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## New York

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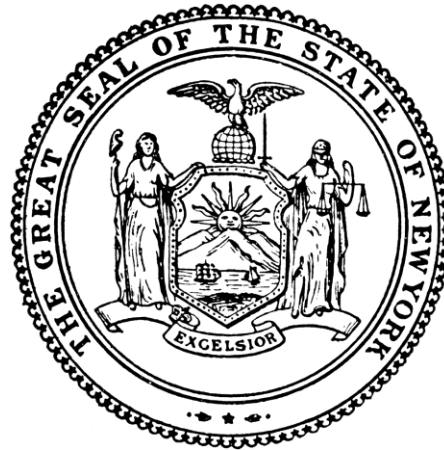
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NEW YORK



*Nathaniel I. Holland\**

## *I. Introduction*

There were few significant New York cases involving oil and gas in the past year due to New York's continuing moratorium on high-volume hydraulic fracturing operations, which are necessary for the development of unconventional oil and gas formations. The most significant case involved the New York Department of Environmental Conservation's denial of a water quality certificate for a FERC-regulated interstate natural gas pipeline.

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## II. Judicial Developments

*Nat'l Fuel Gas Supply Corp. v. New York State Dep't of Env'tl. Conservation*, 761 F. App'x 68 (2d Cir. 2019).

National Fuel Gas Supply Corporation (“National Fuel”) sought to build a natural gas pipeline in northwestern Pennsylvania and New York. The Federal Energy Regulatory Commission (“FERC”) granted a certificate of public convenience and necessity to National Fuel under the Natural Gas Act.<sup>1</sup> National Fuel was “also required to obtain state water quality certifications from Pennsylvania and New York” under the Clean Water Act.<sup>2</sup> Pennsylvania granted the certificate but New York denied the certificate and National Fuel appealed.<sup>3</sup>

National Fuel argued that the New York Department of Environmental Conservation (“DEC”) applied the wrong standard by requiring “absolute certainty” that the project would meet water quality standards.<sup>4</sup> The DEC conceded that a “reasonable assurance” standard applied but argued that the project did not meet that standard for water turbidity standards.<sup>5</sup>

The Court of Appeals applied an “arbitrary and capricious” standard of review to the DEC denial. In determining whether the action was arbitrary and capricious the Court considered whether the decision:

[(1)] relied on factors which Congress has not intended it to consider; [(2)] entirely failed to consider any important aspect of the problem before it; or [(3)] offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”<sup>6</sup>

The Court concluded that the denial failed to sufficiently explain what factors led to the denial, noting that the denial made no citations to any projects or studies considered by the DEC. The DEC also relied on considerations outside the scope of the project, including permanent culverts

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1. 15 U.S.C.S § 717(f) (Lexis through Pub. L. No. 116-56).

2. 33 U.S.C.S § 1341 (Lexis through Pub. L. No. 116-57).

3. *Nat'l Fuel Gas Supply Co. v. N.Y. State Dep't of Env'tl. Conservation*, 761 F. App'x 68, 69 (2d Cir. 2019).

4. *Id.* at 69-70.

5. *Id.*

6. *Id.* at 70 (quoting *Islander East Pipeline Co., LLC v. McCarthy*, 525 F.3d 141, 150-151 (2d Cir. 2008)).

and wet-crossings.<sup>7</sup> Finally, the DEC failed to consider evidence supporting FERC's findings as to the water impacts of the project.<sup>8</sup> The Court vacated the DEC's denial and remanded the case to directing the DEC to more clearly articulate the basis for its denial.<sup>9</sup>

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7. *Id.* at 70-71.

8. *Id.* at 71.

9. *Id.* at 72.