

E&E Energywire

FERC rule to address landowner complaints draws fire

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A rule last week by the Federal Energy Regulatory Commission to address landowner complaints of proposed energy projects is sparking criticism from both pipeline advocates and lawyers representing property owners.

The rule would stop companies from beginning construction on FERC-approved pipeline and infrastructure projects until the commission addresses objections ([Energywire](#), June 10).

But a legal team representing landowners and environmental groups in a case moving through a federal appeals court say the rule doesn't fully address their concerns.

"The rule doesn't do anything to stop the pipeline company from taking the property and doing significant, irreparable damage to homeowners' land and the environment," said White and Williams LLP partner Siobhan Cole, who represented FERC's challengers in a related case currently before a federal appeals court.

The U.S. Court of Appeals for the District of Columbia Circuit's 11 active judges are weighing whether FERC should limit or eliminate its use of tolling orders, which allow projects to move forward while preventing environmental groups and affected property owners from raising challenges in court ([Energywire](#), April 27).

Cole, along with other lawyers involved in the case, filed a [letter](#) Friday with the D.C. circuit arguing FERC's recent rule change does not resolve the issue.

Pipeline advocates also say they are worried the new rule could create uncertainty for developers.

"We are also concerned that the issuance of an instant final rule did not provide the public and regulated entities with the opportunity to provide comment on FERC's proposal. An issue as important as this one would likely have benefited from a more deliberative rulemaking process," the Interstate Natural Gas Association of America said in a statement Friday.

Under the Administrative Procedures Act of 1946, federal agencies are required to offer a notice and comment period for proposed rules. However, there are certain exceptions. Under the plan, agencies are exempt from notice and comment if the rule is a procedural change, such as in this case, or if they have a "good cause."

FERC does not comment on pending litigation, but in response to the criticism from INGAA, FERC spokesperson Tamara Young-Allen said "the rule provides a reasonable balance between the concerns of landowners and other stakeholders and the pipeline industry."

Tolling orders have prompted critics, including a federal judge and Democratic lawmakers in Congress, to say current FERC procedures put protesting landowners facing eminent domain property takings in "administrative limbo" ([*Energywire*](#), April 28).

In September of last year, FERC Chairman Neil Chatterjee said the commission would reduce its use of tolling orders. In February, Chatterjee announced he would create a special division of FERC's Office of the General Counsel to help ensure that landowner's rehearing requests are considered quickly.

"The Commission has undertaken a number of initiatives to improve affected landowners' access to a fair and transparent process and today's effort is another important step forward," Chatterjee said in a statement last week. "These are complex issues, with a diverse array of stakeholder input, but I remain firmly committed to doing what we can to make the FERC process as fair, open, and transparent as possible for all those affected while the Commission thoroughly considers all issues."

The new rule did not dispense with tolling orders but is intended to prevent developers from moving forward with construction in the interim.

INGAA said the agency should address all complaints, including those from landowners, in a timely manner, but the new rule does not put forth a timeline.

"We are concerned that the absence of a clear timeline for FERC to resolve questions on rehearing will create additional uncertainty for infrastructure developers and those who depend on the timely development of new energy infrastructure," the statement said.

Cole said the commission's new rule may have no impact since it does not define "construction." In past cases, "construction" has applied to laying the pipe in the ground, while "pre-construction" is the term used for cutting trees and other land-disturbing activities. If pre-construction activities are allowed under the new rule, landowners would still see property damage before they are able to put forth a challenge, according to Cole.

If construction applies to all land-disturbing activities, then "perhaps it has some merit, but the rule itself doesn't say that," she said.

"FERC is willing to make these promises and immediately break them," she said. "It would be great if it's true, but I'm not convinced."

FERC spokeswoman Mary O'Driscoll said in a recent email that "construction is any work along the route — clearing land, digging, etc." O'Driscoll later added that "under this rule, there are no activities for which the Office of Energy Projects could issue a notice to proceed until the 30-day rehearing request period passes with no requests, or the Commission issues a merits decision on rehearing issues."