

Speaker 1: You're listening to another episode of empire environmental, a mini series of legal environmental insights. This is Steve Russo chair of the environmental practice in New York for Greenberg Traurig, [00:00:30] your host for today's episode. And I'm joined here with my colleague Howard Nelson, who is a shareholder in our Washington DC office. And today on an empire environmental, we're going to be talking about gas pipelines and the national environmental policy act, which is the federal EIS statute. There's been a lot of action in New York state on gas pipelines recently. And what I defined action as inaction in the sense that many pipelines have been killed in New York because of opposition [00:01:00] to fossil fuels. And really that's a phenomenon that's been going on throughout the country. So how are you guys going to talk a little bit about, um, the approval process for gas pipelines and how it intersects with the national environmental policy act? I'm also going to talk a little bit about recent efforts that are currently underway in the Trump administration to change NEPA, um, which is the shorthand for the national environmental policy act to change NEPA, to make it more [00:01:30] favorable for these pipeline projects and whether or not that actually will turn out to be more successful. So, hi, Howard, how are you doing?

Speaker 2: Thanks.

Speaker 3: Um, so Howard,

Speaker 1: I was wondering if you could kind of give us just a quick outline of sort of NEPA and how it intersects with the federal energy regulatory commission or FERC and the approval of interstate gas pipelines and other similar infrastructure.

Speaker 2: Sure. Um, well, as you know, FERC most [00:02:00] approved the construction of interstate natural gas pipelines and LNG facilities. And as part of that process work, uh, is usually takes the lead, um, in preparing an environmental impact statement or an environmental assessment, uh, and, and FERC's, uh, regulations incorporate, uh, the council of environmental quality regulations. So it goes through a rigorous process of, [00:02:30] uh, preparing an EIS with the cooperation of other agencies that, uh, are discharged with, um, uh, various statutes that come into play in the deeper review, uh, and they are called cooperating agencies. So, um, that's how it works. It's, it's, it's a very, uh, I say it's a very comprehensive process. They have 30 resource reports that the applicant must [00:03:00] complete on a variety of topics, um, that examine, uh, identifying examine the impacts. So

Speaker 1: It's sort of, it seems like FERC is basically a one-stop shop for an interstate gas pipeline and the NEPA review would get, um, participation by other agencies that have jurisdiction over this type of work. Is that correct?

Speaker 2: That's right. Usually the other cooperating agencies will have input [00:03:30] into the, for deeper analysis and then we'll incorporate the final EIS at FERC issues. What

Speaker 1: Kind of agencies are involved typically?

Speaker 2: Well, you know, you, you got the coast guard, um, FEMSA, which governs the safety of pipelines Corps of engineers, uh, BLM E environmental protection agency. Um, they, they all have their own statutes, uh, that they, [00:04:00] um, have to discharge under the clean water act and endangered species act, national historic preservation act. So they all do that in tandem.

Speaker 1: So NEPA is a statute that goes back to 1970, and it requires agencies to examine all potential impacts of, of what what's defined as major federal actions, certainly gas pipelines or state gas pipelines would be a major federal action kinds of things. They look at [00:04:30] our air quality and noise potential impacts on wildlife. And I think there's a robust alternatives analysis is probably one of the key parts of NEPA. And certainly very key as part of the FERC analysis, what our, in your experience as a practitioner, have you seen as sort of some of the big, current environmental issues that are heavily discussed or, you know, by people who are participating in this NEPA process in front of FERC?

Speaker 2: [00:05:00] Well, the hot issue right now, and for the last several years has been climate change. And, you know, what is exactly the first obligation, uh, to examine the impacts of climate change, particularly, you know, emissions, um, from, uh, not only the natural gas pipeline itself, which has always been part of the analysis, but the issue has really been what is Park's obligation to look at both the upstream and downstream impacts, [00:05:30] um, from the construction of a gas pipeline, which, you know, which would then basically ask the question, what is for Castile, what is for our cap to look at in terms of the impact of the production of the gas that goes into the pipeline on the upstream side, and what is the environmental impacts of the consumption of the gas at the downstream end and

Speaker 1: The power [00:06:00] plant emissions, the emissions in, in, in discovering and bringing the gas to market, they want advocates want, all of that looked at when you do part of the greenhouse gas emissions analysis under NEPA for this kind of project, correct?

Speaker 2: That's correct. Yeah. And that raises a lot of legal issues as to what Burke's obligation is to do that. Um, you know, I think generally the standards what's reasonably foreseeable wishes, [00:06:30] you know, obviously could be, uh, somewhat subjective. Um, th the commission doesn't really apply a direct, but for analysis, it's more like a approximate cause analysis,

Speaker 3: Right?

Speaker 1: And this whole climate change thing is definitely driving a lot of the NEPA changes and regulations that the federal council on environmental quality or CEQ has recently adopted. But before we go into those changed regulations, I was wondering if you could tell me how it typically [00:07:00] went under the old regulations? Well,

Speaker 2: It's been, I don't know if I'd use the prob problematic, I would say contentious. Um, and it's been, you know, a history of this kind of changing. I mean, the commission for several years has taken the position that the upstream impacts and downstream

impacts are typically not reasonably foreseeable in the gas industry. When we look at the upstream side, because of what's been going on in the industry [00:07:30] in terms of, uh, integrated natural gas pipeline network. And so when you build a pipeline, um, there is a lot of ways get gas into that pipeline through a lot of different interconnections. So you really don't know when you build a pipeline where the gas is coming from. Uh, typically when we're talking about shale gas, you know, that's obviously been at the forefront recently. Um, there's, you can't [00:08:00] really pinpoint which, you know, what basin or what production Wells are going to produce the gas that goes through the pipeline.

Speaker 2: So the commission says there, it's not reasonably foreseeable on the downstream. And I, you know, a lot of it, a lot of this has come up in connection with LNG facilities, which export LNG to the foreign markets. And so there, again, the commission has said, well, we don't even know where it's going to go. And we don't know what [00:08:30] extent the gas is going to display other more environmentally damaging fuel sources like coal. So given those unknown, the FERC, taking the position, that it doesn't have to examine that, um, then we had some court cases that kind of got in the middle of this, one of which, uh, involved, I think, as you alluded to a power plant, um, where there was a pipeline that was fully subscribed, I contract [00:09:00] take all that capacity and use it apply a few requirements of a power plant.

Speaker 2: Uh, parked, took the same position there, and the court reversed them because the court found well, we know where that we know where the gas is going to be used. You could quantify the impacts. And so what FERC did there is it, it made some assumptions and it said, okay, we'll assume that, that every day, the maximum amount of gas that can float through that pipeline is going to flow through the pipeline and it's going to [00:09:30] be used in the power plant. And we're going to quantify the impacts of that gas combustion in the power plant. And just tell you what that is. And that was fine and dandy, uh, until, uh, maybe a year or two later when we got a new commission, um, we got new members and, uh, the majority politically changed and the commission decided in the basically and obscure case [00:10:00] in 2017 or 2018, there was no longer going to do that, that making these generalized assumptions was inherently speculative. And then we're going to go back to not doing it. And that's kind of where we are now. Uh, we expect there'll be more litigation in the courts about that. Yeah.

Speaker 1: Now, so that's an interesting place for us to just make this observation about NEPA, my experience in litigating NEPA cases and dealing with NEPA, environmental impact statements and [00:10:30] NEPA reviews is that the federal courts on the whole, they're just usually looking at the scope of the examination of significant adverse impacts the agencies in my experience. And I think yours Howard, but you can speak for yourself. Usually allow them a lot of latitude in making a decision, as long as they say, yeah, there are some impacts here and, and there could be more greenhouse gas emissions, but we think from a policy perspective, there are other reasons too, to build this because of supply and needs of the market. [00:11:00] And as long as the impacts are identified and not swept under the rug, so to speak, usually the agency, including FERC has pretty broad latitude in deciding to approve or disapprove a project such as a gas pipeline.

Speaker 2: Right. And in a way that's kind of the odd thing about this issue is that, like I said, for the most part, these projects eventually get approved. So we're not really talking about examining the impacts for [00:11:30] purposes of determining whether to approve the project. I mean, that, that conceptually can happen, but it doesn't happen in practice. So, you know, one has to wonder, you know, from the first perspective, why not just make these assumptions and quantify the impacts, even though the assumptions are speculative, maybe. I mean, it just seems like easier way.

Speaker 1: I agree, because it's really a political issue, which is you disclose it. [00:12:00] And then you just see where the public and where the decision makers want to go once it's out there and let them make a decision, which seems the appropriate place to be, as opposed to just, we don't want to look at it. It's

Speaker 2: Also the purpose of the act. I mean, purpose of that of NEPA is not to, you know, make a decision it's to inform the public and inform the decision makers as you know, Steve, it's not a substantive statute as a procedural statute.

Speaker 1: Exactly. Exactly. So now [00:12:30] let's talk about the recent changes. June through August, 2019 was a common period on new regulations that CEQ had issued public comments received through March of 2020. And in July the Trump administration finalized what could turn out to be a significant overhaul. So what are these revised regulations do? Well, the regulatory overhaul seeks to shorten both the environmental review process and the physical length of environmental reviews themselves. The final rule [00:13:00] sets a two year limit for environmental reviews sets, page limits for the length of the federal environmental assessments and environmental impact statements and directs federal agencies to use categorical exclusions and findings of no significant impact, which forced all a full EIS to reduce delays and inefficiencies. The final rule also establishes a 45 day comment period and attempts to limit the scope of comments, suggesting that public comments site-specific texts in the draft environmental [00:13:30] impact statement.

Speaker 1: And a lot of those things made sense, but there definitely was an attempt without ever using the word climate change or climate change analysis or greenhouse Gasol neurolysis. There clearly seems to be an attempt to try to mandate that this current view of the FERC commissioners, not just the first cases mandate that you have a circumscribed analysis when it comes to climate change impacts mirroring the current view of the Trump administration when it comes to climate change, which is that we don't want to dwell on it or spend a lot of time [00:14:00] on it. So, Howard, I wonder if you could talk a little bit about those recently adopted regulations and the climate change aspect.

Speaker 2: Um, let's see. I mean,

Speaker 1: I think, I think the focus on it is, you know, if, to, to give you a little prompting is, is this definition of environmental effects. And it's basically what these regulations are trying to say is that environmental effects must be there's that word again, reasonably foreseeable and have a reasonably [00:14:30] close causal relationship to the proposed

action. So it seems like it's coming right from these FERC decisions, this, this effort, um, to change the regulations. And when I find interesting about this is it seems to be trying to interpret the statute NIPA through a regulation, even though NEPA has been interpreted through many cases in court cases. And it seems like it's a real open question, whether or not this regulation would even have any weight or really, [00:15:00] you know, hold up against case law that decided differently anything. Yeah.

Speaker 2: Yeah. I think it's a little bit, it's kind of nuanced, right? I mean it, the way they phrase, you know, these, the, these proposals, you can see it from the perspective of, um, trying to, uh, suggest that there should be less rather than more analysis, you know, because they'll say something like, [00:15:30] you know, they propose that the effects should not be considered significant if they are remote in time, geographically remote, or the result of a lumpy causal chain, as you know, so they say it in the negative as opposed to, you know, significant effects that are not remote in time, you know, should be, uh, examined. Um, and then they suggest that the analysis, um, other potential impact, um, you know, should be [00:16:00] that that may have, uh, maybe, you know, shouldn't be as rigorous. I mean, that's kind of the underlying suggestion just by the way that they phrase what the standards are.

Speaker 1: And it's just interesting because they basically say NEPA EIS is, do not need to look at cumulative effects. And yet you've got a case law, you got case law where clearly, [00:16:30] um, com you know, they've said, you do need to look at cumulative effects. So how do you change a statute as interpreted by the courts based on a regulation? That's a very, that's an open question. And when it comes to NEPA, what if these regulations are wrong? What if, what if they're not upheld, it ends up hurting these projects rather than helping them, because they've been subject to us narrowed review that subject to challenge, as opposed to, as you noted before may, if they'd just [00:17:00] done the review and the project got approved, they'd be in a bit, they'd have more, more of a, of a likelihood of withstanding a judicial challenge, more, um, of a, of a view of being able to be built without much question.

Speaker 1: In some ways this may potentially create more problems. There's other things I don't like in that Neper changes such as saying there has to be paged limits on an EIS. It can only be a certain page and it has to be done within a certain period of time. That sounds great because everyone doesn't want bureaucracy and things going on for a long time, [00:17:30] but if you don't give government the resources to do it, and then you give them artificial deadlines, again, the review might not be complete. And the real problem for a project is an incomplete or circumscribed NEPA review, as opposed to something that goes through and covers everything. There's much chance of surviving a challenge. If you have a more complete environmental review. So even though I think these regs were trying to help natural gas pipeline projects, and maybe [00:18:00] other major infrastructure projects, it could turn out hurting them. Um, because the current process works. It may be cumbersome. Maybe frustrating may take longer than people want, but typically projects that get approved, survive, judicial challenge, and get constructed,

Speaker 2: Right? Steve, that's a good point. I think that lead to some practical advice for us as practitioners on these types of issues, project developers might want to consider going

beyond what FERC is really requiring now, [00:18:30] because we know environmental groups are challenging. Almost every one of these orders specifically was related to climate change. So while the current commission may not want to make these assumptions, the applicant may want to go the extra yard, make sure that it's going to be sufficient who was stand judicial review, because the last thing you want is a delay in the process. Absolutely.

Speaker 1: I couldn't agree more because in the end, the final say, isn't just the agency, it's also the courts. And so we're not [00:19:00] trying to have clients just do more work for the sport of it. Um, it's really to make sure that they're in the best position for a project that may get challenged. And for some of these natural gas pipeline cases, given the politics of things are likely to get challenged. So I think that's, that's extremely good advice. So, Howard, I think our time is up, but I really appreciate you, um, giving your thoughts from the Washington DC Burke perspective. I think it's, um, extremely helpful and we're going to be having [00:19:30] additional episodes of this podcast. We're going to talk about natural gas pipelines in New York is a lot to talk about. New York has used something called the water quality certification under the clean water act. Um, to block a lot of these projects, I'm going to talk about some of those recent developments and, uh, what's going on in Washington to potentially stop that from happening. Um, so that'll be, that'll probably be our next episode where I'm going to be speaking to my colleague from all our Albany office Zachary knob. So with that, I'll sign off. Thanks [00:20:00] again, Howard Nelson and you're listening to Stephen Roussel and empire environmental

Speaker 4: [inaudible].