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FERC Failed to Adequately Consider Environmental Impacts of Downstream GHG Emissions Under NEPA Says D.C. Circuit



The U.S. Court of Appeals for the District of Columbia last week vacated and remanded a 2016 Order by the Federal Energy Regulatory Commission that had authorized construction and operation of the Southeast Market Pipelines Project (Project) by granting Section 7 certificates to three natural gas pipelines in Alabama, Georgia and Florida that make up the Project, on the basis that FERC failed to adequately consider the environmental impacts of downstream greenhouse gas emissions from power plants in Florida that will use the Project's natural gas. *Sierra Club v. FERC, Case No. 16-1329* (D.C. Cir. Aug. 22, 2017).

Background

On February 2, 2016, FERC issued its order granting a Section 7 certificate to each of the three pipelines based on a single environmental impact statement for the Project, which will provide natural gas to power plants in Florida. The certificate order recognized several parties as intervenors in the agency proceedings, including three environmental groups (Sierra Club, Flint Riverkeeper and Chattahoochee Riverkeeper) and two Georgia landowners. Those environmental groups and landowners timely sought rehearing and a stay of construction. FERC denied the stay, and on September 7, 2016, it denied rehearing, declining to rescind the pipelines' certificates. The environmental groups and the landowners (Petitioners) petitioned the court for review of the certificate order and rehearing order on several grounds, including that FERC's EIS failed to consider the Project's contribution to GHG emissions and its impact on low-income and minority communities, as required by the National Environmental Policy Act. Petitioners also alleged other EIS deficiencies, asserted that FERC used an insufficiently transparent process to approve the pipeline certificates, disputed the public need for the Project and challenged FERC's service rate methodology.

Majority Opinion

Applying the Administrative Procedure Act's deferential standard of review for challenges to agency compliance with NEPA, the court rejected most of Petitioners' claims but held that FERC had failed to adequately consider the Project's downstream carbon emissions. On remand, the court ordered FERC to either quantify and consider the Project's downstream carbon emissions or explain in more detail why it cannot do so. *Sierra Club v. FERC*, Case No. 16-1329, slip op. at 26 (D.C. Cir. Aug. 22, 2017) (*Sierra Club*). In its opinion, the court distinguished its recent holdings in three similar cases in which it granted certificates to liquefied natural gas export terminals and offered the following guidance to FERC.

- **FERC's obligation to consider downstream GHG emissions depends on the scope of FERC's statutory authority.** The court distinguished its recent decisions in *Sierra Club v. FERC*, 827 F.3d 36 (D.C. Cir. 2016) (*Freeport*); *Sierra Club v. FERC*, 827 F.3d 59 (D.C. Cir. 2016) (*Sabine Pass*); and *EarthReports Inc. v. FERC*, 828 F.3d 949 (D.C. Cir. 2016), where the court held that FERC had no NEPA obligation to consider the climate-change effects of exporting LNG when licensing physical upgrades for LNG export terminals. Relying on the U.S. Supreme Court's holding in *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), the court explained that an "agency has no obligation to gather or consider environmental information if it has no statutory authority to act on that information." *Sierra Club*, slip op. at 21. The U.S. Department of Energy issues licenses for the export of natural gas from the United States but has delegated the authority to license physical upgrades to LNG export terminals to FERC. In *Freeport*, *Sabine Pass* and *EarthReports*, FERC was acting under its narrow delegation of authority from the DOE to issue LNG terminal upgrade licenses and had no legal authority to rely on the environmental effects of the LNG exports as justification for denying those upgrade licenses.

In contrast, FERC has broad authority to consider "the public convenience and necessity" when evaluating applications for a certificate to construct and operate interstate pipelines under Section 7 of the Natural Gas Act. *Id.* at 22-23. "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." *Id.* at 23 (citing *Freeport*, 827 F.3d at 47). FERC therefore had an obligation to consider all reasonably foreseeable direct and indirect environmental effects of authorizing the proposed Project.

- **Reasonable forecasting is sufficient.** In response to FERC's contention that it is impossible to know exactly what quantity of GHG will be emitted as a result of the Project, the court confirmed that "NEPA analysis necessarily involves some 'reasonable forecasting,' and that agencies may sometimes need to make educated assumptions about an uncertain future." *Id.* at 23 (quoting *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1310 (D.C. Cir. 2014)). The court pointed out that FERC had estimated the volume of natural gas the Project will transport and suggested that FERC use this number and a DOE report regarding emissions estimates for various types of plants that was cited by FERC in the EIS to estimate the GHG emissions from the power plants that will use the Project's natural gas. *Id.* at 24. Although the court acknowledged that quantification may not always be possible, it suggested that FERC must provide a satisfactory explanation regarding why quantification is not feasible. *Id.* at 25.
- **FERC must discuss emissions estimates even if they might be offset by reductions elsewhere.** The Project EIS found that some of the natural gas transported by the Project will allow Florida utilities to retire coal-fired plants, which will offset emissions produced by the natural gas transported by the Project. The court found that this discussion did not excuse FERC's failure to address downstream GHG emissions, noting that the regulations implementing NEPA require an EIS to address both the beneficial and detrimental effects of a project, even if on balance the agency believes the project's effects will be beneficial. 40 C.F.R. § 1508.8.
- **FERC must explain on remand its position on using the social cost of carbon (SC-CO2) to convert downstream emissions estimates to concrete harms.** The court addressed but did not rule on whether FERC, in its quantification and consideration of the Project's downstream emissions, must link those

emissions to concrete harms. In its request for rehearing, the Sierra Club asked FERC to convert emissions estimates to concrete harms using the SC-CO₂, a tool developed by an interagency working group that attempts to place a dollar value on the long-term harm inflicted by each ton of carbon emitted. FERC did not discuss the SC-CO₂ in the EIS, but FERC has historically declined to apply the SC-CO₂ for NEPA purposes because it accounts for harms that are not "significant" under NEPA, and several of its components are contested. The court declined to review FERC's position on the SC-CO₂, which FERC did not include in the Project's current EIS, but requested that on remand FERC explain in the EIS, "as an aid to the relevant decisionmakers," whether its previously stated position on the SC-CO₂ still holds. *Id.* at 27.

Judge Brown's Partial Dissent

Circuit Judge Janice Rogers Brown concurred in part but dissented with respect to the majority's finding that FERC failed to adequately consider the Project's downstream GHG emissions. Judge Brown asserted that the majority opinion failed to account for the role that Florida's state agencies play in regulating the downstream power plants that will use the Project's natural gas.

Relying on the court's recent precedent, Judge Brown concluded that FERC had no authority to prevent the downstream GHG emissions and thus no requirement to consider the emissions in its EIS because the Florida Power Plant Siting Board, not FERC, has the sole authority to authorize or prohibit the construction of the power plants in Florida that will use the Project's natural gas. According to Judge Brown, "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." *Id.* at 36. Responding to the dissent, the majority asserted that, even if the authority of Florida's state agencies over power plant construction excused FERC from considering emissions from new or expanded power plants, it would not excuse FERC from considering emissions from the significant portion of the Project's capacity that is earmarked for existing power plants. *Id.* at 21 n.8.

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