

## FERC in Limbo on Greenhouse Gas Reviews Despite Court's Mandates

For those who are following the Federal Energy Regulatory Commission's ongoing battle over the scope of its obligations under the National Environmental Policy Act to evaluate the greenhouse gas implications of natural gas projects, June was an action-packed month.

In its latest opinion on the subject, the D.C. Circuit in *Birckhead v. FERC* cast doubt on the agency's justifications for refusing to evaluate potential upstream and downstream emissions impacts, although it ultimately denied the petition for review. A few weeks later, Democratic Commissioner Cheryl LaFleur announced in a tweet that "After 9 amazing years, I will be leaving @FERC at the end of August." LaFleur had been a staunch critic of the commission's narrow view of its NEPA responsibilities. Her imminent departure will leave two vacancies in the five-member commission that can be filled by the president

with confirmation by the Senate. (Only three commissioners can be from the same political party.) Energy and environment practitioners are left to wonder whether LaFleur's departure will embolden her Republican colleagues to resist the D.C. Circuit's strong suggestion that FERC needs to do more in its GHG reviews.

Under section 7 of the Natural Gas Act, the commission must determine whether a proposed project is or will be required by the present or future "public convenience and necessity," taking into account all factors bearing on the public interest. FERC's consideration of the environmental effects of a proposed project is informed by the agency's environmental analysis under NEPA. How these legal requirements play out in the context of GHG emissions has been the subject of an active debate between FERC's two Demo-

cratic commissioners (LaFleur and Richard Glick) and its two Republican commissioners (Chairman Neil Chatterjee and Bernard McNamee).

The tension can be traced back to the D.C. Circuit's 2017 opinion in *Sierra Club v. FERC* (the "Sabal Trail" case). The court ruled that the EIS for a pipeline that will transport natural gas to a power plant should have provided a quantitative estimate of the downstream GHG emissions that will result from burning the transported gas, or explained in detail why it could not do so. "That natural gas will be burned in those power plants . . . is not just reasonably foreseeable, it is the project's entire purpose," the court reasoned.

On remand, the commission reinstated authorization for the project, while determining that it was not feasible to assess the significance of the downstream GHG emissions using the social cost of carbon or any other methodologies.

Glick sharply dissented: "Far from complying with the court's remand, today's order doubles down on the deficiencies that led the court to vacate the order in the first place." Both he and LaFleur have consistently disagreed with their fellow commissioners on the adequacy of FERC's GHG reviews.

In *Birckhead*, which involved a series of new natural gas compressor stations to service the southeastern United States, challengers argued that the commission violated NEPA by failing to address reasonably foreseeable GHG emissions resulting from increased gas production upstream, and increased gas combustion downstream, of the project. The court rejected the challenge on largely procedural grounds, but made clear it had serious "misgivings" with FERC's approach.

On the upstream side, the court noted the absence of record evidence



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**Practitioners need to keep their eyes open as the commission grapples with circuit**

predicting the number and location of additional wells that would be drilled as a result of increased demand, but strongly suggested that in future cases FERC could readily seek such information from the project proponent. On the downstream side, the court held that it was "a total non-sequitur" for FERC to suggest that "downstream emissions are not reasonably foreseeable simply because the [project] gas . . . may displace existing natural gas supplies or higher-emitting fuels," and rejected the view that such emissions need only be considered when the gas would be combusted at specifically-identified destinations. And the court noted that it was "troubled" by FERC's "decision to discount downstream impacts based on its lack of information about the destination and end use of the gas," noting that NEPA requires the commission "to at least attempt to obtain" such information to fulfill its statutory duty.

Before announcing her August departure, LaFleur appeared with her fellow commissioners before the House Subcommittee on Energy: "I believe the commission, the public, and the regulated community would be better served if the commission proactively addressed these issues [concerning GHG impacts]. If we do not, I expect that the courts, as they have already begun to do, will require the commission to expand its climate analysis. Notably, any projects approved in the meantime will face significant legal risk that their certificates could be vacated."