HUNTON & WILLIAMS

Client Alert

June 2014

DC Circuit Invalidates FERC Approval of Natural Gas Pipeline Upgrade Project on NEPA Grounds For Failure to Assess Cumulative Impacts of Related Upgrade Projects

Text On June 6, 2014, the US Court of Appeals for the DC Circuit held that the Federal Energy Regulatory Commission ("FERC" or "Commission") violated the National Environmental Policy Act ("NEPA") by failing to address the cumulative impacts when it issued a certificate of public convenience and necessity for the Northeast Project, an upgrade project for a 40-mile segment of a natural gas pipeline. The court found that FERC should have considered the Northeast Project in conjunction with three other upgrade projects in other locations along the same pipeline that were under separate FERC review. The court also held that FERC impermissibly segmented its NEPA review of the projects.[1] This decision is likely to result in more expansive NEPA review processes for all existing and future pipeline projects, thereby delaying the FERC approval process and increasing the number of related pipeline projects that are reviewed cumulatively.

In *Delaware Riverkeeper Network v. Federal Energy Regulatory Commission*, DC Cir. No. 13-1015 (June 6, 2014), the court held that the Commission violated NEPA when it reviewed a pipeline improvement project separately from three other projects that together upgraded a large portion of continuous pipeline. Under NEPA, federal agencies must consider the environmental effects of a proposed major action, like pipeline construction, before allowing it to proceed. The agency must issue an environmental assessment ("EA") finding either that the project will result in no significant impact or that a more intensive environmental impact statement ("EIS") is necessary to examine environmental impacts. Council on Environmental Quality ("CEQ") regulations mandate FERC to consider the cumulative effect of "connected," "cumulative" and "similar" actions in the EA.[2]

Between 2010 and 2011, the Tennessee Gas Pipeline Company ("Tennessee Gas") applied to FERC for certification of four projects designed to upgrade and increase the capacity of approximately 200 miles of continuous pipeline. The third project, called the Northeast Project, was the focus of the case before the court. FERC reviewed the Northeast Project, found no significant impact and issued an order approving the project. Several environmental groups, including the Delaware Riverkeeper Network, petitioned for review of the FERC certificate, arguing that the Commission had impermissibly segmented its review. The Commission denied Riverkeeper's request for a rehearing because it maintained that "each project is a stand-alone project and designed to provide contracted-for volumes of gas to different customers within different timeframes." The environmental groups then filed a petition for review of the order with the US Court of Appeals for the DC Circuit.

Petitioners argued that the Northeast Project and the other three projects were "connected, contemporaneous, closely related, and interdependent," and that FERC violated NEPA in failing to

[1] Judge Brown concurred in part and concurred in the judgment, but would have focused only on the need for a more thorough cumulative impacts analysis rather than reaching the question of segmentation. Judge Silberman joined Judge Edwards' opinion in full, but separately concurred to discuss the use of acronyms in Petitioner's brief.

[2] 40 C.F.R. § 1508.25(a).

address them cumulatively. FERC contended that it was not required to look at the Northeast Project in conjunction with the three other upgrade projects because the four factors necessary to show that physically connected projects can be analyzed separately under NEPA were all satisfied. Those four factors include whether the project: "(1) has logical termini, [or rational end points]; (2) has substantial independent utility; (3) does not foreclose the opportunity to consider alternatives; and (4) does not irretrievably commit federal funds for closely related projects."[3] The court disagreed, finding that the Northeast Project did not have a logical terminus or substantial independent utility.

FERC asserted that the Northeast Project is no more or less logical a terminus than any other. The court held that FERC's reasoning "will not do" because it would allow sections of pipeline in any arbitrary increment — one-foot sections, for example — to be reviewed separately. Instead, the court found that the Northeast Project does not have a logical terminus because it is physically interdependent with the rest of the pipeline and has no physical offshoots. Next, FERC asserted that the Northeast Project had substantial independent utility because Tennessee Gas secured new customer contracts for the increase in capacity that the project would create to meet specific customer demand. However, the court reasoned that the Northeast Project was financially interdependent with the three other projects because they decreased the cost of the Northeast Project. Additionally, the court reasoned that there was no substantial independent utility because the projects were functionally interdependent — gas cannot be taken from only the portion of pipeline upgraded in the Northeast Project; instead it must pass through the entire line before it reaches the consumer.

Tennessee Gas and FERC also contended that it was appropriate to review the proposed projects separately because the applications for certification were filed at different times. The court disagreed, emphasizing that the projects were temporally connected because one project had begun and two other applications were pending by the time FERC was considering the Northeast Project. Notably, the court indicated that if the projects had been separated by more time, each stage of construction may have been able to function on its own, and then the projects might have been disconnected enough to be reviewed separately. The court remanded the case to FERC for further consideration of the segmentation and cumulative impacts issues. FERC will likely need to publish a revised EA (and perhaps complete an EIS) for the Northeast Project and hold a new notice-and-comment period before reissuing its approval.

This case has major implications for both new pipeline projects and projects to expand or update existing pipelines. It is likely to make the FERC approval process more extensive, in that FERC has to consider projects that affect the same linear pipeline cumulatively. In turn, this stricter scrutiny of cumulative environmental effects will likely increase the time it takes FERC to review applications and will likely increase the number of more in-depth EIS documents prepared by FERC to evaluate pipeline projects.

About Hunton & Williams LLP's Pipeline Practice

Hunton & Williams' pipeline practice has national experience resolving the regulatory, environmental and enforcement issues that arise during the construction, permitting, operation and maintenance of oil and gas pipelines. Leveraging the talent and experience of more than 75 regulatory lawyers, and strong working relationships with the various federal and state agencies that regulate pipeline activities, Hunton & Williams addresses its clients' evolving legal and business needs as efficiently and effectively as possible. As the pipeline industry becomes subject to increased scrutiny from both the government and private sectors, it is essential that companies coordinate the way in which they address regulatory, civil and potential criminal issues, which often arise simultaneously. Hunton & Williams is experienced in balancing these complex strategic issues while working to preserve all applicable defenses and privileges.

[3] These factors are set forth in *Taxpayers Watchdog v. Stanley*, 819 F.2d 294 (DC Cir. 1987).

Contacts

Deidre G. Duncan
dduncan@hunton.com

Robert E. Hogfoss
rhogfoss@hunton.com

Catherine D. Little
clittle@hunton.com

Linda L. Walsh
lwalsh@hunton.com

Karma B. Brown
kbbrown@hunton.com

Kerry L. McGrath
kmcgrath@hunton.com

Charles D. Case
ccase@hunton.com