# The destiny of natural gas: Recent rulings on the foreseeability of downstream greenhouse gas emissions

**Megan Berge and Kyle Henne**

*Megan Berge is a partner at Baker Botts L.L.P., where she supports clients in all applications of environmental law, including litigation, rulemaking and permit appeals, regulatory advocacy, and compliance counseling. She has an active practice representing power and energy companies and trade associations. Kyle Henne is an associate in the Global Projects group at Baker Botts L.L.P. in Washington, D.C. where he works on regulatory and transactional matters in the energy industry.*

## Overview

When asked to compare key legal developments related to greenhouse gas (GHG) emissions in the summer of 2016 and the summer of 2017, many practitioners will launch into a discussion of "regulatory reforms" and the "Clean Power Plan." But another change that should not escape notice relates to the circumstances in which agencies must consider *downstream* GHG emissions in environmental impact statements published pursuant to the National Environmental Policy Act (NEPA). Virtually identical U.S. Court of Appeals for the D.C. Circuit panels, in rulings a little over a year apart, examined the same question—what environmental impacts are truly caused by an agency action where additional independent regulatory approval is required—and came back with different answers. This inconsistency raises numerous questions for future environmental impact statements, three of which are examined here.

## Expansion or departure

On August 22, 2017, the D.C. Circuit ruled on challenges to the Federal Energy Regulatory Commission's (FERC) issuance of certificates of public convenience and necessity for the Southeast Market Pipelines Project (the Project). *Sierra Club v. FERC*, Case No. 16-1329 (D.C. Cir. Aug. 22, 2017). Petitioners asserted that the environmental impact statement underlying the certificates was inadequate because it failed to quantify *indirect* effects of the Project, specifically GHG emissions from the combustion of the natural gas transported by the pipeline. The majority of Judges Rogers and Griffith agreed with petitioners that such effects were "reasonably foreseeable" and, thus, should have been considered by the agency.

Vigorously dissenting, Judge Brown highlighted the incongruity of the majority opinion with two 2016 cases addressing liquid natural gas terminal approvals issued by FERC. In those cases, Judges Rogers, Griffith, and Millett held that FERC was not required to consider indirect effects of the natural gas exported from those terminals because the U.S. Department Energy had sole authority to license the ultimate export of any natural gas going through the terminals. *See*

*Sierra Club v. FERC*, 827 F.3d 36 (D.C. Cir. 2016), and *Sierra Club v. FERC,* 827 F.3d 59 (D.C. Cir. 2016). Similarly, Judge Brown argued, power plants burning natural gas from the Project cannot ultimately be built or expanded in Florida without approval from the relevant Florida regulator and, thus, FERC is not required to consider such emissions.

While it is clear the downstream GHG emissions associated with the Project will have to be considered (FERC has done so), it is not clear whether the court's "foreseeability" interpretation will be deemed by later courts to apply only to the facts presented in that case or more broadly applicable to other projects.

**Emissions estimates or concrete harms**

In ruling that FERC must "either quantify and consider the [P]roject's downstream carbon emissions or explain in more detail why it cannot do so," the D.C. Circuit implicitly acknowledged the challenge facing the agency: the lack of a standard methodology for making this sort of prediction. If upheld, FERC's remand response may become the template for future GHG emissions impact analyses.

Immediately following the court's decision, FERC prepared and issued for public comment a Draft Supplemental Environmental Impact Statement (DSEIS) to address the identified deficiencies. The DSEIS, which spans only five pages, considers the:

- Current trends in Florida power plants' fuel sources;
- Total increase in gas flow into Florida resulting from the Project;
- GHGs resulting from burning all of the Project's natural gas; and
- Estimated net-GHG emissions, accounting for displacement of coal/oil fired generation.

Notably, FERC also squarely addressed whether there is an appropriate tool to convert emissions estimates into concrete environmental harms. FERC determined that there is no suitable method, including the Social Cost of Carbon, to attribute discrete environmental effects to downstream GHG emissions. The Social Cost of Carbon is a dollar-denominated estimate of the long-term damage caused by carbon dioxide emissions in a given year.

The court's eventual evaluation of the DSEIS—particularly FERC's continued refusal to apply the Social Cost of Carbon—will determine whether downstream GHG emissions impact analyses can consist of five pages focused on benchmarking metrics *or* if they must go the extra step urged by environmentalists and identify concrete harms from a project.

**Administrative flaw or substantive gap**

Potentially more impactful than the specific NEPA deficiencies identified is the D.C. Circuit's decision to vacate the underlying FERC order rather than simply remanding to FERC. *See Sierra Club v. FERC*, Case No. 16-1329 (D.C. Cir. Aug. 22, 2017). If the court stands by its decision on vacatur on reconsideration, it would considerably raise the stakes associated with challenges to impact statement sufficiency.

Although in part still under construction, large sections of the Project are already in full operation, providing hundreds of thousands of dekatherms of natural gas transportation service. If FERC's order approving the Project is vacated, the Project would be forced to cease operation and ongoing construction, at least temporarily. In a challenge to the vacatur decision, Project advocates have described just how dire the impact of such a shutdown would be. Aside from nearly $1.5 million per day of lost revenues, a shutdown would disrupt Florida's electric generation market and the interstate natural gas market and would potentially result in significant litigation with landowners, gas transportation service counterparties, and financial backers of the Project.

The consequences of the Project's shutdown are not unique. Any undertaking with heavy upfront investment requiring federal approval is likely to drive serious market disruptions and financial losses if halted mid-operation or mid-construction. As such, a shift in the D.C. Circuit's position in favor of vacating and remanding agency decisions, rather than remanding alone, will require careful consideration by project developers seeking certainty.