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ENERGY AND ENVIRONMENTAL LAW

FERC's Hard Look at Pipeline Construction and GHG Emissions

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Special to the Legal

The increase in U.S. pipeline construction resulting from natural gas production in unconventional places, including the Marcellus and Utica formations, has sparked additional interest in the Federal Energy Regulatory Commission's (FERC) process for issuing "certificates of public convenience and necessity" that are required under Section 7 of the Natural Gas Act before construction can begin. One factor that FERC evaluates in choosing whether to award a certificate is the avoidance of unnecessary disruptions to the environment, which necessarily implicates one of the oldest federal environmental statutes, the National Environmental Policy Act (NEPA). Environmental groups and other stakeholders have argued that the greenhouse gas (GHG) emissions from the upstream production of natural gas and the downstream combustion of that gas qualify as indirect and cumulative impacts that must be evaluated by FERC under NEPA before issuance of a Section 7 certificate. As described below, FERC's approach to this argument necessarily shifted following the U.S. Court of Appeals for the D.C. Circuit's August 2017 decision in *Sierra Club v. FERC* and will likely continue to be a key question in FERC proceedings going forward.

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> *Recent developments related to FERC and NEPA signal potential additional changes in FERC's approach toward upstream and downstream GHG emissions.*

NEPA BASICS

In general, NEPA requires federal agencies to prepare a "detailed statement" discussing and disclosing the environmental impact of any major federal action significantly affecting the quality of the environment, typically in the form of an Environmental Impact Statement (EIS), which has been described in cases as a "hard look" at environmental consequences of federal action. Importantly, NEPA does not mandate an outcome of that look. Rather, it is an information-forcing statute that is supposed to provide sufficient information to allow for informed public comment and decision-making.

THE 'SIERRA CLUB' DECISION AND REMAND

The *Sierra Club* decision concerned FERC's review of a 500-mile pipeline crossing portions of Alabama, Georgia and Florida called the Sabal Trail pipeline. At the time of the application, two major utilities had committed to purchase virtually all the gas to be transported by the Sabal Trail pipeline as fuel for certain electric power plants. FERC issued the certificates on Feb. 2, 2016, and various environmental intervenors, including the Sierra Club, requested re-hearings and stays of construction arguing, among other things, that the EIS failed to adequately consider the GHG emissions from downstream combustion by the power plants. FERC denied those requests and the intervenors subsequently appealed the denial to the U.S. Court of Appeals for the D.C. Circuit.

The D.C. Circuit agreed with intervenors, holding that because the stated purpose of the pipelines was to transport gas to identifiable power plants of two utilities, the resulting downstream GHG emissions were reasonably foreseeable under NEPA regulations. Accordingly, the EIS should have provided a quantitative estimate of the GHG emissions that would result from the downstream burning of the natural gas, or an explanation of why the agency couldn't have done so.

The Sierra Club also argued that the EIS should have provided an analysis that linked the estimated GHG emissions to harms associated with climate impacts by using the Social Cost of Carbon (SCC) tool, which had been previously developed by an interagency workgroup under the Obama administration as an attempt to place an across-the-board monetized value on harm caused by a ton of GHG emissions. FERC had previously rejected the SCC tool for project level reviews, however, and the DC Circuit declined to force FERC to adopt it. Instead, the panel directed FERC only to explain whether its position on the SCC still holds and why.

On remand, after taking public comment, FERC issued a final supplemental EIS in February. As instructed, the supplemental EIS quantified the maximum GHG emissions from downstream use of natural gas from the Sabal Trail pipeline. However, the supplemental EIS rejected use of the SCC tool to assess significance, generally arguing that parts of the SCC tool are contested and that not every harm that served as the basis for the dollar value resulting from the tool would be considered "significant" for NEPA purposes. Instead, the supplemental EIS simply compared the incremental GHG emissions from the downstream use to the published GHG inventories for Florida and the United States. One month later, in a pattern that would be repeated in future decisions, FERC reinstated the Sabal Trail certificate along party lines, with the three Republican commissioners agreeing with the rejection of the SCC tool, while the two Democrat commissioners dissented and advocated for its use.

THE AFTERMATH OF 'SIERRA CLUB'

In the year following the *Sabal Trail* decision, the FERC Republican majority has taken incremental steps to limit the instances where the agency chooses to estimate GHG emissions associated with natural gas pipeline construction. First, the majority has consistently held that the *Sabal Trail* decision does not require FERC to estimate GHG emissions from upstream natural gas production as indirect or cumulative effects. With respect to downstream emissions, the FERC majority has held that Sabal Trail only requires estimation of downstream GHG emissions if specific customers and operations are known at the time of pipeline construction. Nevertheless, the initial FERC EISs following Sabal Trail—including the EISs for Marcellus/Utica projects like Atlantic Sunrise and PennEast—provided estimates of both upstream and downstream GHG emissions for "informational purposes only" and with caveats that such estimates were not required under NEPA.

The FERC majority, however, recently changed its position on providing GHG emissions estimates in May 2018 in a denial of rehearing on a New York pipeline expansion project called the New Market project. In that decision, the three Republican commissioners reiterated that upstream and unspecified downstream GHG emissions did not qualify as reasonably foreseeable, noted that previous estimates were beyond NEPA requirements, but now concluded that providing these upper bound estimates for informational purposes served to "muddle the scope of [FERC's] obligations under NEPA" and therefore were not helpful to the public. Accordingly, the majority opinion stated that going forward FERC would not provide upper bound estimates of GHG emissions associated with upstream or downstream natural gas uses, unless the downstream uses were specifically identifiable like in Sabal Trail.

In contrast to GHG emissions estimates, since Sabal Trail the FERC majority has consistently rejected use of the SCC tool for same reasons announced in the order reinstating the Sabal Trail certificate. And most recently, the FERC majority provided a detailed analysis in support of its continued rejection of the SCC tool in an Order on Rehearing issued June 15, 2018, for the Mountain Valley Pipeline Project in Virginia and West Virginia.

Like the Sabal Trail remand, each of these decisions on the issues of the need to estimate GHG emissions and the use of the SCC tool have been split along party lines, with the two Democrat commissioners authoring separate opinions advocating for GHG emission estimates and use of the SCC tool, even in instances where the minority commissioners indicated that such an analysis would not have affected their approval.

A HARD LOOK IN THE FUTURE?

Recent developments related to FERC and NEPA signal potential additional changes in FERC's approach toward upstream and downstream GHG emissions. For example, in April FERC issued a "Notice of Inquiry" seeking feedback on its 1999 pipeline certification policy statement. In June the CEQ also issued an advanced notice of public rulemaking seeking input on potential changes to NEPA regulations. Furthermore, appeals of the Atlantic Sunrise approval and New Market project rehearing denial are currently before the D.C. Circuit. Finally, Commissioner Robert Powelson announced that he will step down in August, which will leave a 2-2 split at FERC and could result in FERC withholding approvals based on GHG review issues until a replacement is nominated by the President and confirmed by the Senate. In short, FERC's "hard look" at GHG emission issues promises to continue for the near future. ●