

FERC Finds No Cause For Change In Its GHG Analysis

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On June 23, 2015, the Federal Energy Regulatory Commission issued an order denying rehearing of its April 6, 2015, order authorizing Sabine Pass Liquefaction LLC to expand its existing liquefied natural gas export facilities in Cameron Parish, Louisiana, and to construct an upstream pipeline to deliver gas to the liquefaction facility.

Because approval of Sabine Pass' project is a federal action, FERC is required to perform an analysis under the National Environmental Policy Act to assess the project's environmental impacts. The Sabine Pass rehearing order responds to several points of error asserted by the Sierra Club. Among them, and likely the most significant, is the Sierra Club's assertion that FERC failed to follow the Council on Environmental Quality's recently issued revised draft guidance for federal departments and agencies on consideration of greenhouse gas emissions and the effects of climate change in NEPA reviews.

In its earlier April 6 order initially authorizing Sabine Pass' expansion, FERC noted that the draft guidance, released in December 2014, had not been issued at the time FERC completed its environmental assessment of the project. In the recent rehearing order, however, FERC addressed the draft guidance on the merits, despite the timing of the environmental assessment in the case, and even though the draft guidance had not yet been finalized. Thus, the June 23 order offers a glimpse into how FERC intends to address the draft guidance.

Perhaps most controversially, the draft guidance instructs that agencies' NEPA analyses should take into account greenhouse gas "emissions from activities that have a reasonably close causal relationship to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)." Upstream emissions associated with FERC-jurisdictional pipeline and LNG facilities include those associated with the production of the gas delivered through the pipeline or LNG facilities.

In the Sabine Pass rehearing order, FERC chose to tread its previously trodden path: viewing the impacts of future gas production as not sufficiently causally linked to the project facilities under consideration. Therefore, consistent with its evaluation of other environmental impacts of gas production, FERC found that the GHG impacts of such production are not reasonably foreseeable and need not be considered as



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either indirect or cumulative impacts in the NEPA analysis.

In response to LNG export studies, which Sierra Club claimed would inform FERC's decision, the commission found that such studies simply did not provide enough specificity as to where the production would be located or the associated environmental impacts of such production. Consequently, FERC found that the upstream impacts — including GHG emissions — do not merit a NEPA analysis because they are not reasonably foreseeable and there is no “reasonably close causal relationship” between the environmental impacts of future natural gas production and the proposed liquefaction project.

As to downstream emissions, FERC declined to consider the effects of natural gas use in importing countries, noting, again, an insufficient causal link between approval of the Sabine Pass proposal and the consumption of gas. While FERC identified climate change-related effects in the project region resulting from GHG emissions, the commission declined to assess “cumulative impacts” of approved or pending LNG export proposals that were alleged to result in increased natural production, domestic coal use and natural gas use in importing countries.

Noting that CEQ’s regulations provide agencies with “substantial discretion” in determining the extent of a cumulative impacts assessment, FERC equated Sierra Club’s objection to a request for a “programmatic NEPA review.” FERC found such review unnecessary because it has no general program or policy to further production or exportation of, or increased reliance on, natural gas. Importantly, FERC 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. FERC also found that any net change in global emissions is dependent on the fuels being replaced with natural gas and that any regional impacts of induced gas production 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 Pass rehearing order, FERC found that the “social cost of carbon calculator,” used by the U.S. Environmental Protection Agency is intended to estimate the climate costs and benefits of rule-making and policy alternatives and to present a monetized value for the economic costs of climate change.

According to FERC, this tool is not appropriately used to predict a project’s actual climate change impacts. Here, FERC pointed out that the draft guidance states that estimates resulting from use of the social cost of carbon tool are dependent upon variable inputs and require updating. Importantly, the environmental assessment did quantify the GHGs and GHG equivalents from the project itself.

Finally, FERC rejected the Sierra Club’s contention that it failed to follow the draft guidance’s requirement that agencies undertake a “significance” determination under NEPA. The Sierra Club argued that having rejected the social cost of carbon tool, FERC was obligated to provide another method for discussing the impact of GHG emissions. As FERC indicated, determining whether environmental impacts are “significant” under NEPA requires an examination of the context and intensity of the impacts. FERC listed the alternate methodologies it used to evaluate the significance of the impacts of the liquefaction project, including GHG emissions. Notably, consistent with its refusal to broaden the analysis to speculative upstream and downstream impacts, the alternative methodologies discussed focus on the impacts of the project in the affected region. FERC’s discussion is consistent with

the notion that in determining “significance,” the appropriate context of the action is the project’s specific location, rather than the broader global region that may be implicated by LNG exports.

Conclusion

In sum, the Sabine Pass rehearing order suggests that the draft guidance will not change FERC’s NEPA analysis insofar as it concerns GHGs. The draft guidance seems to leave unchanged 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. The impression that FERC is disinclined to alter its practice of assessing GHG emissions draws support from the commission citing, at least twice, the draft guidance as a basis for limiting rather than enlarging the inquiry.

The Sabine Pass rehearing order offers guidance to practitioners seeking to avoid a broad, costly and time-consuming NEPA analysis of GHG emissions that could delay the issuance of a certificate or LNG export authorization. The order can be cited to support the argument that neither NEPA, the CEQ regulations nor the draft guidance requires agency NEPA analyses to be exercises in speculation; in fact, those regulations discourage such speculation. Further, the draft guidance itself emphasizes agency discretion in formulating GHG and climate change analyses.

The draft guidance cautions, however, that a cogent and understandable explanation must accompany an agency determination of what is appropriate under the circumstances. This suggests that a party should furnish to FERC reasoning and data to support an appropriately circumscribed analysis of a proposal’s GHG and climate change impacts. Also, applicants should bear in mind that the draft guidance, even when it becomes final, sets out no enforceable requirements or duties. Rather, by its explicit terms, it is not universally applicable to all agency actions. Nor is it “a rule or regulation” and “does not establish legally binding requirements in and of itself.”

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