



FERC, D.C. Circuit Reject Recent Challenges to Gas Pipeline Development

Landowners and environmental groups are bringing increasingly sophisticated challenges to gas pipeline projects and sometimes succeed in delaying development, but in recent cases they have ultimately lost on the merits. The latest setback for pipeline opponents came in July in *Gunpowder Riverkeeper v. FERC*, where the D.C. Circuit rejected an environmental group's challenge to a Federal Energy Regulatory Commission ("FERC") order approving a gas pipeline expansion project.¹ Recent FERC orders have also consistently found that new projects will benefit the public despite environmental groups' concerns.

Pipelines have responded to steady demand for expansion of gas infrastructure with proposals for numerous new and expanded projects. In particular, shippers require additional capacity to support conversions from coal to gas-fired generators, as well as to move liquefied natural gas ("LNG") to export facilities. In deciding whether to authorize construction and operation of the projects under section 7 of the Natural Gas Act,² FERC "balanc[es] the public benefits," such as more reliable and efficient service, "against the potential adverse consequences" to determine whether the project will serve the public interest.³ FERC also conducts an Environmental Assessment of each proposal under the National

Environmental Policy Act ("NEPA"), examining the proposal's potential impacts on numerous environmental resources. As part of the Environmental Assessment, FERC must take a "hard look" at each project's potential impact and include "sufficient discussion of the relevant issues and opposing viewpoints,"⁴ meaning that in some cases it must undertake further study that may result in project delays in order to develop the necessary analysis. FERC employs a range of options, including imposition of mitigation measures as a condition of approval, to address environmental concerns.⁵ It need not conduct further environmental analyses where it concludes that "there would be no significant [environmental] impact or [it has] planned measures to mitigate such impacts."⁶

Last year, the D.C. Circuit in *Delaware Riverkeeper v. FERC* remanded a pipeline approval to FERC for further consideration of the "cumulative environmental impacts" of a group of closely related natural gas pipeline projects.⁷ The court held that NEPA requires FERC to provide more than a " cursory statement" describing a project's environmental effects "when added to other past, present, and reasonably foreseeable future actions" in the same geographic area.⁸ While the court signaled apparent willingness to scrutinize the rigor of FERC's NEPA review, over the past 14 months, the

decision has not amounted to a significant hurdle for project approvals at either the FERC or the appellate level.

In the wake of *Delaware Riverkeeper*, FERC has declined invitations from many pipeline opponents to broaden the scope of its NEPA reviews. For example, FERC has repeatedly refused to consider global climate change as a cumulative impact of proposed projects. FERC reasons that it is impossible to quantify a given project's impact on climate change, as "[t]here is no standard methodology to determine how a project's incremental contribution to greenhouse gases would result in physical effects on the environment, either locally or globally."⁹ Accordingly, FERC has held that climate change impacts stemming from future development of upstream production fall outside the scope of the required analysis because they are "speculative"¹⁰ and not "'reasonably foreseeable' within the meaning of the rules governing environmental assessments."¹¹ FERC similarly has rejected the argument that it must consider downstream greenhouse gas emissions as a cumulative impact of a specific project.¹²

Given that FERC has consistently rejected calls to expand the reach of its NEPA analyses since *Delaware Riverkeeper*, pipeline opponents continue to build new variations on their existing arguments in opposition to project approvals. The Sierra Club, for instance, sought rehearing of FERC's April 2015 approval of the Sabine Pass Liquefaction's LNG export facility. It asserted that FERC violated NEPA requirements by failing to take a "hard look" at the effects of greenhouse gas emissions in connection with the project¹³ and failing to consider "increases in gas production, increases in domestic coal use, and increases in gas use in importing countries" that may result from export projects.¹⁴ It further argued that the "social cost of carbon" method, a technique for estimating monetized damages associated with incremental increases in carbon levels, enables FERC to quantify climate change impacts and consider them in its NEPA analysis.¹⁵ The Sierra Club noted that December 2014 draft guidance from the Council on Environmental Quality ("CEQ") "specifically identifies the social cost of carbon as a tool to use to provide context for discussion of greenhouse gas emissions."¹⁶

In response, FERC held that it could not use the social cost of carbon tool to determine whether the project would cause significant climate change impacts because the "tool cannot

predict the actual environmental impacts of a project on climate change."¹⁷ FERC adhered to its precedent and declined to expand the scope of the NEPA analysis because it could not determine "whether the project's contribution to cumulative impacts on climate change would be significant."¹⁸

The D.C. Circuit has likewise rejected attempts by environmental groups to expand on *Delaware Riverkeeper* and require FERC to perform more expansive environmental analyses under a wider range of circumstances. In both *Myersville and Minisink Residents for Environmental Preservation and Safety v. FERC*,¹⁹ the court drew factual distinctions indicating that *Delaware Riverkeeper's* impact will remain confined to the narrow set of facts underlying that case. Most recently, in *Gunpowder Riverkeeper v. FERC*, the D.C. Circuit held that Gunpowder Riverkeeper lacked a valid cause of action to challenge a pipeline approval under NEPA, as well as the Natural Gas Act and the Clean Water Act.

Gunpowder Riverkeeper had argued before FERC that the agency's environmental assessment improperly failed to consider numerous environmental impacts, including "how the [project at issue] might affect demand for additional development of the Marcellus or other, unconventional Shale plays..."²⁰ After FERC rejected Gunpowder Riverkeeper's request for rehearing of the order authorizing construction of the facilities at issue in that proceeding,²¹ Gunpowder Riverkeeper chose to frame its appeal differently by asserting that eminent domain actions resulting from the project approval threatened its members' property interests. The D.C. Circuit rejected this approach. Holding that the group lacked a valid cause of action, the court construed standing requirements narrowly, reasoning that landowners' interests in protecting their property from seizure by eminent domain did not fall within the "zone of interests" protected by NEPA, the Natural Gas Act, or the Clean Water Act.²² While the court acknowledged that "the affidavits of Gunpowder's members contain some assertions of injury that could be construed as environmental," it determined that Gunpowder did "not invoke them for the purpose of showing environmental harm."²³ In the NEPA context, "[b]ecause Gunpowder did not argue that its members would suffer any environmental harm—indeed it expressly disclaimed the need to do so," the court concluded that Gunpowder Riverkeeper fell outside the zone of interests protected by the statute.²⁴

Even if future challengers avoid the pitfall that proved fatal in *Gunpowder Riverkeeper* by framing their injuries in terms of environmental harm, the dissent articulated an alternative basis for denying relief. Namely, the dissent disagreed with *Gunpowder Riverkeeper*'s arguments on the merits and in particular rejected a claim that FERC's environmental analysis improperly relied on other agencies' work.²⁵ Instead, the dissent praised FERC for demonstrating an "appreciation of relevant views" during the review process.²⁶

Thus, while future petitioners are now on notice that they must expressly allege "environmental" injuries to advance their claims, *Gunpowder Riverkeeper* shows that pipeline opponents continue to face both procedural and substantive hurdles that may be difficult to anticipate. Recent developments that initially appeared advantageous for pipeline opponents have not proven to be game-changers. Both FERC and the courts have maintained a consistent approach to project approvals, and FERC retains great discretion in fulfilling its NEPA obligations while also taking into account the ways in which new projects will benefit the public.

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Endnotes

- ¹ *Gunpowder Riverkeeper v. FERC*, No. 14-1062, 2015 WL 4450952 (D.C. Cir. July 21, 2015).
- ² 15 U.S.C. § 717f.
- ³ *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227, at 61,745 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000).
- ⁴ *Myersville Citizens for a Rural Community, Inc. v. FERC*, 783 F.3d 1301, 1324-25 (2015) (citing *Nevada v. Dep't. of Energy*, 457 F.3d 78, 93 (D.C. Cir. 2006)).
- ⁵ See *id.* at 1322.
- ⁶ *Id.* (quoting *Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23, 29 (D.C. Cir. 2008)).
- ⁷ *Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304 (D.C. Cir. 2014).
- ⁸ *Id.* at 1319-20.
- ⁹ *Columbia Gas Transmission, LLC*, 149 FERC ¶ 61,255, at P 125 (2014).
- ¹⁰ *Dominion Cove Point LNG, LP*, 151 FERC ¶ 61,095, at P 57 (2015).
- ¹¹ *Sabine Pass Liquefaction Expansion, LLC*, 151 FERC ¶ 61,012, at P 94 (2015) (citing "Addendum to Environmental Review Documents Concerning Exports of Natural Gas from the United States," issued May 29, 2014).
- ¹² *Dominion Cove Point LNG, LP*, 151 FERC at P 58.
- ¹³ Request for Rehearing of the Sierra Club, Docket Nos. CP13-552 and CP13-553 (May 6, 2015) at 17.
- ¹⁴ *Id.* at 21.
- ¹⁵ *Id.* at 19.
- ¹⁶ *Id.*
- ¹⁷ *Sabine Pass Liquefaction Expansion, LLC*, 151 FERC ¶ 61,253, at P 48 (2015).
- ¹⁸ *Id.* at P 45.
- ¹⁹ 762 F.3d 97 (2014).
- ²⁰ Petition for Rehearing by *Gunpowder Riverkeeper*, Docket No. CP13-8-000 (Dec. 20, 2013) at 17 (quoting EPA letter).
- ²¹ *Columbia Gas Transmission, LLC*, 146 FERC ¶ 61,116 (2014).
- ²² *Gunpowder Riverkeeper*, 2015 WL 4450952 at **3-5.
- ²³ *Id.* at *5.
- ²⁴ *Id.* at *5.
- ²⁵ *Id.* at *11 (Rogers, J., dissenting).
- ²⁶ *Id.*

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