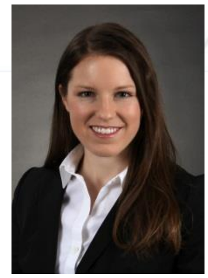
The PIOGA press

The monthly newsletter of the Pennsylvania Independent Oil & Gas Association September 2017

Federal court directs FERC to evaluate downstream climate change impacts

Authors:



Meredith Odato Graham

Brianne Kurdock

Federal agencies tasked with reviewing energy projects will likely take a harder look at climate change following a recent decision by the U.S. Court of Appeals for the District of Columbia Circuit. In a 2-1 ruling issued August 22, a D.C. Circuit panel vacated a decision by the Federal Energy Regulatory Commission (FERC) to approve a major interstate pipeline project, holding that FERC failed to adequately consider the greenhouse gas emissions that will result from burning the natural gas being carried by the pipelines. See *Sierra Club v. FERC*, D.C. Cir., No. 16-1329. The court faulted FERC's project review under the National Environmental Policy Act of 1969 (NEPA) in a decision that has the potential to delay pipeline development across the country.

What NEPA requires

As the first major environmental law in the United States, NEPA established a broad national framework for protecting the environment. NEPA requires federal agencies to evaluate the environmental and related social and economic impacts of proposed actions prior to making decisions. It requires agencies to follow certain procedures, gather public input and take a "hard look" at various factors, but it does not require a particular outcome. NEPA can apply to a wide range of federal actions, including but not limited to permit approvals. Private companies frequently become involved in the NEPA process when they need a permit issued by a federal agency, such as FERC or the U.S. Army Corps of Engineers.

Depending on the circumstances of a project, the reviewing agency may be required to prepare a decision document known as an environmental impact statement (EIS). NEPA requires preparation of an EIS for each "major Federal action[] significantly affecting the quality of the human environment." *See 42* U.S.C. § 4332(2)(C). Decades of case law have developed around the meaning of this statutory obligation. It presents an ongoing challenge for agencies as they seek to define the scope of information that must be considered when evaluating a proposed project.

Challengers criticize FERC's NEPA review

Pursuant to Section 7 of the Natural Gas Act, a pipeline developer must obtain a certificate of public convenience and necessity (also known as a Section 7 certificate) from FERC prior to constructing and operating an interstate natural gas pipe - line. *See* 15 U.S.C. § 717f. On February 2, 2016, FERC issued the Section 7 certificates for the Southeast Market Pipelines Project. Scheduled for completion in 2021, the project consists of three separate but connected natural gas transmission pipe - lines in Alabama, Florida and Georgia. One of these pipelines, Sabal Trail, is a 515-mile interstate pipeline transporting natural gas to Southeast markets, including natural gas-fired power generators in Florida.

Environmental groups and landowners opposed to the project asked FERC for a rehearing with respect to the Section 7 certificates as well as a stay of construction. FERC denied the stay and project construction began in August 2016. Shortly thereafter, on September 7, 2016, FERC denied the request for rehearing.

The landowners and environmental groups, led by the Sierra Club, petitioned the D.C. Circuit for review of FERC's decision to approve the Southeast Market Pipelines Project. The Sierra Club argued that the NEPA analysis performed by FERC was deficient. In relevant part, the Sierra Club alleged that FERC should have considered the effects of greenhouse gas emissions from natural gas-fired power plants downstream in Florida. Although FERC discussed climate change in the EIS associated with the project, the agency declined to engage in "speculative analyses" concerning the "relationship between the proposed project and upstream development or downstream end-use." Overall, FERC concluded in the EIS that the project "would not result in a significant impact on the environment."

The court's decision

The court agreed with the Sierra Club, finding that "FERC's environmental impact statement did not contain enough information on the greenhouse-gas emissions that will result from burning the gas that the pipelines will carry." The court determined that the greenhouse gas emissions from the power plants "are an indirect effect of authorizing this project, which FERC could reasonably foresee, and which the agency has legal authority to mitigate." Without quantifying the project's greenhouse gas emissions and making comparisons to regional emission reduction goals, for example, the court said it would be impossible for FERC and the public to engage in the kind of informed review that is required by NEPA.

Although the court ruled in favor of FERC on all other issues presented, it ultimately vacated the Section 7 certificates and remanded the case to FERC for preparation of a new EIS. FERC must estimate the quantity of power plant emissions that will be made possible by the pipelines, or explain in more detail why such quantification cannot be done. The court also directed FERC to explain the agency's current position on the use of a "Social Cost of Carbon" tool developed by an interagency working group to measure the harm of emissions in dollar amounts.

Judge Janice Rogers Brown authored the lone dissent, stating that FERC was not obligated under NEPA to include a discussion of downstream greenhouse gas emissions where the agency has no legal authority to prevent those environmental effects. Power plants downstream of the pipeline project are regulated by state agencies. In Judge Brown's view, "FERC has no control over whether the power plants that will emit these greenhouse gases will come into existence or remain in operation." If an agency lacks the authority to act on the information collected during the NEPA process, then the same agency is not required to analyze that effect in its NEPA review.

Implications for future permitting

Unless FERC seeks en banc review or an appeal of the decision, the agency is now tasked with preparing a revised EIS for the Southeast Market Pipelines Project. Interestingly, the court did not require Sabal Trail (Phase 1) to cease operation. Phase 1 of Sabal Trail began full commercial service in July 2017.

It remains to be seen how this decision may affect other pipe - line projects, but it is likely that federal agencies may take an even broader approach to NEPA reviews and devote additional attention to greenhouse gas emissions. Applicants may be asked to submit more expansive and detailed information to support an agency's analysis. Even in situations where it is not feasible to quantify indirect greenhouse gas emissions, the D.C. Circuit's decision suggests that the agency must provide a satisfactory explanation for its feasibility determination. Finally, it is not clear if the downstream environmental effects of gas transported by a pipeline for other end uses would also be considered reasonably foreseeable.

This decision could potentially have an impact on applications for state permits as well. The State of New York has already cited the Sierra Club v. FERC decision in support of its conditional denial of water quality permits for the Valley Lateral Project, a seven-mile pipeline segment that would supply gas to a power plant. In denying the permits, the New York State Department of Environmental Conservation (NYSDEC) stated that FERC failed to account for the downstream greenhouse gas emissions in its NEPA review for the Valley Lateral Project. NYSDEC cited the Sierra Club v. FERC decision and appeared to make the denial contingent on whether FERC reopened its NEPA process for the Valley Lateral Project.

The Sierra Club v. FERC decision could also influence the broader discussion (beyond the NEPA context) about how climate change concerns play into agency decision making. The D.C. Circuit decision will likely continue to bolster environmental groups seeking to challenge industrial and commercial development in general. Unfortunately, the court did not address a growing concern in the regulated community about how far in time and space an agency may or must go when evaluating greenhouse gas emissions. Climate change is generally considered a global issue with long-term consequences. At what point will the inquiry end?

For additional information about developments described in this article, contact Brianne K. Kurdock at 202-853-3462 or bkurdock@babstcalland.com or Meredith Odato Graham at 412-773- 8712 or mgraham@babstcalland.com.