

DC Circ. Puts FERC On Notice To Bulk Up Climate Reviews

By Keith Goldberg

Law360 (June 4, 2019, 6:58 PM EDT) -- The D.C. Circuit said on Tuesday that the Federal Energy Regulatory Commission should do more to evaluate the climate change impacts of pipeline projects, even though it couldn't determine whether the agency flouted federal environmental law in limiting its climate review of a Kinder Morgan unit's project in Tennessee.

The ruling ends a challenge of FERC's approval of Tennessee Gas Pipeline Co. LLC's \$400 million Broad Run Expansion Project. A D.C. Circuit panel said landowners affiliated with local advocacy group Concerned Citizens for a Safe Environment had provided insufficient evidence to support their claims that FERC violated the National Environmental Policy Act when it refused to consider the project's indirect greenhouse gas emission impacts in the form of increased upstream gas production and downstream gas use.

But echoing concerns they had raised during oral arguments in April, the judges said they were “troubled” by FERC's claim that too little information was available to reasonably gauge the indirect upstream and downstream impacts of the project, a new natural gas compression station. The D.C. Circuit said in 2017's *Sierra Club v. FERC* that NEPA requires the agency to review indirect environmental impacts that are “reasonably foreseeable” and ordered FERC to review the downstream greenhouse gas impacts of the Sabal Trail pipeline.

The D.C. Circuit panel said Tuesday that FERC's argument that its required GHG analysis of projects is limited to the facts of the Sabal Trail case — a pipeline feeding specific power plants in Florida — is an improper reading of *Sierra Club v. FERC*.

It also noted that Commissioner Cheryl LaFleur said that FERC has never asked project applicants for information that might help it determine whether a project's upstream impacts are reasonably foreseeable and that FERC made no effort to get information from Tennessee Gas about the downstream use of the gas supplied by its project.

“It should go without saying that NEPA also requires the commission to at least attempt to obtain the information necessary to fulfill its statutory responsibilities,” the D.C. Circuit panel said in its opinion.

The ruling comes amid a clear rift that pits LaFleur and fellow Democratic Commissioner Richard Glick against Chairman Neil Chatterjee and fellow Republican Commissioner Bernard McNamee over what they believe the agency's GHG obligations are under NEPA and the Natural Gas Act. LaFleur and Glick's push for a more robust analysis have fueled legal challenges to project approvals.

Glick said in a statement Tuesday that the D.C. Circuit's decision "unambiguously affirms" FERC's obligations under NEPA and the NGA to examine reasonably foreseeable upstream and downstream GHG impacts of pipeline projects.

"Although the court denies the petition on procedural grounds, the opinion puts to bed any suggestion that NEPA and the NGA do not permit FERC to seriously consider the GHG emissions caused by a pipeline," Glick said. "I hope to work with all of my colleagues to reform FERC's policy to reflect this decision and Sabal Trail."

LaFleur echoed his comments.

"The court once again reiterates that 'the agency is a legally relevant cause of the direct and indirect environmental effects of pipelines, and we must consider these climate impacts in our NEPA analysis and as part of our public interest determination under the NGA,'" LaFleur said in a statement Tuesday. "I hope the commission acts on this guidance, rather than perpetuating the legal risk that it narrowly avoided in this case."

A spokeswoman for Chatterjee declined comment Tuesday.

Despite questioning FERC's approach, the D.C. Circuit panel said the landowners challenging the Broad Run project failed to counter FERC's contention that trying to analyze the project's upstream impacts would be futile.

The panel said the landowners identified no evidence that would help FERC predict where and how many additional gas wells would be drilled to feed the project, nor evidence to support their allegation that the driller that contracted with Tennessee Gas for the project's added transportation capacity would not otherwise be able to get its gas to market.

"Although we are dubious of the commission's assertion that asking Tennessee Gas to provide additional information about the origin of the gas would be futile, Concerned Citizens nowhere claim that the commission's failure to seek out additional information constitutes a violation of its obligations under NEPA," the D.C. Circuit panel said in its opinion.

As for FERC's refusal to analyze the project's downstream impacts, the D.C. Circuit panel said the agency can't argue that those impacts are not reasonably foreseeable because the gas may replace existing gas supplies or prompt coal-to-gas fuel switching. FERC also can't say the Broad Run project's greenhouse gas impacts can't be analyzed because unlike with respect to the Sabal Trail project, it doesn't identify where its gas will be burned.

The D.C. Circuit didn't suggest either of those interpretations of its ruling in *Sierra Club v. FERC*, the panel said.

But while the panel chastised FERC for not trying to get information on downstream gas use from Tennessee Gas — citing Glick's dissenting statement in FERC denying the landowners' rehearing bid on

the project's approval — it said it lacked jurisdiction to review the issue because the landowners never raised that issue during rehearing process.

"Therefore, taking the record as it currently stands, we have no basis for concluding that the commission acted unreasonably in declining to evaluate downstream combustion impacts as part of its indirect effects analysis," the panel said in its opinion.

Carolyn Elefant, who represents the landowners, told Law360 Tuesday that the D.C. Circuit "got it very wrong" and ignored the precedent it set in the Sabal Trail case.

FERC's original order approving the Broad Run project came out before *Sierra Club v. FERC*, so the landowners couldn't have raised the argument that FERC didn't get enough information on GHG impacts in its rehearing bid, Elefant said. She said FERC also denied rehearing based on distinguishing the Broad Run project from the Sabal Trail project, not the fact that it had too little information to analyze Broad Run's GHG impacts.

Elefant said she would ask the D.C. Circuit to rehear the case. She also said it tees up successful future challenges to FERC GHG reviews.

"It was nice that they said FERC was wrong about all the issues, and there's some vindication in that," said Elefant, who says she plans to seek a rehearing before the D.C. Circuit. "But they came up with the most ludicrous reason for giving FERC another bite at the apple, basically."

Gillian Giannetti, a staff attorney with the Natural Resources Defense Council's Sustainable FERC project, said the D.C. Circuit's ruling also casts doubt on FERC's May 2018 determination that it would no longer estimate greenhouse gas emissions on certain projects on which production or downstream use of the gas is not considered a cumulative or indirect impact. The D.C. Circuit panel that issued Tuesday's decision nixed a challenge to that policy in May on issues of standing, but didn't address the policy's legality.

"FERC needs to recognize that this is a warning shot, that if it doesn't change its approach to upstream and downstream greenhouse gas emissions, it will lose at the court and it's only a matter of time," Giannetti told Law360 Tuesday.

Kinder Morgan spokeswoman Katherine Hill said the company is pleased with the D.C. Circuit's decision.

"We believe that this project is important to continue to provide clean, efficient natural gas to the region," Hill said.

Circuit Judges Merrick B. Garland, David S. Tatel and Robert L. Wilkins sat on the panel for the D.C. Circuit.

The petitioners are represented by Carolyn Elefant of the Law Offices of Carolyn Elefant.

FERC is represented by solicitor Robert H. Solomon, general counsel James P. Danly and staff attorneys Scott Ray Ediger and Elizabeth E. Rylander.

Tennessee Gas is represented by Brian D. O'Neill, Michael R. Pincus and Frances B. Morris of Van Ness Feldman LLP.

The case is Lori Birckhead et al. v. FERC, case number 18-1218 in the U.S. Court of Appeals for the District of Columbia Circuit.

--Editing by Peter Rozovsky.

Read more at: <https://www.law360.com/articles/1165765/dc-circ-puts-ferc-on-notice-to-bulk-up-climate-reviews?copied=1>