

Environmental Challenges Clash with Reality

Why FERC Can't Foresee Downstream Emissions

By **Emily P. Mallen and Katy Lukaszewski** | March 01, 2019

Natural gas produced in Texas has heated homes and powered businesses across America for decades. Gas from the state's shale plays such as Eagle Ford and Barnett is now also entering international markets through cross-border pipelines with Mexico and liquefied natural gas export terminals along the Gulf Coast of the United States. Almost all of the gas leaving Texas will inevitably make its way to end-users along pipeline or LNG facilities approved by the Federal Energy Regulatory Commission (FERC), the agency charged with making public interest determinations that permit these facilities' construction and operation. In recent years, FERC has been flooded with new pipeline and LNG project applications, with developers seeking to accommodate the growing appetite for natural gas.

This increased domestic reliance on natural gas and additional production for export has experienced opposition, primarily from environmental groups that favor lower-emitting energy sources over fossil fuels. Such groups often use FERC as a forum to litigate climate change, challenging its approval of projects under the National Environmental Policy Act. NEPA, which is intended to promote informed decision-making by federal agencies regarding a project's environmental impacts, does not mandate a particular outcome. It does obligate FERC to consider a proposed project's "reasonably foreseeable" indirect effects on the environment. Failure to do so could result in a court reversal of FERC's project approval.

Environmentalists argue that NEPA requires FERC to disclose and consider downstream greenhouse gas emissions from natural gas transported on proposed pipelines or exported from proposed LNG facilities. They contend that a project's perceived contribution to climate change bars FERC from finding the project in the public interest. A number of such challenges are pending in federal court on NEPA grounds.

Federal courts have repeatedly held with respect to LNG export facilities that downstream uses of natural gas are not an indirect effect that FERC must review under NEPA. This is because the Department of Energy, not FERC, has legal authority over exports. What remains in dispute is what constitutes reasonable foreseeability for NEPA purposes regarding FERC-approved natural gas pipelines. Sabal Trail, a 2017 federal court decision, vacated a FERC pipeline approval on NEPA grounds for failing to consider the indirect effects of downstream GHG emissions when the downstream users of the gas are known. In that case, FERC was aware that specific electric generation facilities would combust almost all of that pipeline's transported gas.

The Sabal Trail facts are unique in that it is rare for FERC or a pipeline operator to know about transported gas's exact downstream use. FERC recognized this in 2018, in the case of Dominion New Market, in which it rejected the need to quantify a project's downstream GHG emissions as a matter of policy when the gas's downstream uses are not known. Dominion New Market ended FERC's brief practice of performing worst-case "full burn" analyses that measured the potential GHG emissions from all the gas that could be transported on a permitted project. The agency determined that this type of analysis did not constitute "reasonable forecasting" under NEPA when end-uses were unknown. FERC emphasized that it cannot reasonably determine the level of environmental impacts when it does not know whether the transported natural gas is adding to the overall consumption of natural gas, displacing natural gas supplied from elsewhere, or replacing other, higher-emitting fuel sources, such as coal for electricity generation.

FERC's commissioners currently disagree over whether downstream GHG emissions should be considered an indirect effect of approving a natural gas pipeline, and whether a full-burn analysis is an informative analytical tool. Yet, for NEPA purposes, the emissions cannot be an indirect effect unless their

use is knowable, as in Sabal Trail. Downstream uses generally are unknowable specifically because of the way FERC regulates the highly integrated natural gas pipeline network, which spans hundreds of thousands of miles. Natural gas can end up almost anywhere at any time to meet the needs of consumers.

This is particularly true because of the secondary market for natural gas that has developed due to FERC regulatory policies, spurred on by congressional mandates to increase consumer choice and to remove bottlenecks, focus on promoting an economically efficient, competitive and market-responsive integrated pipeline system. Natural gas pipelines, for example, must allow their shippers to “segment” their capacity to transport it to multiple delivery points, and to release their unneeded capacity to replacement shippers, who often utilize the capacity at different receipt or delivery points, to move natural gas to where it is valued most.

While electric-generation facilities, such as the end-users in Sabal Trail, may obtain capacity through implementation of these rules, the secondary market often is populated with gas marketers who buy, sell, and re-sell natural gas to customers based on spot and futures market prices, sometimes requiring multiple interim resellers. This fluidity can foreclose FERC from determining whether that natural gas is used for industrial feedstock or combusted, and whether it is adding to aggregate GHG emissions. Thus, for pipelines that are fully integrated with the national grid, potential downstream GHG emissions from gas transported on any particular pipeline are not feasibly quantifiable. As such, for NEPA purposes, they are not reasonably foreseeable.

FERC’s regulatory scheme, which focuses on promoting the natural gas infrastructure construction and connectivity, underscores why FERC is an imperfect agency to litigate climate change policy. Instead, the agency’s primary goal is to increase access and lower prices for consumers. FERC will nevertheless continue to find itself in the middle as its own commissioners debate the agency’s NEPA obligations. This certainty for conflict creates uncertainty for the multitude of Texas-based midstream companies contributing to the grid’s build-out.

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