FERC Ignores D.C. Circuit to Overlook Climate Impacts of Gas Projects

INTRODUCTION

The United States' energy sector is the country's "principal . . . contribution to climate change."[1] The Federal Energy Regulatory Commission (FERC) "regulates significant swaths of the U.S. energy industry, including the wholesale sale and transmission of electricity," the permitting of several types of energy infrastructure projects, and the transportation of oil and natural gas, imbuing the Commission's decisions with serious climate impacts.[2] The Commission approving natural gas pipelines in the face of climate change is an "increasingly high-profile issue" and "has been the subject of significant litigation in recent years."[3]

Two recent D.C. Circuit decisions, *Sierra Club* and *Birckhead*, clarified how FERC must consider the climate impacts of infrastructure projects under the National Environmental Policy Act of 1969 (NEPA).[4] In *Sierra Club*, the court held that a natural gas pipeline's downstream greenhouse gas (GHG) emissions were reasonably foreseeable indirect environmental effects when FERC knew that the gas was going to be combusted in specific powerplants.[5] This decision can be interpreted extremely narrowly to stand for the proposition that downstream GHG emissions are foreseeable *only* when FERC knows the exact destination and end-use of natural gas.[6] In *Birckhead*, the court explicitly rejected a narrow interpretation of *Sierra Club*.[7] The case involved whether upstream and downstream GHG emissions were indirect effects of installing a natural gas compression facility, infrastructure that compresses gas so that more can be transported in a pipeline.[8] While the court ultimately held that it lacked jurisdiction to rule on this issue,[9] it stated in dicta that projects' indirect GHG

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1. Richard Glick & Matthew Christiansen, *FERC and Climate Change*, 40 ENERGY L.J. 1, 3 (2019).
2. *See id.* at 4.
3. *Id.* at 39.
4. Birckhead v. Fed. Energy Regulatory Comm'n, 925 F.3d 510 (D.C. Cir. 2019); Sierra Club v. Fed. Energy Regulatory Comm'n, 867 F.3d 1357 (D.C. Cir. 2017).
5. *Sierra Club*, 867 F.3d at 1372.
6. *See id.*
7. *Birckhead*, 925 F.3d at 518–19.
8. *Id.* at 514–15.
9. *See id.* at 516–21.

effects are not just foreseeable when the gas's destination and end-use are precisely known, thereby rejecting FERC's "extreme" interpretation of *Sierra Club*.[10] Instead, it provided that these decisions should be made on a case-by-case basis.[11]

Despite the dicta in *Birckhead*, many recent FERC decisions only recognized GHG emissions to be indirect effects of natural gas projects when the destination and end-use of gas was precisely known.[12] FERC Commissioner Glick opined in numerous dissents that by not fully considering the indirect climate effects of natural gas projects, FERC is snubbing the D.C. Circuit's interpretation and violating NEPA.[13] *Birckhead*'s dicta portends a future D.C. Circuit decision finding FERC in violation of NEPA and providing more stringent guidelines on how FERC must consider the climate impacts of projects under its purview.

I. BACKGROUND

A. Natural Gas in the United States

As of 2018, natural gas accounted for 31 percent of U.S. primary energy use and 35 percent of U.S. electricity generation.[14] Most of the natural gas consumed in the United States is produced domestically and is transported to customers via a vast, integrated pipeline network.[15] Of the 134 active natural gas pipeline projects that the U.S. Energy Information Administration (EIA) tracks, forty-six entered or were expected to enter service in 2019.[16] In 2018, one-third of carbon dioxide emissions in the electric power sector came from natural gas.[17] Approximately 97 percent of natural gas consumed in the United States is combusted, meaning that nearly all of the natural gas that is transported via pipelines causes GHG emissions.[18]

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10. *See id.* at 519–20.

11. *See id.*

12. *See, e.g.*, *E. Shore Nat. Gas Co.*, 169 F.E.R.C. ¶ 61,228 (2019); *Tenn. Gas Pipeline Co.*, 169 F.E.R.C. ¶ 61,230 (2019); *El Paso Nat. Gas Co.*, 169 F.E.R.C. ¶ 61,133 (2019).

13. *E.g.*, 169 F.E.R.C. ¶ 61,228.

14. *U.S. Energy Facts Explained*, U.S. ENERGY INFO. ADMIN., https://www.eia.gov/energyexplained/us-energy-facts/ (last updated Aug. 28, 2020); *Frequently Asked Questions: What is U.S. Electricity Generation by Source?*, U.S. ENERGY INFO. ADMIN., https://www.eia.gov/tools/faqs/faq.php?id=427&t=3 (last updated Feb. 27, 2020).

15. *Natural Gas Explained*, U.S. ENERGY INFO. ADMIN., https://www.eia.gov/energyexplained/natural-gas/ (last updated Dec. 6, 2019).

16. Katie Dyl, *Today in Energy*, U.S. ENERGY INFO. ADMIN., https://www.eia.gov/todayinenergy/detail.php?id=41933 (last updated Nov. 7, 2019).

17. *Frequently Asked Questions: How Much of U.S. Carbon Dioxide Emissions are Associated with Electricity Generation?* U.S. ENERGY INFO. ADMIN., https://www.eia.gov/tools/faqs/faq.php?id=77&t=11 (last updated Oct. 25, 2019).

18. U.S. ENERGY INFO. ADMIN., SEPTEMBER 2019 MONTHLY ENERGY REVIEW 22, 97–99 (2019) (reporting that in 2018, 778 billion cubic feet (Bcf) of natural gas had a noncombustion use compared to 29,956 Bcf of total consumption), *available at* https://www.eia.gov/totalenergy/data/monthly/archive/00351909.pdf.

B. Natural Gas Act and NEPA

Section 7 of the Natural Gas Act (NGA) gives FERC jurisdiction to approve or deny the construction of interstate natural gas pipelines.[19] Before a pipeline can be built, FERC must grant the developer a "certificate of public convenience and necessity"[20] upon a finding that the project will serve the public interest.[21] FERC evaluates public interest by weighing the public benefit of a project against its adverse effects, including environmental effects.[22]

FERC must also prepare an Environmental Impact Statement (EIS) for new gas projects because NEPA requires one for every "major federal action . . . significantly affecting the quality of the human environment."[23] NEPA review does not require a specific substantive outcome, it only requires agencies to take a "hard look" at the environmental consequences before commencing an action.[24] During the NEPA review process, the Commission must consider the direct and indirect environmental effects of a pipeline project.[25] Indirect effects are "later in time or farther removed in distance, but are still reasonably foreseeable," meaning that "they are sufficiently likely to occur [such] that a person of ordinary prudence would take [them] into account in reaching a decision."[26] The Commission has determined that GHG emissions can be considered indirect effects of natural gas projects.[27] In theory, taking a "hard look" at potential GHG emissions would lead to fewer projects being deemed in the public interest and fewer being certified.

II. RECENT D.C. CIRCUIT DECISIONS

Two recent D.C. Circuit decisions developed how FERC must consider the climate impacts of gas projects when conducting NEPA reviews.

A. Sierra Club v. Federal Energy Regulatory Commission

In *Sierra Club*, the court held that a natural gas pipeline's downstream GHG emissions were reasonably foreseeable indirect effects of the project when FERC

19. *See* Natural Gas Act § 7, 15 U.S.C. § 717f (2018).
20. *Id.* § 717f(c)(1)(A).
21. *See id.* § 717f; Sierra Club v. Fed. Energy Regulatory Comm'n, 867 F.3d 1357, 1364 (D.C. Cir. 2017).
22. *Sierra Club*, 867 F.3d at 1373.
23. *See* 42 U.S.C. § 4332(C) (2018); *Sierra Club*, 867 F.3d at 1364 (quoting 42 U.S.C. § 4332(C) (2012)).
24. *Sierra Club*, 867 F.3d at 1376.
25. *Id.* at 1373.
26. *Id.* at 1371 (quoting EarthReports, Inc. v. Fed. Energy Regulatory Comm'n, 828 F.3d 949, 955 (D.C. Cir. 2016)); 40 C.F.R. 1508.8(b) (2020).
27. When GHG emissions are indirect effects, the EIS must include a discussion of the significance of this indirect effect as well as "the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions." *See* 40 C.F.R. §1508.7 (2020).

knew that the gas was going to be combusted in specific powerplants.[28] In this case, environmental groups and landowners challenged FERC's approval of the construction and operation of three new interstate natural gas pipelines in the southeastern United States.[29] While FERC argued that it was impossible to know the quantity of GHG emissions that would result from the projects because of several "uncertain variables," the court reasoned that NEPA analysis necessarily involves "reasonable forecasting" and making "educated assumptions about an uncertain future."[30]

The court stipulated that GHG quantification is not required *every time* emissions are an indirect effect of an agency action because in some cases it may not be feasible.[31] However, these situations require a satisfactory explanation as to why quantification is not feasible.[32] The court concluded that the EIS for the pipelines should have either estimated downstream GHG emissions or explained more specifically why it did not do so.[33]

B. Birckhead v. Federal Energy Regulatory Commission

Two years later in *Birckhead*, the D.C. Circuit provided substantial guidance in dicta on how FERC should consider the indirect effects of natural gas projects under NEPA.[34] FERC argued that GHG emissions were only reasonably foreseeable if the destination and end-use of gas were specifically known, taking the narrowest possible interpretation of *Sierra Club*—but the court rejected this "extreme" interpretation.[35] Rather, the court stated that whether downstream GHG emissions qualify as indirect effects should be decided on a case-by-case basis.[36]

In *Birckhead*, FERC authorized the construction and operation of a new natural gas compression facility near Nashville, Tennessee. Residents and business owners represented by an environmental group sued FERC, alleging that it violated NEPA by failing to adequately address the project's indirect environmental effects.[37] Specifically, plaintiffs alleged that FERC failed to consider the GHG emissions from increased gas production upstream of the compression facility and increased gas combustion downstream of the facility.[38]

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28. *Sierra Club*, 867 F.3d at 1372.
29. *Id.* at 1363.
30. *Id.* at 1374; *see also* Del. Riverkeeper v. Fed. Energy Regulatory Comm'n, 753 F.3d 1304, 1310 (D.C. Cir. 2014) ("While the statute does not demand forecasting that is not 'meaningfully possible,' an agency must fulfill its duties to the 'fullest extent possible.'" (quoting Scientists Inst. For Pub. Info. v. Atomic Energy Comm'n, 481 F.2d 1079, 1092 (D.C. Cir. 1973)).
31. *Sierra Club*, 867 F.3d at 1374.
32. *Id.*
33. *Id.*
34. Birckhead v. Fed. Energy Regulatory Comm'n, 925 F.3d 510, 519 (D.C. Cir. 2019).
35. *Id.*
36. *Id.*
37. *Id.* at 515.
38. *Id.*

FERC had not requested additional records from the developer to assess these effects (e.g., how large the source area for the gas was or the number or location of any additional natural gas wells), claiming that this would be an "exercise in futility."[39]

Despite the court's "misgivings regarding the Commission's decidedly less-than-dogged efforts" to obtain information, the environmental group did not identify any specific evidence that would have allowed FERC to better predict emissions, nor did it bring up the record-development issue (FERC failing to request additional records) before the Commission.[40] Because the issue was not addressed in the agency proceeding, the D.C. Circuit concluded that it lacked jurisdiction to decide whether the agency's actions were arbitrary and capricious thus violating NEPA.[41]

III. RECENT FERC DECISIONS

FERC recently approved many projects under an extremely narrow construal of *Sierra Club*.[42] In Commissioner Glick's words, FERC is continuing "to thumb its nose at the court by stubbornly clinging" to an interpretation of *Sierra Club* that *Birckhead* repudiated.[43]

For example, FERC recently approved the Adelphia Gateway natural gas project in Pennsylvania and Delaware without seriously considering its potential GHG emissions.[44] FERC held that "because the end-use of this volume of gas as well as the uncontracted for volumes is unknown, any potential greenhouse gas emissions associated with the ultimate combustion of the transported gas are not reasonably foreseeable, and therefore not an indirect impact of the [project]."[45] This determination came after FERC sought information about the end-use of the gas, and the company responded that the gas would be delivered to the interstate grid with the end-use unknown.[46] FERC concluded that because it was unable to assess whether the project's contribution to climate change would be significant, the project would have no significant environmental impact.[47]

In a biting dissent, FERC Commissioner Glick reasoned that there were "plenty of steps" that the Commission could have taken to consider the project's GHG emissions if it "were actually inclined to take a 'hard look' at climate change."[48] He cited that 97 percent of all natural gas consumed in the United

39. *Id.* at 517.
40. *Id.* at 520.
41. *Id.*
42. *See, e.g.*, *E. Shore Nat. Gas Co*., 169 F.E.R.C. ¶ 61,228 (2019); *Tenn. Gas Pipeline Co.*, 169 F.E.R.C. ¶ 61,230 (2019); *El Paso Nat. Gas Co.*, 169 F.E.R.C. ¶ 61,133 (2019).
43. 169 F.E.R.C. ¶ 61,228, at ¶ 9 (Glick, Comm'r, dissenting in part).
44. *See Adelphia Gateway, L.L.C.*, 169 F.E.R.C. ¶ 61,220 (2019).
45. *Id.* at ¶ 249.
46. *Id.* at ¶¶ 3–4.
47. *Id.* at ¶ 263.
48. *Id.* at ¶ 7 (Glick, Comm'r, dissenting in part).

States is combusted[49] and suggested that this fact "on its own might be sufficient to make downstream emissions reasonably foreseeable, at least absent contrary evidence[,]" because "some educated assumptions are inevitable in the NEPA process."[50] He concluded that a public interest determination that "systematically exclude[d] the most important environmental consideration of our time was contrary to law, arbitrary and capricious, and not the product of reasoned decision-making."[51] The Commissioner also criticized FERC's non sequitur conclusion that an unknown significance equals no significance as "ludicrous, unreasoned, and an abdication of our responsibility to give climate change the hard look that the law demands."[52]

IV. ANALYSIS

By adhering to the extremely narrow interpretation of *Sierra Club* that *Birckhead* expressly rejected in dicta, many recent FERC decisions likely violate NEPA.[53] We can expect a D.C. Circuit decision in the near future that recognizes this and provides more stringent rules on how FERC must consider the climate impacts of projects under its purview.

Birckhead ensured that FERC will at least attempt to develop the record by requesting information regarding the destination and end-use of natural gas that companies are transporting.[54] Based on their apparent desire to avoid assessing GHG impacts in recent FERC decisions, Trump-appointed Commissioners Chatterjee and McNamee will likely not be overzealous in their requests. When companies respond that they are unsure precisely where gas will be consumed, FERC will likely continue to conclude that downstream GHG emissions are not reasonably foreseeable.[55] This would strike a person of ordinary prudence as patently absurd.[56] As Commissioner Glick frequently reminds us, 97 percent of natural gas that is consumed in the United States is combusted to produce heat and power, thereby producing GHG emissions.[57] This fact *should* be sufficient to make GHG emissions of transported or compressed gas reasonably foreseeable absent contrary evidence.[58] If 97 percent of toothpaste were used to brush teeth and was ultimately spit into the sink, would a reasonable person

49. *Id.*

50. *Id.* (quoting Sierra Club v. Fed. Energy Regulatory Comm'n, 867 F.3d 1357 (D.C. Cir. 2017)).

51. *Id.* at ¶ 5.

52. *See, e.g.*, *E. Shore Nat. Gas Co.*, 169 F.E.R.C. ¶ 61,228 (2019); *Tenn. Gas Pipeline Co.*, 169 F.E.R.C. ¶ 61,230 (2019); *El Paso Nat. Gas Co.*, 169 F.E.R.C. ¶ 61,133 (2019).

53. *See, e.g.*, *E. Shore Nat. Gas Co.*, 169 F.E.R.C. ¶ 61,228 (2019); *Tenn. Gas Pipeline Co.*, 169 F.E.R.C. ¶ 61,230 (2019); *El Paso Nat. Gas Co.*, 169 F.E.R.C. ¶ 61,133 (2019).

54. *See* Birckhead v. Fed. Energy Regulatory Comm'n, 925 F.3d 510 (D.C. Cir. 2019).

55. *See, e.g.*, 169 F.E.R.C. ¶ 61,228; 169 F.E.R.C. ¶ 61,230; 169 F.E.R.C. ¶ 61,133.

56. *See* Sierra Club v. Fed. Energy Regulatory Comm'n, 867 F.3d 1357, 1371–72 (D.C. Cir. 2017).

57. U.S. ENERGY INFO. ADMIN., *supra* note 18, at 22, 97.

58. This is a stronger version of Commissioner Glick's argument that this fact *might* be sufficient to make GHG emissions foreseeable absent contrary evidence. *See* 169 F.E.R.C. ¶ 61,230, at ¶ 8 (Glick, Comm'r, dissenting in part).

foresee toothpaste washing down the drain? While the amount of GHGs generated by combusting natural gas can vary depending on how it is burned, this leaves only the *level* of emissions in question, not *whether* emissions will foreseeably be produced.[59] Declaring that GHG emissions are not reasonably foreseeable indirect effects of developing gas projects when the location and end-use are not specifically known is a blatant assault on the reasonably foreseeable standard.

FERC's interpretation also offends precedent and NEPA. Straightforward readings of *Sierra Club* and *Birckhead* compel FERC to conclude that downstream GHG emissions are foreseeable in situations far beyond those where the exact destination and end-use of gas are known.[60] NEPA analysis necessarily requires that agencies sometimes make "educated assumptions about an uncertain future[,]" and FERC is required to "fulfill its duties to the fullest extent possible."[61] FERC is only exempt from forecasting when it is not "meaningfully possible," and in this event, it must explain why it cannot make an estimation.[62] Impelled by these imperatives, FERC should be estimating downstream GHG emissions for the vast majority of natural gas being compressed or transported. Instead, the Commission has used *Sierra Club*'s stipulation that GHG quantification is not required "*every time*" (i.e. when it is not feasible) to support the conclusion that FERC is *only* required to quantify GHG emissions when the end-use and location is known with specificity.[63] This directly conflicts with *Birckhead*'s admonition in dicta that *Sierra Club* "hardly suggests" emissions are an indirect effect only when a gas project's destination and end-use are known.[64] The *Birckhead* court went as far as to label this position "extreme."[65] *Sierra Club*'s holding alongside *Birckhead*'s dicta suggests that FERC has repeatedly violated NEPA in its recent decisions.[66]

Finally, FERC's latest argument that projects will have no significant environmental impact because the Commission is unable to assess the

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59. Moreover, it would not be difficult to estimate GHG emissions using the 97 percent statistic or some similar metric along with use-by-sector and facility information for a given region. However, courts have held that there are several situations in which FERC does not need to estimate emissions. But in those cases, FERC was exempt from NEPA for one reason or another. For example, FERC does not have to make an estimation when approving liquefied natural gas export terminals, *see Adelphia Gateway, L.L.C.*, 169 F.E.R.C. ¶ 61,220, ¶ 240 (2019), and it may not be required to when new infrastructure directly replaces or displaces existing infrastructure. *See Sierra Club*, 867 F.3d at 1372. When the Commission knows that gas will not be combusted, i.e., in the 3 percent of cases where the gas will be used as a chemical feedstock or to make nitrogenous fertilizer, FERC need not estimate GHG emissions. *See* U.S. ENERGY INFO. ADMIN., *supra* note 18 at, 22, 97.

60. *See* Birckhead v. Fed. Energy Regulatory Comm'n, 925 F.3d 510, 520 (D.C. Cir. 2019).

61. *See Sierra Club*, 867 F.3d at 1357; Scientists Inst. For Pub. Info. v. Atomic Energy Comm'n, 481 F.2d 1079, 1092 (D.C. Cir. 1973).

62. *Scientists Inst. For Pub. Info.*, 481 F.2d at 1092.

63. *See Sierra Club*, 867 F.3d at 1374.

64. *See Birckhead*, 925 F.3d at 519.

65. *Id.*

66. *See id.*

significance of projects' effects on climate change is illogical on its face.[67] The decisions that rely on this illogic should be found arbitrary and capricious in violation of NEPA.[68]

CONCLUSION

FERC has repeatedly ignored D.C. Circuit precedent and dicta regarding when it must quantify the indirect climate effects of natural gas projects. Thus, the court will likely soon find FERC in violation of NEPA. This decision will undoubtedly provide FERC with more stringent (and binding) instructions on how it must conduct these analyses.

Because FERC is responsible for permitting new natural gas pipelines and compression facilities, it bears significant responsibility for the country's climate impacts. If FERC took the indirect climate effects of projects more seriously, this would create a higher bar for determining that a project is in the public interest, resulting in fewer new gas projects, more opportunities for cleaner energy sources, and fewer emissions. In practice, however, taking emissions into account would not likely affect the current Commission's final determinations because of the Commissioners' political ideologies. GHG emissions tipping the scale in public interest calculations is only realistic if a future president appoints enough like-minded FERC commissioners to create a majority.

But this does not mean that the current Commission can snub D.C. Circuit precedent and give NEPA short shrift. It is critical that FERC follow NEPA given the Commission's enormous climate responsibility. The American people deserve a Commission that properly considers the long-term public interest when evaluating natural gas projects. If you asked a reasonable person what they thought would eventually happen to gas being put into a pipeline, what would they say?

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67. *See Tenn. Gas Pipeline Co.*, 169 F.E.R.C. ¶ 61,230, ¶ 15 (2019) (Glick, Comm'r, dissenting in part).

68. *See Tenn. Gas Pipeline Co.*, 169 F.E.R.C. ¶ 61,230; *E. Shore Nat. Gas Co.*, 169 F.E.R.C. ¶ 61,228 (2019); *El Paso Nat. Gas Co.*, 169 F.E.R.C. ¶ 61,133 (2019).