

IN THE STARK COUNTY COURT OF APPEALS
FIFTH DISTRICT COURT OF APPEALS

CASE NO. 2019CA00056

REGULAR CALENDAR

STATE OF OHIO, *EX REL.*, DAVE YOST,
OHIO ATTORNEY GENERAL,
Plaintiff-Appellant,

V.

ROVER PIPELINE, LLC; PRETEC DIRECTIONAL DRILLING, LLC; MEARS GROUP, INC.;
LANEY DIRECTIONAL DRILLING CO.; ATLAS TRENCHLESS, LLC; and B & T
DIRECTIONAL DRILLING, INC.
Defendants-Appellees.

On appeal from the Stark County Court of Common Pleas
Trial Court Case No. 2017-CV-02216

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ASSIGNMENTS OF ERROR

1. The trial court erred as a matter of law when it held that, under the Clean Water Act, 33 U.S.C. 1341, the State of Ohio waived all of its water pollution authority over environmental violations occurring during the construction of Rover's interstate pipeline. *Decision* at 9.
2. The trial court erred as a matter of law when it found, in a footnote, that even without waiver, the other defenses raised by Rover and its contractors including preemption barred the State of Ohio's Counts One through Six. *Decision* at 9-10, fn. 2.

ISSUES PRESENTED FOR REVIEW

1. Did the trial court err when it found that the State of Ohio waived all water pollution authority over the construction of an interstate pipeline (as set forth in Counts One through Six) when the State of Ohio did not include all prohibitions, requirements, violations, and conditions in a Section 401 water quality certification under the Clean Water Act, 33 U.S.C. 1341? (*Assignment of Error No. 1*)
 - A. Did the trial court err by failing to separate the State of Ohio's power to enforce water pollution prohibitions, water quality standards, and permit requirements from the authority under 33 U.S.C. 1341 that governs a Section 401 water quality certification?
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(*Assignment of Error No. 1*)
2. Did the trial court err when it found, in a footnote, that even without waiver, the other defenses raised below including preemption preclude the State of Ohio from bringing Counts One through Six? (*Assignment of Error No. 2*)
 - A. Did the trial court err by failing to provide any basis for this Court to review the finding that the other defenses bar Counts One through Six?
(*Assignment of Error No. 2*)

- B. Did the trial court err by finding that the other defenses preclude Counts One through Six when this finding patently conflicts with the trial court's decision?
(Assignment of Error No. 2)
- C. Did the trial court err to the extent that it found the other defenses, on their merits, bar Counts One through Six?
(Assignment of Error No. 2)

INTRODUCTION

This case presents an important question of state sovereignty: Does a state permanently waive its power to enforce all of its water pollution authorities against a polluter if it fails to timely submit a water quality certification under Section 401 of the federal Clean Water Act?

The question arises because Rover and its pipeline contractors polluted Ohio's streams and wetlands with millions of gallons of drilling fluids. The State responded by suing under Ohio's Water Pollution Control statute, R.C. Chapter 6111. No one disputes that States have the authority to pass these laws generally. As the trial court recognized in its decision below, the State of Ohio has "a right to impose regulations to curb disastrous environmental impacts on its waterways as a result of [interstate pipeline] construction." *Trial Court's Judgment Entry and Decision* ("Decision"), Appendix, Exhibit 1 at 9.

Despite that recognition, the trial court dismissed the case. It concluded the State waived *all* of its powers to enforce against unpermitted water pollution by untimely issuing Rover's Section 401 certification for *one* type of pollution. *Id.* at 9-10. It also found, in a footnote without any analysis, that the other "alternative grounds" to dismiss including preemption bar the State's claims. *Id.* at 9-10, fn. 2. The trial court erred for two main reasons.

First, Ohio's program that issues Section 401 certifications does not cover any of the discharges alleged here. Ohio EPA regulates these specific discharges through state law, its diverse National Pollutant Discharge Elimination System ("NPDES") permitting program, and its federally-approved water quality standards. All of these sources of authority exist independent of Section 401, 33 U.S.C. 1341. Thus, even if the State waived Rover's Section 401 certification, that waiver would have nothing to do with the State's power to exercise its sovereign authority under these tools. The trial court missed this point, lumping all of these

distinct water pollution controls in with the Section 401 certification. *Id.* at 9-10. This all-in-one approach is not grounded in law and leads to untenable and unintended consequences.

Second, the trial court's "alternative holding" fares no better. The court below accepted the other defenses, including preemption, in a footnote, that contained no analysis and that contradicted the rest of the court's decision. *Id.* at 9-10, fn. 2. These defenses either rehash the waiver defense, or rely upon it. As a result, the trial court's finding that these "alternative grounds" prompted dismissal "even if such waiver had not occurred" cannot stand. *Id.* Regardless, even if these other defenses existed independently of the waiver argument, they would still fail because of the Natural Gas Act's savings clause. 15 U.S.C. 717b(d). The preemption defense goes like this: The Natural Gas Act grants the Federal Energy Regulatory Commission ("FERC"), not Ohio EPA, the authority over the construction and operation of Rover's interstate pipeline including control of Rover's water pollution. This power, as Rover and its contractors argue, preempts the State's attempt to enforce Ohio's Water Pollution Control statute. The trouble with this argument is that the text of the Natural Gas Act's savings clause authorizes all of the State's claims under the Clean Water Act. *Id.*

For these reasons, this Court should reverse the trial court's decision dismissing Counts One through Six, reinstate these counts, and remand this matter for further proceedings.

STATEMENT OF THE CASE

Plaintiff-Appellant, the State of Ohio (the "State"), on relation of its Attorney General, Dave Yost, seeks review of the trial court's dismissal of an environmental enforcement action against Defendants-Appellees¹ (collectively "Rover and its contractors"). The trial court

¹ All Defendants-Appellees include: Rover Pipeline, LLC (Rover); Prettec Directional Drilling, LLC (Prettec); Mears Group, Inc. (Mears); Laney Directional Drilling Co. (Laney); Atlas Trenchless, LLC (Atlas); and B & T Directional Drilling, Inc. (B & T).

dismissed for lack of subject matter jurisdiction and for the failure to state a claim. *Decision*, Appendix, Exhibit 1 at 10. This section addresses how the Court got there.

1. The State filed its original complaint for civil penalties and injunctive relief against Rover in 2017, asserting seven different sets of water pollution claims arising from the construction of its interstate pipeline. *Original Complaint* (dated 11/3/17) ¶ 4. Less than a month later, the State filed its First Amended Complaint, adding Pretec and unknown contractors, as Defendants. It alleged that these new Defendants caused water pollution violations when they drilled underground to lay the pipe at Rover's direction. *First Amended Complaint* (dated 11/30/17) ¶ 4, 7-10.

Later, the State, amended the Complaint twice more. *Second Amended Complaint* (dated 4/17/18); *Third Amended Complaint* (dated 7/19/18) (hereinafter the "Complaint"). Together, the amendments added all of the contractors as Defendants and more water pollution violations. As filed, the Complaint alleged the following:

- Count One – On 23 different occurrences, Rover and its contractors collectively discharged millions of gallons of drilling fluids to Ohio's streams and wetlands.
- Count Two – Rover failed to obtain a permit to regulate its storm water—sediment-laden water generated by the mixture of rainfall and construction activity—despite notice to do so from the Ohio Environmental Protection Agency ("Ohio EPA").
- Count Three – On each occasion that Rover and its contractors polluted Ohio's streams, they violated Ohio's general water quality standards designed to protect these waters from the harmful effects of the pollution.
- Count Four – When Rover and its contractors polluted wetlands, they violated Ohio's wetland-specific water quality standards as well.
- Count Five – Rover not only violated the law and rules requiring a storm water permit, as alleged in Count Two, it also violated the Ohio EPA Director's Orders that mandated permit coverage.

- Count Six – Rover failed to comply with various pollution limits and reporting, monitoring, and sampling requirements in its Hydrostatic Permit, under the NPDES program, that controls the discharge of water used to test the pipeline for leaks.
- Count Seven – Rover began construction without timely paying its certification fees.

2. In September 2018, Rover and its contractors filed motions to dismiss the State's Complaint. *Rover and Mears Motion to Dismiss* ("MTD") (dated 9/10/18); *Pretec MTD* (dated 9/10/18); *Laney MTD* (dated 9/10/18); *Atlas MTD* (dated 9/10/18); *B & T MTD* (dated 9/7/18). They asserted that the State failed to raise a claim for which relief could be granted and that the trial court lacked subject matter jurisdiction. *See generally, Rover and Mears MTD* at 1; *see also Pretec MTD* at 1. More specifically, Rover and Mears asserted that Ohio EPA untimely issued the Section 401 certification that formed the basis for Count Seven and therefore waived it. *Rover and Mears MTD* at 20. In other words, they argued that the State's failure to issue a Section 401 certification barred it from punishing non-compliance with the rules regulating certification fees. *Id.* They also moved to dismiss Counts One through Six, arguing that if the State waived its 401 certification authority, the State also lost its ability to enforce against any and all water pollution related to the construction of the interstate pipeline. *Id.* at 24.

Pretec advanced separate defenses. It argued that even without waiver, the Natural Gas Act preempted the State's enforcement action. *Pretec MTD* at 13-14. According to Pretec, the Federal Energy Regulatory Commission ("FERC") exercised enforcement authority over the pipeline construction including any water pollution violations to the exclusion of the State. *Id.* at 17-28. In Pretec's view, the State had no enforcement authority in state court. *Id.* at 26.

The other pipeline contractors, Laney, Atlas, and B & T, each repeated the defenses of Rover, Mears, and Pretec. *Laney MTD*; *Atlas MTD*; *B & T MTD*. And Rover, Mears, and Pretec joined the others' defenses as well. *Rover and Mears MTD* at 20; *Pretec MTD* at 13.

3. The State responded that waiver in this case made no sense because the State's claims (aside from Count Seven) were based on authorities unrelated to the Section 401 certification process. *State Memo Contra* (10/12/18) at 15-16. No authority, the State argued, mandates that a Section 401 certification incorporate and subsume all other water pollution control programs, permits, and rules that apply to the pollution caused by the project. *Id.* at 21. Thus, there was no basis for inferring that the Section 401 certification had anything to do with the many other laws, permits, and rules that the State sought to enforce. *See id.* The State additionally asserted that waiver did not preclude Count Seven because Rover reapplied for its Section 401 certification, and Ohio EPA granted the reapplication the next day—364 days in advance of the deadline for Ohio EPA to act under 33 U.S.C. 1341. *Id.* at 25.

As for the preemption defense, the State noted the strong presumption against preemption, which protects the State's power to regulate water pollution. *Id.* at 27. The State then explained that the Natural Gas Act's express savings clause—15 U.S.C. 717b(d)—reserves rights to States under the Clean Water Act. Specifically, it says that “nothing” in the statute “affects the rights of States under” the Clean Water Act. 15 U.S.C. 717b(d). This protects the State's enforcement of the various water pollution prohibitions, permit requirements, and water quality standards from preemption. *State Memo Contra* at 28. Thus, the Natural Gas Act by its own terms allows States to enforce environmental laws like Ohio's Water Pollution Control statute at issue here.

Rover and its contractors filed their replies to conclude the briefing. *Rover, Mears, and*

B & T Reply (11/2/18); *Pretec Reply* (11/2/18); *Laney Reply* (11/2/18); and *Atlas Reply* (11/2/18).

4. On March 12, 2019, the trial court dismissed the State's Complaint for the failure to state a claim and lack of subject matter jurisdiction. *Decision*, Appendix, Exhibit 1 at 10. Relying on a provision of the Clean Water Act that provides States with one year to issue a Section 401 water quality certification, the trial court found that Ohio EPA waived not only Count Seven, but also Counts One through Six. *Decision* at 9-10 (citing to Section 401 of the Clean Water Act, 33 U.S.C. 1341(a)(1)). It dismissed the State's entire case as a result. *Id.* at 10.

Although the trial court stated that it would "not address the merits of defendants' remaining arguments for dismissal," it found, in a footnote, "that, even if such waiver had not occurred," it would dismiss "on the alternative grounds presented by the motions to dismiss, including, but not limited to, preemption." *Id.* at 9-10, fn. 2.

5. The State filed this timely appeal. *Notice of Appeal*. While the State disagrees with the conclusion below that it waived Count Seven, the State seeks review of the trial court's dismissal of the water pollution claims alleged in Counts One through Six only.

STATEMENT OF THE FACTS

The facts of this case fit neatly into two categories. *First*, the State exercises its authority by regulating and enforcing its water pollution control programs against polluters. *Second*, as alleged by the State, Rover and its contractors violated the State's laws, rules, permits, and standards designed to prevent water pollution and protect water quality.

A. The State implements federal water pollution control programs through regulation and enforcement.

Acting pursuant to its authority, the State prohibits water pollution, administers permits, and imposes water quality standards from any source and any pollutant, and issues Section 401 water quality certifications for fill-material placement only.

1. To protect its waters, the State enforces against water pollution and issues permits.

Revised Code Chapter 6111 prohibits the discharge of pollution to Ohio's waters. R.C. 6111.04(A). The State's prohibition mirrors the Clean Water Act, 33 U.S.C. 1311(a), and serves as the default to protect against water pollution. This blanket prohibition against pollution has only one exception: when a "valid, unexpired permit," i.e. the National Pollutant Discharge Elimination System ("NPDES") program, regulates the water pollution discharge. *Id.*

Ohio EPA, like U.S. EPA, controls and minimizes pollution, based on its type, through its permitting programs. *See id.*; *see also* 33 U.S.C. 1311(a). In 1974, Ohio received authorization from U.S. EPA to administer the NPDES permitting program for water pollution discharges.² *See* Ohio Adm.Code 3745-33-02(A) (prohibiting pollution discharges "without applying for and obtaining an Ohio NPDES permit * * *"); *see also* Ohio Adm.Code 3745-38-02 (requirements for general NPDES permits). Once U.S. EPA transferred this water pollution program, U.S. EPA suspended its own federal permitting authority for Ohio. 33 U.S.C. 1342(c).

² U.S. EPA, *Permitting for Environmental Results (PER), NPDES Profile: Ohio* (May 3, 2005) https://www3.epa.gov/npdes/pubs/ohio_final_profile.pdf (at 1 of 36) (accessed June 12, 2019). The Court has authority to take judicial notice of a government website. *State ex rel. Ohio Republican Party v. Fitzgerald*, 145 Ohio St.3d 92, 2015-Ohio-5056, 47 N.E.3d 124, ¶ 18.

Ohio EPA manages several categories of NPDES water pollution permits. Relevant here, the General Construction Storm Water Permit regulates discharges caused by construction (i.e., earth disturbing) activities. *Complaint* ¶ 54-57—Attachment 1. The General Industrial Storm Water Permit governs similar discharges when generated by particular industrial activities rather than general construction practices. *Id.* ¶ 59-61—Attachment 2. Both of these permits seek to control storm water, or sediment-laden discharges, to Ohio’s streams, wetlands, and other waters. *Id.* ¶ 55, 60.

Another NPDES permitting program, the Hydrostatic Permit, regulates the discharge of hydrostatic water used to detect leaks in pipeline equipment and tanks. *Id.* ¶ 88, 90—Attachment 4. Together, these NPDES programs, among others, minimize pollution from an array of sources.

2. The State establishes and enforces its water quality standards.

In another occurrence of cooperative federalism, the Clean Water Act authorizes States to adopt their own water quality standards but reserves the right for U.S. EPA to approve the standards before they become enforceable rules. *See* 33 U.S.C. 1313(c). The Director of Ohio EPA, under this federal delegation, adopts and revises Ohio’s general water quality standards in Ohio Adm.Code 3745-1-04. *See* R.C. 6111.041. These standards ensure Ohio’s waters are free from the following: substances, debris, or materials that adversely affect aquatic life; an unsightly appearance; degradation; or conditions such as color or odor that result in a nuisance. Ohio Adm.Code 3745-1-04(A)-(C).

Similarly, the Director uses delegated authority to adopt wetland-specific water quality standards under Ohio Adm.Code 3745-1-51. *See* R.C. 6111.041. Unique to wetlands, these standards protect water currents, temperature, oxygen levels, movement of aquatic animals, pH

levels, and water elevation from outside activities or forces. Ohio Adm.Code 3745-1-51(A)(1)-(6). Guarding wildlife food supplies, areas for reproduction, and avenues for organisms to move throughout the wetland are additional priorities. Ohio Adm.Code 3745-1-51(B)(1)-(3).

Importantly, each water quality standard cited to in the Complaint was approved by U.S. EPA under the Clean Water Act and enshrined in rule pursuant to R.C. 6111.041. Thus, the State uses its authority to enforce its standards against any violator. R.C. 6111.07(A) (prohibition authority); R.C. 6111.09(A) (civil penalty authority).

3. Ohio EPA issues the Section 401 water quality certification for fill placement requiring a Section 404 permit under the Clean Water Act.

Congress delegated authority to States, pursuant to Section 401 of the Clean Water Act, to issue water quality certifications to persons seeking federal permits. 33 U.S.C. 1341(a). In Ohio, before placing fill material into waters of the state (e.g., filling in a wetland or stream for development at these locations), a prospective permittee must first obtain a Section 401 certification from the Director of Ohio EPA. Ohio Adm.Code 3745-32-02(A). Once issued, the Section 401 certification places conditions and limitations on how and when the permittee may impact specific waters of the state during its planned filling activities. *See generally, Rover and Mears MTD*, Exhibit H. It also prescribes what the permittee must do to mitigate or compensate for the negative impact to Ohio's waters that it proposes. *See id.* Ohio's Section 401 certification is a binding instrument and the foundation for the Section 404 permit issued by the United States Army Corps' of Engineers for the same proposed activity. *See* R.C. 6111.04(A); 33 U.S.C. 1344.

B. The State asserts that Rover and its contractors violated the laws, rules, permits, and standards that protect against water pollution.

Rover's construction of a 700-mile, interstate pipeline polluted Ohio's waters in four ways: (1) with fill material where the pipeline route planned to cross Ohio's waterways; (2) with hydrostatic water designed to test the pipeline for leaks; (3) with drilling fluids used to lubricate and encase the pipeline underground; and (4) with sediment-laden storm water generated by pipeline construction activities. *See Rover and Mears MTD*, Exhibit H; *Complaint* ¶ 4, 49, 68-70, 90.

Rover sought, and Ohio EPA granted, authorization for the first two categories of water pollution associated with the pipeline project. Specifically, Ohio EPA permitted Rover's placement of fill material under the Section 401 certification and the discharge of hydrostatic test water under the NPDES program's Hydrostatic Permit. *See generally, Rover and Mears MTD*, Exhibit H; *Complaint* ¶ 89. These tools limited the quantity and location of the fill material and hydrostatic test water that Rover and its contractors could discharge without violating the law. *See Rover and Mears MTD*, Exhibit H; *Complaint* ¶ 142-149. And in the case of Rover's intended fill placement, the Section 401 certification provided offsets for water quality impacts. *See Rover and Mears MTD*, Exhibit H.

As for the pollution caused by its drilling fluids and storm water, however, Rover and its contractors did not seek, and Ohio EPA did not grant, any permit or authorization. *See Complaint*, Counts One and Two. Thus, any alleged discharge of drilling fluids or storm water was prohibited by Ohio's Water Pollution Control law and rules. R.C. 6111.04; Ohio Adm.Code 3745-32-02(A); Ohio Adm.Code 3745-33-02(A); Ohio Adm.Code 3745-38-02(A); Ohio Adm.Code 3745-39-04.

1. Rover and its contractors discharged drilling fluids into Ohio's waters and negatively impacted water quality.

The prohibition against water pollution applies in Count One. R.C. 6111.04(A). The State has alleged the illegal discharge of millions of gallons of drilling fluids to the State's waters across more than ten counties, as Rover and its contractors developed over 700 miles of natural gas pipeline. *See, e.g., Complaint* ¶ 101-123. Rover and Pretec committed the most egregious violations on April 13, 2017 when they discharged several million gallons of drilling fluids that contained diesel fuel in addition to the standard, bentonite-clay material into a high quality wetland in Richland Township, Stark County. *Id.* ¶ 49, 103. The State requests relief in the form of an injunction against future illegal discharges under R.C. 6111.07(B) and civil penalties for the past discharges under R.C. 6111.09(A). *Complaint* ¶ 124, Prayer for Relief ¶ B, I.

Not only did Rover and its contractors fail to comply with this basic prohibition, the State also alleges violations of general water quality standards (Count Three) and wetland water quality standards (Count Four). Ohio Adm.Code 3745-1-04, 1-51. For every day that the drilling fluids and Rover's sediment-laden storm water remained in the streams and wetlands, Rover and its contractors violated these standards. *Complaint* ¶ 131-32, 136-37. Counts Three and Four request civil penalties and an injunction to prohibit future violations. *Id.* ¶ 133, 138, Prayer for Relief ¶ B, I.

2. Rover failed to obtain or comply with Ohio EPA's NPDES permits for discharges of storm water and hydrostatic test water.

Counts Two, Five, and Six rely on Ohio EPA's permit authority. Specific to Count Two, the State asserts that Rover ignored its obligations to obtain coverage under Ohio EPA's General Construction Storm Water Permit. *Complaint* ¶ 58, 128, Prayer for Relief ¶ C-D; Ohio Adm.Code 3745-38-02(A). This permit, or the General Industrial Storm Water Permit, would

have sufficed, but as the State pled, Rover refused to obtain either permit despite notice of this requirement from Ohio EPA. *Complaint* ¶ 62, 69, 128. Rover then continued to discharge contaminated storm water. *Id.* ¶ 70. The State seeks a court order mandating that Rover obtain permit coverage and pay civil penalties for its failure to obtain a storm water permit. *Id.* ¶ 128-129, Prayer for Relief ¶ C, I. Rover's completion of the pipeline does not excuse civil penalties for past violations. *Id.* ¶ 129; *see also* R.C. 6111.09(A) (civil penalty authority).

When a permit is necessary, like Ohio EPA's storm water permit in this case, and a polluter fails to apply, state law authorizes the Ohio EPA Director to issue administrative orders that mandate the polluter seek coverage under the appropriate permit. *See* R.C. 6111.03(H)(1). The Director did so in this case. *Complaint* ¶ 81, 87, 139—Attachment 3. And as alleged in Count Five, Rover violated the Director's Orders as well, subjecting the company to a separate set of civil penalties. *Id.* ¶ 140, 141.

Another NPDES permitting program, the Hydrostatic Permit, regulates the discharge of hydrostatic water used to detect leaks in pipeline equipment and tanks, as alleged in Count Six. *Id.* ¶ 88, 90—Attachment 4. Unlike the storm water permitting obligations, Rover actually obtained Ohio EPA's Hydrostatic Permit. *Id.* ¶ 89. The State asserts that Rover violated the conditions of the permit by exceeding pollution limits, and failing to comply with monitoring, reporting, and sampling requirements. *Id.* ¶ 142-148. The State asks for civil penalties and an order requiring future compliance with the issued Hydrostatic Permit. *Id.* ¶ 149, Prayer for Relief ¶ H, I.

3. No violation of the Section 401 certification is at issue here.

The State does not allege that Rover violated the Section 401 certification that it obtained from Ohio EPA. *See Complaint* ¶ 152. Rather, Counts One through Six seek relief under the completely separate water pollution authorities mentioned above in Section B, 1 and 2. Count Seven is not at issue in this appeal and merely asserts that Rover violated the rules that require certification fees. *Id.* ¶ 150-154.

4. Rover obtained *some* of the necessary approvals.

As provided in Section B, 2 and 3 above, Rover separately obtained from Ohio EPA the Section 401 certification for fill material placement and the Hydrostatic Permit. *Complaint* ¶ 88-90, 152. FERC also issued its certificate for Rover to construct and operate its interstate pipeline. *Rover and Mears MTD*, Exhibit B. Before signing off on the certificate, FERC issued a final environmental impact statement that identified the permits and approvals for Rover to obtain. *Rover and Mears MTD*, Exhibit D, Table 1.5-1, Appendix, Exhibit 2 at 1-13. In addition to the Section 401 certification, FERC included, by separate entry, Ohio EPA's Construction Storm Water Permit and Hydrostatic Permit. *Rover and Mears MTD*, Exhibit D, Table 1.5-1, Appendix, Exhibit 2 at 1-16, 1-17. But Rover never applied for, or obtained, the Construction Storm Water Permit, as discussed in Section B, 2 above. *See Complaint* (Counts Two and Five).

LAW AND ARGUMENT

I. This Court's standard of review is *de novo*.

The trial court dismissed the State's case under Civ.R. 12(B)(6) for the failure to state a claim and under Civ.R. 12(B)(1) for lack of jurisdiction. *Decision*, Appendix, Exhibit 1 at 10. *De novo* review applies for both. *State ex rel. Ohio Civ. Serv. Emp. Assn. v. State*, 146 Ohio St.3d 315, 2016-Ohio-478, 56 N.E.3d 913, ¶ 12 (citation omitted). For the failure-to-state-a-

claim defense under Civ.R. 12(B)(6), this Court must “presume that the complaint’s factual allegations are true and make all reasonable inferences in the nonmoving party’s favor.” *Id.* (citation omitted). If there are *any* facts for “which the nonmoving party could recover,” the Court must reverse and remand the dismissal for the failure to state a claim. *Id.* (citation omitted). For the lack-of-subject-matter-jurisdiction defense under Civ.R. 12(B)(1), the Court must reverse and remand, if the State’s Complaint “raises any cause of action cognizable by the forum.” *Id.* (citation omitted).

II. The State did not waive its power to enforce all environmental laws simply by failing to timely issue a Section 401 certification.

The trial court’s application of waiver to Counts One through Six divested the State of basic enforcement powers and permitting authorities. If affirmed, the trial court’s decision will strip the State of its sovereign authority to regulate Rover’s water pollution. The trial court erred by conflating the Section 401 certification with Ohio’s other statutes and rules that prohibit water pollution generally (R.C. 6111.04), impose permitting obligations and requirements (Ohio Adm.Code Chapters 3745-33, 38 and 39), and enforce water quality standards (Ohio Adm.Code Chapter 3745-1). None of this has anything to do with Section 401. For example, federal law does not require States to address all of the foregoing issues in their certifications. 33 U.S.C. 1341; *see generally, Rover and Mears MTD*, Exhibit H. Because the trial court erred, this Court should reverse.

A. The Clean Water Act prohibits and regulates water pollution, and the State takes primacy in its implementation and enforcement.

Congress designed the Clean Water Act to “restore and maintain the chemical, physical and biological integrity of the Nation’s waters.” 33 U.S.C. 1251(a). The Clean Water Act sets national goals to eliminate “the discharge of pollutants into the navigable waters.” 33 U.S.C.

1251(a)(1). To accomplish these goals, States—not the federal government—take the lead in controlling water pollution within their boundaries. Indeed, the Clean Water Act is a paradigm of “cooperative federalism,” under which, U.S. EPA and States “work[] together to clean the Nation’s waters.” *Am. Farm Bur. Fedn. v. United States EPA*, 792 F.3d 281, 288 (3d Cir. 2015). The governments’ prohibitions and programs exemplify this valuable relationship.

The text of the Clean Water Act further defines the preeminent role of the State in combatting water pollution. *See* 33 U.S.C. 1251(b). It shall not “be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters * * * of such States.” 33 U.S.C. 1370. Thus, the State, without fear of exclusion or denial, “adopt[s] or enforce[s] any standard or limitation respecting discharges of pollutants” and imposes “any requirement respecting control or abatement of pollution.” *Id.*

B. The trial court erred when it failed to separate the State’s other water pollution powers from the authority over Section 401 water quality certifications.

The State has many, different tools at its disposal to enforce against illegal pollution of its waters. These include the general statutory prohibition against water pollution contained in R.C. 6111.04(A), the NPDES permitting programs contained in Ohio Adm.Code Chapters 3745-33, 3745-38, and 3745-39, and the water quality standards contained in Ohio Adm.Code Chapter 3745-1. In Counts One through Six, the State raises claims using each of these statutory and rule-based tools without reference to Ohio’s Section 401 certification for fill-material placement. However, in dismissing all counts under the theory of waiver, the trial court found that all of the State’s claims somehow relied on only one tool: Rover’s Section 401 certification. *Decision*, Appendix, Exhibit 1 at 9.

At its core, the trial court's decision means that if Ohio EPA did not incorporate all other water pollution prohibitions, permits, and programs *into* Rover's Section 401 certification (and issue it timely), Ohio EPA waived all of its authority over Rover's violations of those prohibitions. *Id.* The trial court's absolute waiver barred the State's claims even when the extent of the pollution complained of could not have been anticipated (i.e., several million gallons of discharged drilling fluids) at the time that Rover obtained its Section 401 certification. *Complaint* ¶ 103, 152. Nor had the regulatory trigger for a storm water permit (i.e., notice from Ohio EPA) occurred before issuance of the Section 401 certification. *Id.* ¶ 127, 152. Such results run contrary to Ohio EPA's broad authority to implement and enforce the Clean Water Act through its application of Ohio's Water Pollution Control statute and rules. Indeed, they run contrary to our federalist system, which is a union of sovereign States, not agents of the federal government. *See Murphy v. NCAA*, ___ U.S. ___, 138 S.Ct. 1461, 1477, 200 L.Ed.2d 854 (2018).

It is true enough that a state may waive its authority to issue a Section 401 certification to FERC if that state fails to issue it on time. *See New York State Dept. of Environmental Conservation v. FERC*, 884 F.3d 450, 455-456 (2d Cir.2018) (New York forfeited all authority over Section 401 certification to FERC because of delays.). But that waiver applies only to activity covered by the Section 401 certification. Because Counts One through Six are separate and outside the scope of the Section 401 certification, waiver does not preclude these claims. If there is any doubt, it should be resolved in favor of the State: When Congress means to strip States of their sovereign powers, it must do so clearly. *Bond v. United States*, 572 U.S. 844, 857-858, 134 S.Ct. 2077, 189 L.Ed.2d 1 (2014). Nothing in the Clean Water Act clearly strips States of *all* authority to enforce environmental laws whenever States untimely return a Section 401 certification.

C. The Clean Water Act does not require that a Section 401 water quality certification contain conditions regulating all discharges.

To be sure, States *may* condition a Section 401 certification on compliance with other water quality considerations. But they need not. See *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700, 713-714, 114 S.Ct. 1900, 128 L.Ed.2d 716 (1994) (“States *may* condition certification upon any limitations necessary to ensure compliance with state water quality standards or any other ‘appropriate requirement of State law.’”) (emphasis added). Thus, the Supreme Court has read the relevant statute as permitting States to introduce these other requirements, despite 33 U.S.C. 1341(d) stating that “[a]ny certification * * * shall set forth” other conditions. *Id.* (emphasis added); *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 963 (9th Cir. 2006) (“*PUD No. 1* merely holds that states *may* set * * * standards as a part of section 401 certification requirements; it does not hold that states *must* do so.”); see *Delaware Riverkeeper Network v. Secy. of Pennsylvania Dept. of Environmental Protection*, 833 F.3d 360, 370, 389 (3d Cir.2016) (Pennsylvania used its discretion to add a water obstruction and encroachment permit to a Section 401 certification.).

“May” is important here because Ohio EPA exercised its discretion and certified only that Rover’s placement of fill material under the stated conditions would comply with Ohio’s water quality standards. See generally, *Rover and Mears MTD*, Exhibit H. Indeed, the reporting protocols for an “inadvertent spill” and “unpermitted impacts to surface water resources” in the Section 401 certification do not demonstrate that such discharges would comply with the standards, or even authorize the discharges in the first place. *Rover and Mears MTD*, Exhibit H, Appendix, Exhibit 3 at 62 of 72. Instead, they apprise Ohio EPA of a potential violation that

allows the State to take appropriate action, as the State attempts to do here, to minimize harm to water quality and hold polluters accountable.

Thus, the trial court's conclusion that the State somehow forfeited its water pollution enforcement over the discharges when the Section 401 certification did not authorize them is simply wrong. *Decision*, Appendix, Exhibit 1 at 9. The silence as to these discharges in Rover's Section 401 certification shows that the State reserved its enforcement power over the violations, not that it abandoned its authority.

D. The trial court's all-encompassing view of the Section 401 water quality certification is inconsistent with the Clean Water Act and leads to untenable results.

The Section 401 certification does not approve activities that violate water quality standards. It does the opposite, certifying that the placement of fill material will comply with various sections of the Clean Water Act. Ohio Adm.Code 3745-32-02(A); 33 U.S.C. 1344(a). The Director of Ohio EPA is strictly barred from issuing a Section 401 certification if the fill material will violate Ohio's water quality standards or otherwise violate the Clean Water Act. *See* Ohio Adm.Code 3745-32-03(D)(1). As alleged in Counts Three and Four, the discharges of drilling fluids and storm water did, in fact, violate Ohio EPA's water quality standards. *Complaint* ¶¶ 132, 136. Therefore, even if the Section 401 certification covered these discharges (which is not mandatory, *see* Section II, C above), Ohio EPA still could not certify that these discharges were compliant with the water quality standards, specifically, or with the Clean Water Act, generally, in accordance with Ohio Adm.Code 3745-32-03(D)(1).

Without the ability to certify compliance with Ohio's water quality standards, the value of the other, independent authorities set forth in Counts One through Six is well-defined. So too is the consequence—if the State cannot assert its prohibitions, permits, and water quality

standards, it cannot protect its waters. The trial court overlooked this outcome, and reversal is appropriate as a result.

What is more, the trial court's decision would have disastrous consequences if upheld. Consider the millions of gallons of drilling-fluid pollution that Rover and its contractors discharged into Ohio's waterways (Counts One, Three, and Four). This pollution occurred months after Rover applied for and received its Section 401 certification that regulated the placement of fill material. *Complaint* ¶¶ 101-123, 152. Even so, based on the trial court's logic, Ohio EPA should have anticipated—and *permitted*—these future discharges under a timely-issued Section 401 certification. *Decision*, Appendix, Exhibit 1 at 9. Using this same reasoning, if Rover had pumped chemicals directly into a stream during the pipeline construction, the trial court's decision would effectively grant Rover immunity from a lawsuit under R.C. Chapter 6111 unless that pollution was similarly-anticipated and permitted through Rover's timely Section 401 certification.

This conclusion runs contrary to Congress's intent in enacting the Clean Water Act and to the General Assembly's adoption of Ohio's Water Pollution Control statute. U.S. EPA delegated authority to the State so that Ohio EPA may directly control the discharges of pollution such as drilling fluids, storm water, and hydrostatic water through a variety of means—the Revised Code's blanket prohibition against water pollution, Ohio EPA's NPDES permitting programs, and federally-approved State water quality standards. *See, e.g.*, R.C. 6111.04, Ohio Adm.Code 3745-33-02, 3745-1-04, 3745-1-51. This authority was intended to protect Ohio citizens and the environment from the public nuisance that water pollution causes. R.C. 6111.04(A)(2).

Mandating that a single regulatory tool (Ohio EPA's Section 401 certification) cover every manner and form of water pollution is also unworkable from a timing perspective. Rover,

as an oil-and-gas operation, was not required to obtain either the Construction Storm Water Permit or the Industrial Storm Water Permit *until after* it discharged storm water and violated a water quality standard. *See* 40 C.F.R. 122.26(c)(1)(iii)(C); Ohio Adm.Code 3745-39-04(A)(2)(b) and (C)(1)(c); *see also Complaint* ¶ 127-29. As Count Two alleges (and Count Five incorporates), beginning on or before May 12, 2017, Rover failed to obtain coverage under a storm water permit after it committed water quality standard violations. *Complaint* ¶ 128, 140. It would make no sense to require Rover to obtain a storm water permit as a condition of the Section 401 certification before construction began in February 2017 because no water quality standard violation had yet occurred. *See Id.* ¶ 152. Construction continued for several months before Rover violated water quality standards and thus qualified for a storm water permit in May 2017. *See Id.* ¶ 127-128.

Most troubling, the trial court found that the State could not hold Rover accountable for its Hydrostatic Permit violations (Count Six) because Ohio EPA did not include the permit in the Section 401 certification. *Decision* at 9; *Complaint* ¶ 142-149. It dismissed for waiver even though Rover obtained the Hydrostatic Permit from Ohio EPA. *Id.* ¶ 89. Simply put, the trial court's decision prevents the State from enforcing the conditions of a permit on the permittee, Rover. *See* R.C. 6111.07(A) (violations of permit, orders, and rules are prohibited). This is unprecedented and especially questionable given that Rover had FERC believe it would obtain not only the Hydrostatic Permit but the Construction Storm Water Permit as well, each independently from the Section 401 certification. *Rover and Mears MTD*, Exhibit D, Table 1.5-1, Appendix, Exhibit 2 at 1-16, 1-17. The permits' separation from the Section 401 certification and the impossibility to predict, let alone certify the discharges, shows that the trial court's decision leads to untenable results and unintended consequences.

III. The trial court erred when it found, in a footnote, that the other defenses raised below preclude the State from bringing Counts One through Six.

Not only did the trial court improperly find that the State waived its water pollution control authority, it erred again by accepting “alternative grounds” to dismiss “even if such waiver had not occurred.” *Decision*, Appendix, Exhibit 1 at 9-10, fn. 2. The trial court listed these “alternative grounds” as preemption, “impos[ing] additional permitting requirements * * * not previously identified to the FERC,” and a collateral attack on the FERC certificate. *Id.* at 4. The preemption defense refers to FERC’s authority over the construction and operation of Rover’s interstate pipeline to the exclusion of the State’s control of water pollution. The last two defenses are essentially the same: Rover and its contractors assert that during FERC’s proceedings, the State should have advised of its intent to impose permitting requirements. Instead, the State sued in state court, which Rover and its contractors maintain is a collateral attack on FERC’s authority.

Before this Court even reaches the merits of these “alternative grounds,” it should reverse for two independent reasons. *First*, the trial court offers no basis for finding that these other defenses, discussed in a footnote, bar the State’s claims. *Id.* *Second*, the trial court’s footnote that approves of preemption clashes with the very text of its own decision. *Compare id.* at 9-10, fn. 2 *and id.* at 9.

But even considering the merits, the State still prevails. Essentially, for their last two defenses, they reassert waiver—the State cannot bypass FERC by requiring permits not included in the Section 401 certification, and if the State attempts to do so, it acts as a collateral attack on FERC. For the reasons in Section II above, these last two defenses, like waiver, fail on their merits.

The State's claims survive preemption for another reason. The Natural Gas Act's savings clause protects any right of the State under the Clean Water Act. 15 U.S.C. 717b(d). This means that FERC may control the operation and construction of the interstate pipeline, but the State's prohibition, permits, and rules—all designed to control water pollution under the Clean Water Act—are shielded from FERC preemption. Reversal is appropriate as a result.

A. The “alternative grounds” in the second footnote of the Decision provide no basis for dismissal.

The trial court failed to support its own conclusion that even without waiver, all the other defenses bar Counts One through Six. *Decision*, Appendix, Exhibit 1 at 9-10, fn. 2. It plainly stated that it would “not address the merits of the defendants’ remaining arguments for dismissal.” *Id.* at 9. All of its analysis, instead, focused on waiver under 33 U.S.C. 1341, a defense that Rover and Mears presented as a failure to state a claim under Civ.R. 12(B)(6), not as preemption or some other jurisdictional defense under Civ.R. 12(B)(1). *Id.* at 7-9; *see Rover and Mears MTD* at 20.

Even worse, the court below only mentioned in passing, and by way of footnote, that the “alternative grounds” applied in this case. *Id.* at 9-10, fn. 2. This empty conclusion is reversible because “the trial court must give a basis for its decision to permit proper appellate review.” *Fair v. Fair*, 164 Ohio App.3d 177, 2005-Ohio-5704, 841 N.E.2d 806, ¶ 8 (10th Dist.) (sustain assignment of error and remand because the trial court failed to provide a basis). This shows that the Court should reverse any conclusion rendered from the second footnote.

B. The trial court’s acceptance of preemption as a defense in the second footnote is inconsistent with its holding.

Beyond the failure to analyze “the alternative grounds for dismissal,” the trial court’s second footnote also conflicts with the Decision. In the footnote, the court below found that

Rover and its contractors “would be entitled to dismissal” for the other defenses “even if such waiver had not occurred.” *Decision*, Appendix, Exhibit 1 at 9-10, fn. 2.

Assuming that waiver applies here (which it does not), preemption, on its own, would not preclude Counts One through Six *without waiver*. Put another way, preemption, as one of these other defenses, is the result of waiver—*i.e.* FERC exercises water pollution authority belonging to a state *only after* a state waives it. *See Id.* at 10 (FERC oversight). The trial court proved this point. It found that the State, under 33 U.S.C. 1341, had “the opportunity, within one year of Rover’s request for certification, to set forth such limitations and requirements.” *Id.* at 9. And it continued: “The failure by the State of Ohio to do so * * * waived its authority to enforce the same.” *Id.* (The State has “a right to impose regulations to curb disastrous environmental impacts on its waterways as a result of [pipeline] construction.”).

If preemption, or some other defense, stood as an independent bar to the State’s claims, then the State would have no authority to “enforce” its “limitations and requirements.” *See Decision* at 9. This would be true whether or not the State waived the Section 401 certification. Thus, the Section 401 certification, let alone its waiver, would be irrelevant.

FERC preemption would block the State from imposing conditions in a *lawful* Section 401 certification—an extreme consequence not endorsed by courts. *See Deschutes River Alliance v. Portland GE*, 249 F.Supp.3d 1182, 1191-92 (D.Or.2017) (state may enforce conditions in a Section 401 certification at least through the federal citizen suit provision, 33 U.S.C. 1365); *Stillwater of Crown Point Homeowner Assn. v. Stiglich*, 999 F.Supp.2d 1111, 1125 (N.D.In.2014) (same). And because FERC coordinates air pollution permits in addition to Section 401 certifications, preemption would also bar the State’s enforcement of Rover’s air

permit issued by Ohio EPA. 15 U.S.C. 717n(b); *Rover's Motion to Dismiss*, Exhibit D, Table 1.5-1, Appendix, Exhibit 2 at 1-16, 1-17 (Rover to apply for air permit).

The trial court did not contemplate such a result. Rather, its holding shows that it considered waiver essential for dismissal, not preemption or other grounds. *Decision* at 7-9. If preemption or some other defense barred jurisdiction, the trial court should have disposed of the case on this basis and not examined waiver. *See Roesch v. Cleveland Trust Co.*, 12 Ohio Misc. 239, 244, 230 N.E.2d 746 (C.P.1967) ("A court is presumed to determine its own jurisdiction before proceeding to the merits."). But the trial court did the opposite here, ruling on the waiver defense under Civ.R. 12(B)(6). *Decision* at 7-9. Therefore, the conclusion in the footnote to dismiss the State's case "even if such waiver had not occurred," conflicts with the decision and should be reversed.

C. The State's Counts One through Six survive preemption and the other defenses on their merits.

This Court should reverse the dismissal no matter the defense. As discussed in Sections III, A and B above, the trial court failed to analyze the other defenses, and at the very least, preemption conflicts with the ruling on waiver. This should prompt reversal. But even if this Court decides to review these defenses on the merits, reversal is still appropriate.

1. The defenses related to "additional permitting requirements" and "collateral attack" are the same as waiver and thus fail on their merits.

Rover and its contractors dressed up their waiver defense a second and third time as improper state permitting outside the FERC process and collateral attack on the FERC certificate. *Decision*, Appendix, Exhibit 1 at 4 (Defense Nos. 2, 4). In other words, they argue that the State cannot bypass FERC by requiring permits not incorporated into the Section 401

certification, and if the State attempts to do so, it acts as a collateral attack on FERC. This Court should hold that both fail, like waiver, for the reasons provided in Sections I and II, A and B above.

Consider if the State, without any obligation to do so, had included the challenged permit requirements in a timely Section 401 certification. Then, Rover and its contractors could not, in good faith, raise waiver as a defense. Incorporating these conditions in the Section 401 certification would eliminate any claim that the State “impose[d] additional permitting * * * not previously identified to FERC through the [Environmental Impact Statement] process.” *See Decision* at 4. The defense of collateral attack on FERC would prove worthless as well because there would be no doubt that these requirements were before FERC. *See id.*; *Rover’s Motion to Dismiss*, Exhibit D, Table 1.5-1, Appendix, Exhibit 2 at 1-16, 1-17. Therefore, this simple example shows that these other arguments are merely restated waiver defenses. *Decision* at 4.

Further, the trial court’s account that “the permits sought were not previously identified to the FERC” is incorrect. *Decision* at 4. FERC’s environmental impact statement plainly states that Rover will obtain Ohio EPA’s Construction Storm Water Permit (Counts Two and Five) and Hydrostatic Water Permit (violations in Count Six) in addition to the Section 401 certification. *Rover’s Motion to Dismiss*, Exhibit D, Table 1.5-1, Appendix, Exhibit 2 at 1-16, 1-17. This is harmony between the State and FERC—the opposite of a collateral attack on FERC’s authority. Indeed, these permits for storm water and hydrostatic water represent the only water pollution control permits that the State required Rover to obtain, given that either the Construction Storm Water Permit, or Industrial Storm Water Permit would cover storm water.

The remaining drilling-fluid discharges (Count One) and resulting water quality violations (Counts Three and Four) do not appear on FERC’s permitting list because they do not

concern permitting. Like the federal Clean Water Act, R.C. 6111.04(A) and Ohio Adm.Code 3745-33-02(A) do “not require that a person acquire an NPDES permit.” *See PennEnvironment v. PPG Indus.*, 964 F. Supp.2d 429, 461 (W.D.Penn.2013). “Instead, a violation * * * can be remedied by halting or eliminating the discharge.” *Id.* As a result, the second and third waiver defenses should be rejected like the first one.

2. The Natural Gas Act does not preempt Counts One through Six.

FERC, under the Natural Gas Act, controls the construction and operation of Rover’s interstate pipeline, but this power does not preempt the State’s water pollution authority under the Clean Water Act. Preemption thus fails like the other “alternative grounds” for dismissal. *See Decision*, Appendix, Exhibit 1 at 9-10, fn. 2. Although the Supremacy Clause, U.S. Constitution, Article VI, cl. 2, generally allows for preemption, it does not apply to the State’s Counts One through Six, as these water pollution claims are protected under the presumption against preemption. *City of Girard v. Youngstown Belt Ry. Co.*, 134 Ohio St.3d 79, 2012-Ohio-5370, 979 N.E.2d 1273, ¶ 15 (In “*all* preemption cases,” Ohio courts “start with the presumption that the States’ historic police powers shall not be superseded by federal law unless” it is “the clear and manifest purpose of Congress.”).

This presumption honors cooperative federalism by preserving States’ traditional police powers including the control of water pollution. *See State ex rel. Zugravu v. O’Brien*, 130 Ohio St. 23, 26, 196 N.E. 664 (1935); R.C. 6111.03(A) (Director’s powers for water pollution control); R.C. 6111.04(A) (prohibition against water pollution). Congress fulfills its purpose by saving for the States the traditional power to minimize or eliminate water pollution. 33 U.S.C. 1251(b) (States’ primary responsibility to “prevent, reduce, and eliminate pollution”); 33 U.S.C. 1370 (“nothing” prevents States from regulating “control or abatement of pollution”).

In the second footnote, the trial court identified “preemption” as a defense but failed to mention, let alone apply this presumption or the heavy burden assigned to Rover and its contractors to rebut it. *Decision*, Appendix, Exhibit 1 at 9-10, fn. 2; *See City of Girard* ¶ 15. There was no reason (and the trial court did not offer one) to neglect the required presumption against preemption for the State’s water pollution claims.

Under the presumption against preemption, the “clear and manifest purpose of Congress” is to reserve authority so that the State regulates water pollution within its jurisdiction, even when interstate pipeline companies are the polluters. *See City of Girard* at ¶ 15. It is true that the Natural Gas Act establishes broad federal regulation over natural gas sales and transport. 15 U.S.C. 717(a); *see also* 15 U.S.C. 717(b) (The Natural Gas Act regulates “the transportation of natural gas in interstate commerce.”). But this vague language imposes no bar on States’ enforcement of their water pollution laws delegated under the Clean Water Act against interstate pipelines. *Id.*

The Natural Gas Act is blunt, by contrast, when it expressly reserves rights to States under the Clean Water Act. 15 U.S.C. 717b(d) (“[N]othing” in the Act “affects the rights of States under” the Clean Water Act). Together, 15 U.S.C. 717b(d) and the Clean Water Act (*see* 33 U.S.C. 1251(b), 1370) explicitly grant the State the authority to bring water pollution claims against Rover and its contractors. Thus, the Natural Gas Act does not expressly preempt Counts One through Six.

The State’s claims also survive implied (field and conflict) preemption. *See City of Girard* at ¶ 15; *see also Baldwin v. Golden Hawk Transp. Co.*, 160 Ohio App.3d 399, 2005-Ohio-1643, 827 N.E.2d 780, ¶ 26 (5th Dist.) *quoting Gade v. Natl. Solid Wastes Mgt. Assn.*, 505 U.S. 88, 98, 112 S.Ct. 2374, 120 L.E.2d 73 (1992) (quotation marks omitted). The Natural Gas

Act's savings clause, 15 U.S.C. 717b(d), confirms that Congress did not intend to "occupy the field exclusively," or deem "state law [] an obstacle to the accomplishment and execution of [its] full purposes and objectives" by reserving state power under the Clean Water Act. *See Baldwin* at ¶ 44 (field preemption and conflict preemption rules). It is also possible for Rover and its contractors to comply "with both state and federal requirements" by virtue of the savings clause. *See Id.* (conflict preemption rule).

Only when a state law's "central purpose is to regulate matters that Congress intended FERC to regulate," does the Natural Gas Act preempt the field in deference to FERC. *See Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 308-09, 108 S.Ct. 1145, 99 L.Ed.2d 316 (1988). For example, preemption may apply when a state attempts to impose site safety, pipeline routing, and land restoration requirements. *Id.*; *see also Northern Natural Gas Co. v. Iowa Utils. Bd.*, 377 F.3d 817, 821 (8th Cir.2004) (Iowa's land restoration standards preempted).

But here, FERC has *no* authority, let alone *exclusive* authority, over Counts One through Six under the savings clause and the Clean Water Act. These claims are a clear-cut example of state authority immune from field preemption. *See Oneok, Inc. v. Learjet, Inc.*, ___ U.S. ___, 135 S.Ct. 1591, 1599, 191 L.Ed.2d 511 (2015) ("As * * * repeatedly stressed, the Natural Gas Act was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way.") (internal citations omitted).

The State's case does not run afoul of FERC's authority either. Counts One through Six did not "conflict with federal regulation" or "delay construction" of Rover's interstate pipeline. *See Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 244, 245 (D.C. Cir.2013) (conflict preemption barred such conflicts or delays but not when a state incorporated plans approved by U.S. EPA under the Clean Air Act); *see also Islander E. Pipeline Co., LLC v. Blumenthal*, 478

F.Supp.2d 289, 295 (Conn.D.C.2007) (conflict preemption barred state's attempt to stop construction after pipeline failed to obtain a state permit for fill placement).

While it is true FERC acknowledges in its certificate that drilling fluids may impact water quality, the State's prohibition against their discharge poses no conflict. *See Rover and Mears MTD* at 31, Exhibit D at 5-8. FERC would have to consciously allow several million gallons of Rover's drilling fluids into the top quality wetland followed by 20 additional discharges before Counts One, Three, and Four present a conflict. This is not the case. The State's action survives conflict preemption, field preemption, and express preemption as a result. To the extent the trial court found otherwise, in the second footnote, this Court should reverse.

3. The State's claims belong in state court.

Because the Natural Gas Act's savings clause reserves authority to the State, it naturally follows that jurisdiction is proper in state court. *See* 15 U.S.C. 717b(d). In other words, the State's case does not serve as a collateral attack on FERC or a challenge to FERC's authority that would otherwise belong in a federal circuit court of appeals. *Compare California Save Our Streams Council, Inc. v. Yeutter*, 887 F.2d 908, 912 (9th Cir.1989) (collateral attack when a party objects to conditions in a FERC certificate in federal district court); *and compare Phelps Dodge Corp. v. El Paso Corp.*, 213 Ariz. 400, 403-404, 142 P.3d 708 (Ariz.Ct.App.2006) (state law antitrust claims in state court held to be collateral attack on FERC certificate after challenging the certificate in federal appeals court on other grounds). This Court should disregard any defense related to collateral attack or this Court's jurisdiction as a result.

CONCLUSION

For these reasons, this Court should reverse the trial court's decision and entry that dismissed the State's Counts One through Six and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to App.R. 13(B), (C)(6), and (E), the undersigned hereby certifies that a true copy of the foregoing Appellant's Brief was served on June 13, 2019 upon all Counsel of Record below by email.

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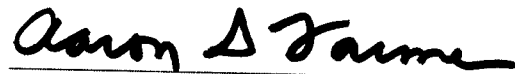
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IN THE COURT OF COMMON PLEAS, STARK COUNTY, OHIO

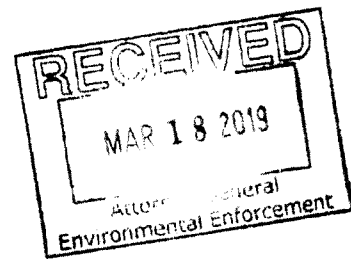
**LOUIS P. GIAVASIS
STARK COUNTY CLERK OF COURTS
NOTICE OF JUDGMENT**

2017CV02216

STATE OF OHIO EX REL VS ROVER PIPELINE LLC

YOU ARE HEREBY NOTIFIED THAT AN ENTRY WHICH MAY BE A FINAL APPEALABLE ORDER HAS BEEN FILED WITH THE CLERK OF THE COMMON PLEAS COURT ON MAR 12 2019.

AARON SCOTT FARMER
30 E. BROAD ST 25TH FLOOR
COLUMBUS, OH 43215



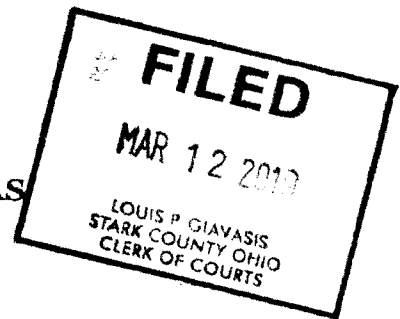
LOUIS P. GIAVASIS
CLERK OF COURTS
STARK COUNTY, OHIO

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J. LAWRENTZ, DEPUTY CLERK

March 13, 2019

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO



STATE OF OHIO, EX REL.,
MICHAEL DEWINE, OHIO
ATTORNEY GENERAL,

Plaintiff,

vs.

ROVER PIPELINE, LLC, et al.,

Defendant.

CASE NO. 2017CV02216

JUDGE KRISTIN G. FARMER

JUDGMENT ENTRY

This matter came before the Court upon the motions of the following defendants to dismiss the Third Amended Complaint filed by the plaintiff, The State of Ohio ex rel. Michael Dewine, Attorney General ("State of Ohio"): Rover Pipeline, LLC ("Rover")/ Mears Group, Inc. ("Mears"), Pretec Directional Drilling, LLC ("Pretec"), Laney Directional Drilling Co. ("Laney"), Atlas Trenchless, LLC. ("Atlas"), and B & T Directional Drilling, Inc. ("B & T"). The State of Ohio filed a combined response to all of the motions to dismiss, to which the individual defendants have replied. Upon review, the Court finds as follows.

Procedural History

The State of Ohio filed an Amended Complaint on November 30, 2017. After the filing of the amended complaint, a "Notice of Removal to Federal Court" was filed on December 8, 2017. The Federal Court remanded this matter back to the Stark County Court of Common Pleas on January 31, 2018. In his Order remanding this matter back to Stark County, Judge John R. Adams found that, although the State of Ohio's complaint necessarily raises a federal issue in some capacity, the focal point of the litigation will be the Clean Water Act and as such, the federal court "cannot exercise jurisdiction without

disrupting the division of labor between the state of Ohio and the federal government.”

Upon remand, the State of Ohio filed a motion for leave to file a Second Amended Complaint. The Court granted the motion and the Second Amended Complaint was filed on April 17, 2018. After the filing of the Second Amended Complaint, the defendants filed motions to dismiss. Prior to ruling upon said motions, the State of Ohio filed an unopposed motion for leave to file a Third Amended Complaint. The Third Amended Complaint was filed on July 19, 2018. Thereafter, the defendants again filed motions to dismiss. Those motions, which have been fully briefed, are as follows:

1. B & T Directional Drilling, Inc.’s Motion to Dismiss Plaintiff’s Third Amended Complaint filed on September 7, 2018;
2. Rover Pipeline LLC and Mears Group, Inc.’s Motion to Dismiss filed on September 10, 2018 (referred to herein as “Rover’s Motion to Dismiss”);
3. Laney Directional Drilling Co.’s Motion to Dismiss filed on September 10, 2018;
4. Pretec Directional Drilling LLC’s Motion to Dismiss Third Amended Complaint filed on September 10, 2018; and
5. Atlas Trenchless LLC’s Motion to Dismiss filed on September 10, 2018.

The State of Ohio filed a collective memorandum contra to all defendants’ motions to dismiss on October 12, 2018. Defendants, Atlas Trenchless LLC, Pretec Directional Drilling LLC, and Laney Directional Drilling Co., and defendants, Rover, Mears, and B&T, filed separate reply briefs on November 2, 2018.

The Complaint filed by the State of Ohio

The State of Ohio’s complaint alleges that the defendants illegally discharged millions of gallons of drilling fluids to Ohio’s waters, causing pollution and degrading water quality across the state in construction of the Rover Pipeline, a 713-mile interstate natural

gas pipeline crossing 18 counties. Rover was the owner or operator of the drilling operations for the construction of the pipeline. Pretec, Laney, Atlas, Mears, and B&K were subcontractors hired by Rover to perform horizontal-directional-drilling activities related to the construction of the pipeline.

More specifically, the State of Ohio's complaint alleges the following:

Count One: Defendants (Rover, Pretec, Laney, Atlas, Mears, and B & T) discharged pollutants (drilling fluids) to waters of the state without point source NPDES permits.

Count Two: Defendant Rover Pipeline LLC failed to obtain a necessary storm water permit for its storm water discharges.

Count Three: Defendants (Rover, Pretec, Laney, Atlas, Mears, and B & T) violated Ohio's general water quality standards (unpermitted drilling fluid discharges into waters of the state and unpermitted storm water discharges into waters of the state).

Count Four: Defendants (Rover, Pretec, Laney, Atlas, Mears, and B & T) violated Ohio's wetland water quality standards (unpermitted drilling fluid discharges into wetlands).

Count Five: Defendant Rover Pipeline LLC violated the Director's Orders by failing to obtain coverage or even submit a notice of intent to obtain coverage under the Construction Storm Water Permit.

Count Six: Defendant Rover Pipeline LLC violated the Hydrostatic Permit.

Count Seven: Defendant Rover Pipeline LLC engaged in activities without effective certification. Plaintiff alleges that the Defendant engaged in activity from February 24, 2017 through May 15, 2017, without the state 401 water quality certification.

Rover's Motion to Dismiss

While separate, the defendants' motions to dismiss are, for the most part, duplicative in argument. Because Rover is the main defendant in this litigation, i.e., the claims arising against the other defendants are a result of actions taken at the behest of Rover, the Court will focus its consideration primarily on Rover's motion to dismiss. In its motion, Rover

argues for dismissal of the Third Amended Complaint on the following assertions:

1. The State of Ohio's failure to act within one year on Rover's application for the State of Ohio to issue a §401 certification (a Water Quality Certification request) under the federal Clean Water Act, resulted in the State of Ohio waiving its power to impose conditions and to enforce environmental requirements for the pipeline project as a matter of federal statutory law;
2. Rover received all necessary regulatory approvals from FERC for the construction of the pipeline. In the process of obtaining these approvals, an Environmental Impact Statement ("EIS") was completed, which the State of Ohio helped to prepare. The State of Ohio now seeks to impose additional permitting requirements without any legal authority, as the permits sought were not previously identified to the FERC through the EIS process;
3. The State of Ohio's claims are preempted by the Natural Gas Act and, as such, this Court lacks subject matter jurisdiction; and
4. The State of Ohio's claims are challenges to FERC's approval of the pipeline project and improper collateral attacks on FERC's orders.

Civil Rule 12(B) Standard

In essence, the collective motions of the defendants seek dismissal of the State of Ohio's Third Amended Complaint for failure to state a claim upon which relief may be granted and lack of subject matter jurisdiction.¹

In construing a complaint under a Civ. R. 12(B) motion to dismiss for failure to state a claim upon which relief can be granted, the Court must presume the truth of all factual allegations of the complaint and make all reasonable inferences in favor of the nonmoving party. *Mitchell v. Lawson Milk Co.* (1989), 40 Ohio St.3d 190. The Court, nonetheless, need not assume the truth of the conclusions, which are not supported by factual allegations. *Id.* at 193.

Dismissal is appropriate where it appears beyond doubt that the complaining party

1. While all of the Defendants have filed separate motions to dismiss, all of the motions are based upon the same arguments. In fact, arguments have been referenced, adopted, and restated by some Defendants from other Defendants' briefs.

can prove no set of facts in support of the complaining party's claim that would entitle said party to relief. *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242.

The trial court is not confined to allegations of complaint when determining its subject matter jurisdiction pursuant to a Civ.R. 12(B)(1) motion to dismiss, and it may consider material pertinent to such inquiry without converting the motion into one for summary judgment. Civ.R. 12(B)(1,6). *Southgate Dev. Corp. v. Columbia Gas Transmission Corp.*, 48 Ohio St. 2d 211 (1976).

Applicable Federal Law

Congress enacted the Natural Gas Act to govern the transportation of natural gas in interstate commerce. 15 U.S.C. §717. In so doing, Congress gave authority to regulate natural gas companies and the interstate sale and transportation of natural gas, as well as the construction of natural gas facilities, including natural gas pipelines, to the Federal Power Commission, which ultimately became the Federal Energy Regulatory Commission ("FERC").

However, the Natural Gas Act is subservient to the Federal Water Pollution Control Act, aka the Clean Water Act, found in 33 U.S.C. §1251, which prohibits the discharge of pollutants in waterways. 15 U.S.C. §717(b)(d). The Clean Water Act specifically reserves to the states the right to adopt and enforce standards and requirements regarding pollutants in waterways as follows:

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 discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other

limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

33 U.S.C. 1370. In response, the State of Ohio has delegated to its Director of Environmental Protection the authority to promulgate rules and regulations, including the issuing of permits, concerning the discharge of pollutants into the waters within Ohio. R.C. 6111.03. Such rules and regulations are found in OAC Chapter 3745, including, but not limited to OAC 3745-33-01, et seq., and OAC 3745-38-02, et seq.

In addition to the preservation of the states' rights to enforce and adopt standards and requirements regarding the discharge of pollutants into waterways, the Clean Water Act requires that any state promulgated water quality standards be subject to review and approval by the EPA. 33 U.S.C. §1313 (also referred to as "Section 303 of the Clean Water Act"). The Clean Water Act also provides that any project in which discharge of a pollutant into navigable waters may occur, must receive certification from the state in which the discharge will originate that such discharge will comply with the state's water quality standards. 33 U.S.C. §1341 (a)(1) (also referred to as "Section 401 of the Clean Water Act").

As to such "401 certification,"

If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

Id. Therefore, if a state fails or refuses to act on a 401 Certification within one year from the request, the 401 Certification requirement is waived with respect to any application. If a 401 Certification request is denied by the state, no permit shall be issued for the requesting project. If the state approves the 401 Certification request upon any conditions or limitations, such conditions or limitations shall be set forth in the 401 Certification. 33 U.S.C. §1341(d). The time frame set forth in Section 401 of the Clean Water Act is a “bright-line rule” and not a “subjective standard.” *N.Y. State Dep’t of Envtl. Conservation v. FERC*, 884 F.3d 450, 456 (2nd Cir., 2018).

Additionally, the Clean Water Act authorizes the EPA to regulate the discharge of pollutants in navigable waters under the National Pollutant Discharge Elimination System (“NPDES”). 33 U.S.C. §1342. The EPA has given such permitting authority to the States, including Ohio, that meet the EPA’s requirements.

While, as previously noted, the Natural Gas Act gives deference to the Clean Water Act, such deference is not unlimited. Notably, the Natural Gas Act designates FERC as the lead agency for the coordination of all federal permits (which would include any permit required under the Clean Water Act), special use authorizations, certifications, opinions, or other approvals regarding the construction of a natural gas pipeline. 15 U.S.C. §717n(b). Further, the Act requires all federal and state agencies considering an aspect of an application for the construction of a natural gas pipeline to cooperate with FERC and comply with the deadlines established by FERC. Id.

Analysis

In its motion, Rover asserts that the State of Ohio failed to “act” on its request for a

401 certification within the one-year period provided in said section. As such, Rover argues that the State of Ohio waived any limitations on a discharge certification. The State of Ohio argues that it did “act” upon such request within one year. Moreover, the State of Ohio asserts that any such waiver applies only to Count 7 of the complaint and does not affect the other claims.

On November 16, 2015, the State of Ohio received a 401 Certification request from Rover. As such, the State of Ohio had until November 16, 2016, to “act” on such request pursuant to Section 401 of the Clean Water Act. However, the State of Ohio did not “act” on the initial 401 Certificate request. Rather, the State of Ohio required Rover to resubmit its request on February 23, 2017, and the State granted the revised request on February 24, 2017, again without ever acting on the initial request filed November 16, 2015.

The Court finds the language of Section 401 to be clear and unambiguous in regard to the timeframe for acting upon a 401 Certification. Further, as noted by the Court in *N.Y. State Dep’t of Envtl. Conservation*, the one-year requirement is a “bright-line” rule. *Id.* The Court finds that, in order to assert its rights under the Clean Water Act, the State of Ohio was required to “act,” i.e., grant or deny, upon Rover’s November 16, 2015, 401 Certification request on or before November 16, 2016. Its failure to do so, resulted in a waiver of rights.

The Court does not find that the “resubmission” of Rover’s request on February 23, 2017, acts to save the State of Ohio from such waiver. Although the State of Ohio timely acted upon the resubmitted request, such action, which occurred outside of the one-year period for the initial submission, does not negate the waiver that resulted from the failure to act on or before November 16, 2015. Simply put, because the State of Ohio did not grant or deny the November 16, 2015, 401 Certification request on or before November 16, 2016, it waived its rights pursuant to the Clean Water Act, regardless of any subsequent action.

Like a house of cards, Rover asserts that, because the State of Ohio waived its rights under section 401, all of its remaining claims fail as well. To the contrary, the State of Ohio argues that any such waiver applies only to count 7 of its complaint and does not affect any of the remaining claims. Upon review, the Court finds that counts 1-6 of the Third Amended Complaint are based upon limitations and monitoring requirements needed for compliance with Ohio's water quality standards. However, Section 401 gave the State of Ohio the opportunity, within one year of Rover's request for certification, to set forth such limitations and requirements. The failure by the State of Ohio to do so, as set forth above, waived its authority to enforce the same.

This Court finds that the State of Ohio cannot, through the instant litigation, assert rights given to it under the Clean Water Act which it waived by failing to act within the specified time provided by the Clean Water Act. Because the Court finds that such waiver is dispositive of all claims in the Third Amended Complaint, the Court will not address the merits of the defendants' remaining arguments for dismissal.²

The holding of this Court in no way stands for the position that the State of Ohio does not have rights relative to the construction of a natural-gas pipeline through the State and a right to impose regulations to curb disastrous environmental impacts on its waterways as a result of such construction. Nor does this holding provide natural gas companies *carte blanche* to perform drilling and other construction related to natural-gas lines regardless of the environmental impact of such action. Rather, in order to assert its rights, the State of Ohio is required to act in conformance with the Clean Water Act, as opposed to instigating litigation as a collateral attack subsequent to the completion of a

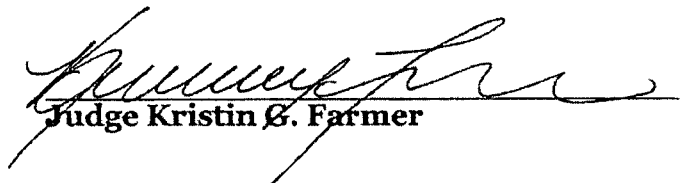
2. Although not specifically addressed in this entry, the Court has reviewed the arguments relative to dismissal on grounds other than a waiver under Section 401. The Court finds that, even if such waiver had not occurred, the defendants would be entitled to dismissal on the alternative grounds presented by the motions to dismiss, including,

pipeline. Moreover, the Court finds that, despite the State of Ohio's inability to pursue the instant litigation, all aspects of the construction of the pipeline, including the discharging of pollutants into waterways, were subject to oversight by FERC, which responded to environmental concerns presented by the State of Ohio, including, but not limited to, halting construction operations. As such, any alleged discharges were still subject to Federal Regulations, including the Clean Water Act.

Conclusion

For the reasons set forth herein, as well as those set forth in the motions to dismiss, the Court finds that the State of Ohio failed to act upon rights specifically given to it pursuant to the Clean Water Act within the Act's specified period of time. As such, the Court finds that it lacks jurisdiction over this matter, and further finds that the State of Ohio can prove no set of facts entitling it to its requested relief. As such, the Third Amended Complaint filed by the State of Ohio is, hereby, **DISMISSED**.

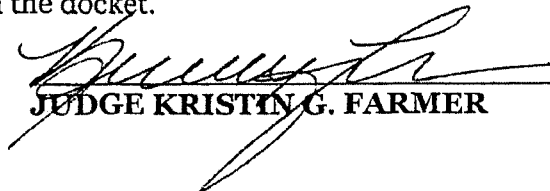
IT IS SO ORDERED.



Judge Kristin G. Farmer

**NOTICE TO THE CLERK:
FINAL APPEALABLE ORDER
Case No. 2017CV02216**

IT IS HEREBY ORDERED that notice and a copy of the foregoing Judgment Entry shall be served on all parties of record within three (3) days after docketing of this Entry and the service shall be noted on the docket.



JUDGE KRISTIN G. FARMER

but not limited to, preemption.

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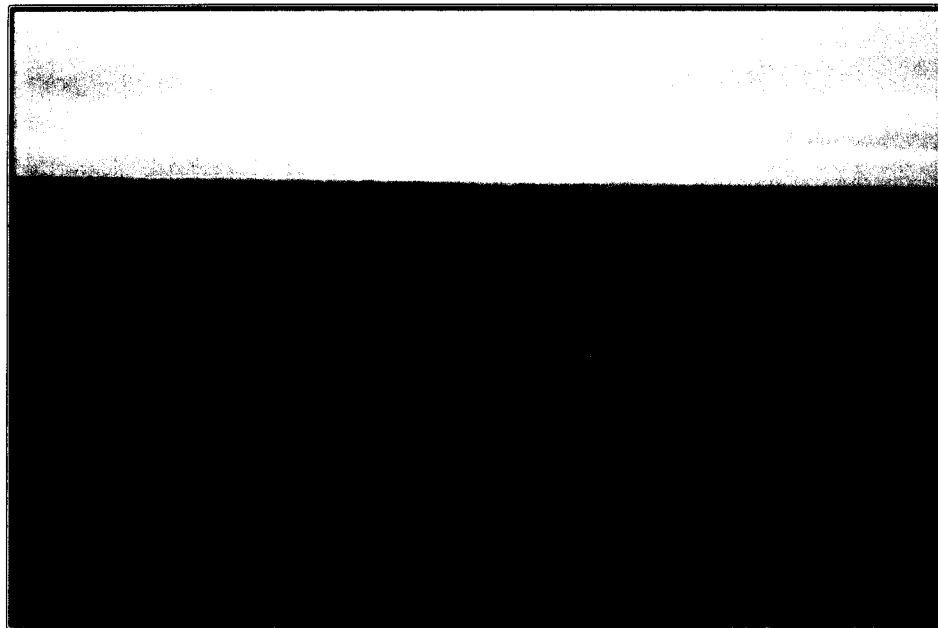
Federal Energy Regulatory Commission
Office of Energy Projects
888 First Street, NE, Washington, DC 20426

FERC/FEIS-0267F

July 2016

Rover Pipeline, Panhandle Backhaul, and Trunkline Backhaul Projects

Final Environmental Impact Statement



**Rover Pipeline, LLC; Panhandle Eastern Pipe Line Company LP;
Trunkline Gas Company, LLC**

FERC Docket Nos.: CP15-93-000, CP15-94-000, and CP15-96-000

Cooperating Agencies:



**U.S.
Environmental
Protection
Agency**



**U.S. Fish &
Wildlife
Service**



**U.S. Army
Corps of
Engineers**



**West Virginia
Department of
Environmental
Protection**



**Ohio
Environmental
Protection
Agency**

Commentors recommended that the impacts associated with producing natural gas from the Marcellus Shale be included in the environmental review of the Rover Project. Our authority under the NGA and the NEPA review requirements relate only to natural gas facilities that are involved in interstate commerce. Thus, the facilities associated with the production of natural gas are not under FERC's jurisdiction. The development of the Marcellus Shale, which is regulated by the states, continues to drive the need for takeaway interstate pipeline capacity to allow the gas to reach markets. Therefore, companies are planning and building interstate transmission facilities in response to this new source of gas supply. In addition, many production facilities have already been permitted and/or constructed in the region, creating a network through which natural gas may flow along various pathways to local users or interstate pipeline systems.

That is not to say that the environmental impact of individual production facilities is not assessed. The permitting of oil and gas production facilities is under the jurisdiction of other agencies, such as the COE or state agencies. Although we do not examine the impacts of Marcellus Shale production facilities to the same extent as the Project facilities in this EIS, we have identified existing and proposed Marcellus Shale production facilities in proximity to the Rover Project and have considered them within the context of cumulative impacts in the Rover Project area (see section 4.13, Cumulative Impacts).

1.5 PERMITS, APPROVALS, CONSULTATIONS, AND REGULATORY REVIEW

Table 1.5-1 lists the major federal, state, and local permits, approvals, and consultations identified for the construction and operation of the Projects. Table 1.5-1 also provides the dates or anticipated dates when Rover, Panhandle, and Trunkline commenced or anticipate commencing formal permit and consultation procedures. Rover, Panhandle, and Trunkline would be responsible for obtaining all permits and approvals required to implement the proposed Projects prior to construction regardless of whether they appear in this table.

TABLE 1.5-1					
Major Permits, Approvals, and Consultations Applicable to the Proposed Projects ^a					
Agency	Permit/ Approval/ Consultation	Agency Action	Rover Project Status	Panhandle Backhaul Project Status	Trunkline Backhaul Project Status
Federal					
FERC	Certificate of Public Convenience and Necessity	Determine whether the proposed project is in the public interest, and consider issuance of a Certificate.	Application under review (filed February 2015).	Application under review (filed February 2015).	Application under review (filed February 2015).
COE	Section 404, CWA Permit and Section 10	Issuance of a Section 404 Permit for discharges of dredged or fill material into waters of the United States, including jurisdictional wetlands.	Application under review (filed February 2015).	Not Applicable.	Not Applicable.

TABLE 1.5-1 (continued)

Major Permits, Approvals, and Consultations Applicable to the Proposed Projects a

Agency	Permit/ Approval/ Consultation	Agency Action	Rover Project Status	Panhandle Backhaul Project Status	Trunkline Backhaul Project Status
State of West Virginia					
WVDEP Division of Water and Waste Management	Water Quality Certification (WQC), Section 401	Review and issuance of WQC.	Application under review (submitted in April 2016).	Not Applicable.	Not Applicable.
	NPDES Construction Stormwater General Permit	Issue NPDES Construction Stormwater General Permit.	Application to be submitted June 2016.	Not Applicable.	Not Applicable.
	Hydrostatic Test Water Discharge Permit	Issue hydrostatic testing general permit.	Application to be submitted October 2016.	Not Applicable.	Not Applicable.
WVDEP Division of Air Quality	Air Permit	Issue permit for construction and operation of source air pollutant emissions.	Application under review (submitted in February 2015).	Not Applicable.	Not Applicable.
West Virginia Division of Natural Resources Office of Land and Streams	Waterbody Crossing Permits	Issue permits for waterbody crossings.	Application to be submitted June 2016.	Not Applicable.	Not Applicable.
West Virginia Division of Culture and History	NHPA, Section 106	Review and comment on the project and its effects on historic properties.	Consultation initiated on June 25, 2014; response dated February 25, 2015; ongoing.	Not Applicable.	Not Applicable.
State of Ohio					
OHEPA, Division of Surface Water	WQC, Section 401	Review and issuance of WQC.	Application under review (submitted in November 2015).	Not Applicable.	Not Applicable.
	Isolated Wetland Permits	Issue isolated wetland permit for discharge dredged or fill material into isolated wetlands.	None required to date.	Not Applicable.	Not Applicable.
	NPDES Construction Stormwater Permit	Issue NPDES Construction Stormwater General Permit.	Application estimated to be submitted June 2016.	Application to be submitted at least 30 days prior to construction start.	Not Applicable.

TABLE 1.5-1 (continued)

Major Permits, Approvals, and Consultations Applicable to the Proposed Projects a

Agency	Permit/ Approval/ Consultation	Agency Action	Rover Project Status	Panhandle Backhaul Project Status	Trunkline Backhaul Project Status
Division of Air Pollution Control	Hydrostatic Test Water Discharge Permit	Issue hydrostatic test water general permit.	Application to be submitted October 2016.	Not Applicable.	Not Applicable.
	Air Permit	Issue permit for construction and operation of source air pollutant emissions.	Application under review (filed February 2015).	Not Applicable.	Not Applicable.
Ohio Department of Natural Resources	State-listed species consultation	Provide comments to prevent impacts on state- listed species.	Consultation initiated on June 25, 2014; ongoing.	Consultation initiated on December 17, 2014; response received in February 2015.	Not Applicable.
Ohio State Historic Preservation Office Resource Protection and Review	NHPA, Section 106	Review and comment on the Project and its effects on historic properties.	Consultation initiated on June 25, 2014; ongoing.	Consultation initiated on December 17, 2014; response dated February 23, 2015. Consultation complete.	Not Applicable.
Stark County Park District	Consultation for Project crossing of the Ohio and Erie Canalway at the Tuscarawas River	Provide comments to minimize impacts on the Ohio and Erie Canalway.	Consultation initiated on June 25, 2014; ongoing.	Not Applicable.	Not Applicable.
State of Michigan					
MIDEQ Water Resources Division Lansing District Office and Jackson District Office	Sections 401 and 404, CWA	Review and issuance of WQC and 404 permit.	Application under review (submitted in February 2015).	Not Applicable.	Not Applicable.
	Part 301, Inland Lakes and Streams Permit and Part 303, Wetland Permit	Issue Part 301 and Part 303 Permits.	Application under review (submitted in February 2015).	Not Applicable.	Not Applicable.
	Soil Erosion and Sedimentation Control Approval	Issue soil erosion and sediment control permit.	Application to be submitted June 2016.	Not Applicable.	Not Applicable.
	Water Withdrawal Permit	Issue a water withdrawal permit.	Application to be submitted July 2016.	Not Applicable.	Not Applicable.
	Groundwater (Hydrostatic) Discharge Permit	Issue hydrostatic test general permit.	Application to be submitted July 2016.	Not Applicable.	Not Applicable.

not expect any blasting-related fishery impacts. As a pre-emptive measure, Rover developed a Blasting Plan should it be determined at a later date that in-stream blasting is required. The Blasting Plan does contain measures to minimize potential impacts on aquatic resources from blasting.

Rover would minimize the effects of its Project on aquatic resources at waterbody crossings through the use of HDD technology where practicable; construction timing windows, and through proposed restoration procedures. Rover would also implement measures outlined in its Procedures to minimize impacts on aquatic resources such as restoring stream beds and banks to pre-construction conditions and installing and maintaining erosion control devices. Adherence to Rover's Procedures would increase the potential for regrowth of riparian vegetation.

Currently, Rover proposes to use an HDD to install its pipeline at 45 waterbody crossings, dry-ditch method at 30 crossings, and the open-cut (wet-ditch) method for the remaining 789 crossings. The use of an HDD allows the pipeline to be installed beneath the bed of a waterbody without affecting aquatic resources. Inadvertent releases of drilling fluids could occur within a waterbody and result in impacts on water quality and aquatic organisms. However, the majority of these releases occur onshore near the drill's entry and exit points. Rover would adhere to its HDD Plan to prevent inadvertent releases from occurring, as well as to contain and clean up a release should one occur.

Rover would use 23 waterbodies as sources of water for hydrostatic testing, none of which contain sensitive fisheries or fisheries of special concern. The Panhandle and Trunkline Projects would obtain hydrostatic test water entirely from municipal sources.

Rover would minimize impacts associated with hydrostatic testing by fitting intake lines with screens to minimize the entrainment of fish and maintaining base flows, and controlling downstream flow rates to protect aquatic life. Following the completion of the hydrostatic tests, Rover would discharge the test water through energy-dissipation devices to prevent erosion, stream bed scour, suspension of sediments, flooding, or excessive flows. After testing of the Panhandle and Trunkline Projects, water would be discharged to well-vegetated upland areas at a controlled rate. Discharge of hydrostatic test water would comply with all applicable permits, including the sampling of discharge water to document water quality at the time of discharge.

To reduce the potential for surface water contamination and resulting impacts on aquatic life, Rover would implement measures in its Spill Procedures, and Panhandle and Trunkline would adhere to the measures in their respective SPARs. These documents include BMPs to minimize the potential for accidental releases and measures that would be implemented to contain, clean up, and report any releases, should they occur. Additional measures in Rover's CMPs include conducting routine inspections of construction equipment, tanks, and storage areas to help reduce the potential for spills or leaks; restricting refueling and the handling of hazardous materials to greater than 100 feet from wetland and waterbody resources; and the use of secondary containment around all containers and tanks. With adherence to these measures, we conclude that impacts on aquatic resources from potential spills would be adequately minimized.

Based on our review of potential Project impacts on aquatic resources as described above, we conclude that the Rover Project would result in some temporary impacts on aquatic resources, but that these impacts would be adequately mitigated through adherence to the measures described in Rover's CMPs, agency recommendations regarding the timing of construction activities, and our recommendations regarding sensitive waterbody crossings.

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John R. Kasich, Governor
Mary Taylor, Lt. Governor
Craig W. Butler, Director

ENTERED DIRECTOR'S JOURNAL

I certify this to be a true and accurate copy of the official documents as filed in the records of the Ohio Environmental Protection Agency

2017 FEB 24 AM 11:24

LEGAL OFFICE

[Signature] Date: 2/24/17

Certified Mail

**Re: Rover Pipeline Project
Permit - Intermediate
Approval
401 Wetlands**

**Crawford, Seneca, Hancock, Wood, Henry, Defiance, Fulton,
Ashland, Noble, Monroe, Harrison, Carroll, Tuscarawas, Stark,
Wayne, Richland, Belmont, Monroe, and Jefferson Counties
DSW401154852**

February 24, 2017

Buffy Thomason
Rover Pipeline LLC
1300 Main St.
Houston, TX 77002

Subject: Rover Pipeline Project
Crawford, Seneca, Hancock, Wood, Henry, Defiance, Fulton, Ashland,
Noble, Monroe, Harrison, Carroll, Tuscarawas, Stark, Wayne, Richland,
Belmont, Monroe, Jefferson Counties
Grant of a Section 401 Water Quality Certification
Minimal Degradation Alternative
Ohio EPA ID No. 154852

Dear Stakeholders:

I hereby authorize the above referenced project under the following authorities and it is subject to the following modifications and/or conditions:

Section 401 Water Quality Certification

Pursuant to Section 401 of the Federal Water Pollution Control Act, Public Law 95-217, I hereby certify that the above-referenced project will comply with the applicable provisions of Sections 301, 302, 303, 306, and 307 of the Federal Water Pollution Control Act. This authorization is specifically limited to a Section 401 Water Quality Certification (here after referred to as "certification") with respect to water pollution and does not relieve the Certification Holder of further Certifications or Permits as may be necessary under the law. I have determined that a lowering of water quality in the Tiffin, Lower Maumee, Cedar-Portage, Sandusky, Upper Ohio, Upper Ohio Wheeling, Little Muskingum-Middle Island, Tuscarawas, Mohican, Walhonding, and Wills watersheds

50 West Town Street • Suite 700 • P.O. Box 1049 • Columbus, OH 43216-1049

epa.ohio.gov • (614) 644-3020 • (614) 644-3184 (fax)

(HUC 05030106, 05030101, 05040005, 05040001, 05030201, 05040003, 05040002, 04100011, 04100010, 04100006, 04100009) as authorized by this certification is necessary. I have determined that the project meets public need for impacts to certain wetlands. I have made these determinations based upon the consideration of all public comments, if submitted, and the technical, social, and economic considerations concerning this application and its impact on waters of the state.

PART I ON-SITE WATER RESOURCES AND IMPACTS

A. Watershed Setting

The watersheds are a mix of stream classifications and primary contact water. General land use types crossed by the proposed project include: agricultural, old fields, pipeline ROW, scrub shrub, wooded uplands, wetlands, mining sites and residential lots.

B. Project Description

Rover Pipeline, LLC is proposing a new natural gas pipeline system to move natural gas from producer processing plants in the Marcellus and Utica shale areas of Ohio to interconnections with the existing pipeline system in western Ohio and Michigan. The project will include approximately 369 miles of pipeline in Ohio. Pipeline impacts within the right-of-way have been deemed temporary by the Director of Ohio EPA and will be restored onsite to pre-construction conditions. Impacts that result in a conversion of wetland from forested to non-forested will require conversion mitigation as determined by the U.S. Army Corps of Engineers and referenced in the Nationwide Permit 12 authorization.

C. Impacts

Under the Minimal Degradation Alternative, impacts to waters of the state are as follows as defined by Army Corps of Engineers Nationwide Permit 12:

Pittsburgh District:

According to the Nationwide Permit 12 issued within the Pittsburgh District Regulatory Boundary, the project will involve the temporary discharge of dredged and/or fill material into 32,810 linear feet of 256 streams and 10.60 acres of 68 wetlands, at separate and distinct locations. The discharge or dredged and/or fill material into waters of the U.S. is described in detail within tables below. As indicated in the submitted information, all temporary affected waters of the U.S. will be returned to their pre-construction conditions upon project completion.

Huntington District:

According to the Nationwide Permit 12 issued within the Huntington District Regulatory Boundary, the project will involve the temporary discharge of dredged and/or fill material into 15241.5 linear feet of 286 streams and 64.36 acres of 226 wetlands, at separate and distinct locations. The discharge or dredged and/or fill material into waters of the U.S. is described in detail within tables below. As indicated in the submitted information, all temporary affected waters of the U.S. will be returned to their pre-construction conditions upon project completion.

Buffalo District:

According to the Nationwide Permit 12 issued within the Buffalo District Regulatory Boundary, the project will involve the temporary discharge of dredged and/or fill material into 744.9 linear feet of 89 streams and 13.94 acres of 58 wetlands, at separate and distinct locations. The discharge or dredged and/or fill material into waters of the U.S. is described in detail within tables below. As indicated in the submitted information, all temporary affected waters of the U.S. will be returned to their pre-construction conditions upon project completion. The total amount of impacts appears less in this district because the Buffalo Corps District measured impacts across stream resources as opposed to the width of the stream impact.

Lakes

Lake impacts are not authorized by this certification.

PART II TERMS & CONDITIONS

- A. Terms and conditions outlined in this section apply to project and mitigation construction as described in this certification.
- B. The Certification Holder shall notify Ohio EPA, in writing, and in accordance with *Part IV (NOTIFICATIONS TO OHIO EPA)* of this certification, upon the start and completion of site development and mitigation construction.
- C. A copy of this certification shall remain on-site for the duration of the project and mitigation construction activities.
- D. In the event of an inadvertent spill, the Certification Holder must immediately call the Ohio EPA Spill Hotline at 1-800-282-9378, as well as the Ohio EPA Section 401/Stormwater Manager (614-644-2001).
- E. Unpermitted impacts to surface water resources and/or their buffers occurring as a result of this project must be reported within 24 hours of occurrence to Ohio EPA, Division of Surface Water, Section 401/Stormwater Manager (614-644-2001), for further evaluation.
- F. Pesticide application(s) for the control of plants and animals shall be applied in accordance with rule 3745-1-01 of the Ohio Administrative Code, and may require a site specific application permit from Ohio EPA. Such a permit may be obtained by calling 614-644-2001 and speaking with the Toxicology Specialist.
- G. This project may affect drinking water wells and potable water intakes. Precautions must be taken to limit any effect on the water supply. Officials at any City/Village along the pipeline route should be notified before beginning the project and activities shall be coordinated with them. Additionally, notice should be given to residential wells within 150' of the right of way easement before activities begin.
- H. Any authorized representative of the director shall be allowed to inspect the authorized activity at reasonable times to ensure that it is being or has been accomplished in accordance with the terms and conditions of this certification.
- I. In the event that there is a conflict between the certification application, including the mitigation plan, and the conditions within this certification, the condition shall prevail unless Ohio EPA agrees, in writing, that the certification application or other provision prevails.

Environmental Review Appeals Commission
77 South High Street, 17th Floor
Columbus, Ohio 43215

Sincerely,



Craig W. Butler
Director

cc: Wes Barnett, Department of the Army, Huntington District, Corps of Engineers
Shawn Blohm, Department of the Army, Buffalo District, Corps of Engineers
Josh Shaffer, Department of the Army, Pittsburgh District, Corps of Engineers
Peter Swenson, U.S. EPA, Region 5
Dan Everson, U.S. Fish & Wildlife Service
John Kessler, ODNR, Office of Real Estate
Dave Snyder, Ohio Historical Preservation Office
Todd Surrena, Ohio EPA, DSW, Section 401/IWP
Jeff Boyles, Ohio EPA, DSW, Section 401/IWP
Jeff DeShon, Ohio EPA, DSW, EAS

Attachments: Site Location Map (project)
Response to Comments

Ohio EPA has developed a customer service survey to get feedback from regulated entities that have contacted Ohio EPA for regulatory assistance, or worked with the Agency to obtain a permit, license or other authorization. Ohio EPA's goal is to provide our customers with the best possible customer service, and your feedback is important to us in meeting this goal. Please take a few minutes to complete this survey and share your experience with us at <http://www.surveymonkey.com/s/ohioepacustomersurvey>.

ATTACHMENT: Site Location Map (project)

