ This permit can be waived if an isolated wetland is of “minimal ecological value.”¹⁴ No Virginia Water Protection Permits are required for wetlands caused by agricultural, silvicultural, residential gardening, lawn/landscape maintenance, farm, or stock pond activities.¹⁵

Virginia Code § 62.1-44.15:21 was amended by SB 950 to exclude public convenience and necessity pipelines from general permits, instead requiring an individual Virginia Water Protection Permit for natural gas pipeline projects.¹⁶ If a pipeline crosses wetlands and streams, each crossing shall be evaluated separately, with the Board determining if the construction “minimizes temporary and permanent impacts to state waters and protects water quality to the maximum extent practicable.”¹⁷ For public necessity and convenience pipelines, this determination must be completed within the one-year period established under 33 U.S. § 1341(a).¹⁸

SB 950 also codifies Article 2.6 (§ 62.1-44.15:80 *et seq.*) to serve as a second, broader-scope evaluation method for upland area activities of

10. S.B. 950, 2018 Gen. Assembly, Reg. Sess. (Va. 2018).

11. VA. CODE ANN. § 62.1-44.15:21(A).

12. *Id.* at § 62.1-44.15:21(B).

13. *Id.* at § 62.1-44.15:21(D).

14. *Id.*

15. *Id.* at § 62.1-44.15:

16. S.B. 950.

17. *Id.*

18. *Id.*

natural gas pipelines that may affect water quality.¹⁹ In addition to applying for a Virginia Water Protection Permit, these pipelines must submit a description of all activities that will occur in upland areas, including those in or related to: (a) slopes with a 15% grade or steeper; (b) geology features, including sinkholes and underground springs; (c) proximity to sensitive streams and wetlands; (d) seasonally high “water tables”; (e) “water impoundment structures and reservoirs”; and (f) areas with “highly erodible soils, low pH, and acid sulfate soils.”²⁰ The Department of Environmental Quality may issue further requests for information needed to determine if the upland area activities will result in discharge to state waters and how the applicant proposes to minimize the impacts.²¹ The Department will review the information that will not be covered by the Virginia Water Protection Permit process and allow opportunity for public comment on a drafted certificate at the review’s conclusion.²² Applicants are barred from performing land-disturbing activity until this review has been completed.²³

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III. Judicial Developments

A. *Barr v. Atlantic Coast Pipeline, LLC*

In *Barr v. Atlantic Coast Pipeline, LLC* the Supreme Court of Virginia (the “Court”) addressed the standard under VA Code § 56-49.01 required in order for a natural gas company, as defined in 15 U.S.C. § 717a (“Gas Company”), to enter onto a landowners property without written permission for the purposes of examinations, tests, hand auger borings, appraisals, and surveys for a proposed pipeline.²⁴

The requisite legislative statute is VA Code § 56-49.01(A), which states, in relevant part:

Any firm, corporation, company, or partnership, organized for the bona fide purpose of operating as a natural gas company as defined in 15 U.S.C. § 717a, as amended, may make such examinations, tests, hand auger borings, appraisals, and surveys for its proposed line or location of its works as are necessary (i)

19. S. 950, (codified as VA. CODE § 62.1-44.15:80).

20. S. 950, (codified as VA. CODE § 62.1-44.15:81(A)).

21. S. 950, (codified as VA. CODE § 62.1-44.15:81(B)).

22. S. 950, (codified as VA. CODE §§ 62.1-44.15:81(C), 62.1-44.15:83).

23. S. 950, (codified as VA. CODE § 62.1-44.15:81(D)).

24. *Barr v. Atlantic Coast Pipeline, LLC*, 295 Va. 522, 815 S.E.2d 783 (Va. 2018).

to satisfy any regulatory requirements *and* (ii) for the selection of the most advantageous location or route, the improvement or straightening of its line or works, changes of location or construction, or providing additional facilities, and for such purposes, by its duly authorized officers, agents, or employees, may enter upon any property without the written permission of its owner if (a) the natural gas company has requested the owner's permission to inspect the property as provided in subsection B, (b) the owner's written permission is not received prior to the date entry is proposed, and (c) the natural gas company has given the owner notice of intent to enter as provided in subsection C.²⁵

1. Background

Atlantic Coast Pipeline, LLC (“ACP”) is a company organized to operate “as a natural gas company as defined by 15 U.S.C. § 717a.”²⁶ ACP was planning to build a natural gas pipeline from West Virginia, through the Commonwealth of Virginia, and into North Carolina (the “Pipeline”), and was in the process of acquiring permits.²⁷ Various landowners (Landowners) owned property along ACP’s proposed route for the Pipeline.²⁸ The Landowners refused to grant ACP consent to enter their properties in order to conduct “surveys, tests, appraisals, and other examinations,” so ACP proceeded under VA Code § 56-49.01(A) sending notice of their intent to enter the Landowner’s properties.²⁹ ACP also filed a declaratory judgment action seeking “seeking an order affirming ACP’s authority to enter their properties ‘for the limited purposes defined in Va. Code § 56-49.01.’”³⁰

At the trial, the Landowners asserted three major objections against ACP.³¹ First, the Landowners asserted that VA Code § 56-49.01(A) requires that a Gas Company’s notice must demonstrate that entry is “necessary (i) to satisfy any regulatory requirements *and* (ii) for the selection of the most advantageous location or route...” (emphasis added);³²

25. VA Code § 56-49.01(A) (emphasis added).

26. *Barr*, 815 S.E.2d at 784.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 784, 85.

32. VA Code § 56-49.01(A).

and therefore ACP's notice was defective under VA Code § 56-49.01(A) because ACP only asserted entry was necessary to select the most advantageous route, not to satisfy any regulatory requirements as well.³³ Second, the Landowners asserted that the requirement in VA Code § 56-49.01(A) that the notice "set forth the date of the intended entry"³⁴ must provide a date certain on which the Gas Company will enter the property, and that ACP's use of a date range made their notice defective. Third, the Landowners asserted that because ACP's notice was defective, ACP's entry onto their property was outside the scope of the statute and amounted to an illegal taking of private property without compensation in violation of Article I, Section 11 of the Constitution of Virginia.

After several demurrers and re-filings, the matter proceeded to trial where the trial court held that ACP's notice was not defective and granted permission for ACP to enter the properties pursuant to VA Code § 56-49.01(A).³⁵ The Landowners appealed and the Court granted certiorari.³⁶

2. Analysis

The Court addressed each of the Landowners' objections in turn.³⁷ First, the Court addressed the Landowners' contention that VA Code § 56-49.01(A) requires that a Gas Company's notice must demonstrate that entry is "necessary (i) to satisfy any regulatory requirements *and* (ii) for the selection of the most advantageous location or route..." (emphasis added).³⁸ The Court held that the proper interpretation of this language is not conjunctive, requiring Gas Companies to demonstrate both parts, but disjunctive, requiring the Gas Company only to demonstrate that one is necessary.³⁹ The Court reasoned that:

[i]f the 'and' separating the enumerated provisions were read in the conjunctive, natural gas companies could only conduct those activities necessary to satisfy both provisions. Yet, it is clear that not all activities necessary to satisfy regulatory requirements are also necessary for the selection of the most advantageous route, etc., and vice versa. Moreover, as the landowners have correctly

33. *Barr*, 815 S.E.2d at 784-86.

34. *Id.*

35. *Id.*

36. *Id.* at 786.

37. *Id.*

38. VA Code § 56-49.01(A) (emphasis added), *Id.*

39. *Id.* at 790.

pointed out, the need to satisfy regulatory requirements occurs at an entirely different time from the need to select and/or improve the pipeline and its route. Therefore, the few activities that are necessary to satisfy both provisions would not be necessary at the same time.⁴⁰

Second, the Court addresses the Landowners' contention that the requirement in VA Code § 56-49.01(A) that the notice "set forth the date of the intended entry," requires that the notice provide a certain date on which the Gas Company will enter the property, rather than a date range.⁴¹ The Court held that the requirement under VA Code § 56-49.01(A) to provide the date on which entry is proposed in the notice was satisfied by ACP's provision of a date range.⁴² The Court cited their previous holding in *Chaffins v. Atlantic Coast Pipeline, LLC*,⁴³ when the word "date" is read in context, it is clear that "Code § 56-49.01(C) only requires that a notice of intent to enter provide a limited range of dates as is necessary to complete the surveys and tests."⁴⁴

Third, the Court addresses the Landowners' contention that the "trial court failed to properly apply Code § 56-49.01 and, as a result, ACP's entry onto their properties amounts to an unconstitutional taking under Article I, § 11 of the Constitution of Virginia."⁴⁵ The Court held that having "determined that the trial court's application of Code § 56-49.01 was not improper in this case, we do not reach the question of whether the improper application of the statute could amount to an improper taking in violation of Article I, § 11 of the Constitution of Virginia."⁴⁶

3. Conclusion

Accordingly, the Court affirmed the decision of the trial court.⁴⁷

40. *Barr*, 815 S.E.2d at 788 (footnote omitted).

41. *Id.* at 790-92.

42. *Id.*

43. 801 S.E.2d 189, 192-93 (Va. 2017).

44. *Barr*, 815 S.E.2d at 791.

45. *Id.* at 790-91.

46. *Id.* at 792.

47. *Id.*