
FERC Pipeline Siting Program Deals with Legal Challenges

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The United States is currently experiencing an unprecedented growth in natural gas production and infrastructure development. The Department of Energy's Energy Information Administration (EIA)—the nation's statistical and analytical agency for tracking the production, flow, and use of energy—estimates total domestic dry natural gas production was approximately 31.3 trillion cubic feet (Tcf) in 2014, up from 23.4 Tcf in 2005, before the shale gas revolution. The prolific production in the Marcellus and Utica shale regions has led this growth. The surge in production has driven interstate natural gas pipeline companies to request authorization from the Federal Energy Regulatory Commission (FERC)—which has jurisdiction over the siting, construction, and operation of interstate natural gas pipelines pursuant to the Natural Gas Act (NGA)—to construct thousands of miles of pipelines. Between 2009 and 2015, FERC authorized approximately 4,000 miles of pipeline projects according to EIA and FERC estimates.

At the same time, FERC's profile has risen. Between nomination fights over commissioner seats and being mentioned on the Beltway drama *House of Cards*, FERC, a once-sleepy agency, is operating under greater scrutiny. FERC is under almost constant fire from environmental groups and landowners that oppose the construction of new or expanded pipelines and liquefied natural gas (LNG) terminals, drilling, and hydraulic fracturing. Protesters are now a relatively common sight outside the doors of 888 First Street NE, and in FERC open meetings. Members of one group even staged a fast last year to protest FERC's pipeline and LNG approvals.

Legal challenges to FERC's pipeline siting program also abound. In a key victory, an environmental group won a National Environmental Policy Act (NEPA) challenge in 2014 against FERC at the Court of Appeals for the District of Columbia Circuit (D.C. Circuit). *Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304 (D.C. Cir. 2014) (*Delaware Riverkeeper*). In *Delaware Riverkeeper*, the D.C. Circuit found that FERC unlawfully "segmented" the NEPA review of four pipeline certificate applications for the construction of new pipeline facilities proposed by Tennessee Gas Pipeline Company, L.L.C. (Tennessee). The court held that FERC failed to assess the effects of the Tennessee's Northeast Upgrade Project in conjunction with the effects of "the three other connected, contemporaneous, closely related, and interdependent" projects. *Delaware Riverkeeper*, 753 F.3d at 1308. The court also held that FERC violated NEPA by failing to provide an adequate analysis of the cumulative environmental impacts of the four projects on the eastern portion of Tennessee's 300 Line

and remanded the order back to FERC.

On November 19, 2015, FERC issued its order on remand responding to the D.C. Circuit's decision in *Delaware Riverkeeper. Tennessee Gas Pipeline Company, L.L.C.*, 153 FERC ¶ 61,215 (2015) (Remand Order). On remand, FERC stated that it had directed its staff to perform a supplemental environmental analysis to examine the additive environmental impacts of the four projects, as well as to incorporate the other three projects into the cumulative impacts analysis performed in the Environmental Assessment for the Northeast Upgrade Project. The supplemental analysis concluded that when the four Tennessee projects are considered additively, none of the resource impacts escalated to a significant level or required additional mitigation. The supplemental analysis further concluded that there were no cumulatively significant environmental impacts. FERC reviewed the staff's supplemental analysis, adopted these conclusions, and held that no additional mitigation would be required for authorization of Tennessee's Northeast Upgrade Project. As a result, the certificate of public convenience and necessity FERC issued for the Northeast Upgrade Project was unaffected by the order on remand.

Remand Order notwithstanding, the D.C. Circuit's decision represents the first successful challenge to FERC's environmental review of a certificate of public convenience and necessity in a number of years. Up until this case, FERC's natural gas pipeline environmental review program had been relatively successful in fending off challenges from opposition—typically, environmental groups or impacted landowners—that claim FERC's environmental review is inadequate.

FERC, the pipeline industry, and environmental groups are currently responding to the repercussions of the case. However, the long-term impact of the case is likely to be limited for several reasons. First, the court's holding can be viewed as quite narrow, only applying to the relatively uncommon scenario where multiple pipeline projects result in "a single pipeline running from the beginning to the end of [a portion of a pipeline's system]." *Delaware Riverkeeper*, 753 F.3d at 1316. Second, because NEPA imposes procedural, not substantive, requirements, many potential segmentation issues may be addressed in a more robust cumulative impacts analysis in FERC's environmental documents rather than through the combination of allegedly connected projects into a single environmental review. As demonstrated by the approach adopted by FERC in its Remand Order, FERC can prepare stronger cumulative impacts analyses by disclosing more and better information on the impacts of other—past, present, proposed, and reasonably foreseeable—projects in relation to the impact of the proposed project. In many circumstances, preparing a more robust cumulative impacts analysis can protect FERC from similar NEPA challenges in the future.

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This article provides (1) a brief overview of FERC's authority to site natural gas pipelines under the NGA and FERC's NEPA review process, (2) a brief summary of *Delaware Riverkeeper* and a discussion of its impacts, and (3) a potential response to the case by FERC.

FERC Review of Pipeline Projects under the NGA and NEPA

Under Section 7 of the NGA, FERC is authorized to issue certificates of public convenience and necessity to natural gas companies for the operation, sale, service, construction, extension, or acquisition of natural gas facilities after a finding that the "proposed service, sale, operation, construction, extension, or acquisition . . . is or will be required by the present or future public convenience and necessity." 15 U.S.C. § 717f(e). Natural gas company is defined by the NGA as an individual or corporation "engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale." *Id.* § 717a(6). FERC issues such certificates of public convenience and necessity after a hearing, typically a paper hearing, and environmental review under NEPA. For large pipeline construction projects, the NEPA review process is the most time-consuming and resource-intensive part of the FERC review process.

FERC's NGA certificate process involves review of proposed interstate natural gas pipeline projects under NEPA, which requires FERC to take a "hard look" at the environmental consequences of an action before issuing its approval. *Coalition for Responsible Growth & Res. Conservation v. FERC*, 485 F. App'x 472, 474 (2d Cir. 2012). FERC acts as lead agency and typically prepares an environmental assessment (EA) or an environmental impact statement (EIS) to complete the required NEPA review. 40 C.F.R. §§ 1501.3–1501.4. If FERC determines that a federal action is not likely to have significant adverse effects, it may rely on an EA for compliance with NEPA. *Id.* If FERC determines that the project will significantly affect the quality of the human environment, then FERC prepares an EIS. See 18 C.F.R. § 2.80 & pt. 380. All federal and state agencies considering an aspect of a natural gas company's application for a certificate are required to cooperate with FERC. 15 U.S.C. § 717n(b). FERC must consider "the environmental impact of the proposed action," "alternatives to the proposed action," and "the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity." 42 U.S.C. § 4332(C).

While FERC will typically perform individual reviews of pipeline project applications before it, there are circumstances under NEPA regulations where it is appropriate for FERC to combine its review of one or more projects. NEPA and its implementing regulations require the agency preparing an EIS to consider carefully the scope of its analysis, *i.e.*, "the range of actions, alternatives, and impacts to be considered" in the EIS, and consider three types of actions: "connected actions," "cumulative actions," and "similar actions." 40 C.F.R. § 1508.25(a).

Actions are "connected" or "closely related" if they: (1) automatically trigger other actions that may require [EISs], (2) cannot or will not proceed unless other actions are taken previously or simultaneously, or (3) are interdependent parts of a larger action and depend on the larger action for their

jurisdiction. *Id.* § 1508.25(a)(1). "Cumulative actions" are actions "which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same" EIS. *Id.* § 1508.25(a)(2). "Similar actions" are actions that when "viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography." *Id.* § 1508.25(a)(3). At the heart of this requirement is, as the D.C. Circuit has explained, that federal agencies may not "artificially divid[e] a major federal action into smaller components, each without a 'significant' impact." *Coalition on Sensible Transp. v. Dole*, 826 F.2d 60, 68 (D.C. Cir. 1987). Thus, the regulations provide that connected and cumulative actions should be discussed in the same EIS, whereas similar actions should be analyzed in the same EIS when doing so is the best way to assess adequately the combined impacts of those actions or reasonable alternatives to those actions. 40 C.F.R. § 1508.25(a).

It is the definition of "connected action" and FERC's interpretation of this regulation that gave rise to the *Delaware Riverkeeper* case.

**Remand order notwithstanding,
the D.C. Circuit's decision
in *Delaware Riverkeeper*
represents the first successful
challenge to FERC's
environmental review of a
certificate of public convenience
and necessity in several years.**

Delaware Riverkeeper v. FERC

On June 6, 2014, a panel of judges from the D.C. Circuit remanded to FERC an order issuing a certificate of public convenience and necessity under Section 7 of the NGA, finding FERC's environmental review under NEPA was deficient. The court held FERC unlawfully "segmented" the NEPA review of four certificate applications for the construction of new pipeline facilities on Tennessee's 300 Line by failing to assess the cumulative effects of the Northeast Upgrade Project in conjunction with the effects of "the three other connected, contemporaneous, closely related, and interdependent" projects. *Delaware Riverkeeper*, 753 F.3d at 1308. The court also held that FERC violated NEPA by failing to provide an adequate analysis of the cumulative environmental impacts of the four projects on the eastern portion of the 300 Line. *Id.* at 1309.

The Delaware Riverkeeper Network and other environmental groups (collectively, Delaware Riverkeeper) brought the case seeking judicial review of FERC's issuance of a certificate of public convenience and necessity for Tennessee's

Northeast Upgrade Project. That project included five new segments of 30-inch diameter pipeline loops, totaling about forty miles, on Tennessee's 300 Line in Pennsylvania and New Jersey, together with certain modifications to existing compressor and meter stations. Between 2010 and 2013, Tennessee also proposed three other upgrade projects on its 300 Line: (1) the 300 Line Project, consisting of eight new pipeline loop segments totaling 127.4 miles of 30-inch diameter pipeline, two new compressor stations, and modifications at existing compressor stations; (2) the Northeast Supply Diversification (NSD) Project, consisting of increases in capacity on the 200 and 300 Lines and construction of 6.8 miles of looped pipeline in northern Pennsylvania; and (3) the MPP Project, consisting of increases in capacity on the 300 Line and construction of 7.9 miles of looped pipeline in Pennsylvania and the modification of compressor stations.

Tennessee filed four separate applications for each of the proposed upgrade projects, and each of the projects was reviewed and approved separately by FERC. In November 2011, FERC staff completed an EA and recommended a Finding of No Significant Impact (FONSI) to FERC for the Northeast Upgrade Project. At the time of FERC's review of the Northeast Upgrade Project, the 300 Line Project already had been approved and was under construction, the application for the NSD Project was pending before FERC, and the MPP Project certificate application was not yet filed (that application was filed in December 2011). FERC issued an order approving the Northeast Upgrade Project in May 2012 and upheld that order on rehearing in January 2013.

On appeal, Delaware Riverkeeper claimed that FERC violated NEPA by segmenting review of the Northeast Upgrade Project and the three other projects and that FERC should have prepared a single EIS addressing the environmental impacts of the four projects. The groups also claimed that FERC violated NEPA by failing to provide a meaningful

analysis of the cumulative impacts of the projects.

The bulk of the court's opinion (reflecting the views of two of the three judges on the panel) addressed Delaware Riverkeeper's segmentation claim. The court agreed that FERC had improperly segmented its NEPA review of the projects. Citing NEPA regulations, the court explained that when determining the contents of an EA or an EIS, an agency must consider all "connected" actions (i.e., closely related actions), "cumulative" actions (i.e., actions which when viewed with other proposed actions have cumulatively significant impacts), and "similar" actions (e.g., actions with common timing or geography). *Delaware Riverkeeper*, 753 F.3d at 1314. An agency impermissibly "segments" NEPA review, the court stated, "when it divides connected, cumulative, or similar federal actions into separate projects and thereby fails to address the true scope and impact of the activities that should be under consideration." *Id.* at 1313.

Based on its finding that during FERC's consideration of the application for the Northeast Upgrade Project, the other three upgrade projects were either under construction or pending before FERC for environmental review and approval, reflecting a "complete overhaul and upgrade" of a portion of the 300 Line, the court concluded that the Northeast Upgrade Project was "indisputably related and significantly 'connected' to the other three pipeline upgrade projects." *Id.* at 1314.

The court also held that FERC failed to demonstrate the projects had either logical termini or substantial independent utility, the two relevant factors cited in *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 298 (D.C. Cir. 1987) (*Taxpayers Watchdog*). In *Taxpayers Watchdog*, the D.C. Circuit held the rule against segmentation was not required to be applied in every situation, and noted that, in determining the appropriate scope of an EIS, courts had considered such factors as whether the proposed segment: "(1) has logical termini; (2) has substantial independent utility; (3) does not foreclose

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the opportunity to consider alternatives; and (4) does not irretrievably commit federal funds for closely related projects.” *Taxpayers Watchdog*, 819 F.2d at 298.

With respect to logical termini, the court explained that FERC did not argue that the four projects “were properly divided pursuant to some ‘logical termini,’ or rational end points.” *Delaware Riverkeeper*, 753 F.3d at 1309. Rather, FERC simply argued that its choice was not arbitrary and capricious because “one terminus is no more logical than another.” *Id.* The court rejected FERC’s argument, explaining that, “[u]nder this line of reasoning, FERC could have certified pipeline construction in one-mile sections, or hundred-yard sections, or one-foot sections.” *Id.* The court next found that FERC also failed to show that the Northeast Upgrade Project had “substantial independent utility” separate from the other three upgrade projects. *Id.* The court found unpersuasive FERC’s contention that the Northeast Upgrade Project had independent utility because the company had secured new shipping contracts in anticipation of the increased capacity that would come with the completion of the project. Instead, the court concluded that the Northeast Upgrade Project’s utility, both functionally and financially, was inextricably intertwined with the other three improvement projects on Tennessee’s 300 Line. *Id.* at 1317.

The court also placed significant importance on the timing of the four projects and the fact that there was temporal overlap between the projects. While the court acknowledged that, separated by more time, the projects could have independent utility from each other—using a decade of separation as an “obvious example” where timing would support a conclusion that the projects had independent utility from each other—the court concluded that the timing in this case did not support the independence of the projects. *Id.* at 1319.

The court’s treatment of the environmental groups’ cumulative impacts claim was comparatively brief, but worth noting. In holding that FERC’s EA was “deficient in its failure to include any meaningful analysis of the cumulative impacts” of Tennessee’s projects, the court explained that “a meaningful cumulative impact analysis must identify (1) the area in which the effects of the proposed project will be felt; (2) the impacts that are expected in that area from the proposed project; (3) other actions—past, present, and proposed, and reasonably foreseeable—that have had or are expected to have impacts in the same area; (4) the impacts or expected impacts from these other actions; and (5) the overall impact that can be expected if the individual impacts are allowed to accumulate.” *Id.* (citing *Grand Canyon Trust v. FAA*, 290 F.3d 339, 345 (D.C. Cir. 2002)).

The court concluded that the other three upgrade projects were clearly “other actions—past, present, and proposed, and reasonably foreseeable.” *Id.* It found that the record did not support FERC’s claim that the construction impacts were temporary and separated in time and distance from the Northeast Upgrade Project. Although the court acknowledged that the EA contained a “few pages” discussing potential cumulative impacts with respect to the Northeast Upgrade Project, it found that the EA did not demonstrate any serious consideration of the cumulative effects of the other upgrade projects on the 300 Line. *Id.* It therefore concluded that, “[i]n light of the close connection between the various sections of the line that have been upgraded with new pipe and other infrastructure improvements, FERC was obliged to assess cumulative impacts by analyzing the Northeast Project in conjunction with the other three projects.” *Id.*

Concurring with respect to the court’s cumulative impacts holding and the judgment of the court (but not with respect to the court’s segmentation holding), one judge agreed that “[t]he close timing, functional interdependence, and physical connectedness of the four upgrade projects inform the need for FERC to address the cumulative impacts of the other projects within the Northeast Project’s EA.” *Id.* at 1320. The concurring opinion continued, explaining that “[h]ere, FERC utterly failed to explain why timing and distance—factors that actually show the connectedness of the projects—justify excluding the other upgrade projects from the cumulative impacts analysis.” *Id.* However, the opinion concluded that “the practical effect of the Court’s segmentation holding—now that several of the projects are complete—can only be FERC’s need for a more thorough cumulative impacts analysis.” *Id.* The court remanded the case for further consideration of the segmentation and cumulative impacts issues.

The court agreed that FERC had improperly segmented its NEPA review of the four upgrade projects and placed significant importance on the fact that there was temporal overlap between the projects.

On remand, FERC performed a supplemental environmental analysis and determined that the impacts of the four projects, when considered additively, would not have a significant impact on the environment. FERC also concluded that when considered cumulatively, the four projects would not give rise to cumulatively significant impacts. As a result, FERC declined to require additional mitigation measure for Tennessee’s Northeast Upgrade Project and the previously issued certificate for the project was essentially unaffected by the Remand Order.

The Remand Order provides guidance on how FERC will conduct its cumulative impacts analysis. Quoting from Council on Environmental Quality (CEQ) regulations, FERC explained that a cumulative impact “results from the incremental impact of the [proposed] action when added to other past, present, and reasonably foreseeable future actions.” Remand Order at 26. FERC also noted that when performing a cumulative impacts analysis consistent with CEQ guidance, FERC staff establishes a “region of influence” to define the area affected by the proposed action in which existing and reasonably foreseeable future actions may also result in cumulative impacts. This region of influence is established on a project-by-project basis and is specific to the resource affected and the magnitude of other projects being considered. Based on this framework, the supplemental environmental analysis performed by FERC staff in this case analyzed the cumulative impacts of the four projects.

The Remand Order also provides some guidance on what actions FERC considers “connected” for the purpose of combining the environmental review of proposed pipeline projects. Specifically, FERC stated that “[b]ecause pipelines are integrated systems, the engineering design of any additions to a pipeline system is necessarily reflective (or ‘dependent’) on the then-existing or anticipated state of the system to which they are being added. However, the fact that the engineering of one expansion recognizes components proposed in another, does not, in and of itself, compel a finding that the two projects are interdependent or connected for purposes of regulatory review.” Remand Order at n.35. Delaware Riverkeeper has filed a rehearing request of the Remand Order that is pending before FERC.

The court’s holding in *Delaware Riverkeeper* can be viewed as quite limited, only applying to multiple pipeline projects that result in a single pipeline within a portion of a pipeline’s system.

Consequences of Delaware Riverkeeper

Despite some expansive language, the court’s holding in *Delaware Riverkeeper* can be viewed as quite limited, only applying to multiple pipeline projects the “end result” of which “is a single pipeline running from the beginning to the end of [a portion of a pipeline’s system].” *Delaware Riverkeeper*, 753 F.3d at 1316. In addition, recent D.C. Circuit opinions since the case have seemingly narrowed its holding, both from a timing and interdependence perspective. In *Minisink Residents for Envtl. Pres. & Safety v. FERC*, 762 F.3d 97 (D.C. Cir. 2014) (*Minisink*), the D.C. Circuit again was faced with the argument that FERC had improperly segmented its review of multiple pipeline projects. The D.C. Circuit explained that in *Delaware Riverkeeper* the court “took pains to emphasize that the other three projects were all ‘either under construction or were also pending before [FERC] for environmental review and approval.’” *Id.* at 113 n.11 (quoting *Delaware Riverkeeper*, 753 F.3d at 1308). The court in *Minisink* also upheld FERC’s cumulative impacts analysis of the two different pipeline projects and concluded there would not be cumulatively significant impacts. *Minisink*, 762 F.3d at 113 n.11. Similarly, in *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301 (D.C. Cir. 2015), the D.C. Circuit emphasized that *Delaware Riverkeeper* applied to “financially and functionally interdependent pipeline improvements [with] no apparent logic to where one project began and the other ended.” *Id.* at 1326–27. These opinions narrow the scope of applicability of *Delaware Riverkeeper*.

Nevertheless, FERC (and, necessarily, the pipeline industry) will be forced to adapt to the long-term consequences of the D.C. Circuit indicating a willingness to withhold deference to FERC’s environmental review of pipeline projects,

and the extent to which such emboldens project opposition. For the agency’s part, it seems reasonable that FERC will give greater scrutiny and consideration to whether projects that are related in some way—e.g., affecting a common geographic area or proposed or under consideration by the agency during the same period of time—should be combined for purposes of environmental review. While some proposed projects may need to be combined into the same NEPA review, the concurring opinion shows a path forward for FERC, namely a more robust cumulative impacts analysis for projects that share common timing and geography.

The D.C. Circuit has explained that “[t]he rule against segmentation was developed to insure that interrelated projects, the overall effect of which is environmentally significant, not be fractionalized into smaller, less significant actions.” *Taxpayers Watchdog*, 819 F.2d 294, 298. Instead, the rule against segmentation is not required to be applied in every situation. If proposed projects have logical termini, substantial independent utility, do not foreclose the opportunity to consider alternatives, or do not irretrievably commit federal funds for closely related projects, the proposed actions are not considered connected and may be assessed separately. Similarly, the purpose of the requirement to assess the cumulative impacts of a given project “is to prevent agencies from dividing one project into multiple individual actions ‘each of which has an insignificant environmental impact, but which collectively have a substantial impact.’” *Natural Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288, 297–98 (D.C. Cir. 1988) (quoting *Thomas v. Peterson*, 753 F.2d 754, 758 (9th Cir.1985)).

In *Delaware Riverkeeper*, the court held that FERC’s EA was “deficient in its failure to include any meaningful analysis of the cumulative impacts” of Tennessee’s projects and identified the proper test FERC was meant to apply to its cumulative impacts analysis. As the court in *Delaware Riverkeeper* noted, the three other projects were clearly other past, present, and reasonably foreseeable actions that had impacts in the same area. Had FERC included the impacts of all of the other projects in its review of the Northeast Upgrade Project, the court could have reasonably concluded that FERC properly assessed all of the potential impacts of all four projects together. Therefore, due to its broad and inclusive scope, a proper cumulative impacts analysis would capture any other project that could arguably be considered “connected” for NEPA purposes and allow an agency to take a hard look at the impacts of those other projects.

Rather than combine multiple projects into a single review process, FERC may more thoroughly consider in its cumulative impacts analysis the “incremental impact of the action when added to other past, present, and reasonably foreseeable future actions.” 40 C.F.R. § 1508.7. On remand, FERC outlined its four-step process for performing a cumulative impacts analysis, consistent with *Delaware Riverkeeper*, in the supplemental environmental analysis attached to the Remand Order: (1) identify the significant cumulative effects issues associated with the proposed action; (2) establish the geographic scope for analysis; (3) establish the time frame for analysis, equal to the timespan of the direct and indirect impacts of a proposed project; and (4) identify other actions that potentially affect the same resources, ecosystems, and human communities that are affected by the proposed action. FERC’s articulation of this cumulative impacts analysis does not represent a significant departure from its current practice. This approach is not