

AUGUST 23, 2017

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Project, Energy and Infrastructure Finance Group Client Alert: D.C. Court orders FERC to reassess GHG impacts of Sabal Trail Pipeline

In a 2 to 1 decision, the D.C. Circuit supports Sierra Club and requires that FERC include the secondary effects of increased natural gas consumption in its environmental assessment. Decision appears at odds with three recent cases involving LNG export projects.

On August 22, 2017, Judge Thomas Griffith, on behalf of a divided D.C. Circuit Panel, issued an order (*Sierra Club, et al., v. FERC*, Nos. 16-1329 and 16-1387)¹ finding that the Federal Energy Regulatory Commission's (FERC or Commission) assessment of the environmental impact of the \$3.5 billion, 685-mile long Southeast Market Pipelines Project (Project) was inadequate in that FERC's environmental impact statement (EIS) did not contain sufficient information on the greenhouse-gas (GHG) emissions that would result from burning the gas that the natural gas pipelines will transport.

BACKGROUND

FERC had previously issued three conditional certificates of public convenience and necessity under section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c), to the following companies: (1) Florida Southeast to build and operate the 126-mile long Florida Southeast Project; (2) Transcontinental to build and operate the 44-mile long Hillabee Expansion Project and lease that capacity to Sabal Trail; and (3) Sabal Trail to build and operate the 515-mile long Sabal Trail Project.² FERC addressed the related

¹ Available at <https://www.ferc.gov/legal/court-cases/opinions/2017/16-1329opn.pdf>.

² Sabal Trail is owned by Spectra Energy Partners, NextEra Energy, and Duke Energy; the Hillabee Expansion is owned by the Williams Companies; and Florida Southeast Connection is owned by NextEra. Duke Energy, and NextEra's subsidiary Florida Power & Light, will also be the project's primary customers.

projects together. The “linchpin” of the three is the Sabal Trail pipeline that runs from Alabama to Florida.

FERC found a “persuasive need” for the Project to meet increased demand for domestic natural gas in the Southeast. Florida Power & Light claimed that without the Project, its gas needs will begin to exceed its supply this year. The Project’s developers also indicated that the increased transport of natural gas will make it possible for utilities to retire older, dirtier coal-fired power plants. The Commission issued a 477-page final EIS in December 2015 reflecting the Commission’s consideration of the public interest pursuant to the Natural Gas Act section 7(e), 15 U.S.C. § 717f(e) and the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C). The Commission determined that the Project, upon the satisfaction of numerous environmental conditions and mitigation measures required in the orders, were consistent with the public convenience and necessity under section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c). *See Fla. Se. Connection, LLC*, 154 FERC ¶ 61,080 (2016) (Certificate Order), *order on reh’g*, 156 FERC ¶ 61,160 (2016).

The Project drew opposition from several opponents. Environmental groups argued that increased burning of natural gas will hasten the harmful consequences of climate change. This case represents the latest in a series of natural gas project challenges brought by the Sierra Club in the D.C. Circuit base on climate change grounds.³

THE DECISION

The majority accepted the GHG argument, finding that “at a minimum, FERC should have estimated the amount of power-plant carbon emissions that the pipelines will make possible.” Judge Griffith then stated that a NEPA review must consider not only the direct effects, but also the indirect environmental effects, of the project under consideration (citing 40 C.F.R. 1502.16(b)). In this case, the majority found that under NEPA, “indirect effects” are those that are caused by the project and are later in time or farther removed in distance, but are still reasonably foreseeable. Judge Griffith next found that the burning of gas in the Florida power plants served by the Project is not just “reasonably foreseeable,” but is the entire purpose behind the Project’s development. Just as foreseeable, per the majority’s reasoning, is that burning natural gas will release the kinds of GHGs into the atmosphere that contribute to climate change.

The court rejected the developers’ argument that relied upon *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), that since FERC has no ability

³ Other objections were also raised in the case. Landowners in the pipelines’ path objected to the seizure of their property by eminent domain. In addition, some communities on the project’s route were concerned that pipeline facilities will be built in low-income and predominantly minority areas already overburdened by industrial polluters. These challenges were rejected by the court.

to control power plant carbon emissions, it had no obligation to consider those emissions in its NEPA analysis. In *Public Citizen* a unanimous Supreme Court held that the Federal Motor Carrier Safety Administration, in developing safety standards for Mexican trucks operating in the United States, was not required by NEPA to evaluate the environmental effects of increased truck traffic between the two countries because the agency had no authority to prohibit Mexican trucks from entering United States.

This pipeline case represents a departure from the D.C. Circuit's recent upholding of FERC against three challenges regarding Liquefied Natural Gas (LNG) terminals. See *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). In those cases, the court found that the Department of Energy (DOE) – not FERC – had the authority to approve or deny LNG exports and that therefore FERC had no legal authority – and thus no NEPA responsibility – to consider the environmental effects of those exports.

The court distinguished this case from the “LNG-terminal trilogy,” which stands for the proposition that “FERC had *no legal authority to prevent* the adverse environmental effects of natural gas exports [.]” and thus had no obligation to gather or consider that environmental information under *Public Citizen*. (Emphasis in original). With respect to LNG terminals, the court reasoned that since FERC was acting under a narrow delegated authority from DOE, it could not refuse a license upgrade upon grounds that it had no legal authority to consider in the first place.

By contrast, the majority found that FERC is not similarly constrained in its review in natural gas pipeline certificate cases.

Because FERC could deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment, the agency is a “legally relevant cause” of the direct and indirect environmental effects of pipelines it approves. See *Freeport*, 827 F.3d at 47. *Public Citizen* thus did not excuse FERC from considering these indirect effects.

Over FERC's objection that it was impractical to accurately measure GHG emissions attributable to the Project, the majority countered that the court has held that NEPA analysis involves some “reasonable forecasting” and that agencies may need to make “educated assumptions” about an uncertain future. The court then said that FERC already estimated the pipelines' shipping capacity at 1.1 billion cubic feet of gas per day, but the EIS gave no reason why that number could not be used to estimate GHG emissions from the power plants serviced by the pipelines.

The court concluded that FERC (in the EIS) should have either given a quantitative estimate of the downstream GHG emissions that will result from burning the natural gas that the pipelines will transport or explained more specifically why it could not have done so.

Quantification would permit the agency to compare the emissions from this project to emissions from other projects, to total emissions from the state or the region, or to regional or national emissions-control goals. Without such comparisons, it is difficult to see how FERC could engage in “informed decision making” with respect to the greenhouse-gas effects of this project, or how “informed public comment” could be possible.

THE DISSENT

The majority’s pivotal finding drew a strongly-worded dissent from Judge Janice Rogers Brown, who opined that the majority ignores the fact that the Florida Electrical Power Plant Siting Board, not FERC, has the exclusive authority to license the construction and expansion of power plants in Florida, and that the current case is thus indistinguishable from *Freeport* and *Public Citizen*. Therefore, she states that just as in the LNG cases, NEPA does not require FERC to analyze GHG emission from power plants serviced by the pipelines.

While the Court concludes FERC’s approval of the proposed pipelines will be the cause of greenhouse gas emissions because a significant portion of the natural gas transported through the pipeline will be burned at power plants, [] the truth is that FERC has no control over whether the power plants that will emit these greenhouse gases will come into existence or remain in operation.

* * * *

Thus, just as FERC in the DOE cases and the Federal Motor Carrier Safety Administration in *Public Citizen* did not have the legal power to prevent certain environmental effects, the Commission here has no authority to prevent the emission of greenhouse gases through newly-constructed or expanded power plants approved by the Board.

GOING FORWARD

The order vacates FERC’s approval of the Project, which went into service in July of this year. The court remanded the matter to FERC for preparation of a conforming EIS. Should the order stand on appeal, FERC will have to issue a supplemental EIS that addresses the directives of the decision, *i.e.*, it must provide an estimate of the downstream GHG emissions that will result from burning the natural gas that the

pipelines will transport or, alternately, explain more specifically why it cannot do so. Similarly, FERC may also have to supplement other pending pipeline EISs in the same fashion and expand its future pipeline certificate analysis to include the quantification of associated GHG effects where feasible, or explain why it cannot in particular circumstances. As it stands, the decision is not expected to halt pipeline development – only add to FERC’s required level of certificate analysis.

The FERC and the Project’s developers may seek rehearing or the court’s decision *en banc*. Alternatively, they could pursue a *writ of certiorari* from the Supreme Court. It is likely that these parties would argue, consistent with Judge Brown’s dissent, that the majority “completely omits any discussion of the role Florida’s state agencies play in the construction and expansion of power plants within the state[]” and that the majority inadequately distinguished this case from the LNG cases.

Given that the Project is already operational, the parties’ next steps are uncertain. A Sierra Club representative is reported to have said that the environmental groups are still considering what further steps to take. A spokesperson for Sabal Trail reportedly indicated that “the court’s decision will not affect Sabal Trail’s operation at this time.” FERC generally does not comment on pending litigation. In any case, the court’s decision will not take effect until such time as it issues its mandate. Generally this happen 7 days after the 45-day deadline for requests for rehearing *en banc* has passed (if no requests are filed), or 7 days after the court has acted on any such requests that are filed. See F.R.A.P. Rule 41. Absent the Petitioners bringing a successful action for some sort injunctive relief, it is not likely that the Project’s operations will be affected in the near term by this decision.

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