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FERC's Reaction to CEQ's Greenhouse Gas Guidance: For Now, Business as Usual

On June 23, 2015, the Federal Energy Regulatory Commission issued an Order Denying Rehearing of its earlier April 6, 2015 order, authorizing Sabine Pass Liquefaction, LLC to construct and operate natural gas liquefaction export facilities. The order is noteworthy for the Commission's response to the arguments made by the Sierra Club that the Commission failed to follow the Council on Environmental Quality's (CEQ) Revised Draft Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act (NEPA) Reviews, which was issued in December 2014 (Draft Guidance). In its earlier April 6 Order, the Commission noted that the Draft Guidance had not been issued at the time the Environmental Assessment (EA) was completed in that case. In the recent rehearing order, however, the Commission addressed the Draft Guidance on the merits despite the timing of the EA in the case, and even though the Draft Guidance has not yet been finalized. Thus, this Order provides a glimpse of how the Commission intends to address the Draft Guidance.

Perhaps the most controversial aspect of the Draft Guidance is its instruction that agencies' NEPA analyses take into account GHG "emissions from activities that have a reasonably close causal relationship to the Federal action, such as those that may occur as a predicate for the agency action (often referred to as upstream emissions) and as a consequence of the agency action (often referred to as downstream emissions)." In the Sabine Pass Rehearing Order, the Commission continued to follow its prior findings that the impacts of future gas production are not sufficiently causally linked to the project under consideration. Therefore, consistent with its evaluation of other environmental impacts of gas production, the Commission found that the GHG impacts of such production (i.e., upstream emissions) are not reasonably foreseeable and do not require NEPA analysis. With respect to downstream emissions, the Commission declined to consider the effects of natural gas use in importing countries as part of a cumulative effects analysis. While the Commission identified climate change-related effects in the project region resulting from GHG emissions, it concluded that it could not be determined whether the project's contribution to cumulative impacts on climate change would be significant. Importantly, the Commission cited to the Draft Guidance in support of its conclusion that its responsibility under NEPA focuses on local or regional environmental impacts attributable to the project. The Commission found that any net change in global emissions is dependent on the fuels being replaced with

natural gas and that any such impacts are “distant” from the project.

The Sabine Pass Rehearing Order also addresses CEQ’s latest guidance regarding the need for quantitative analyses of GHG emissions and tools for performing such analyses. The Draft Guidance suggests that a quantitative analysis of GHG emissions would be appropriate for projects emitting 25,000 metric tons of CO₂ equivalent emissions and that tools and methodologies for performing such analyses should be considered. In the Sabine Rehearing Order, the Commission found that the “social cost of carbon calculator,” used by EPA is intended to estimate the climate costs and benefits of rulemaking and policy alternatives and to present a monetized value for the economic costs of climate change, and was not an appropriate tool for predicting the actual environmental impacts of a project on climate change. Consistent with its overall approach, the Commission did quantify the GHGs and the GHG equivalents from the project itself.

In sum, this order suggests that the Draft Guidance will not change the Commission’s NEPA analysis insofar as it concerns GHGs. It does not appear that the Draft Guidance has altered FERC’s view that (1) upstream production impacts and downstream consumption impacts are not causally related to the proposal before FERC; and (2) quantitative analyses of GHG impacts from related upstream and downstream activities are not required.

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