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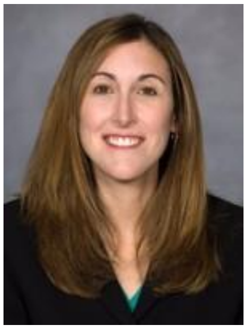
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

DC Circ. Ruling Could Change Pipeline Review Procedure

By **James Thompson and Katy Larkins**

Law360, New York (September 7, 2017, 2:17 PM EDT) -- In approving natural gas pipeline projects, the Federal Energy Regulatory Commission has resisted calls from environmental groups and even the U.S. Environmental Protection Agency for more detailed environmental reviews of downstream greenhouse gas (GHG) emissions from local power plants the pipelines may serve. FERC has concluded such projects would reduce GHG emissions by displacing more carbon-intensive coal use and typically has not considered detailed calculations of potential downstream or carbon emissions from other uses that might be avoided if a project is approved.

James Thompson


Katy Larkins

A decision issued Aug. 22 from a 2-to-1 panel of the D.C. Circuit in Sierra Club v. FERC may change that procedure.[1] If the majority's ruling stands, pipeline developers will need to ensure that environmental reviews for future projects include a comprehensive GHG analysis of potential downstream effects along with detailed information to support that analysis. Developers can further expect legal challenges to the adequacy of these evaluations, all of which could increase costs and delay project approval if not impede implementation altogether.

The "Journey and the Destination"

The court's ruling in Sierra Club v. FERC considered a host of challenges from landowners and environmental groups to the agency's approval of the Southwest Market Pipelines Project, comprising three proposed natural gas pipelines (the Sabal Trail pipeline, the Hillabee Expansion, and the Florida Southeast Connection) that together would run nearly 500 miles from Alabama through Georgia and into Florida.

The D.C. Circuit first found that the challengers had standing to sue and that the project must be considered as a whole even though different segments of the pipeline project were under separate ownership. The court then rejected all but one of the many challenges.

Requiring a new environmental impact statement (EIS), the court held that FERC's environmental review should have analyzed future GHG emissions not only from the construction and operation of the pipelines themselves but also from the power plants that might burn natural gas carried by the lines.

“It’s not just the journey,” the court stated, but “also the destination” that counts in any environmental review. The dissenting judge, who would have rejected the GHG challenge as well as the petitioners’ other challenges, countered that “NEPA is a procedural statute that is all about the journey” and “does not dictate any particular decisional outcomes.”

The panel’s majority decision hinged on its conclusion that FERC must consider GHG emissions from power plants serviced by the pipelines, even though FERC has no authority to regulate those emissions. Under the National Environmental Policy Act, however, courts have held that an agency generally need not evaluate indirect effects over which a separate agency has sole jurisdiction and statutory power to act.

Implicit in these prior decisions is the idea that NEPA neither requires nor contemplates duplicative environmental reviews or potential second-guessing among government agencies. The decision point for analysis should rest with the agency having jurisdiction over the emission source, not just its chain of supply.

The panel majority took pains to distinguish earlier challenges to FERC decisions involving LNG terminals, through which natural gas may be exported with a U.S. Department of Energy (DOE) license. The court held in those cases that FERC was not required to consider climate change effects of gas exports when deciding whether to approve physical modifications to LNG terminals because the agency had no control over the DOE’s licensing of the exports.[2]

The two-judge majority determined that FERC had been granted only narrow statutory authority to approve modifications to LNG terminals that did not extend to adverse environmental effects from natural gas exports. But, the majority said, the statute directs FERC to consider “public convenience and necessity” when evaluating pipeline projects, a command the court found broad enough to encompass downstream GHG effects.

The dissent disagreed, seeing no practical difference between FERC’s approval of natural gas pipelines and LNG terminal expansion projects. According to the dissent, FERC has no statutory authority to prevent the indirect effects from power-plant emissions, which are regulated by other agencies, including state regulators.

Further, the dissent found unpersuasive paternalistic arguments that the state regulatory authority responsible for permitting power plants should be treated differently under NEPA than a federal permitting authority responsible for LNG exports. Because FERC cannot be considered the “legally relevant cause” of any power-plant emissions under the oversight of state regulators, the dissent concluded that an analysis of those emissions should have no bearing on FERC’s review.

The majority acknowledged that downstream GHG effects of some projects may be too speculative to quantify. FERC could fulfill its obligation under NEPA in those cases by explaining why it is infeasible to estimate downstream impacts. But the court cautioned that the mere existence of some uncertainty does not excuse a robust analysis, as the environmental review process necessarily entails “reasonable forecasting” and “educated assumptions.”

The majority postulated that it would, indeed, be feasible to estimate downstream GHG effects of the Southwest Market Pipelines Project based on the capacity of the pipelines to transport gas. Because the “entire purpose” of the pipelines was to transport natural gas to be burned in Florida power plants, the court suggested that FERC could have used that full capacity figure to estimate the potential GHG emissions from the plants.

“No Action” Considerations

If FERC must address indirect GHG effects from utility operations, it also must consider how the energy needs addressed by the pipeline would be met if the project does not go forward — known as the “no action” alternative. As the dissent noted, “Given the dire consequences of failing to act, it is inconceivable that the ... utility companies would stand idly by and allow a power crisis to develop.” The dissent predicted that “a much more inconvenient, expensive, and possibly environmentally-harmful alternative” would be the likely outcome if FERC does not approve the pipeline project.

But even if FERC believes the positive consequences of a project outweigh all negative considerations, “the agency still needs to discuss both the good and the bad,” the court said in its majority opinion.

Given the majority’s conclusion that FERC must consider downstream GHG impacts from power plants, it will be all the more important for pipeline proponents to counterbalance those considerations when possible with estimates of any potentially harmful downstream consequences of “no action.” Even in the best of cases, however, downstream estimates are fraught with uncertainty and may create further prospects for opposition and delay.

Social Cost of Carbon

The D.C. Circuit’s ruling was limited to the question of whether FERC should have quantified downstream GHG emissions from the project. The court did not reach the Sierra Club’s argument that the agency should have taken another step to “link those downstream carbon emissions to particular climate impacts” using the "Social Cost of Carbon," a tool developed by an Obama administration working group that attempts to assess the impact in dollars of each ton of carbon emitted.

FERC has taken the position in other environmental reviews that the Social Cost of Carbon is a disputed measure and not useful in NEPA assessments. Further, in a March 28, 2017, executive order, President Donald Trump disbanded the interagency working group that developed the Social Cost of Carbon construct and directed that its guidance documents be withdrawn as unreliable and no longer representative of government policy.

The D.C. Circuit’s majority panel nevertheless directed FERC on remand to explain whether it still regards the Social Cost of Carbon as an unhelpful metric. It remains to be seen whether the court will agree with FERC’s determination in that regard.

The D.C. Circuit’s ruling follows a Montana federal district court’s decision overturning an evaluation of a coal mine modification on the ground that the agency did not consider cumulative effects of coal transportation and combustion and foreseeable GHG emissions.[3] The Montana court concluded that the U.S. Office of Surface Mining failed to take a “hard look” at indirect GHG emissions when it quantified the benefits, but not the costs, of the project. Further, the court viewed the Social Cost of Carbon as an available tool to conduct this analysis.

Other Challenges

Although the D.C. Circuit’s ruling on indirect GHG emissions has garnered the most attention, the court notably rejected all of the petitioners’ other arguments, which covered a range of topics from environmental justice to rate-setting criticisms. The court refused to “flyspeck” FERC’s review, nothing that

NEPA merely requires that the agency take a “hard look” at the impacts and alternatives; NEPA is “information-forcing,” the court stated, not a dictate of the ultimate agency action.

Regarding environmental justice concerns, the Sierra Club argued that the agency compared the demographics along the various alternative pipeline routes to each other rather than to the population at large. But an EIS is intended to address only the relevant alternatives, including the alternative of taking no action, the court stated. The challengers had identified no reasonable alternative that FERC had not considered.

The court also concluded that the Sierra Club “elevated form over substance” by asserting that FERC did not designate the area of a compressor station as an environmental justice community despite its location in an African-American census block in a majority-white census tract. FERC did recognize the demographics of the neighborhood in question, the court determined, even though the agency did not label it an environmental justice community.

The court found more persuasive the argument that the county was already overburdened with industrial pollution sources and that FERC did not consider “cumulative impacts.” The court said the agency might have said more about that in its EIS but concluded the discussion of cumulative impacts was sufficient to fulfill NEPA’s goal. According to the court, the EIS addressed the substance of the concerns addressed, which is all NEPA requires.

Broader Implications and Conclusion

It remains to be seen whether the panel’s majority ruling will stand after a rehearing or appeal. If it does, FERC will be required to gather information and consider downstream GHG emissions or explain why estimating them is not feasible. But the decision whether to approve a pipeline project still ultimately rests with the agency, and the court’s ruling will not necessarily result in changed outcomes.

The court’s decision could, however, signal a setback in the Trump administration’s attempts to shorten the lengthy process of environmental review necessary for agency approval of infrastructure projects. If the decision is not reversed on further review, the five-year average time for completing NEPA reviews for natural gas infrastructure projects is likely to get even longer and the costs could escalate further.

On Aug. 15, 2017, Trump issued an executive order to “streamline and expedite” the permitting and environmental review process for high-priority infrastructure projects. The order sets a goal to reduce environmental review time to not more than two years on average from the publication of notice of intent to prepare an EIS.

A further requirement to provide a quantitative assessment of GHG emissions from indirect downstream impacts over which FERC has no jurisdiction or permitting authority will add another layer of review and potential challenge, making the administration’s goal for two-year reviews unrealistic in most cases.

Further, it appears the court’s decision effectively reinstates and makes binding a NEPA guidance document the administration jettisoned earlier this year. That policy directive, which the President’s Council for Environmental Quality (CEQ) finalized in the waning days of the Obama administration, expressly called for consideration of downstream and upstream GHG emissions in the NEPA process for all projects requiring federal review.

On April 4, 2017, the CEQ formally withdrew its “Final Guidance for Federal Departments and Agencies on

Consideration of Greenhouse Gas Emissions and Effects of Climate Change in National Environmental Policy Act Reviews" as required by Trump's March 28, 2017, executive order, with the goal of "Promoting Energy Independence and Economic Growth." The withdrawn guidance was not a regulation and thus was never legally binding on agencies. In light of the D.C. Circuit's recent decision, however, it appears the policy set out in the former guidance may have new life and even greater legal significance.

James F. Thompson is a partner and Kathryn A Larkins is of counsel at Shook Hardy & Bacon LLP in Kansas City, Missouri.

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[1] No. 16-1329 (D.C. Cir. Aug. 22, 2017).

[2] Sierra Club v. FERC (Freeport), 827 F.3d 36 (D.C. Cir. 2016); Sierra Club v. FERC (Sabine Pass), 827 F.3d 59 (D.C. Cir. 2016); EarthReports Inc. v. FERC, 828 F.3d 949 (D.C. Cir. 2016).

[3] Montana Envt'l Information Center v. U.S. Office of Surface Mining, No. 9:15-cv-00106 (D. Mont. Aug. 14, 2017).

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