Updates
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FERC Announces GHG Emissions Assessments in Pipeline Certificate Proceedings

On March 22, 2021, FERC took a step toward reforming the way in which it analyzes greenhouse gas emissions for purposes of natural gas pipeline certificates. However, FERC did so via a certificate order rather than a revised policy statement, as many had anticipated, and garnered sharply dissenting opinions from Commissioners Danly and Christie (though they both supported issuance of the certificate). While the move is consistent with expected changes under Chairman Glick's leadership, the order leaves many questions unanswered about how FERC's analysis will be applied in future cases with more controversial facts. It also causes uncertainty in FERC's path forward on pending pipeline certificate proceedings once Commissioner Chatterjee's term expires later this year, possibly leaving the Commission with four commissioners who could deadlock on issuing certificates for projects that exhibit more significant GHG emissions.

The March 22 order addressed an application by Northern Natural Gas Company (Northern Natural) for authorization to abandon in-place a segment of existing pipeline running from Dakota County, Nebraska to Lincoln County, South Dakota, and to construct and operate about 87 miles of new pipeline facilities to replace the capacity associated with the abandoned facilities. FERC staff prepared an Environmental Assessment for the project rather than a more comprehensive Environmental Impact Statement. In the EA, FERC staff explained that the proposed project's construction and operation would emit a total of 20,006 metric tons of carbon dioxide equivalent.

The March 22 order acknowledged that, in prior certificate orders, FERC had concluded that it was unable to assess the significance of a project's GHG emissions or how those emissions contribute to climate change. Asserting that "[u]pon reconsideration, we no longer believe that to be the case," the March 22 order analyzed the significance of the Northern Natural replacement project's GHG emissions and their contribution to climate change by comparing it to total GHG emissions of the United States as a whole. Ultimately, FERC concluded that those impacts are not significant and granted the certificate.

However, the dicta included in the March 22 order is more significant for the industry than the specific outcome here. For example, while noting that neither Nebraska nor South Dakota have state emissions targets, FERC asserted that "when states have GHG emissions reduction targets we will endeavor to consider the GHG emissions of a project on those state goals." FERC did not indicate how it would do so, though, adding uncertainty for project developers considering pipeline proposals that may cross multiple states, some with and some without state emissions targets. Likewise, FERC also asserted that "[i]n future proceedings, we will continue to consider all appropriate evidence regarding the significance of a project's reasonably foreseeable GHG emissions and those emissions' contribution to climate change" and if those foreseeable emissions are significant, "those GHG related impacts would be considered along with many other factors when determining whether a project is required by the public convenience and necessity."

The March 22 order indicates Chairman Glick's intent to forge ahead in reshaping how GHG emissions are analyzed in the FERC certificate process without waiting for the conclusion of the pending Notice of Inquiry (NOI) issued in February 2021. This decision drew partial dissents from Commissioner Christie and Commissioner Danly, who wrote a particularly caustic separate statement dissenting from the March 22 order's GHG analysis. Asserting that the order amounted to "regulatory malfeasance at its most arbitrary and capricious," Commissioner Danly wrote an extensive roadmap to an appeal of the order—though he acknowledged the "obscure docket" was not likely to be appealed—taking particular umbrage at FERC's decision to change course without awaiting industry input on whether and how to assess GHG emissions in the NOI and failing to set out an adequate test for future assessments. He also took the unusual step of adding a "warning" to his dissent, advising "every single natural gas pipeline company, LNG company, and shipper" to "intervene in every single certificate item" in order to preserve the ability to appeal FERC's decisions with precedential impact.

The March 22 order leaves many more questions than answers. The Northern Natural replacement project did not exhibit significant impacts, so FERC did not have to grapple with more difficult questions about defining the scope of its GHG emissions analysis or what evidence of project need is sufficient to overcome a finding of significant impact from GHG emissions. In particular, FERC concluded that it did not have to consider downstream GHG emissions because the Northern Natural project involved replacement capacity rather than new capacity. Chairman Glick acknowledged in FERC's open meeting that further refinement of its methods of assessing GHG emissions will be forthcoming. However, it is not clear whether FERC will attempt to create further precedent in this area via pending certificate applications involving pipelines with more significant impacts, or will instead use this and other recent cases exhibiting a harder look at environmental and community impacts of pipeline projects as a backdrop to shape policy outcomes from the NOI proceeding. Moreover, the departure of Commissioner Chatterjee—who joined the majority in the March 22 order—after the expiration of his term in June 2021 portends more uncertainty and potential delay for pending pipeline projects that exhibit significant GHG emissions. The remaining four commissioners appear evenly split on the issue of GHG emissions analysis, at least until FERC issues guidance via its NOI. Without a majority of commissioners to vote out a certificate, a pipeline project cannot commence construction.

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