GT GreenbergTraurig

Alert | Environmental/Energy & Natural Resources

August 2017

D.C. Circuit Holds FERC Natural Gas Pipeline NEPA Review Must Consider Greenhouse Gas Emissions Impacts from Power Plants Served by Proposed Pipeline

Although there has been a significant shift with regard to climate change policy with the change of administrations, a recent decision at the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) makes clear that the National Environmental Policy Act or NEPA, enacted in 1970, remains an important weapon for those who seek to ensure that the climate change impacts of major federal actions are considered. On Aug. 22, 2017, the D.C. Circuit held that the Federal Energy Regulatory Commission (FERC) failed to fully examine greenhouse gas impacts related to a pipeline project because the agency's Environmental Impact Statement (EIS) for the project failed to consider the impacts from greenhouse gas emissions from the power plants to be served by the proposed pipeline.

In *Sierra Club v. Federal Energy Regulatory Commission*, No. 16-1329 (D.C. Cir. Aug. 22, 2017), the Sierra Club challenged FERC's environmental review process for the proposed Southeast Market Pipelines Project, a three-phase natural gas pipeline project that includes a five hundred mile pipeline stretching from Alabama, through Georgia, to Florida. FERC initially began reviewing this 500-mile interstate segment—known as the Sabal Trail pipeline—in 2013, as the project sponsors sought certificates of public convenience and necessity under Section 7 of the Natural Gas Act. As this project would be considered a "major Federal action significantly affecting the quality of the human environment," FERC commenced proceedings in accordance with NEPA, releasing a draft and final EIS for the project in September and December 2015, respectively. FERC issued the required certificate on Feb. 2, 2016. Shortly thereafter, the Sierra Club, landowners, and other environmental groups challenged FERC's orders, alleging, among other things, that the EIS failed to take a necessary "hard look" at the pipeline's impact on greenhouse gas emissions and environmental justice communities. In particular, they alleged that FERC's greenhouse gas analysis, which focused on the pipeline itself, did not consider the greenhouse gas emissions from the power plants that would use the gas transported by the pipeline.

In response, FERC and the pipeline developers relied upon the Supreme Court's decision in *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), arguing that because the regulation of greenhouse gas emissions from the end-point users was not within the regulatory purview of FERC, FERC was not required to consider those potential impacts in connection with its approval of the pipeline. FERC pointed to several recent opinions applying *Public Citizen* which held that FERC has no obligation under NEPA to consider the environmental effects of natural gas exports from liquefied natural gas (LNG) export terminals because the Department of Energy, not FERC, regulates such exports. FERC further argued that it would be impossible for it to quantify or predict the exact quantity of greenhouse gases that would be emitted as a result of the pipeline.

In a 2-1 decision, the D.C. Circuit panel agreed with Petitioners, finding that "the EIS for the Southeast Market Pipelines Project should have either given a quantitative estimate of the downstream greenhouse 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."

The opinion by Circuit Judge Thomas B. Griffith finds a distinction between *Public Citizen*—where the agency had no legal power to prevent certain environmental effects and therefore no duty to assess those impacts—and the facts in *Sierra Club*. In this review, FERC was authorized by statute and rules to evaluate applications to construct pipelines by balancing "the public benefits against the adverse effects of the project," empowering it to deny a pipeline on the basis of its downstream effects. As such, the Court found that the agency's approval was a "legally relevant cause" of the downstream emissions. The Court further asserted that the EIS should have provided a quantitative estimate of downstream emissions or more specifically explained why it could not have. As a result, the Court required the preparation of an EIS examining those impacts.

Circuit Judge Janice Rogers Brown dissented, asserting that *Public Citizen* and its progeny still controls and that the downstream emissions, which are regulated by other state and federal agencies, are outside of the control of FERC. Judge Brown wrote:

> 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.

Assuming it is not overturned *en banc* or on appeal to the U.S. Supreme Court, this decision is likely to raise issues as to the scope of the EIS that FERC must issue for each new natural gas pipeline project. While this decision may be read to remove *Public Citizen* and its progeny as a justification for FERC's failure to examine and quantify downstream emissions of pipeline projects, it heightens the importance of FERC's determination of whether there is a sufficient causal connection between a pipeline project and downstream environmental impacts. While the Court in *Sierra Club* found that downstream emissions from specific power plants to be served by a pipeline were reasonably foreseeable, there will likely be debate over whether FERC must examine the environmental impacts of pipelines serving other end uses or where the entirety of the end uses to be served has yet to be determined. If FERC finds that downstream impacts of a pipeline project are reasonably foreseeable and can be quantified, the Court's opinion may require a complex assessment of energy markets and the likelihood that the increased gas supply displaces other energy sources that have greater or lesser greenhouse gas emissions.

Authors

This GT Alert was prepared by **Steven C. Russo** and **Evan J. Preminger**. Questions about this information can be directed to:

- Steven C. Russo | +1 212.801.2155 | russos@gtlaw.com
- Evan J. Preminger | +1 212.801.2189 | premingere@gtlaw.com
- Kenneth M. Minesinger | +1 202.530.8572 | minesingerk@gtlaw.com
- Howard L. Nelson | +1 202.331.3163 | nelsonh@gtlaw.com
- Or your Greenberg Traurig attorney

About Greenberg Traurig's Environmental Practice

Greenberg Traurig's Environmental Practice assists clients with issues under the environmental and natural resource laws that affect their businesses. The firm's environmental attorneys assist with securing permits and approvals; negotiate and close transactions; defend clients in enforcement actions; handle a broad range of environmental and toxic tort litigation; ensure the understanding and satisfaction of regulatory requirements; prepare for and respond to emergencies; craft approaches for legacy cleanup issues; and develop solutions for product regulation, market access, and environmental policy challenges. The practice was named "Law Firm of the Year" for Environmental Law in the U.S. News – Best Lawyers 2016 edition of "Best Law Firms."

About Greenberg Traurig's Energy & Natural Resources Practice

Greenberg Traurig's Energy & Natural Resources Practice brings together attorneys from across the firm's global offices to provide broad-ranging representation of upstream, midstream, downstream, traditional power generation and renewable energy companies on important aspects of their gas exploration, energy production, transportation and storage operations. Our attorneys' knowledge and experience, including in-house and government experience, within many segments of the energy and natural resources industry enables us to develop and implement legal strategies for our clients in the United States and in international markets, including Latin America, Europe, Africa, the Middle East and Asia. The firm's energy practice is further distinguished by lawyers with substantial FERC experience and extensive energy finance representations. Several of the firm's energy attorneys are former General Counsel at energy industry companies, and provide a valuable business perspective for energy clients across the globe. Greenberg Traurig's Energy & Natural Resources Practice has expanded significantly in Latin America and Europe with the establishment of our Mexico City and Warsaw offices.