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**IN THE COURT OF COMMON PLEAS**
**STARK COUNTY, OHIO**

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| **STATE OF OHIO, EX REL., MICHAEL DEWINE, OHIO ATTORNEY GENERAL,** | ) | **CASE NO. 2017CV02216** |
| | ) | **JUDGE KRISTIN G. FARMER** |
| **Plaintiff,** | ) | **JUDGMENT ENTRY** |
| **vs.** | ) | |
| **ROVER PIPELINE, LLC, et al.,** | ) | |
| **Defendant.** | ) | |

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.