

Client Alert

Global Transactions and Tort & Environmental Litigation Practice Groups

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D.C. Circuit Court Requires FERC To Consolidate its NEPA Review of Nominally Separate Interstate Gas Pipeline Projects

On June 6, 2014, the D.C. Circuit Court of Appeals issued an opinion holding that the Federal Energy Regulatory Commission acted improperly in separately analyzing the environmental impacts of several nominally separate interstate natural gas pipeline projects, rather than treating them as one interrelated project in its review under the National Environmental Policy Act (“NEPA”). *Delaware Riverkeeper Network, et al. v. FERC*, D.C. Cir. No. 13-1015 (June 6, 2014). The Court remanded the case to FERC with directions to conduct a further environmental review of four interdependent pipeline upgrade projects and their cumulative environmental impacts.

The D.C. Circuit’s opinion has significant implications for FERC’s environmental review of interstate natural gas pipeline project proposals under NEPA. The opinion suggests that proponents of multiple expansions of a pipeline, or FERC on its own initiative, may need to combine what might otherwise be considered separate projects for environmental review purposes. This could result in a more extensive review, and the need to evaluate the environmental impacts associated with multiple projects in turn can be expected to extend the time required for completion of FERC’s NEPA review process.

In the case before the D.C. Circuit, environmental organizations sought judicial review of a FERC order authorizing Tennessee Gas Pipeline Company, L.L.C. (“Tennessee Gas”) to construct its Northeast Upgrade Project. The project included five new segments of 30-inch pipeline, totaling about 40 miles, on the Eastern Leg of Tennessee Gas’ so-called “300 Line.” The Northeast Upgrade project was one of four projects through which Tennessee Gas expanded the capacity of the 300 Line’s Eastern Leg in order to enhance its ability to transport gas produced from the Marcellus Shale in Pennsylvania to markets in the Northeast U.S.

Section 7 of the Natural Gas Act requires the developer of a proposed interstate natural gas pipeline project to obtain from FERC a certificate of public convenience and necessity authorizing project construction and operation. As the lead agency for the review of interstate natural gas pipeline certificate applications, FERC must conduct a NEPA review of each project’s

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environmental impacts. NEPA requires that, in the course of the required environmental review of each pipeline project's potential impacts, FERC must prepare an Environmental Assessment ("EA"), and, if significant impacts are found, a more comprehensive Environmental Impact Statement ("EIS"). Under Council on Environmental Quality regulations generally governing federal agency NEPA reviews, FERC's environmental review of a specific pipeline project must include both "connected actions" and "similar actions." 40 C.F.R. § 1408.25(a)(1), (3). U.S. Supreme Court and federal Courts of Appeals decisions have found that this regulation and NEPA itself forbid the "segmentation" of connected or similar projects for separate environmental review, and that connected actions, similar actions and cumulative actions must be considered together in a comprehensive environmental review.

At the time FERC was reviewing the Northeast Upgrade project, FERC had before it two other Eastern Leg projects, and had recently certified a fourth Eastern Leg project. Nevertheless, FERC found it appropriate to consider the Northeast Upgrade project on a stand-alone basis, without specific regard for the other Eastern Leg upgrade projects that were ongoing, under review or soon to be proposed. FERC's NEPA review of impacts associated only with the Northeast Upgrade Project resulted in an EA which included a finding of no significant impact ("FONSI").

Petitioners argued that NEPA required FERC to undertake a broader environmental analysis of the Northeast Upgrade Project, including consideration of Tennessee Gas' three additional Eastern Leg projects. The D.C. Circuit agreed, noting that NEPA requires FERC to consider "connected actions," "cumulative actions," and "similar actions." Finding a "clear physical, functional, and temporal nexus between the projects," the D.C. Circuit concluded that FERC impermissibly segmented its environmental review of the various Eastern Leg upgrade projects in violation of NEPA. It also concluded that FERC's Northeast Upgrade project EA is deficient in its failure to include any meaningful analysis of the cumulative impacts of the four Tennessee Gas Eastern Leg upgrade projects.

The D.C. Circuit acknowledged circumstances under which separate environmental reviews might be appropriate, noting that there may be projects with "logical termini" or "substantial independent utility." But the D.C. Circuit rejected FERC's arguments regarding logical termini, noting that the Eastern Leg is a single, continuous pipeline. The court also rejected FERC's arguments regarding independent utility, even though each Eastern Leg upgrade project was supported by different customer commitments, because the projects were financially interdependent. The court emphasized the importance it placed on the timing of the four Eastern Leg upgrade projects, observing that had the projects been separated by more time, they may well have had utility independent of the others. But the court concluded that the close temporal and physical proximity of the four upgrade projects, together with their functional and financial interdependence, made FERC's decision to conduct its NEPA review of the Northeast Upgrade project on a stand-alone basis an example of impermissible segmentation, in violation of NEPA and the applicable regulations.

The *Delaware Riverkeeper* opinion suggests that FERC will have a difficult time in the future in treating separate interstate natural gas pipeline projects proposed in close temporal and spatial proximity to one another as separate for NEPA review purposes. This could present a practical challenge to FERC and interstate pipeline project proponents grappling with the need to expand and extend multiple pipeline systems to accommodate the remarkable and ongoing growth in natural gas production in the Marcellus and Utica Shale plays and in other regions. The required expansions tend to resolve themselves into individual projects as shipper commitments to specific expansions are made. The D.C. Circuit's *Delaware Riverkeeper* opinion indicates that FERC's NEPA review of expansion projects on a single pipeline system – or even on separate pipeline systems located close to one another – very likely will need to take into account other nearby projects if they are proposed or are to be constructed within a short period of time.

The combination of multiple projects may expand the range of impacts that will need to be evaluated in some cases. Accordingly, the court's ruling will likely extend the time required for FERC to complete its environmental review of some pipeline projects. It is also possible that the consolidation of environmental reviews of multiple projects could result in more frequent EIS-level reviews. FERC may even feel itself bound to defer resolution of earlier-filed

applications in order to conduct a consolidated environmental review where later-filed project proposals appear to be connected in some way with earlier-filed projects. The outcome in all events is likely to be a more protracted NEPA review of interstate natural gas pipeline expansion projects.

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