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FERC Order Announces Policy Shift To Limit Environmental Review in Pipeline Certification Decisions

Announcing an unexpected policy shift, the Federal Energy Regulatory Commission (FERC) issued an Order on May 18, 2018, limiting its analysis of upstream and downstream greenhouse gas (GHG) emissions in its environmental review of natural gas infrastructure projects. The Order came out on the heels of FERC's April Notice of Intent that requested stakeholder input on whether and how the Commission should adjust its evaluation of the environmental impacts of proposed pipeline projects.¹ The Order's 3-2 split signals a new standard for environmental review in pipeline certification applications, at least until FERC releases its promised updated Policy Guidelines.

The Order denied rehearing of FERC's 2016 approval of Dominion Energy Transmission Inc.'s estimated \$159 million pipeline expansion project in New York, which included the construction of two new compressor stations.² The Commission majority—Chairman McIntyre and Commissioners Chatterjee and Powelson, all Republicans—relied on the National Environmental Policy Act's (NEPA) implementing regulations to determine that where upstream and downstream effects are not indirect or cumulative, they are not environmental effects of the proposed project and thus the Commission is not required to consider them as part of its environmental review.³ The Commission will, however, continue to analyze upstream and downstream effects when they are “sufficiently causally connected to and are reasonably foreseeable effects of the proposed action.”⁴ The Commission acknowledged the shift in approach: “For a short time, the Commission went beyond that which is required by NEPA, providing the public with information regarding the potential impacts associated with unconventional natural gas production and downstream combustion of natural gas, even where such production and downstream use was not reasonably foreseeable nor causally related to the proposals at issue.”⁵ The Commission further determined that it was not bound to consider environmental effects outside of its NEPA analysis in its



evaluation of whether a project is in the public convenience and necessity under the Natural Gas Act (NGA).⁶

FERC's policy shift "particularly troubled" dissenting Commissioner LaFleur, who emphasized that the Order was issued only "a few weeks after [the Commission] invited a generic proceeding to look broadly at the Commission's pipeline review, and more specifically at the Commission's current policy regarding consideration of upstream and downstream impacts."⁷ LaFleur agreed with dissenting Commissioner Glick—both Democrats—that FERC should continue to analyze and include information on upstream and downstream GHG emissions in its pipeline orders.⁸ Glick stated that he could not support a certificate where the Commission had not made its "best effort" to collect information regarding GHG emissions.⁹ The dissenters also felt that even if NEPA does not require the Commission to consider upstream or downstream emissions for all pipeline projects, the data is at least relevant to the Commission's analysis under the NGA's public interest standard determination.¹⁰

Currently, however, the Commission may not have complete freedom to limit its analysis of proposed pipeline projects' GHG emissions. LaFleur's dissent pointed to the only case in which FERC's certification of a natural gas pipeline was successfully challenged in federal court. In August of last year, the U.S. Court of Appeals for the D.C. Circuit ruled that FERC failed to adequately analyze GHG emissions in its NEPA review of a \$3.5 billion project that included the 515-mile Sabal Trail pipeline in Alabama and Florida.¹¹ The *Sabal Trail* Court found that downstream power plant emissions resulting from burning natural gas transported by the pipeline were, in fact, indirect impacts of the project, thus requiring FERC to either make a "quantitative estimate of the downstream GHG emissions or explain in more detail why it could not do so."¹² *Sabal Trail* changed the landscape, LaFleur argued, and "the Commission must now quantify and consider those impacts as part of its NEPA review."¹³ In a footnote, the Commission majority briefly distinguished *Sabal Trail* as a project that delivered gas to "identifiable" electric generating plants, so "the downstream use of the gas was foreseeable."¹⁴ With respect to Dominion's project, however, the Commission felt that because there was insufficient information to determine the origin of the gas to be transported onto the pipeline, any attempt to calculate the scope of emissions impacts would be "inherently speculative."¹⁵ LaFleur disagreed, stating that "it is reasonably foreseeable, in the vast majority of cases, that the gas being transported by pipelines [that the Commission] authorize[s] will be burned for electric generation or residential, commercial, or industrial end uses," thus creating a reasonably foreseeable causal relationship that warrants Commission review of emissions data.¹⁶

For future pipeline projects, the Commission will likely evaluate emissions data where it finds a sufficient causal relationship between the proposed project and upstream or downstream GHG emissions to warrant such analysis. Applicants can expect this analysis for proposed projects that include, for example, power plants directly connected to a pipeline project, as in *Sabal Trail*. For the time being, though, applicants whose proposed projects do not have a sufficient causal relationship with specific emissions impacts, like Dominion's compressor station project, can expect the Commission to limit its review of upstream and downstream emissions or perhaps not review such data at all. Despite this, applicants may still want to include emissions data in their pipeline certification applications. If the Commission's certification of an applicant's project is later challenged in federal court under NEPA, emissions data would be in the record and available for review if necessary, which could avoid unnecessary project delays.

Comments on FERC's Notice of Intent requesting input on its evaluation of the environmental impacts of proposed pipeline projects are due on June 25, 2018.¹⁷ FERC will likely issue its revised policy guidelines in response to those comments sometime in late 2018. Until then, applicants can likely expect more 3-2 decisions from FERC on pipeline certificate applications.



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¹ See *Certification of New Interstate Natural Gas Facilities*, Notice of Inquiry, 163 FERC ¶ 61,042 (2018).
² See *Dominion Transmission Inc.*, Order Denying Rehearing, 163 FERC ¶ 61,128, Docket No. CP14-497-001 (2018).
³ *Id.* at P 42.
⁴ *Id.* at P 44.
⁵ *Id.* at P 41.
⁶ *Id.* at P 43.
⁷ *Id.* (statement of Commissioner LaFleur, dissenting in part, at 1).
⁸ *Id.* (LaFleur at 2) (statement of Commissioner Glick, dissenting in part, at 1).
⁹ *Id.* (Glick at 4).
¹⁰ *Id.* (LaFleur at 5) (Glick at 7).
¹¹ See *Sierra Club v. FERC*, 867 F.3d 1357, 1375 (D.C. Cir. 2017) (“*Sabal Trail*”).
¹² *Id.*
¹³ *Dominion*, 163 FERC ¶ 61,128 (LaFleur at 3).
¹⁴ *Id.* at P 43 n.96.
¹⁵ *Id.* at P 41, 61.
¹⁶ *Id.* (LaFleur at 3.)
¹⁷ See Federal Energy Regulatory Commission, Notice of Inquiry, *Certification of New Interstate Natural Gas Facilities*, 83 Fed. Reg. 18020 (Apr. 25, 2018).