

Clients & Friends Memo

D.C. Circuit Vacates and Remands FERC Approval of Southeast Market Pipelines Project

August 25, 2017

On Tuesday, August 22, 2017, the U.S. Court of Appeals for the District of Columbia Circuit vacated and remanded an order by the Federal Energy Regulatory Commission (“FERC”) authorizing the construction and operation of the Southeast Market Pipelines Project (the “Certificate Order”).¹ Although the court rejected several of the claims raised by environmental and landowner groups seeking judicial review of the Certificate Order, a divided panel held that FERC’s environmental review of the project failed to adequately consider the downstream effects of greenhouse gas emissions resulting from increased power generation. In reaching this conclusion, the court distinguished this case from three 2016 D.C. Circuit decisions upholding FERC’s National Environmental Policy Act (“NEPA”) review of liquefied natural gas (“LNG”) facilities²—finding that whereas FERC is not the “legally relevant cause” and thus not required to review the indirect effects of increased natural gas exports, FERC *is* required to evaluate the indirect effects of increased power generation served by an interstate natural gas pipeline, at least when the pipeline has stated that power generation is one of the primary purposes of the project. The D.C. Circuit vacated the Certificate Order and directed FERC on remand to prepare an Environmental Impact Statement (“EIS”) consistent with the court’s decision. Judge Brown filed a partial dissent, agreeing with the court’s decision in all aspects except for its findings with respect to FERC’s review of greenhouse gas emissions.

The Southeast Market Pipelines Project involves three separate interstate natural gas pipelines currently being constructed in Alabama, Georgia, and Florida. Although the pipelines have different owners, the project’s overall aim is to serve the growing natural gas demand of Florida’s power plants. As the court’s decision points out, the two major natural gas pipelines already serving the state are nearly at capacity, and Florida utilities require the additional natural gas provided by the project to generate enough power to meet electricity demands. FERC treated the three pipelines

¹ See *Sierra Club v. FERC*, Case No. 16-1329 (D.C. Cir. Aug. 22, 2017).

² See *Sierra Club v. FERC*, 827 F.3d 36 (D.C. Cir. 2016); *Sierra Club v. FERC*, 827 F.3d 59 (D.C. Cir. 2016); *EarthReports v. FERC*, 828 F.3d 949 (D.C. Cir. 2016).

as one project for purposes of its review under the NEPA and Natural Gas Act (“NGA”), preparing a single EIS and issuing the Certificate Order for all three pipelines on February 2, 2016.

Two sets of challenges were filed against the project with the D.C. Circuit: (1) Environmental groups Sierra Club, Flint Riverkeeper, and Chattahoochee Riverkeeper (collectively, “Sierra Club”) filed a petition for review in Case No. 16-1329, which the court granted in part; and (2) landowners filed petitions in Case No. 16-1387, which the court denied.

Environmental Arguments

Both Sierra Club and the landowners raised several challenges to FERC’s NEPA review. The court upheld FERC’s EIS against each of these claims, except for the greenhouse gas issue.

Environmental Justice Review

Sierra Club’s first challenge was that, for various reasons, FERC’s review of the project’s effects on low-income and minority populations (“environmental justice communities”) was insufficient. As a preliminary matter, the court explained, NEPA requires an agency to adequately consider and publicly disclose the environmental impact of its actions, but does not direct an agency to reach any particular result. Accordingly, FERC was required to take the requisite “hard look” at environmental justice issues but was “not required to select the course of action that best serves environmental justice.”³ The court upheld the sufficiency of FERC’s environmental justice review, finding the EIS indicated that 83.7% of the proposed route would cross through or near environmental justice communities, and that FERC evaluated various alternatives, identified relevant environmental justice communities, and adequately considered cumulative impacts. The court further noted that FERC took commenters’ concerns on this issue seriously, reopening the comment period for the EIS to seek additional input and eventually securing agreement from the applicant to relocate a portion of the project to mitigate effects on environmental justice communities.

Greenhouse Gas Emissions

Next, Sierra Club argued, and the court agreed, that the EIS inadequately considered the indirect effects of downstream greenhouse gas emissions. According to the court, it is “reasonably foreseeable” that the gas transported via the project will be burned in power plants, and that the burning natural gas will in turn release greenhouse gases that will affect climate change. NEPA obligates an agency to consider effects that are “reasonably foreseeable,” but this obligation does not apply where the agency is not the “legally relevant cause” of such effects.

³ *Sierra Club v. FERC*, Case No. 16-1329, slip. op at 13.

Here, the court's analysis turned on its interpretation of the Supreme Court's decision in *Department of Transportation v. Public Citizen*.⁴ *Public Citizen* held that NEPA does not require an agency to evaluate the environmental impacts where that agency does not have the authority to prevent the cause of injury. In last year's LNG decisions, the D.C. Circuit relied on *Public Citizen* in deciding that FERC is not the "legally relevant cause" of any indirect effects of increased natural gas exports—and consequently is not required to consider such effects in its NEPA review—because the Department of Energy ("DOE") is the agency with authority to approve natural gas exports.⁵ The August 22 decision distinguished the LNG cases, and the scope of FERC's environmental review thereunder, from FERC's NEPA obligations in this case. In the court's words:

Our holding in the LNG cases was not based solely on the fact that a second agency's approval was necessary before the environmental effect at issue could occur. Rather [the cases] rested on the premise that FERC had *no legal authority to prevent* the adverse environmental effects of natural gas exports. . . . ***The holding in [the LNG cases] turned, not on the question "What activities does FERC regulate?" but instead on the question "What factors can FERC consider when regulating in its proper sphere?"***⁶

Thus the court contrasted the limited scope of what FERC may consider under DOE's "narrow delegation" of authority *versus* FERC's broader statutory authority to determine whether applications to construct and operate pipelines are in the public convenience and necessity under NGA section 7. In the LNG context, the court maintained, FERC was not statutorily authorized to evaluate the effects of natural gas exports when considering an application to construct and operate a facility. On the other hand, the court continued, FERC does have the authority to deny a pipeline certificate based on its potential environmental harm under NGA section 7; therefore FERC is the "legally relevant cause" of the direct and indirect environmental effects of approved pipelines, such as downstream greenhouse gas emissions. Accordingly, the court found FERC was required to analyze the indirect and cumulative effects of greenhouse gas emissions in the EIS.

Next, the court addressed FERC's assertion that it is impossible to know the exact quantity of greenhouse gases that would result from the project's approval. Because NEPA requires agencies to engage in "reasonable forecasting," the court concluded that FERC should have either provided a quantitative estimate of downstream greenhouse gas emissions in the EIS or given a specific explanation as to why it could not do so. According to the court, such an estimate or explanation is required notwithstanding that greenhouse gas emissions may be somewhat offset due to the

⁴ *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004).

⁵ Under section 3 of the NGA, DOE has the authority to approve exports of natural gas, including LNG. Under delegated authority from the DOE, FERC authorizes the construction, siting, and operation of LNG facilities.

⁶ *Sierra Club v. FERC*, Case No. 16-1329, slip. op at 22 (emphasis added).

pipeline project itself (e.g., due to the retirement of coal-fired plants), and notwithstanding that the emitting power plants are subject to state and federal air permitting processes.

Landowner NEPA Challenges

The Landowner petitioners attacked two aspects of the EIS. First, they argued that FERC erroneously limited the scope of its evaluation of alternatives. The court upheld FERC's evaluation of alternatives, noting that FERC considered twelve major route alternatives (including a no-action alternative). The court also noted that the Landowners failed to provide arguments to support their claim or give examples of alternatives FERC failed to consider. Second, the Landowners assert that FERC inadequately considered safety risks with respect to the pipeline's construction. The court disagreed, finding FERC took the requisite "hard look" by evaluating the risk of pipeline crossings and responding to commenters' safety concerns in its EIS.

Non-Environmental Arguments

Landowners also challenged FERC's evaluation of a need for the project under its NGA section 7 review, arguing that the project merely serves the profit motives of the applicants and fails to satisfy a public need. Pointing out that petitioners misconstrued the relevant standard that the project meet a "market need," the court found that the requirement had been met by a showing that 93% of the project's capacity has been subscribed.

Finally, Landowners argued that FERC violated the Sunshine Act by issuing the Certificate Order by notational vote rather than in a public meeting. The court disagreed, noting the Sunshine Act does not require agencies to conduct business via meetings, but rather requires that if such meetings are held that they be open to the public.

Judge Brown's Partial Dissent

Judge Brown concurred in part and dissented in part, agreeing with the decision in all respects except for the court's findings related to greenhouse gas emissions and its vacatur and remand of the Certificate Order. Judge Brown disagreed with the court's analysis of *Public Citizen*, arguing that "when the occurrence of an indirect environmental effect is contingent upon the issuance of a license from a separate agency, the agency under review is not required to address those indirect effects in its NEPA analysis."⁷ Judge Brown found the issues in the instant case "virtually identical" to those in the LNG decisions: Just as FERC cannot control the effects of increased exports because exports are approved by DOE, FERC cannot control the effects of greenhouse gases emitted by power plants because the construction and operation of power plants are regulated by state authorities. According to Judge Brown, this "breaks the chain of causation," such that FERC is not required to consider greenhouse gas emissions caused by power plants in its NEPA review.

⁷ *Sierra Club v. FERC*, Case No. 16-1329, slip. op at 36.

In response to the court's distinction between the statutory authority afforded FERC under NGA section 3 *versus* NGA section 7, Judge Brown noted that "nothing in the text of either statute empowers the Commission to entirely deny the construction of an export terminal or the issuance of a certificate based solely on an adverse indirect environmental effect regulated by another agency."⁸ Moreover, she noted, even if FERC did have the authority to deny a project based on such concerns, its denial would prevent neither the state's ability to approve construction or expansion of the relevant power plants nor the attendant downstream greenhouse gas emissions

In the absence of rehearing *en banc*, FERC will need to address the issues identified by the panel majority on remand. As the D.C. Circuit has held, NEPA does not mandate particular results; NEPA prescribes a necessary process. Nothing in the majority opinion prevents FERC on remand from determining that the proposed projects remain in the public interest, once the additional elements identified by the majority are identified and addressed.

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Please feel free to contact any of the following Cadwalader lawyers if you have any questions about this Clients & Friends Memo.

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⁸ *Id.* at 40.