[Cite as *State ex rel. Yost v. Rover Pipeline, L.L.C.*, 2024-Ohio-4769.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO, EX REL. DAVE YOST, OHIO ATTORNEY GENERAL	:	Hon. Patricia A. Delaney, P.J.
	:	Hon. W. Scott Gwin, J.
	:	Hon. Craig R. Baldwin, J.
Plaintiff-Appellant	:	
	:	
-vs-	:	Case No. 2023CA00151
	:	
ROVER PIPELINE, LLC AND PRETEC DIRECTIONAL DRILLIING, LLC	:	OPINION
Defendants-Appellees		

CHARACTER OF PROCEEDING:	Appeal from the Stark County Court of Common Pleas, Case No. 2017-CV-02216
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	October 1, 2024

APPEARANCES:

For: Appellant

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Gwin, J.,

{¶1} Appellant State of Ohio, ex rel. Dave Yost, Ohio Attorney General, appeals the judgment of the Stark County Court of Common Pleas dismissing its fourth amended complaint against appellees Rover Pipeline, LLC and Pretec Directional Drilling, LLC.

Facts & Procedural History

{¶2} Appellee Rover Pipeline, LLC ("Rover") is the owner and operator of the drilling operations for the Rover pipeline. Appellee Pretec Directional Drilling, LLC ("Pretec") is a subcontractor hired by Rover to perform horizontal-directional drilling related to construction of the pipeline.

{¶3} In February of 2015, Rover filed an Application for a Certificate of Public Convenience and Necessity with the Federal Energy Regulatory Commission ("FERC Certificate"), as required by federal law, to construct the 713-mile interstate pipeline. The pipeline is designed to transport natural gas from the Marcellus and Utica shale supply areas through West Virginia, Pennsylvania, Ohio, and Michigan, to outlets in the Midwest and elsewhere.

{¶4} As required by Section 401 of the Clean Water Act ("Section 401"), 33 U.S.C. 1341(a)(1), Rover applied for water quality certification from appellant on November 10, 2015 (hereinafter "401 Certification"). Appellant did not respond to Rover's application within one year. FERC issued an Environmental Impact Statement ("EIS") in July of 2016. In February of 2017, FERC issued its Certificate, granting approval for construction of the pipeline, subject to 45 environmental conditions. FERC gave Rover the authorization to begin construction in March of 2017. In May of 2017, the Ohio Environmental Protection Agency asked FERC to halt construction of the pipeline based

on concerns of inadvertent returns and failure to adequately control storm water runoff. FERC stopped construction until Rover implemented protective measures. In September of 2017, FERC allowed Rover to resume activity. Additionally, in 2017, the FERC Office of Enforcement opened an investigation into the discharge of diesel fuel, hydraulic oil, contaminated fluids, and unapproved additives into the water in various locations across Ohio caused by the construction of the Rover pipeline.

{¶5} On May 6, 2022, appellant filed a fourth amended complaint, the dismissal of which is the entry appealed in the instant action. The complaint alleges appellees illegally discharged millions of gallons of drilling fluids into Ohio's waters, causing pollution and degrading water quality across the state during construction of the Rover pipeline.

{¶6} Appellant alleges, "during construction of an interstate, natural-gas pipeline, [appellees] illegally discharged millions of gallons of drilling fluids to Ohio's waters, causing pollution and degrading water quality on numerous occasions and in various counties across the state" on multiple dates in April and May of 2017. Further, Rover "discharged sediment-laden stormwater" during construction on dates in April through October of 2017. Appellant states appellees failed to secure any permits designed to control these discharges, and, because appellees had control, authority, direction, and responsibility for construction of the pipeline, Rover violated Ohio state law.

{¶7} In its complaint, appellant sought both civil penalties and injunctive relief. However, the pipeline became fully operational in 2018. Thus, appellant is seeking civil penalty damages only for past violations.

{¶8} The fourth amended complaint contains the following counts:

Count One – Rover and Pretec discharged pollutants (drilling fluids) to the waters of the State without point-source NPDES permits, failing to apply for and obtain point-source NPDES permits in violation of Ohio law.

Count Two – Rover failed to obtain a general storm water permit for its storm water discharges

Count Three – Rover and Pretec violated Ohio's general water quality standards for unpermitted drilling fluid discharges into waters of the state and unpermitted storm water discharges into the waters of the State.

Count Four – Rover and Pretec violated Ohio's wetland water quality standards (unpermitted drilling fluid discharges and unpermitted storm water discharges severe enough to violate standards).

Count Five – Rover violated the Director's Orders by failing to obtain coverage or even submit a notice of intent to obtain coverage under the Ohio EPA's Construction Storm Water Permit.

Count Six – Rover violated the Hydrostatic Permit (the permit that covers discharge of water that a pipeline company places into the pipe, during the construction phase, for safety testing).

{¶9} The trial court held pre-trials with the parties. As stated in the trial court's judgment entry, "the parties agreed that, instead of addressing the matters on remand, they wished to readdress the arguments made in the prior motions to dismiss that were summarily addressed by the Court in the footnote." Appellees each filed motions to dismiss appellant's fourth amended complaint on August 1, 2022. Appellant filed a

memorandum in opposition to the motions to dismiss on October 3, 2022. Appellees each filed replies.

{¶10} The trial court issued a judgment entry on October 20, 2023, granting appellees' motion to dismiss. The trial court found the Natural Gas Act ("NGA") is a "comprehensive scheme," wherein FERC serves as the lead agency in regulating and assuring compliance with the National Environmental Policy Act. The trial court went through the various applicable provisions of the NGA, in addition to the Clean Water Act ("CWA"), and found that, through the NGA, the federal government exclusively occupies the field of sale and transportation of natural gas, which, by necessity, includes the construction of natural gas pipelines. Further, that the NGA creates a scheme so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it.

{¶11} As to the argument by appellant that the CWA's "Savings Clause," prevents preemption, the trial court found such a reading would allow appellant to independently attack the FERC-certified project and, while Congress carved out the ability of states to have the right to approve or disapprove certain discharges and certifications under the 401 Certification process, the "Savings Clause" does not create independent rights. The trial court held such a reading of the "Savings Clause" would undermine the regulatory nature of the NGA. The trial found the NGA preempts the claims asserted by appellant in its fourth amendment complaint. Consequently, the trial court dismissed the complaint.

{¶12} Appellant appeals the October 20, 2023 judgment entry of the Stark County Court of Common Pleas and assigns the following as error:

{¶13} "I. THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT HELD THAT THE STATE OF OHIO'S CLAIMS AGAINST ROVER AND PRETEC, WHICH ALLEGED VIOLATIONS OF OHIO'S WATER POLLUTION LAW, WERE EITHER PREEMPTED BY THE NATURAL GAS ACT OR WAIVED UNDER THE CLEAN WATER ACT, SECTION 401, THOUGH THE TRIAL COURT DID NOT HEAR ANY EVIDENCE, THEREBY IGNORING THE OHIO SUPREME COURT'S DIRECTIVES ON REMAND."

Standard of Review

{¶14} If the claims of appellant are federally preempted, the common pleas court does not have jurisdiction over the matter. The standard of review regarding a claimed lacked of subject matter jurisdiction is "whether any cause of action cognizable by the forum has been raised in the complaint." *State v. Spurlock*, 42 Ohio St.3d 77 (1989). When determining its subject matter jurisdiction, "the trial court is not confined to the allegations of the complaint." *Southgate Dev. Corp. v. Columbia Gas Transmission Corp.*, 48 Ohio St.2d 211 (1976). The trial court can consider material beyond the complaint "without converting the motion into one for summary judgment." *Id.*

{¶15} This case is before us based on the trial court's grant of appellees' motions to dismiss pursuant to Civil Rule 12(B)(1) and (6). We review dismissals pursuant to Civil Rule 12(B)(6) de novo, presume the truth of all material factual allegations in the complaint, and make all reasonable inferences in appellant's favor. *Alford v. Collins-McGregor Operating Co.*, 2018-Ohio-8. We also review dismissals under Civil Rule 12(B)(1) de novo. *State ex rel. Ohio Civ. Serv. Emps. Assn. v. State*, 2016-Ohio-478.

Law of the Case

{¶16} This case was remanded to the trial court from the Ohio Supreme Court in *State ex rel. Yost v. Rover Pipeline, LLC*, 2022-Ohio-766 ("*Rover I*"). In the majority opinion, the Supreme Court held appellant waived its authority with respect to issues related to the Section 401 Certification. *Id.* However, if the allegations are "outside the contours" of the Section 401 Certification, waiver does not apply. *Id.* The Supreme Court remanded to the trial court to determine whether any allegations in the complaint were "outside the contours" of the Section 401 Certification. *Id.*

{¶17} Upon remand from the Supreme Court, the trial court held several pre-trial conferences with the parties. In its judgment entry, the trial court stated it held these conferences "for remaining parties to discuss proceeding on the remand from the Ohio Supreme Court." Further, "pursuant to discussions, the parties agreed that, instead of addressing the matters on remand," they wanted to address jurisdictional issues such as preemption. In its appellate brief, appellant states the "parties agreed to address the issue of preemption and other jurisdictional issues within the motions to dismiss first, instead of the matters on remand because the motions to dismiss are jurisdictional and thus could be dispositive * * * the State understood that the hearing on the scope of the State's 401 waiver would follow the jurisdictional briefing below if the trial court did not dismiss the State's case entirely on preemption grounds."

{¶18} In its assignment of error, appellant contends the trial court violated the law of the case by ignoring the directives of the Ohio Supreme Court.

{¶19} The law of the case doctrine provides that the decision of a reviewing court in a case remains the law of the case on the legal questions involved for all subsequent

proceedings in the case at both the trial and reviewing levels. *Giancola v. Azem*, 2018-Ohio-1694. However, the doctrine of the law of the case only comes into play with respect to issues previously determined and "while a mandate is controlling as to matters within its compass, on remand a lower court is free as to other issues." *Id.* at ¶16. The doctrine is considered to be a rule of practice rather than a binding rule of substantive law and will not be applied so as to achieve unjust results. *Nolan v. Nolan*, 11 Ohio St.3d 1 (1984). However, the rule is designed to ensure consistency of results in a case. *Id.*

{¶20} Appellant contends the trial court did not rely on preemption as the sole basis to dismiss the complaint and instead dismissed the claims based upon waiver, improperly determining the waiver issue without conducting the hearing contemplated by the Ohio Supreme Court in *Rover I*. Appellant bases its conclusion on a footnote by the trial court stating, "the parties have agreed to address the issue of preemption prior to addressing the remanded issue. However, even if the Court had the hearing contemplated by the remand and determined that the counts in the complaint were outside of the 401 certification, dismissal of the complaint would still be appropriate as such claims would be preempted by the NGA for the reasons set forth in this judgment entry."

{¶21} We find nothing in this language violating the law of the case. Appellant contends this language means the trial court improperly based its decision on the waiver issue. This Court reads the text appellant focuses on to mean that, even if the court held the hearing and determined there were claims that fell outside of the "contours" of Section 401, the claims in the complaint that *do not* fall within the "contours" of Section 401 are preempted by the NGA. The trial court's judgment entry focuses on preemption, and

issues its ruling based upon preemption, not waiver. As noted by the trial court and both parties in their appellate briefs, the parties agreed they wanted the trial court to rule on the preemption issue prior to conducting any hearing on remand due to the jurisdictional nature of preemption.

{¶22} While the dissent in the *Rover I* case addressed the preemption argument and found the NGA preempted the majority of appellant's claims, the majority opinion did not address the preemption issue at all. Accordingly, the preemption issue was not "an issue previously determined" by the Ohio Supreme Court, and thus the doctrine of law of the case does not come into play on the issue of preemption. *Giancola v. Azem*, 2018-Ohio-1694. The trial court did not act contrary to the mandates of any superior tribunal, and the law the case doctrine did not preclude the trial court from resolving the dispute by considering an alternative legal theory on remand. *Id.* at ¶17.

{¶23} Appellant also contends the trial court's statement that a certain paragraph in the Supreme Court's *Rover I* opinion regarding the text of the CWA was "dicta," means the trial court violated the law of the case because it wrongly considered this paragraph "dicta." However, the trial court clearly stated the reason it considered the paragraph dicta is because the majority in *Rover I* did not consider the preemption issue. The trial court did not consider it dicta for the waiver issue (which was specifically ruled on by the Court), but did consider it dicta for the preemption issue (which was not ruled on by the Court). As discussed above, the parties sought to have the trial court deal with the issue of preemption first, and the trial court based its holding upon preemption, not waiver.

{¶24} Finally, appellant contends the language utilized by the Ohio Supreme Court means that some of the claims in appellant's complaint must survive, but the trial

court failed to follow this holding in violation of the law of the case. The Ohio Supreme Court held that some of appellant's claims may not have been waived. However, as noted above, the majority opinion never deals with preemption. Simply because some of appellant's claims may not have been waived does not mean they cannot be preempted. The legal issue of preemption was not an "issue previously determined" by the Supreme Court. Accordingly, the trial court did not violate the law of the case in this regard.

{¶25} As to the parties' agreement to address the preemption issue first before having the trial court determine which claims were and were not within the "contours" of the 401 Certification, any such argument on appeal that this was incorrect or violated the law of the case is barred by the doctrine of invited error. The invited-error doctrine is a well-settled principle of law under which a "party will not be permitted to take advantage of an error which he himself invited or induced." *Hal Artz Lincoln-Mercury, Inc. v. Ford Motor Co.*, 28 Ohio St.3d 20 (1986). Appellant failed to object to the trial court ruling on the preemption issue first, agreed to having the trial court decide the preemption issue first, and argued the case on that basis. Appellant cannot now take advantage of any error in that regard. *Wojcik v. Pratt*, 2011-Ohio-5012 (9th Dist.).

{¶26} While this Court does not believe the trial court impermissibly premised its opinion on waiver or violated the law of the case, we note that any confusion as to or mention of waiver is due to the fluctuating arguments by appellant at the various stages in these proceedings. In response to motions to dismiss filed by appellees in 2018, appellant argued it was exercising its powers under the CWA Sections 303 and 402. At the Supreme Court level, appellant instead argued it was exercising its "traditional power to regulate water quality," which was authority that allegedly existed independently of the

CWA. *Appellant's Supreme Court Brief* at p. 4, 21, 32 (claims are saved from waiver due to state's "traditional power to regulate water quality," "traditional and primary power over land and water use," and "traditional authority over water quality"). In its response to the 2022 motions to dismiss at issue in this case, appellant returns to the CWA Sections 303 and 402 arguments. The Supreme Court did not directly decide the CWA Section 303 or 402 issue, because it based its decision on the state's "traditional" authority to bring these claims. Thus, the law of the case is not violated.

Preemption Law

{¶27} The doctrine of federal preemption originates from the Supremacy Clause of the United States Constitution in Article VI, clause 2. Pursuant to the Supremacy Clause, the United States Congress has the power to preempt state laws.

{¶28} There are three ways federal law can preempt state law: (1) where federal law expressly preempts state law (express preemption); (2) where federal law has occupied the entire field (field preemption); or (3) where there is conflict between federal law and state law (conflict preemption). *State ex rel. Yost v. Aktiengesellschaft,* 2019-Ohio-5084.

{¶29} Conflict preemption is a form of "implied" preemption, and occurs where it is impossible for a private party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Id.* at ¶13.

{¶30} Field preemption is also a form of "implied" preemption, in which Congress meant to preempt state law without explicitly saying so, and in which the state law regulates conduct in a field Congress intended the Federal Government to occupy

exclusively. *State ex rel. Yost v. Volkswagen Aktiengesellschaft*, 2021-Ohio-2121. "Field preemption," occurs when Congress has enacted a legislative and regulatory scheme that is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, or where an Act of Congress touches a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of states law on the same subject. *Id.* at ¶13.

{¶31} In determining whether federal law preempts state law, "the purpose of Congress is the ultimate touchstone." *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978). Congress' intent is primarily discerned from the language contained in the preemption statute and the statutory framework around it. *State ex rel. Yost v. Aktiengesellschaft,* 2019-Ohio-5084 at ¶14. Also relevant is the structure and purpose of the statute as a whole as revealed through text and the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law. *Id.* A court reviewing possible preemption must consider federalism as part of its analysis because both national and state governments have elements of sovereignty the other is bound to respect. *Id.* at ¶14-15.

Preemption by the NGA

{¶32} It is well-established that under the Commerce Clause, U.S. Constitution, Article I, Section 8, cl. 3, the federal government "has dominion, to the exclusion of the States, over navigable waters of the United States." *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958). The NGA has long been recognized as a "comprehensive scheme of federal regulation of all wholesales of natural gas in interstate commerce."

Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 300 (1988). The NGA confers upon FERC exclusive jurisdiction over the transportation of sale of natural gas in interstate commerce for resale. *Id.* at 300-301. Thus, FERC is the regulatory body charged with implementation of the NGA. FERC serves as the lead agency to coordinate all applicable federal authorizations and for the purposes of complying with the National Environmental Policy Act of 1969. 15 U.S.C. 717n(b)(1).

{¶33} The NGA mandates each federal and state agency considering an aspect of an application for federal authorization to "cooperate" with FERC and comply with deadlines established by FERC. 15 U.S.C. 717n(b)(1). FERC has the authority to establish a schedule for all federal authorizations. 15 U.S.C. 717n(c). Additionally, the NGA requires FERC to, "with the cooperation of Federal and State administrative agencies and officials, maintain a complete consolidated record of all decisions made or actions taken by the Commission * * * with respect to any Federal authorization." 15 U.S.C. 717n(d). This record maintained by FERC serves as the record for judicial review under section 717r(d) of "decisions made or actions taken of Federal and State administrative agencies and officials." *Id.*

{¶34} Among other duties, FERC must determine the public necessity for the development of natural gas pipelines. This determination is made by FERC when they issue a "certificate of public convenience and necessity." 15 U.S.C. 717f(c). The NGA details a specific procedure for an applicant to obtain a FERC Certificate, and no company may construct any facilities for the transportation in interstate commerce of natural gas without obtaining this certificate from FERC. The applicant must first: (1) describe the proposed pipeline project, (2) explain why the project is required, and (3) estimate the

beginning date and completion date for the project. Notice of the application is filed in the Federal Register, a period of public comment and protest is allowed, and FERC conducts public hearings on the application. *Id.*

{¶35} In evaluating an application, FERC must investigate "the environmental consequences of the proposed project and issue an environmental impact statement." *Id.* FERC must ensure that the proposed pipeline construction complies with specific federal environmental regulations, including those promulgated under the CWA. 15 U.S.C. 717b(d); 18 CFR 4.38. The EIS addresses multiple areas, including water use and water quality. FERC also requires natural gas companies to develop and comply with contingency and mitigation plans for construction, including the measures to be taken in the event of an inadvertent release. *Rover Pipeline, LLC, and Energy Transfer Partners, LP*, 177 FERC P 61182 (F.E.R.C.), 2021 WL 5982321. In this case, during the EIS process, FERC required as a condition of its FERC Certificate that Rover comply with an "HDD Contingency Plan," and required Rover to comply with specific procedures to address storm water discharges and potential discharges of fuel and fuel oil.

{¶36} If, after completing the process, FERC finds the proposed project "is or will be required by the present or future public convenience or necessity," and the applicant demonstrates it will conform to the rules and regulations of FERC, FERC will issue the certificate. 15 U.S.C. 717f(e). FERC has the "power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require." *Id.*

Clean Water Act

{¶37} Congress established the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). Under CWA Section 401, any applicant for a federal license or permit to conduct any activity that may result in any discharge into navigable waters – defined in the statute as "waters of the United States," shall provide the federal licensing or permitting agency with a 401 Certification. This certification issued by the state in which the discharge originates, attests that the discharge will comply with applicable provisions of certain enumerated sections of the CWA. These include effluent (i.e., discharge) limitations and standards of performance for new and existing discharge sources (Sections 301, 302, and 306), water quality standards and implementation plans (Section 303), and toxic pretreatment effluent standards (Section 307). Effluent limitations establish the levels of specific pollutants that are allowable in a discharger's effluent based on levels necessary to attain water quality standards in the waterbody receiving the discharge (water quality-based effluent limitations). *Water-Quality Based Effluent Limits.* U.S. Environmental Protection Agency https://www3.epa.gov/npdes/pubs/chapt_06.pdf (accessed September 15, 2024).

{¶38} The CWA gives states the opportunity to have a substantial role in the FERC certification proceedings, and specifically allows states to participate in environmental regulation of natural gas facilities pursuant to the CWA. "By enacting the [Clean Water Act], Congress provided states with an offer of shared regulatory authority." *Arkansas v. Oklahoma*, 503 U.S. 91 (1992). The Supreme Court has established that the CWA is a valid exercise of Congress' power under the Commerce Clause, and, in regard to the CWA, Congress has the power to offer states the choice of regulating activity

according to federal law or having state law preempted by federal law. *New York v. U.S.*, 505 U.S. 144 (1992).

{¶39} In this comprehensive regulatory scheme, Congress has delegated to the states the option to exercise some authority to enforce state environmental laws that are more stringent or broader than federal laws. The U.S. Supreme Court has held that the authority given to the states in the 401 Certification process is broad, as state approval through the 401 Certification process is required any time a federally licensed activity "may" result in a "discharge." *S.D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370 (2006). Further, that the authority given to the states via the 401 Certification process in the CWA "provides for a system that respects the State's concerns," and state certifications under the CWA are "essential in the scheme to protect state authority to address the broad range of pollution." *Id.* at 386.

{¶40} However, in order for a state to avail itself of this option to exercise authority, the state must follow a certain procedure. If the state fails to exercise this option to participate in the 401 Certification process, waiver applies. *State ex rel. Yost v. Rover Pipeline, LLC*, 2022-Ohio-766; *FFP Missouri 15, LLC, FFP Missouri, LLC*, 162 FERC 61237 (F.E.R.C.), 2018 WL 1364654 (March 15, 2018) ("as a result of the state's waiver, the conditions listed in its waived certifications were no longer mandatory"). This is because the waiver provisions were created to prevent a state from indefinitely delaying a federal licensing proceeding. *Hoopa Valley Tribe v. Federal Energy Regulatory Commission*, 913 F.3d 1099 (Dist. Col. 2019).

"Savings Clause"

{¶41} Appellant contends it maintains all of its authority pursuant to the "Savings Clause" contained in the NGA. Appellant believes it has the authority to adopt or enforce *any* standard or limitation regarding discharges of pollutants, separate and distinct from its ability to regulate through its issuance of the 401 Certification or its participation (or lack thereof) in the 401 Certification process, due to the broad nature of the "Savings Clause" in the NGA. The "Savings Clause" in the NGA provides, "Except as specifically provided in this chapter, nothing in this chapter affects the rights of States under * * * (3) the Federal Water Pollution Control Act (commonly known as the "Clean Water Act").

{¶42} We find appellant's reading of the Savings Clause to be too broad. The Savings Clause specifically preserves the "rights of the States" under the CWA. However, as discussed further below, the "right of the States" under the CWA is the federally delegated power to participate in the 401 Certification process. Outside of these federally delegated "rights" referenced in the Savings Clause, states have no power to regulate the construction of interstate natural gas pipelines due to the dominion the federal government has, to the exclusion of the states, over navigable waters of the United States. Unlike an antitrust claim that "affected" the FERC-regulated field of wholesale natural gas rates but was not "aimed directly" at the field, in this case, the claims set forth in appellant's complaint are aimed directly at the heart of a FERC-regulated field (the construction of an interstate natural gas pipeline). *Oneok v. Learjet, Inc.*, 575 U.S. 373 (2015) (no preemption because antitrust law was not aimed at natural gas companies and broadly aimed at all businesses, so not directly aimed at FERC-regulated field).

{¶43} The Savings Clause does not separately create any independent rights for appellant. As stated by the EPA, the CWA "does not provide an independent regulatory enforcement role" for states once they have waived certification. *2020 EPA Rule,* 85 Fed. Reg. at 42,255, 42,276. Rather, the rights protected from preemption via the Savings Clause are those rights delegated to the state from the federal government in the 401 Certification process. The object of giving states broad authority during the 401 Certification process is to maintain states' water quality standards. *S.D. Warren Co. v. Maine Board of Environmental* Protection, 547 U.S. 370 (2006).

{¶44} To read the Savings Clause as broadly as appellant would like this Court to would allow appellant to independently attack a FERC-certified project, despite having the opportunity and authority to utilize their authority during the 401 Certification process. It would also give states a second chance to regulate through the Savings Clause, as appellant is essentially seeking to impose new requirements after the FERC Certificate has already been issued, even though they were given the chance to participate in process. See *S.D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370 (2006) (stating Congress provided states with power to enforce "any other appropriate" requirement of state law" in the 401 Certificate). Given the detailed regulations promulgated by the NGA and the power given to FERC throughout these regulations, we find such a broad reading would undermine the regulations contained in the 401 Certification process. See *Arizona v. U.S.*, 567 U.S. 387 (2012) (permitting state to impose its own penalties would conflict with careful framework Congress adopted).

{¶45} We find preemption is consistent with the text and purpose of the NGA. 15 U.S.C. 717(a) provides that "federal regulation in matters relating to the transportation of

natural gas and the sale thereof * * * is necessary in the public interest." Additionally, 15 U.S.C. 717r specifically provides that, after a FERC Certificate is issued, as it was in this case, the way in which to challenge or contest that order is to: (a) apply for a rehearing with FERC and (b) by filing a petition in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia. Additionally, the NGA provides states with the ability to petition FERC to investigate a potential violation of the NGA or the FERC Certificate. 15 U.S.C. 717m; 15 U.S.C. 717n.

{¶46} FERC has the authority to pursue an enforcement action and penalties for violations of the NGA. 15 U.S.C. 717s; 15 U.S.C. 717t and t-1. FERC initiated an enforcement action against Rover for the same actions appellant in this case lists in its complaint: (1) intentionally including diesel fuel and other toxic substances and unapproved additives in the drilling mud during its horizontal directional drilling operations; (2) failing to adequately monitor and (3) improperly disposing of inadvertently released drilling mud that was contaminated by diesel fuel and hydraulic oil. FERC directed Rover to show cause why it should not be assessed a civil penalty under 15 U.S.C. 717t in the amount of $40 million. *Rover Pipeline, LLC, and Energy Transfer Partners, LP*, 177 FERC P 61182 (F.E.R.C.), 2021 WL 5982321. FERC has thus crafted a multi-million dollar penalty that balanced a variety of financial and environmental factors. *Id.*

{¶47} Courts examining the issue have also found the preemptive effect of the NGA to be broad. *Karuk Tribe of Northern California v. California Regional Water Quality*

Control Board, North Coast Region, 183 Cal.App.4th 330 (1st Dist. March 20, 2010) (it is only when states attempt to act outside of the federal context and federal scheme under authority of independent state law that such collateral assertions of state power are nullified); *Delaware Riverkeeper Network v. Secretary, Pennsylvania Dept. of Environmental* Protection, 833 F.3d 350 (3rd Cir. Aug. 8, 2016) (holding when a state declines to exercise its authority to issue a Water Quality Permit, this non-participation returns the state's delegated authority to enforce Section 401 to FERC with respect to the project due to NGA preemption); *Islander East Pipeline Co., LLC v. Connecticut Dept. of Environmental Protection*, 482 F.3d 79 (2nd Cir. Oct. 5, 2006) (Congress wholly preempted and completely federalized the area of natural gas regulation, but provided states with the option of being deputized regulators under the 401 Certification process); *Islander East Pipeline Co., LLC v. Blumenthal*, 478 F.Supp.2d 289 (D. Conn. March 22, 2007) (state permitting preempted by NGA once FERC certificate was issued); *National Fuel Gas Supply Corp. v. Public Service Commission of New York*, 894 F.2d 571 (2nd Cir. Jan. 24, 1990) (the matters sought to be regulated by the state were directly considered by FERC in the 401 Certification process, this direct consideration is more than enough to preempt state regulation); *Northern Natural Gas Co. v. Munns*, 254 F.Supp.2d 1103 (S.D. Iowa Feb. 28, 2003) (considerations of state regulations does not change the fact FERC considers and determines a full range of environmental and land use standards); *Northern Natural Gas Co. v. Iowa Utilities Board*, 377 F.3d 817 (8th Cir. 2004) (NGA preempts laws state was attempting to enforce; because FERC has authority to consider environmental issues, states may not engage in concurrent environmental review; FERC policy to require certain companies cooperate with state and local

authorities does not change the preemptive effect of NGA); *No Tanks, Inc. v. Public Utilities Commission*, 697 A.2d 1313 (Maine 1997) (state commission's review of environmental issues would be an attempt to regulate matters within FERC's exclusive jurisdiction contrary to preemption rule).

{¶48} The U.S. EPA itself recognizes the limited role the states have, and also recognizes that the ability of the state to participate in the 401 Certification process is a carve-out from what otherwise would be preempted by federal law. As stated by the EPA, "Section 401 * * * provides specific and defined authority for States and Tribes to protect their water quality in the context of a federal licensing and permitting process, including those processes in which State or Tribunal authority may otherwise be entirely preempted by federal law." *2020 EPA Rule,* 85 Fed. Reg. at 42,255, 42,276. The EPA also recognizes that while there may be situations in which "state enforcement under state authorities may be lawful where State authority is not preempted by federal law," one example of a situation "where State authority would be preempted by federal law includes FERC's sole authority to approve the construction of interstate natural gas pipelines * * * under the National Gas Act." *2020 EPA Rule,* 85 Fed. Reg. at 42,255, 42,276.

{¶49} Appellant contends it is conflicting and not possible for a court to find the federal government occupies the field of the sale and transportation of natural gas, which includes the construction of a natural gas pipeline, while at the same time recognizing the state retains some authority under the CWA 401 Certification process (assuming they do not waive the right). According to appellant, (1) either Congress has exclusive governance of the field, or (2) the states maintains *all* of its powers under the Savings Clause. We find this argument is too narrow, and misapprehends the fact that preemption

can be limited in scope. In fact, when preemption is used, it should be used in as narrow scope as possible so as to retain as much of the state's historical police powers as possible. *City of Girard v. Youngstown Belt Railway Co.*, 2012-Ohio-5370; *Matthews v. Centrus Energy Corp.*, 15 F.4th 714 (6th Dist. Oct. 6, 2021) (even absent complete preemption, can have partial preemption).

{¶50} We find that, during the permitting process, states can exercise their CWA permitting authority, and choose to regulate the activity. However, once the state waives this authority, state law is preempted by federal law. See *Millennium Pipeline Co., LLC v. Seggos*, 860 F.3d 696 (Dist. Col. 2017) (stating once the CWA's requirements have been waived, the CWA "falls out of the equation" and "there is nothing left for the state to do.") Appellant's "either/or" scenario misses a crucial and important detail: Congress has set up the regulatory system to offer a state the option to regulate the activity. The state retains their authority and ability to regulate through the CWA when the state imposes conditions, limitations, and specific permits on the project to assure compliance with various provisions of the CWA through the 401 Certification process.

{¶51} However, once the state gives up this authority Congress offered to them by waiving participation in the 401 Certification process, the state's delegated authority to enforce is returned to FERC, and the NGA preempts the field. "Where Congress has the authority to regulate private activity under the Commerce Clause, [the Supreme Court] recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law preempted by federal regulation." *Islander East Pipeline Co., LLC v. Connecticut Dept. of Environmental Protection*, 482 F.3d 79, 92 (2nd Cir. Oct. 5, 2006); see also: *Karuk Tribe of Northern California v. California Regional*

Water Quality Control Board, North Coast Region, 183 Cal.App.4th 330 (1st Dist. March 20, 2010) (state must exercise its authority through the 401 Certification process or preemption applies); *Delaware Riverkeeper Network v. Secretary, Pennsylvania Dept. of Environmental* Protection, 833 F.3d 350 (3rd Cir. Aug. 8, 2016) (holding when a state declines to exercise its authority to issue a Water Quality Permit, this non-participation returns the state's delegated authority to enforce Section 401 to FERC with respect to the project); *Islander East Pipeline Co., LLC v. Connecticut Dept. of Environmental* Protection, 482 F.3d 79 (2nd Cir. Oct. 5, 2006) (stating if state chooses not to regulate through the 401 Certification process, the regulatory decision-making reverts back to federal authorities). We find this is not an either/or proposition, as Congress has clearly stated its intention as to the scope of preemption, i.e., either participate, regulate, and enforce through the 401 Certification process or lose authority under the CWA because this ability to regulate and enforce reverts back to the federal authorities.

Specific Clean Water Act Provisions

{¶52} Appellant contends it retains power or authority under the CWA *other* than the power or authority that it derives from the 401 Certification process. However, Congress has provided direction regarding the scope of what a state should consider in making a Section 401 Certification decision. Section 401(a)(1) provides that, in the 401 Certification process, the state must certify that a discharge to navigable waters that may result from a proposed activity will comply with specific enumerated sections of the CWA, including Sections 301, 302, 303, 306, and 307, and also whether the proposed activity will comply with any other appropriate requirement of state law. *2020 EPA Rule,* 85 Fed. Reg. at 42,255, 42,276. Section 401(d) of the CWA provides that any 401 Certification

by the state "shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under Section 301 or 302 of this title, standard of performance under section 306 of this title, or prohibition, effluent standard, or pretreatment standard under section 307 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section." *Id.*; 33 U.S.C.§1341(d).

{¶53} Specifically, appellant contends that Sections 303 (33 U.S.C. 1313) and 402 (33 U.S.C. 1342) of the CWA provide it independent authority to require the permits listed in their complaint or allow them to set water quality standards even though they waived their opportunity to participate in the 401 Certification process. Appellant contends Section 303 "saves" Counts 3 and 4 from preemption, and Section 402 "saves" Counts 1, 2, and 5 from preemption.

{¶54} However, both Sections 303 and 402 take their force from 301(a) of the CWA, which prohibits the "discharge of any pollutant" into U.S. waters "except as in compliance" with certain enumerated provisions of the CWA, including state quality standards under 303 and permitting requirements under 402. In turn, Section 401 of the CWA, the section that deals with the 401 Certification process, specifically provides that compliance with Section 301 (including the requirements of Sections 303 and 402 incorporated therein) must be addressed during the 401 Certification process ("any applicant for a federal permit to conduct * * * construction * * * which may result in any discharge into the navigable waters, shall provide * * * a certification from the State * * *

that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title"). Section 401(d) makes it mandatory for appellant, through the 401 Certification process, to set forth and include in the 401 Certification, any limitations it seeks to impose via Section 301 of the CWA, which includes any permits or limitations sought pursuant to Sections 303 and 402.

{¶55} Viewing these provisions of the CWA together and examining the statutory text, it is clear that these provisions do not separately create any independent rights for appellant. Rather, to the extent that these sections provide any authority to appellant, they provide the authority through the 401 Certification process. See *PUD No. 1 Jefferson County v. Washington Dept. of* Ecology, 511 U.S. 700, 712 (upholding state's ability to impose limitations on the project through the 401-certification process to assure compliance with various provisions of CWA). Based upon the unambiguous statutory language, if the state wanted to require permits or impose limitations pursuant to Sections 301, 303, and 402, they had to participate in the 401-certification process.

{¶56} Appellant also contends that Section 510 (33 U.S.C. 1370) of the CWA provides it authority to require the permits listed in the complaint or allow them to set water quality standards even though they waived their opportunity to participate in the 401 Certification process. Appellant argues Section 510 triggers the NGA "Savings Clause," and creates rights for them independent of the 401 Certification. Section 510 of the CWA provides, "except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharge of pollution * * * except that if an effluent limitation, or other limitation * * * is in effect under this

chapter, such State * * * may not adopt or enforce any effluent limitation or other limitation * * * which is less stringent than the effluent limitation, or other limitation * * * under this chapter."

{¶57} We find Section 510 does not separately create any rights or "independent authority" for a state who has waived its participation in the 401 Certification process. Section 510 does provide that a state who participates in the 401 Certification process is permitted to require "more stringent" limitations than the federal government does on effluent and other limitations. The purpose of Section 510 is to clarify that the CWA does not prohibit states from adopting water quality standards that are stricter than federal standards. *International Paper v. Ouelette*, 479 U.S. 481 (1987). However, these limitations must be set forth in the 401 Certification, because Section 401 requires a state to attach conditions to the 401 Certificate related to any part of the proposed "activity," which, in this case, is the construction of the pipeline. *PUD No. 1 v. Jefferson County v. Wash. Dep't of Ecology*, 511 U.S. 700, 712 (1994),

{¶58} The first words of Section 510 are instructive and important. Section 510 states, "except as expressly provided in this chapter * * *." Chapter 26 of the CWA expressly contains the 401 Certification provisions that (1) requires the state to grant, deny, or waive participation in the 401 Certification process and (2) requires a state, as part of the 401 Certification process, to set forth *any* effluent limitations, other limitations, or monitoring requirements necessary to assure the applicant will comply with the CWA and any other appropriate requirement of State law so they can be included in the FERC Certificate. Application of state law pursuant to Section 510 as appellant seeks to do would allow the state to circumvent the permit system established by the CWA. *Id.*

Notably, Section 510 makes no mention of the NGA. Accordingly, Section 510 does prevent the presumptive effect of the NGA from applying to a situation in which the state has waived its participation in the 401 Certification process.

{¶59} We note that our discussion of Sections 301, 303, 402, and 510 are not designed to indicate we premise our opinion on waiver in violation of the Supreme Court's *Rover I* opinion. Rather, our analysis is done to explain why Sections 303, 402, and 510 of the CWA cannot "save" appellant's complaint from preemption, i.e., because Sections 301, 303, 402, and 510 do not create any independent rights, and appellant waived any authority it did have under these sections by waiving their participation in the 401 Certification process. If appellant retained power or authority under the CWA in Sections 301, 303, 402, and 510 to regulate these items, the waiver by appellant in the 401 Certification process would be meaningless. Additionally, it would allow the state two opportunities to regulate discharges from natural gas pipeline construction, first, through the 401 Certification process, and second, through state court litigation premised on other CWA provisions. Congress specifically prohibited this "two opportunity" theory in Section 401(d), which mandates that the state, through the 401 Certification process, include any limitations it seeks to impose via Sections 301, 303, and 402.

{¶60} Permitting a state to essentially regulate twice – once in the 401 Certification process, and then again after the FERC Certificate is issued utilizing their "powers" under the CWA would run afoul of Section 401(d) of the CWA, which requires (as evidenced by the use of the word "shall") the state to set forth ANY effluent limitations, other limitations, or monitoring requirements necessary to ensure compliance with the CWA "and with any other appropriate requirement of state law." These limitations and monitoring

requirements, even if they are more stringent than federal law requires, automatically become a condition of the FERC Certificate. 401(d). "In 401(d), the Congress has given the States the authority to place any conditions on a water quality certification that are necessary to assure that the applicant will comply with effluent limitations, water quality standards * * * and with 'any other appropriate requirement of State law.'" *PUD No. 1 v. Jefferson County v. Wash. Dep't of* Ecology, 511 U.S. 700, 712 (1994), quoting *EPA, Wetlands and 401* Certification 23 (April 1989). If a state could, after the FERC Certificate is issued, simply use their alleged "independent" powers pursuant to the CWA, the plain language contained in Section 401(d) would be rendered meaningless, as would the regulatory framework designed by Congress in the CWA.

Hydrostatic Permit

{¶61} Count 6 of appellant's fourth amended complaint alleges Rover violated the hydrostatic permit issued by the State of Ohio. Unlike the other counts in which the permits and/or regulations the state alleges were violated were not included in the FERC Certificate, the hydrostatic permit was included in the FERC Certificate. However, the permit was obtained by Rover because FERC required it as part of the FERC Certification process, not because it was required by the State of Ohio.

{¶62} The hydrostatic permit was not obtained independently of the 401 Certification process. Since appellant waived its participation in the 401 Certification process and FERC was the regulatory body that required the permit, it is FERC who has to enforce the permit. Federal courts have recognized that FERC is charged with policing compliance with the FERC Certificate it issues. *Waldock v. Rover Pipeline, LLC*, 2020-

Ohio-3307 (6th Dist.). 15 U.S.C. 717m explicitly provides FERC with the power to investigate violations of the provisions of FERC's orders.

{¶63} "[T]he federal agency issuing the applicable federal license or permit is responsible for enforcing certification conditions that are incorporated into a federal license or permit." *2020 EPA Rule,* 85 Fed. Reg. at 42,255, 42,276. Here, the hydrostatic permit was incorporated into the federal license or permit, as required by FERC. Thus, it became a requirement of federal law, not state law. *Karuk Tribe of Northern California v. California Regional Water Quality Control Board, North Coast Region*, 183 Cal.App.4th 330 (1st Dist. March 20, 2010). FERC, in its exercise of regulatory authority pursuant to the power specifically given to it under 15 U.S.C. 717f(e), elected to require Rover to cooperate with state authorities in obtaining the hydrostatic permit despite the state's waiver. This policy decision "does not change the preemptive effect of the NGA." *Hoopa Valley Tribe v. Federal Energy Regulatory Commission*, 913 F.3d 1099 (Dist. Col. Jan. 25, 2019); See *National Fuel Gas Supply Corp. v. Public Service Commission of New York*, 894 F.2d 571 (2nd Cir. Jan. 24, 1990). (state permit does not lessen presumptive effect).

{¶64} Pursuant to the complaint, the alleged violation of the hydrostatic permit occurred due to Rover's "control, authority, direction, and responsibility over the construction of the pipeline." Accordingly, this claim is preempted by the NGA.

Conclusion

{¶65} At various times throughout these proceedings, appellant has argued that it can enforce its state laws due to its "traditional" or "inherent" powers, while at other times

arguing it can enforce its laws through power "delegated" to it by the federal government in the CWA.

{¶66} To avoid any confusion, we conclude the following: Counts 1, 2, and 5 of appellant's fourth amended complaint allege violations under state law for inadvertent returns of drilling fluid and storm water runoff without obtaining permits from the state. Counts 3 and 4 allege violations of Ohio's general wetland-specific-water quality standards. To the extent appellant argues these claims are permitted as an exercise of their "traditional" or "inherent" state authority, we find this does not fall within the NGA Savings Clause and these claims are therefore preempted. If appellant is arguing these claims are permitted due to powers "delegated" to them from the federal government by the CWA, we find the state has no "independent" authority from the CWA; the only powers delegated to them are those delegated to them through the 401 Certification process. If the state wanted to require permits or impose limitations pursuant to Sections 301, 303, and 402, they had to participate in the 401 Certification process, which they did not.

{¶67} Each of the claims in appellant's fourth amended complaint falls within the field of natural gas pipeline construction preempted by the NGA. The complaint expressly ties each of the alleged discharges and/or storm water runoff to natural gas pipeline construction. The complaint states the drilling fluid release occurred "during construction of an interstate, natural gas pipeline," and that the discharges of storm water were "from Rover's construction activities." We agree with the trial court that our finding is narrowly tailored to the specific situation. During the construction of a natural gas pipeline certified by FERC when a state has waived its ability to participate in the 401 Certification process and there are discharges of pollutants into waterways, a state's recourse for such

discharges is limited to those provided in the 401 Certificate. Any claims outside thereof are preempted by the NGA.

{¶68} The state's waiver and the preemption of claims does not mean the state is without remedy for damages from violations of the federal permit. The U.S. Supreme Court has stated that the state may still sue for violations of federal law. *U.S. Dept. of Energy v. Ohio,* 503 U.S. 607 (states may bring suit under CWA pursuant to act's citizens-suit provision, 33 U.S.C. 1365). Further, the state had, and continues to have, despite any waiver or preemption, the ability to petition FERC to revisit its CWA permitting pursuant to the procedures set forth in 15 U.S.C. 717r.

{¶69} Based on the foregoing, appellant's assignment of error is overruled. The October 20, 2023 judgment entry of the Stark County Court of Common Pleas is affirmed.

By: Gwin, J.,

Delaney, P.J., and

Baldwin, J., concur