

Lookadoo and Civins in Oil & Gas 360: Pipeline Ruling Unsettles Industry

September 1, 2017 Phil Lookadoo, Jeff Civins

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Oil & Gas 360 featured extensive analysis by Washington D.C.-based Haynes Boone Partner [Phil Lookadoo](#) and Austin-based Senior Counsel [Jeff Civins](#) in a report on the Aug. 22 decision of the U.S. Court of Appeals for the District of Columbia Circuit in *Sierra Club v. Federal Energy Regulatory Commission (FERC) and Duke Energy*. The court vacated FERC's certificate order and directed the agency to revise its environmental impact statement (EIS) to take into account greenhouse gas carbon emissions from downstream power plants using natural gas transported by a new pipeline.

The case involves three interstate natural gas pipeline segments transporting natural gas from an interconnection with the Transco pipeline in Alabama, through Georgia, to Florida, increasing that state's natural gas transport capacity. The Sierra Club and other petitioners opposed construction of one of the segments.

The petitioners claimed, among other things, that FERC issued an environmental impact statement without adequately taking into account the effects of the greenhouse gas emissions that would eventually impact climate change when the pipeline's largest customers, two utilities, burned the natural gas to make electricity for millions of Florida customers, [Oil & Gas 360 reported](#).

The project developers countered that having more natural gas available would allow the utilities to retire older, dirtier coal-fired power plants, a net benefit with regard to greenhouse gas emissions.

The court said FERC obeyed its environmental review mandate but that the EIS "should either have given a quantitative estimate of the downstream greenhouse gas emissions that will result from burning the natural gas that the pipelines will transport or explain why it could not have done so."

In a separate opinion concurring and dissenting, Circuit Judge Janice Rogers Brown pointed to the utilities' argument that there would be a gas shortage without the pipelines and said the law doesn't require FERC to discuss downstream greenhouse gas emissions.

Lookadoo and Civins told *Oil & Gas 360* that, although the court's decision did not order the pipeline to cease operating, the decision could delay use of the pipeline during the court-ordered further environmental review by FERC. While the court's decision would be unlikely to stop further construction or put an end to the project, it would likely influence future pipeline construction applications and decisions, they said.

NEPA, the National Environmental Policy Act, the basis for the decision, "doesn't compel a particular outcome, it requires agencies to look at a range of alternatives and their environmental impacts," Civins said.

The lawyers said that one question FERC now has to answer is, "Is there an increase in greenhouse gas emissions that is attributable to the pipeline?" According to the court's decision, in

preparing an EIS for proposed pipeline projects, FERC must now look at “greenhouse gas emissions [which] are an indirect effect of authorizing this project, which FERC could reasonably foresee, and which the agency has legal authority to mitigate.”

“FERC is being told by the court to find a way to quantify the emissions,” Lookadoo said. “The court is saying FERC needs to determine if there is any reasonable way to reduce GHGs, but how can a pipeline do that? The GHG emissions would be controlled by the power plants and the decisions of the government authorities that regulate those power plants.”

“Probably it will come down to FERC attempting to quantify emissions by highlighting any GHG reductions that natural gas will make by replacing coal to make electricity, and they will go on conducting business as usual,” Lookadoo said.

“The public needs a diverse portfolio of energy sources,” Civins said. “The remand from the court requires that FERC re-do the EIS to incorporate an accounting for greenhouse gas emissions downstream. As a result of this, FERC will likely come out in the same place. The court did not order the pipeline to cease operations while FERC looks at this.”

The key aspect, Lookadoo and Civins said, is that GHG emissions differ from other emissions and pollutants whose impacts are local: GHGs have global impacts that aren’t as direct and immediate as other pollutants. For greenhouse gases emitted downstream, it’s ultimately a question of what effect those particular emissions will then have on the planet, a new consideration for FERC.

“The uncertainties of trying to predict where things are going to go make it very difficult on industry to make and execute plans,” Civins told *Oil & Gas 360*. Lookadoo noted the strong dissent by Judge Brown and said, “The outcome could also change if a review of the court’s 2-1 split decision is sought.”

Elaborating on that analysis, Lookadoo noted that, in a previous EIS, involving a decision called *EarthReports*, FERC argued that “the Social Cost of Carbon is not useful for NEPA purposes, because several of its components are contested and because not every harm it accounts for is necessarily ‘significant’ within the meaning of NEPA.”

On remand, the court has ordered FERC to “explain in the EIS, as an aid to the relevant decisionmakers, whether the position on Social Cost of Carbon that the agency took in *EarthReports* still holds, and why.”

To read the full *Oil & Gas 360* article, click [here](#).