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ENERGY LAW REPORT

EDITOR'S NOTE: ENERGY POTPOURRI
Victoria Prussen Spears

TRUMP ADMINISTRATION CONTINUES TO OVERHAUL CLIMATE CHANGE REGULATIONS
Matthew Adams and Andrew Shaw

STATE INVESTMENTS IN ELECTRIC VEHICLE CHARGING INFRASTRUCTURE
Jake Levine and Michael Rebuck

HERE TODAY, GONE TOMORROW? FERC'S NATURAL GAS PIPELINE GREENHOUSE GAS ANALYSIS POLICY
Stephen C. Zumbrun

DOE FAST TRACKS SMALL SCALE LNG EXPORTS AND PROVIDES ASSURANCE ON EXPORT ORDERS
Wilbur C. Earley

IRS UNVEILS START OF CONSTRUCTION RULES FOR SOLAR, OTHER ITC-ELIGIBLE TECHNOLOGIES
Scott W. Cockerham

A SIGH OF RELIEF: OIL AND GAS LENDER NOT LIABLE, AS MORTGAGEE, FOR FAILURE TO RELEASE EXPIRED LEASES
Bernard F. Clark, Jr., and Kraig Grahmann

EPA DESIGNATES BEXAR COUNTY, TEXAS, AS "NONATTAINMENT" FOR AIR QUALITY; OPERATORS IN THE COUNTY COULD BE SUBJECT TO ADDITIONAL AIR PERMITTING OBLIGATIONS
Paul D. Tanaka, Stefanie I. Gitler, and Ty'Meka M. Reeves-Sobers

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Editor's Note: Energy Potpourri
Victoria Prussen Spears 329

Trump Administration Continues to Overhaul Climate Change Regulations
Matthew Adams and Andrew Shaw 331

State Investments in Electric Vehicle Charging Infrastructure
Jake Levine and Michael Rebuck 335

Here Today, Gone Tomorrow? FERC's Natural Gas Pipeline Greenhouse Gas Analysis Policy
Stephen C. Zumbrun 338

DOE Fast Tracks Small Scale LNG Exports and Provides Assurance on Export Orders
Wilbur C. Earley 342

IRS Unveils Start of Construction Rules for Solar, Other ITC-Eligible Technologies
Scott W. Cockerham 345

A Sigh of Relief: Oil and Gas Lender Not Liable, as Mortgagee, for Failure to Release Expired Leases
Bernard F. Clark, Jr., and Kraig Grahmann 352

EPA Designates Bexar County, Texas, as "Nonattainment" for Air Quality; Operators in the County Could be Subject to Additional Air Permitting Obligations
Paul D. Tanaka, Stefanie I. Gitler, and Ty'Meka M. Reeves-Sobers 356

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Here Today, Gone Tomorrow? FERC's Natural Gas Pipeline Greenhouse Gas Analysis Policy

By Stephen C. Zumbrun*

The author of this article reviews recent Federal Energy Regulatory Commission guidance on how it will analyze upstream and downstream greenhouse gas emissions when reviewing natural gas pipeline projects.

The Republican majority of the Federal Energy Regulatory Commission ("FERC" or "Commission") has drawn a clear distinction with how and when the Commission will analyze upstream and downstream greenhouse gas ("GHG") emissions when reviewing natural gas pipeline projects. But with the resignation of Republican Commissioner Robert Powelson, a pending Notice of Inquiry issued by the Commission, a separate advanced Notice of Proposed Rulemaking issued by the Council on Environmental Quality ("CEQ"), and a recent petition to the U.S. Court of Appeals for the D.C. Circuit, this current established protocol may not last and by this time next year we may see a whole new approach to pipeline GHG analysis coming out of FERC.

BACKGROUND

The current dynamic began with the D.C. Circuit decision in *Sierra Club.*[1] In this case, the court vacated and remanded FERC's certification of the Southeast Market Pipelines ("SMP Project") and instructed the Commission to consider potential "downstream" GHG emissions from the end-use power plant customers of the SMP Project. On remand, FERC calculated the potential GHG emissions caused by the proposed power plants, but FERC determined that it could not find an appropriate method "to attribute discrete environmental effects to the potential GHG emissions."

RECENT DEVELOPMENTS

Since that time, on March 14, 2018, FERC reinstated the Certificate for the SMP Project.[2] In that order, FERC restated that there are "[n]o appropriate targets for GHG emissions due to Clean Power Plan repeal and Paris Climate Accord Withdrawal." Further, FERC reaffirmed that "there is no widely accepted standard to ascribe significance to a given rate or volume of GHG emissions" and reemphasized that FERC does not find the Social Cost of

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[1] *Sierra Club v. Fed. Energy Regulatory Comm'n*, 867 F.3d 1357 (D.C. Cir. 2017).

[2] *See gen.*, 162 FERC ¶ 61,233.

Carbon tool "appropriate for estimating a specific project's impacts or informing our analysis under NEPA." Finally, FERC put forth that its job is to determine if a natural gas pipeline is too harmful for the environment, not to evaluate whether the use of the product passing through the pipeline is too harmful for the environment; and that job "is for Congress or the Executive Branch to decide national policy on the use of natural gas."

Building off of the March 2018 SMP Project decision, on May 18, 2018, FERC announced its new natural gas pipeline GHG analysis policy in a decision involving the separate Dominion Energy New Market Project in New York. In the decision, FERC stated that the Commission "will only continue to analyze upstream and downstream environmental effects when those effects are sufficiently causally connected to and are reasonably foreseeable effects of the proposed action."[3] Regarding upstream impacts, FERC held that upstream analysis of non-pipeline production activity only warrants an analysis if the pipeline was the only way to transport the product because otherwise the impact cannot be known. For downstream impacts, and specific to the New Market Project, FERC stated that the project will deliver to two distribution companies and no party was able to determine the ultimate end-users; rendering FERC unable to calculate the GHG emissions and the ultimate indirect GHG impacts from the project.

FERC has adhered to this new GHG analysis policy in subsequent natural gas pipeline decisions. For projects connecting to an existing pipeline grid, FERC determined an analysis of upstream natural gas development activity is not required because the connection would not increase the upstream natural gas development activity.[4] Additionally, in a decision striking a rehearing for the Mountain Valley Pipeline Project, FERC did in fact quantify downstream GHG emissions, but reemphasized that the Social Cost of Carbon tool is not meaningful to decisions under the Natural Gas Act ("NGA") and further pointed out that the Commission does not control the production or consumption of natural gas.[5] The votes for these decisions were split on clear party lines, where the outnumbered Democratic Commissioners argued that FERC's policy too narrowly viewed FERC's National Environmental Policy Act ("NEPA") obligations and the Commission was not using its best efforts in considering environmental consequences of GHG emissions.

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[3] *See gen.*, 163 FERC ¶ 61,128.

[4] *See e.g.*, *Okeechobee Lateral Project* 163 FERC ¶ 61,158; *The Broad Run Expansion Project* 163 FERC ¶ 61,190.

[5] *See gen.*, 163 FERC ¶ 61,197.

With these recent decisions, the first half of 2018 established a clear and predictable trend for how and when the Commission would analyze upstream and downstream GHG emissions. However, this trend could be short lived. First, on June 28, 2018, Republican Commissioner Powelson announced his resignation from the Commission, effective in August 2018. On the issue of GHG emissions, Commissioner Powelson's resignation created a temporary even two-two split between the Commissioners that caused a deadlock on decisions regarding natural gas pipelines. The President recently nominated Mr. Bernard McNamee to fill the vacant Commissioner position. If confirmed by the Senate, Mr. NcNamee will likely continue the GHG analysis trend established by the majority of Commissioners while Mr. Powelson sat on the Commission, but his nomination may face opposition and if his confirmation process is delayed his prospects could be hindered by the mid-term elections.

Next, the Commission on April 19, 2018, issued a Notice of Inquiry seeking public comment on FERC's currently effective policy statement on the certification of new natural gas pipelines established in Section 7 of the NGA.[6] Specific to GHG emissions, FERC asked for comment on all of those topics discussed above, including, whether and how FERC should analyze upstream and downstream GHG emissions, and whether FERC should reconsider its position on the Social Cost of Carbon. Many parties submitted comments to FERC, including the U.S. Environmental Protection Agency ("EPA"), which suggested several tools available to FERC in analyzing upstream and downstream GHG emissions for natural gas pipelines.[7] Adding to the upheaval, on June 20, 2018, the CEQ issued an advanced Notice of Proposed Rulemaking seeking comments on the implementing regulations for the procedural provisions of NEPA.[8] GHGs were not specifically referenced in the CEQ advanced notice, but the scope of the questions were wide ranging, including the process for environmental studies. Any ultimate decision from CEQ could affect the now-existing FERC GHG emission analysis policy.

Finally, on July 16, 2018, opponents of the New Market Project petitioned the D.C. Circuit to review FERC's May 18, 2018, decision—where FERC first announced its new approach to GHG analysis for pipelines. A decision by the D.C. Circuit will either solidify the legitimacy of FERC's GHG approach in the eyes of the courts or send it back to the drawing board.

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[6] *Notice of Inquiry on the Certificate Policy Statement*, 163 FERC ¶ 61,042 (2018).

[7] EPA, Comments, *Certification of New Interstate Natural Gas Facilities,* Notice of Inquiry, 163 FERC ¶ 61,042 (2018), Docket No. PL18-1-000 (filed June 21, 2018).

[8] *See* 83 FR 28591.

CONCLUSION

Absent these new developments, the FERC GHG analysis policy we saw in the first half of 2018 created a clear understanding of what to expect out of FERC for natural gas pipeline projects. However, as these new developments progress, we may see a whole new FERC GHG analysis policy for natural gas pipeline projects relatively soon.