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COURT OF APPEALS

STATE OF NEW YORK

NATIONAL FUEL GAS SUPPLY CORPORATION,

Appellant,

-against-

No. 29

SCHUECKLER, et al.,

Respondents.

20 Eagle Street
Albany, New York
June 2, 2020

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN (TELEPHONICALLY)

Appearances:

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Sharona Shapiro
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Good morning, counsel.
2 This appeal is appeal number 29, matter of National Fuel
3 Gas Supply Corporation v. Schueckler.

4 Mr. Joyce?

5 MR. JOYCE: Good morning, Chief Judge DiFiore.
6 May it please the court. I'm Eamon Joyce on behalf of
7 National Fuel.

8 May I reserve three minutes for rebuttal?

9 CHIEF JUDGE DIFIORE: You may, sir.

10 MR. JOYCE: Thank you. While a FERC-approved
11 pipeline project involves many moving pieces and a complex
12 regulatory scheme, the questions before you are
13 straightforward and they have straightforward answers.
14 This case is about statutory construction. The Appellate
15 Division repeatedly erred in that task. One, it badly
16 misinterpreted what EDPL 206(A) requires, which was no more
17 than a certificate of public convenience and necessity from
18 a federal commission, i.e. - - -

19 JUDGE STEIN: Counselor, if we agree with you on
20 that, do we need to address any of the other issues that
21 have been raised in our - - -

22 MR. JOYCE: No, Your Honor, you don't. I,
23 frankly, think it is important to get to the second issue
24 because that one has - - - has the broader repercussions.
25 The - - - the majority's disregard of what 206(A) textually



1 required - - - excuse me, I think I did that answer
2 backward. No, you don't need to get to the effect of the
3 waiver order if you find that 206(A) only requires a
4 certificate of public convenience and necessity which is
5 what the statute says. We're done.

6 If you're only to get to the waiver order, I
7 think that would be a mistake because the 206(A) ruling
8 about a certificate of public convenience and necessity is
9 - - -

10 JUDGE RIVERA: So counsel - - -

11 MR. JOYCE: - - - is the more important one for
12 the lower courts.

13 JUDGE RIVERA: Counsel?

14 MR. JOYCE: Yes.

15 JUDGE RIVERA: Counsel, to be clear, just so I
16 understand your rule, your rule is, once that certificate
17 is issued, it - - - regardless of whatever contingencies
18 are contained in the certificate, that satisfies the state
19 statute. Is that your position?

20 MR. JOYCE: Largely, yes, Judge Rivera.

21 JUDGE RIVERA: Where doesn't - - -

22 MR. JOYCE: Let me note, in a second - - -

23 JUDGE RIVERA: - - - the rule apply, if you're
24 saying "largely"?

25 MR. JOYCE: Let me note, in a second, one



1 possible exception. Any contingency on construction, yes,
2 will satisfy the statute because all 206(A) requires is a
3 certificate of public convenience and necessity. Congress
4 gave FERC, expressly, the power in 717r(e), the power to
5 condition its certificates.

6 Now, there is one thing that FERC can do that it
7 didn't do - - - it didn't do here, and it's important.
8 Sometimes - - - sometimes FERC conditions - - - not
9 construction - - - but conditions the exercise of eminent
10 domain. It's powerful that FERC didn't do so here. And it
11 didn't do so for good reason. It - - - it's because - - -

12 JUDGE RIVERA: But counsel - - - counsel - - -

13 MR. JOYCE: - - - the way it - - -

14 JUDGE RIVERA: Counsel, if I can interrupt you.

15 MR. JOYCE: Sure.

16 JUDGE RIVERA: Let's just say, for one moment,
17 with the denial of the permit. But let's just say - - -

18 MR. JOYCE: Of - - -

19 JUDGE RIVERA: I understand you have a position
20 on that denial. Let's just say for one moment - - - stay
21 with me - - - that there is a denial of the permit. Why -
22 - - why would the court permit eminent domain to move
23 forward when you cannot proceed with the construction?

24 MR. JOYCE: So Judge Rivera, I think it's
25 important to understand what the majority misapprehended



1 about denial of a WQC, which I think is - - - is bound up
2 in Your Honor's question. A WQC permit in fact has nothing
3 to do with construction. All a WQC permit does is it
4 authorizes a discharge. The Delaware Riverkeeper opinion
5 from the D.C. Circuit makes that clear.

6 JUDGE RIVERA: Yeah, but that may affect - - -

7 MR. JOYCE: And so - - -

8 JUDGE RIVERA: If I can interrupt you again.
9 That may affect, indeed, the construction, which may affect
10 what part and how much of the land National Fuel Gas is
11 trying to obtain through the eminent domain process,
12 through the condemnation process.

13 MR. JOYCE: The denial of a WQC does not prevent
14 any part of the construction - - - excuse me, any part of
15 the project from going forward. Indeed, even while the WQC
16 was denial - - - was denied, that is, before FERC found it
17 waived, the project continued to go forward. My clients
18 were under - - -

19 JUDGE STEIN: Counsel, could - - -

20 MR. JOYCE: - - - FERC obligations to continue
21 submitting status reports, which they did. And the - - -
22 and the project continued on.

23 JUDGE STEIN: Counselor - - -

24 MR. JOYCE: What - - -

25 JUDGE STEIN: - - - could - - -



1 MR. JOYCE: Sure.

2 JUDGE STEIN: Could the landowners have sought
3 and possibly obtained a stay from FERC of its certificate
4 under these circumstances?

5 MR. JOYCE: Absolutely, and it's the only place
6 to obtain a stay, right? The - - - the CPLR provisions
7 that we've cited, and the U.S.C. provisions that we've
8 cited, make FERC orders immediately effective unless they
9 are stayed. And those orders sometimes are stayed, and
10 they can be stayed in different ways. FERC can stay the
11 certificate, pending completion of - - - of certain
12 conditions. FERC can stay, as I noted before, the exercise
13 of eminent domain. But - - -

14 JUDGE FAHEY: Can I - - -

15 MR. JOYCE: - - - respondents didn't do any of
16 that.

17 JUDGE FAHEY: Can I interrupt you just a second
18 just to go - - - excuse me.

19 MR. JOYCE: And in fact, the only stay - - -

20 JUDGE FAHEY: Counselor?

21 MR. JOYCE: - - - that was sought - - -

22 JUDGE FAHEY: Counselor?

23 MR. JOYCE: - - - was sought by DEC and the
24 Sierra Club, and it was denied. And now - - -

25 CHIEF JUDGE DIFIORE: Mr. Joyce? Mr. Joyce?



1 MR. JOYCE: - - - here we are in the Second
2 Circuit where DEC and Sierra Club didn't even seek a stay.
3 That is, we are fully going forward on - - -

4 JUDGE FAHEY: It's all right, Judge. Let him
5 finish.

6 MR. JOYCE: - - - this pipeline project, and FERC
7 recognizes it. It's defending its waiver order currently -
8 - -

9 JUDGE FAHEY: Mr. Joyce?

10 MR. JOYCE: - - - before the Second Circuit. If
11 anyone should - - -

12 JUDGE FAHEY: Mr. Joyce?

13 MR. JOYCE: - - - have an interest in saying this
14 pipeline project doesn't exist, none of this is ripe, don't
15 bother us, it's FERC. But yet they're mid-briefing, they
16 filed their oral argument statement in the Second Circuit
17 yesterday, as did I. We're full steam ahead.

18 JUDGE FAHEY: Mr. Joyce?

19 JUDGE RIVERA: There you go.

20 JUDGE FAHEY: Mr. Joyce, Judge Fahey.

21 MR. JOYCE: Judge Fahey - - -

22 JUDGE FAHEY: All right. Yes.

23 MR. JOYCE: Thank you.

24 JUDGE FAHEY: Slow down. You have to listen for
25 our questions. When you get rolling like that, you can't



1 hear us. This applies to both counselors. And we're
2 trying not to interrupt you. We want to let you make your
3 argument, and then - - - so - - - so be careful, all right?
4 Listen for our questions when you're talking.

5 MR. JOYCE: I'm sorry, Judge Fahey, I didn't hear
6 you.

7 JUDGE FAHEY: That's all right because nobody
8 else did either. Don't - - - don't worry about it.

9 But so my question to you is the way I understand
10 your argument is that the National Fuel Gas doesn't need a
11 water quality certificate because it only authorizes
12 construction and not the eminent domain proceedings; is
13 that an accurate statement of your argument?

14 MR. JOYCE: No, Your Honor. So - - - and - - -

15 JUDGE FAHEY: Briefly.

16 MR. JOYCE: - - - maybe I misapprehend your
17 question - - -

18 JUDGE FAHEY: No, no, slow down.

19 MR. JOYCE: And - - -

20 JUDGE FAHEY: Brief - - -

21 MR. JOYCE: National Fuel no longer needs a WQC
22 because FERC has found the WQC requirement waived by the
23 DEC.

24 JUDGE FAHEY: All right.

25 MR. JOYCE: My - - -



1 JUDGE FAHEY: Let me stop you. What's - - -
2 what's the record that the Appellate Division then had in
3 front of it? I'm going to assume that they - - - before
4 the FERC ruling, you needed a - - - a WQC to go forward.
5 And the way I understood the record, in front of the
6 Appellate Division, at the time the majority made their
7 decision, was their decision was made after - - - or excuse
8 me, the waiver order came after Supreme Court submissions,
9 after the Appellate Division record had closed, and after
10 this case was argued. I think - - - and then this FERC
11 waiver order came down after that happened. And you're
12 saying that the majority should have then considered that
13 order; is that correct?

14 MR. JOYCE: That's correct.

15 JUDGE FAHEY: All right. So - - -

16 MR. JOYCE: Let me take on a couple of - - -

17 JUDGE FAHEY: Let me stop you - - -

18 MR. JOYCE: - - - of your points - - -

19 JUDGE FAHEY: No, no, that's all I want to know.

20 MR. JOYCE: - - - that I think - - -

21 JUDGE FAHEY: So my point is that, after the
22 entire record was closed, you're saying that they should
23 have gone back and changed it rather than go forward with
24 the case. Is that - - -

25 MR. JOYCE: I don't think that's accurate, Your



1 Honor.

2 JUDGE FAHEY: All right. Then tell me why not.

3 MR. JOYCE: At oral argument, before the Fourth
4 Department, the Fourth Department expressly asked to be
5 updated on any issuance of a waiver order. Counsel did
6 that and sent that waiver order. And so, at the time the
7 appeal was decided, the law, as it stood before the Fourth
8 Department, was there was a waiver order in effect.

9 JUDGE WILSON: Can - - - can I ask you - - -

10 MR. JOYCE: The Fourth Department didn't actually
11 dispute that. The Fourth Department said it wasn't
12 judicially noticeable. But as we point out, CPLR 4511
13 requires mandatory judicial notice.

14 JUDGE FAHEY: No, but we're talking - - -

15 MR. JOYCE: This court - - -

16 JUDGE FAHEY: Stop.

17 MR. JOYCE: - - - repeatedly - - -

18 JUDGE FAHEY: We're talking - - -

19 MR. JOYCE: - - - held - - -

20 JUDGE FAHEY: Stop.

21 MR. JOYCE: - - - that - - -

22 JUDGE FAHEY: Counsel?

23 MR. JOYCE: Sure.

24 JUDGE FAHEY: Counselor? What we're talking
25 about here is permissive notice under 4511(b), and it says



1 they may or may not consider it. They made a decision,
2 they went forward, and I - - - I don't think this is - - -

3 MR. JOYCE: That's incorrect, Your Honor.

4 JUDGE FAHEY: Excuse me.

5 MR. JOYCE: It's not permissive notice here.

6 JUDGE FAHEY: Well - - -

7 MR. JOYCE: 45 - - -

8 JUDGE FAHEY: - - - I - - - we might disagree - -
9 -

10 MR. JOYCE: 4511(a), common law of the United
11 States, is mandatory, and 4511(b) is mandatory on request
12 where there's an ordinance of an agency of the United
13 States - - -

14 JUDGE FAHEY: I'm not sure I agree with you,
15 counselor.

16 MR. JOYCE: - - - which this is.

17 JUDGE FAHEY: Counselor - - -

18 MR. JOYCE: So it's doubly mandatory, Your Honor.

19 JUDGE FAHEY: Counselor, you've got to slow down,
20 all right, just so I can get my point in, okay? I don't
21 think you're correct about that. I don't think that this
22 constitutes a mandatory requirement of - - - of notice.
23 Leaving that aside, one way or the other, it was clear,
24 when the majority made their decision here, that this
25 decision had not been made and that the writing came out



1 then afterwards, after the decision had been made. That
2 seems to have been - - - well, I don't know if you agree
3 with me, but my experience with the Appellate Division
4 seems that's the sequence of events that actually took
5 place here.

6 MR. JOYCE: Well, it's incorrect, Your Honor,
7 that it came out after the decision had been made. The - -
8 - it came out after oral argument, but prior to decision,
9 which is why both the Fourth Department majority and the
10 dissent referred to it. And then the Fourth Department
11 majority's reasoning for rejecting it was that it couldn't
12 be judicially noticed. But - - -

13 JUDGE STEIN: But counselor - - -

14 MR. JOYCE: - - - as - - -

15 JUDGE STEIN: - - - your position - - -

16 MR. JOYCE: I'm sorry, Your Honor.

17 JUDGE STEIN: Isn't your position that that helps
18 - - - that helps your position, but that's not necessary
19 because, even were there no waiver decision here at that
20 point, it did not preclude the eminent domain from going
21 forward.

22 MR. JOYCE: That's exactly right, Justice Stein.
23 And - - - and look, we had always argued below that waiver
24 or the WQC - - -

25 JUDGE FAHEY: That makes no sense - - -



1 MR. JOYCE: - - - was a red herring.

2 JUDGE FAHEY: - - - counselor.

3 MR. JOYCE: Indeed, as this case found itself
4 before the Fourth Department, it was functionally no
5 different than the Eagle Creek case in which Your Honor sat
6 on the Third Department. That case - - -

7 JUDGE WILSON: Mr. Joyce?

8 MR. JOYCE: - - - the - - -

9 JUDGE WILSON: Mr. Joyce, could I just ask?

10 MR. JOYCE: Sure.

11 JUDGE WILSON: I want to get your understanding.
12 Suppose, just hypothetically, DEC had denied the water
13 quality permit timely, right?

14 MR. JOYCE: Correct.

15 JUDGE WILSON: Does that prevent National Fuel
16 from doing anything? What effect does that have?

17 MR. JOYCE: It's a great question. It prevents
18 it from doing two things. One, it prevents them from
19 discharging. That's all the 401 does. It - - - it says
20 you cannot discharge into the navigable waters of the
21 United States. So that's the primary thing it did here.

22 Two, because FERC made the other federal
23 authorizations, including a WQC, a condition on
24 construction, it prevented National Fuel from constructing.
25 But National Fuel had to do any number of other things.



1 Those are, I think, largely detailed in - - - in reply
2 brief 18, note 2. We had to submit site surveys of the
3 lands that would be effected by this project, including
4 respondent's land and - - - and any number of other pre-
5 construction conditions that - - -

6 JUDGE FAHEY: But ultimately - - - counselor,
7 ultimately you cannot go forward on the project without the
8 WQC; is that correct?

9 MR. JOYCE: No, Your Honor. We cannot construct
10 the project - - -

11 JUDGE FAHEY: All right. Well, if you can't - -
12 -

13 MR. JOYCE: - - - absent the WQC - - -

14 JUDGE FAHEY: Let's - - - let's just deal with
15 the logic of that response. If you can't construct, then
16 you can't do the project. There's no point in going
17 forward. Yes, you could acquire, you're saying, but we
18 couldn't build. Is that what you're saying to us?

19 MR. JOYCE: So - - -

20 JUDGE FAHEY: What would be the point of
21 acquiring if you couldn't build?

22 MR. JOYCE: Because the question of whether we
23 could build was very much open. You know, respondent tries
24 to turn this into a failed condition, but it wasn't. Even
25 if it had been denied and there was no waiver, we had a



1 Second Circuit appeal which overturned the WQC decision.
2 DEC itself said we could reapply.

3 But this case doesn't - - - doesn't look, as we
4 pointed out in our response to the amicus brief, any
5 different from Goldstein or Power. When eminent domain was
6 authorized, Atlantic Yards couldn't go in and build until
7 it had DOB approvals. When, in Power, Columbia got the
8 right of eminent domain, it couldn't suddenly put up a
9 tower. It had to go through a host of approvals. And all
10 of those lie downstream.

11 And the legislature has always known about that,
12 and yet the legislature makes 206(A) hinge on a certificate
13 of public convenience and necessity, not one that's - - -
14 that has conditions, not one that's exhausted judicial
15 review.

16 Under 204 and 206, the legislature has never said
17 eminent domain only occurs where a project is shovel-ready.
18 And - - - and for good reason because eminent domain, as
19 here, as FERC pointed out here, and as FERC has pointed out
20 in numerous other cases, eminent domain is often antecedent
21 to satisfying the conditions of construction.

22 CHIEF JUDGE DIFIORE: Thank you, Mr. Joyce.

23 MR. JOYCE: Thank you, Your Honors.

24 CHIEF JUDGE DIFIORE: Counsel?

25 MR. ABRAHAM: Thank you, Your Honors. May it



1 please the court. I would like to reserve three minutes
2 for rebuttal.

3 CHIEF JUDGE DIFIORE: Counsel, there's no
4 rebuttal, but please go forward with your argument.

5 MR. ABRAHAM: Thank you. The Schuecklers have
6 never stopped National Fuel from coming on their land to
7 survey. Let's start there.

8 We concede that National Fuel's FERC certificate
9 is valid. However, a FERC certificate can be both valid
10 and ineffective, and that's what we have here. Its
11 validity imposes conditions, and if important conditions
12 fail, the FERC certificate is no longer effective.

13 JUDGE STEIN: But counselor, it seems to me that
14 there - - -

15 MR. ABRAHAM: We - - -

16 JUDGE STEIN: Counselor, it seems to me that
17 there are a lot - - -

18 MR. ABRAHAM: There are - - -

19 JUDGE STEIN: - - - of procedures that the land
20 owner could follow and could undertake to - - - to put a
21 hold on things, if they think that the circumstances don't
22 warrant them going forward with - - - with eminent domain.
23 But - - - but is - - - it seems to me, as well, that those
24 procedures don't include having a state court decide what
25 position the - - - the construction of - - - of the - - -



1 of this structure is in that it is up to FERC and the
2 federal courts to make those decisions, that they could
3 seek a stay, that they could appeal certain things.

4 But - - - but - - - but what you're suggesting is
5 that a state court has the power, under the Eminent Domain
6 Procedure Law, as it's written, to - - - to - - - as - - -
7 as things proceed, and as things change, and as - - - as
8 these things go forward, with all their complexities, to
9 make that determination, at a single moment in time, so
10 that you'd be having the - - - you'd be having National
11 Fuel, for example, coming back and forth and back and forth
12 and back and forth, depending upon what was happening that
13 day in what court and so on and so forth.

14 So I guess that's a long-winded question, but - -
15 - but really it is, is where does it give a state court the
16 authority to determine whether the FERC certificate is - -
17 - I can't remember exactly what the - - - the term was
18 used, but whether it - - - it was effective. That's my
19 question.

20 MR. ABRAHAM: Incipient. Well, it's certainly
21 not effective if a - - - if a water quality certification's
22 been denied by the state. The state - - -

23 JUDGE STEIN: But - - -

24 MR. ABRAHAM: - - - has blocked the project.

25 JUDGE STEIN: But the water quality certification



1 was subject to a reapplication, was - - - that the denial
2 of it was subject to - - - to appeals and all sorts of
3 things. So - - - and there - - - my understanding is that
4 there are all kinds of conditions that are in flux all the
5 time on these things and that some of them, in fact, can't
6 be met until there's eminent domain. So it becomes a
7 Catch-22. And - - - and - - - and this thing can never be
8 built.

9 MR. ABRAHAM: No, that's what it looks like,
10 perhaps, but it's not that case. When a water quality
11 certification has been denied, that's a special
12 circumstance, a special condition. It's almost - - -

13 JUDGE STEIN: Where does it say that in the emi -
14 - -

15 MR. ABRAHAM: - - - jurisdictional.

16 JUDGE STEIN: Where does it say that in the
17 Eminent Domain Procedure Law in 206(A)? Where does it say
18 that?

19 MR. ABRAHAM: Well, it doesn't say that, Your
20 Honor. But the kind of certificate that National Fuel has
21 is not the kind of certificate, I believe, the EDPL
22 contemplates. EDPL 206(A), in particular, shouldn't be
23 read to allow National Fuel to avoid any demonstration that
24 its project would or is even likely to satisfy the 204(B)
25 factors under New York's public purpose test. Merely



1 presenting a conditional FERC certificate and asking a
2 court to deem all of the conditions met is not appropriate
3 where the record indicates an important condition has
4 failed. In fact, the jurisdictional condition, the Clean
5 Water Act, preempts the national - - - Natural Gas Act.
6 That's what the Fourth Department found. And that's what
7 the Clean Water Act says. It says no license - - - no
8 federal license shall issue without the water quality
9 certification.

10 JUDGE FAHEY: Just to clarify - - -

11 MR. ABRAHAM: So a landowner ought not to be
12 burdened while a condemnee litigates the blocking of its
13 project. A condemnee can refile, with proof of a public
14 project, after it wins its dispute. We're not parties.
15 The Schuecklers are not a party to the - - -

16 JUDGE FAHEY: Counselor?

17 MR. ABRAHAM: - - - Second Circuit or the D.C.
18 circuit litigation. We have no control over that.

19 JUDGE FAHEY: Counselor?

20 MR. ABRAHAM: In the meantime, it cannot - - -

21 JUDGE FAHEY: Counselor?

22 MR. ABRAHAM: - - - be shown or it cannot be
23 known whether National Fuel will be permitted to move
24 forward with development.

25 JUDGE FAHEY: Counselor?



1 MR. ABRAHAM: Your Honor?

2 JUDGE FAHEY: Counselor, the Clean Water Act - -

3 -

4 MR. ABRAHAM: Yes.

5 JUDGE FAHEY: - - - it's a federal act, right?

6 MR. ABRAHAM: That's correct.

7 JUDGE FAHEY: All right. And the requirement for

8 a - - - a water quality certificate that the state must

9 issue is a product of federal law, correct?

10 MR. ABRAHAM: That's correct.

11 JUDGE FAHEY: All right. So in that

12 circumstance, then, in the circumstance we have here, this

13 wasn't a matter - - - I think Judge Stein is - - - is

14 correct as far as the ruling goes. Certainly she is. But

15 - - - but the State's court's ruling was, in effect, based

16 upon its understanding of the application of the

17 requirements under federal law. Is that a fair analysis?

18 Is that correct?

19 MR. ABRAHAM: No, I disagree, Your Honor. I

20 disagree that the - - -

21 JUDGE FAHEY: Okay. Tell me why.

22 MR. ABRAHAM: The Appellate Division ruled under

23 EDPL and said National Fuel should not be exempt from the

24 obligation to demonstrate it as a public project. Since it

25 has no project, it cannot have a public project.



1 JUDGE FAHEY: I see, so in the absence of any
2 project, they don't have any right to Eminent Domain
3 Procedure Law is what you're saying.

4 MR. ABRAHAM: That's right. And this is fairly
5 unique. This is not going to happen every day because
6 there are conditions which, when they fail, have this
7 result. As you said - - -

8 JUDGE FAHEY: Can I ask a question?

9 MR. ABRAHAM: - - - and as others have said - - -

10 JUDGE FAHEY: Can I ask a ques - - -

11 MR. ABRAHAM: - - - there are many conditions.

12 JUDGE FAHEY: Counselor, can I just - - - just go
13 off this point for one second? The other judges may have
14 questions on it, but can - - - can we turn directly to the
15 - - - the certificate itself? I had understood that both
16 parties had agreed to an extension of the water quality
17 certificate's time period, DEC's time period for approval.
18 Is that correct? It's required to be approved within a
19 year, but both parties, you and National Fuel Gas, have
20 agreed to an extension. Is that right? Counselor?

21 MR. ABRAHAM: We're not a party to that. The - - -
22 - the parties to that did that, you're correct, but I just
23 want to emphasize we're not a party to that. We had
24 nothing to do with that.

25 JUDGE FAHEY: I see. Okay. Thank you,



1 counselor.

2 MR. ABRAHAM: Well, I - - - I wanted to emphasize
3 the - - - the time frame here. You know, when the
4 Schuecklers appeared in trial court, National Fuel's
5 federal water quality certification had been denied, and it
6 could not demonstrate it would ever obtain the
7 certification. National Fuel still has no relief from New
8 York's action blocking the pipeline project. It's been
9 over three years since National Fuel filed its petition,
10 and the company still has no light at the end of the
11 tunnel. It does not hold the sort of license, permit, or
12 similar approval contemplated by the EDPL.

13 And I think this court should carve out a clear
14 rule that when a, essentially, jurisdictional condition
15 fails, and a project is essentially blocked, and there's no
16 light at the end of the tunnel, it's unconstitutional to
17 take people's land. If they want to work their dispute out
18 in other courts and get over that obstacle, they can come
19 back. That's what the Fourth Department said, start all
20 over - - -

21 JUDGE WILSON: So counsel - - -

22 MR. ABRAHAM: - - - take the land then.

23 JUDGE WILSON: Counsel - - - counsel, you keep
24 describing the water quality issue as jurisdictional. The
25 - - - the certificate has a number of conditions, things



1 that are expressly described as conditions, and that's one
2 of them. Why - - - I assume you don't think that
3 everything that has the word "condition" is jurisdictional;
4 is that right so far?

5 MR. ABRAHAM: That's right.

6 JUDGE WILSON: All right. So how do we
7 distinguish - - - I mean, to me, these things don't look as
8 if they're conditions precedent. Many of them clearly
9 can't be conditions precedent because of the way that
10 they're worded, so why is it - - - can you articulate why
11 you say this is different from every other, or at least
12 from some of the other things in the certificate that are
13 identified as conditions?

14 MR. ABRAHAM: Yes, this is different because the
15 authority and the understanding, the meaning of the law, is
16 outside of this certificate. It's found in the Clean Water
17 Act which says without a water quality certification you
18 may not have a federal license.

19 CHIEF JUDGE DIFIIORE: Thank you, counsel.

20 Mr. Joyce?

21 MR. ABRAHAM: Thank you.

22 MR. JOYCE: Yes, Your Honor. Sorry, I was
23 struggling to find my mute button.

24 I think I have three points in rebuttal. The
25 concession that the certificate is valid is dispositive



1 here. The claim that it's no longer effective is simply
2 wrong. That's wrong because the statutes tell you that.
3 15 U.S.C. 717r(c), 15 U.S.C. 3416(a)(5), and 18 C.F.R.
4 385.2007(c)(1) all say that FERC orders are effective when
5 issued unless stayed. Here there was no stay. Moreover -
6 - -

7 JUDGE RIVERA: Yeah, but counsel, if I can
8 interrupt you - - -

9 MR. JOYCE: - - - the court cites - - -

10 JUDGE RIVERA: Excuse me, counsel. Great.

11 MR. JOYCE: Yes?

12 JUDGE RIVERA: I'm glad you heard me. Good. You
13 see my hand up. Okay. But let - - -

14 MR. JOYCE: I couldn't see your hand up, Judge
15 Rivera - - -

16 JUDGE RIVERA: - - - let - - - let - - -

17 MR. JOYCE: - - - but I could hear you.

18 JUDGE RIVERA: No, that's fine.

19 MR. JOYCE: I'm sorry.

20 JUDGE RIVERA: Counsel, no, that's fine. All
21 right. But whether it's effective or not, let's go with
22 it's effective. The question is what's it effective for?
23 So as I understand the argument, it's that it can't be
24 effective to allow you to seek to proceed under the statute
25 for condemnation because you don't - - - let me finish - -



1 - because you do not yet have a WQC.

2 Now, it may be true that, in the pending
3 litigation over this issue, that indeed FERC's
4 determination that New York has waived its opportunity,
5 under both state and federal law, the Clean Water Act, to
6 issue or not issue the WQC has, they - - - they've waived
7 their right to do that. You may succeed on that, but that
8 is not the ruling that exists yet.

9 So why is it that we can't take judicial notice
10 of the fact that you've got all that pending federal
11 legislation when you're arguing that the Appellate Division
12 had to take judicial notice of the FERC decision?

13 MR. JOYCE: So let me start with - - - with the
14 first question you raised - - -

15 JUDGE RIVERA: Yep.

16 MR. JOYCE: - - - which was does the WQC prohibit
17 the exercise of eminent domain. No, it doesn't. That's
18 the issue that the D.C. circuit addressed in Delaware
19 Riverkeeper and it has been addressed by FERC. The
20 certificate is immediately effective for eminent domain
21 purposes even if a WQC certificate - - - excuse me - - -
22 condition on construction remains outstanding.

23 JUDGE RIVERA: But counsel, if I could just
24 interrupt you.

25 MR. JOYCE: On the - - -



1 JUDGE RIVERA: Counsel, if I can interrupt you
 2 there. But how could the project proceed? I get you could
 3 - - - I'll - - - I'll stand with your argument that,
 4 nevertheless, you could proceed to condemn the property.
 5 But then you don't get the WQC. So under the Clean Water
 6 Act, that's the end of the project.

7 MR. JOYCE: Only if there's a discharge, Judge
 8 Rivera. If the project could be set up in a way where you
 9 don't discharge, and again - - -

10 JUDGE RIVERA: Let's just - - -

11 MR. JOYCE: - - - I'm taking - - -

12 JUDGE RIVERA: Counsel?

13 MR. JOYCE: I'm taking for - - -

14 JUDGE RIVERA: Counsel, counsel, I understand you
 15 keep arguing you might find another way to get permission.
 16 My hypothetical, my point is if you never get that
 17 permission, you cannot proceed with the project. Isn't
 18 that what the Clean Water Act makes very clear?

19 MR. JOYCE: The - - - the Clean Water Act makes
 20 clear you can't discharge without the certification. It
 21 doesn't have any - - - anything to do with construction.
 22 In fact, we have - - -

23 JUDGE RIVERA: Well, how can your - - -

24 MR. JOYCE: I think this is most - - -

25 JUDGE RIVERA: - - - project proceed without a



1 discharge?

2 MR. JOYCE: Because if we're not crossing - - -

3 JUDGE RIVERA: All right. Let's go to the second

4 - - -

5 MR. JOYCE: - - - federally navigable streams - -

6 -

7 JUDGE RIVERA: It was rhetorical.

8 MR. JOYCE: - - - we can proceed.

9 JUDGE RIVERA: Let's go to the second question.

10 MR. JOYCE: Judge Rivera, I think the easiest way
11 to illustrate this is we had a WQC from Pennsylvania before
12 we had a FERC certificate. We couldn't go out and
13 construct. It's a certif - - - it's a condition on
14 construction. It doesn't mean that the project goes
15 forward or doesn't go forward.

16 And then I think the answer to your second
17 question is, if you take judicial notice, then you find
18 yourself in the shoes of - - - of a case in which we have
19 everything we need. There is no WQC; it doesn't exist.

20 JUDGE WILSON: I mean, your - - -

21 MR. JOYCE: It's gone - - -

22 JUDGE WILSON: Mr. Joyce, your - - -

23 MR. JOYCE: It's been waived.

24 JUDGE WILSON: Mr. Joyce?

25 MR. JOYCE: It's not reaffirmed in our waiver.



1 JUDGE WILSON: Mr. Joyce?

2 MR. JOYCE: And now the DEC is challenging that
3 on appeal before the Second Circuit.

4 JUDGE WILSON: Mr. Joyce? Your point - - -

5 MR. JOYCE: Yes.

6 JUDGE WILSON: Your point essentially is that in
7 the worst case you wound up having paid for land that
8 you've taken through eminent domain that you can't use.

9 MR. JOYCE: That's correct. And I think that's
10 similar to what happens under 204 and 206, and has for
11 years. If Columbia can't get all its permits to build the
12 project the Development Corp. authorized in Carr, yeah,
13 those are - - - those are the repercussions and the
14 remedies. I'll say that National Fuel doesn't want to
15 spend money for the sake of spending money. It's view is
16 this project is going forward and FERC views it the same
17 way.

18 CHIEF JUDGE DIFIORE: Thank you, Mr. Joyce.

19 MR. JOYCE: Thank you, Your Honors.

20 MR. ABRAHAM: Thank you, Your Honors.

21 (Court is adjourned)

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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the court of Appeals of Matter of National Fuel Gas Supply Corporation v. Schueckler, et al., No. 29, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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