

EPA, Army Corps Moves Herald New Enviro Permit Challenges

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Historically, environmental issues have been front and center for major project development throughout the world.

But for projects in the U.S., the U.S. Environmental Protection Agency's increased focus on the social cost of carbon and environmental justice issues, and the U.S. Army Corps of Engineers' renewed emphasis on environmental justice concerns, may be setting new best practices for environmental permitting.

EPA Instructions on the Social Costs of Carbon

On what seems like a weekly basis, the EPA has been encouraging the Federal Energy Regulatory Commission to take a harder look at climate change and the social costs of carbon in its review of major energy projects.

On Aug. 9, EPA Region 2 (New Jersey, New York, Puerto Rico, the U.S. Virgin Islands) and Region 3 (Delaware, District of Columbia, Maryland, Pennsylvania, Virginia, West Virginia) sent letters to FERC urging the commission to include analysis of climate-related impacts in environmental impact statements for two natural gas pipeline projects.

As background, Iroquois Gas Transmission System LP is seeking to construct new natural gas transmission facilities in New York and Connecticut. Separately, Adelpia Gateway LLC is seeking to install additional compression at its Marcus Hook Compressor Station in Delaware County, Pennsylvania. FERC recently completed draft environmental impact statements for the Iroquois and Adelpia projects.

The EPA, in its comments on the draft environmental impact statements, spelled out the climate criteria that it believes FERC should use to evaluate the air emissions impacts associated with the Iroquois and Adelpia projects, and also urged that FERC pay additional attention to environmental justice impacts associated with the Adelpia project.

EPA Region 2 urged FERC to, among other things, consider the following when evaluating the Iroquois project:



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- The estimates of carbon dioxide and methane emissions associated with construction, operation of new sources and cumulative emissions of existing sources;
- Information including emission factors, key operational assumptions and detailed calculations used to determine all emission estimates for all pollutants presented;
- All upstream emission estimates;
- A quantitative comparison of the total annual greenhouse gas, or GHG, emissions for all alternatives;
- Alternative metrics, such as the social cost of greenhouse gases, or SC-GHG, to assess climate impacts generated by each additional ton of greenhouse gas emitted;
- Incorporation of emission reductions aligned with state-implemented greenhouse gas targets in the project plan; and
- Additional mitigation efforts to offset emissions associated with the proposed action, such as promoting carbon sequestration through revegetation efforts.

With respect to the SC-GHG analysis, EPA Region 2 encouraged FERC to use estimates of the SC-GHG that reflect the best available science and methodologies to incorporate the value to society of net changes in direct and indirect GHG emissions resulting from a proposed action.

EPA Region 3 urged FERC to consider the following, among other things, when evaluating the Adelphia project:

- The social cost of carbon on different peoples and communities in the local and regional area;
- The Adelphia project's indirect downstream GHG impacts and upstream emission estimates;
- Climate targets of the impacted states, including Delaware, that are described in the draft EIS to reduce GHG emissions; and
- Information regarding environmental justice communities, impacts and outreach that has been conducted or is planned.

The EPA's comments underscore its commitment to persuading FERC to conduct more robust analysis of climate impacts, as part of the commission's process for approving construction and expansion of natural gas pipelines and liquefied natural gas terminal projects.

In a separate proceeding, the EPA filed comments in May recommending that FERC incorporate consideration of carbon lock-in, potential stranded assets and climate resiliency into its review of natural gas pipeline projects. In those comments, the EPA also urged FERC to analyze the SC-GHG for natural gas pipeline projects, stating:

In cases where the Commission determines that a monetary comparison of the benefits received by society to the costs imposed on society is appropriate in evaluating a proposed project and potential alternatives, we recommend taking into account established practices for [benefit-cost

analyses (BCA)]. ... [W]hen a BCA is conducted, it is appropriate to use estimates of the SC-GHG that reflect the best available science and methodologies to incorporate the value to society of net changes in direct and indirect GHG emissions resulting from a proposed project (i.e., relative to a no action alternative). Where it is possible to develop a reasonable estimate of the net change in emissions due to the proposed project (e.g., that reflects how carbon-based energy production and demand from competing markets might change), then SC-GHG estimates will be useful for assessing the value to society of GHG changes in the BCA.

The specificity of the EPA's recommendations to FERC underscore the fundamental importance of climate change considerations in all project development decisions, small and large.

Army Corps' Renewed Focus on Environmental Justice

In its recent consideration of permits for a \$9.4 billion proposed petrochemical project in St. James Parish, Louisiana, the Army Corps of Engineers has been focused less on climate change and more on environmental justice.

At issue was the Formosa petrochemical complex and marine facility, on approximately 2,300 acres along the west bank of the Mississippi River between Baton Rouge and New Orleans. In September 2019, the Corps issued a permit for the proposed project under Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act.

After the permits were challenged, the Corps suspended the permits to reanalyze alternatives. On Aug. 18, the acting assistant secretary of the U.S. Army directed the Corps' commanding general to: (1) refer for resolution the Formosa project permit suspension decision; and (2) prepare an EIS to assess the Formosa project's potential impacts on the quality of the human environment in the region, and to support its final decision to modify, reinstate or revoke the permit.

In another likely portent of things to come, the assistant secretary determined the EIS was necessary "to thoroughly review areas of concern, particularly those with environmental justice implications."

Earlier, numerous environmental groups and even other states — including the attorneys general of New York, Connecticut, the District of Columbia, Massachusetts and New Jersey — demanded that the Corps "reevaluate the environmental justice implications of issuing the permit" and "set a strong national precedent for protecting overburdened communities across the nation and in our jurisdictions."

Following the Biden administration's increased focus on considering the environmental justice effects of all governmental and permitting decisions, the Corps required a new, extensive reassessment of the environmental justice aspects of this major project.

Analysis

Through the comments and memo discussed above, the EPA and the Corps have unequivocally embraced an increased emphasis on social cost of carbon and environmental justice analyses in connection with energy facility permitting processes. But questions remain about how these agencies, and individual federal project permitting agencies, will implement these policy objectives.

The EPA acknowledges the uncertainty associated with using the SC-GHG in analysis of proposed projects. To date, the EPA has not been able to answer how federal agencies scientifically quantify the

SC-GHG in the context of a particular project.

It is far from clear how the EPA, FERC and the Corps will reconcile demands that applicants quantify and consider the global impacts of GHGs on a project while also requiring that they analyze the fence-line impacts of a global pollutant.

While environmental assessments have long been a critical part of project development, EPA's and the Corps' steadfast focus on the social cost of carbon and environmental justice underscore just how all-encompassing, and often not well-defined, environmental issues can be in project development. One message seems clear: Federal permitting authorities will henceforth require applicants to undertake an EIS, and not just an environmental assessment, as a foundational matter.

It is too early to draw conclusions regarding the impact the EPA's comments will have on the Iroquois and Adelphia projects, and on FERC policy in general. But it seems safe to say that the environmental impact evaluation process has just been expanded — and that completing it will take substantially more time in the future than it has taken in recent years.

Likewise, while the EIS to be prepared on the Formosa project will clarify how the Corps will evaluate environmental justice issues in the future, there is little doubt that environmental justice considerations are becoming central to permitting decisions the Corps makes going forward.

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