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EarthReports, Inc. v. FERC

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***EarthReports, Inc. v. FERC*, 828 F.3d 949 (D.D.C. 2017).**

Caitlin C Buzzas

In *EarthReports, Inc. v. FERC* the Court ruled that when a state challenges a liquefied natural gas (“LNG”) export project, this should target the Department of Energy, not the Federal Energy Regulatory Commission.

I. INTRODUCTION

Environmental groups including EarthReports, the Sierra Club, and the Chesapeake Climate Action Network (“Petitioners”) challenged the Federal Energy Regulatory Commission’s (“FERC”) approval of Dominion Resources Inc.’s Cove Point liquefied natural gas export project in Maryland.¹ The Petitioners claimed FERC failed to analyze the impacts of the project on future gas production and greenhouse gas emissions.² FERC argued that the link between the project specifically and gas production is too speculative to be considered an indirect impact and was beyond the scope of its review.³

II. FACTUAL AND PROCEDURAL BACKGROUND

Regulation oversight for the export of liquefied natural gas (“LNG”) and the facilities that support it fall under the Natural Gas Act (“NGA”), which divides regulation between FERC and the Department of Energy (“DOE”).⁴ To export natural gas from the United States there must first be authorization from Congress.⁵ Congress transferred these regulatory functions to the DOE, and the DOE delegated to FERC the authority to “approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal.”⁶ While FERC has the authority over construction and operation of interstate natural gas pipelines and facilities, the DOE retains exclusive authority over the exportation of natural gas as a commodity.⁷ An LNG proposal must be

1 Keith Goldberg, *Energy Cases To Watch in the 2nd Half Of 2016*, Law 360 (Nov. 17, 2016, 1:12 PM MST), <http://www.law360.com/articles/805730/energy-cases-to-watch-in-the-2nd-half-of-2016>.

2 Keith Goldberg, *DC Circ. Nixes Enviros’ Challenge To Cove Point LNG Project*, Law 360 (Nov. 17, 2016, 1:33 PM MST), <http://www.law360.com/articles/817939/dc-circ-nixes-enviros-challenge-to-cove-point-lng-project>

3 *Id.*

4 *EarthReports, Inc. v. FERC*, 828 F.3d 949 (D.D.C. 2016).

5 *Id.*

6 *Id.* at 952

7 *Id.* (citing 15 U.S.C.S. § 717(b) (2016)).

authorized if it is “consistent with the public interest,” and if there is a finding that it is “necessary for the present or future public.”⁸

Under the National Environmental Policy Act (“NEPA”), federal agencies are required to include an environmental impact statement (“EIS”) for every proposal recommendation or report for major federal actions that significantly affect the quality of the human environment.⁹ If an EIS is not required, the agency must prepare an environmental assessment (“EA”) that provides brief, sufficient evidence and analysis to show that the proposed actions will not have a significant effect on the human environment, a finding of “no significant impact.”¹⁰ FERC is designated by Congress to be the lead agency for the coordination of all applicable federal authorization in complying with NEPA and the NGA.¹¹ As long as FERC’s decision in its compliance with NEPA is “fully informed and well-considered,” it is entitled to judicial deference and a reviewing court should not insert its own policy judgment.¹²

In April 2013, Dominion Cove Point LNG, LP (“Dominion”) filed an application to convert the Cove Point LNG facility in Maryland from an LNG import maritime facility to a dual-use LNG export and import facility.¹³ The new project called for the construction of an additional LNG facility and modifications to the marine terminal facilities and compressors on its pipeline in Virginia.¹⁴ It did not call for an increase in the size or frequency of LNG traffic to the facility or any additional LNG storage.¹⁵

FERC spent almost two years preparing the EA for the Cove Point facility and concluded that the conversion product “would not constitute a major federal action significantly affecting the quality of the human environment, provided that Dominion complied with specific mitigation measures,” and recommended that FERC issue a Finding of No Significant Impact (“FONSI”).¹⁶ FERC also determined that an EIS was not required because the new facilities would be “within the footprint of the existing LNG terminal and the environmental issues were relatively small in number and well-defined.”¹⁷

The Petitioners requested a rehearing and moved for a stay, which FERC rejected.¹⁸ In response, Petitioners requested review of the authorization and rehearing orders, which the court denied.¹⁹ During this time the DOE conditionally granted Dominion’s request to export LNG

8 *Id.* (citing 15 U.S.C.S §§ 717(b), (f)).

9 *Id.* at 953 (citing 42 U.S.C.S. § 4332(2)(C) (2016)).

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.* at 952.

14 *Id.*

15 *Id.*

16 *Id.* at 953-54.

17 *Id.* at 954.

18 *Id.*

19 *Id.*

through Cove Point to countries with which the U.S. has a free-trade agreement beginning in 2011 and to non-free trade countries in 2013.²⁰

III. ANALYSIS

The Petitioners contend that FERC failed to take a hard look at several possible environmental impacts that could result from the Cove Point conversion project.²¹ The Petitioners said that FERC’s review should have included the impacts of the increased domestic natural gas production due to exports as well as the climate impacts of the emissions from the production, transport, and consumption of exported natural gas.²² The Petitioners additionally contend that FERC failed to adequately consider several direct effects of the conversion project: “the impacts of ballast water on water quality, maritime shipping on the North Atlantic right whale, and the modified facility’s operations on public safety.”²³ FERC concluded that it adequately addressed the impacts from the production, transport, and consumption of exporting LNG and concluded that because the direct effects were reasonably foreseeable consequences of the conversion project, they were not within the scope of a NEPA analysis.²⁴ The court’s review of FERC’s NEPA compliance is limited to determining whether the analysis was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”²⁵ The review is intended to ensure that the agency takes a “hard look” at the environmental consequences before taking a major action and adequately considers and reveals the environmental impacts of its actions.²⁶

A. FERC’s NEPA Compliance

Petitioners claimed that FERC did not consider the indirect effects that increased natural gas exports would have.²⁷ They further claimed that increased exportation leads to an increase in U.S. domestic production of natural gas which will in turn, lead to increased extraction through hydraulic fracturing, pipeline development, and other related activities that result in additional greenhouse gas emissions that contribute to climate change.²⁸ FERC did not consider the potential issue of increased production of LNG and its effect on greenhouse gas emissions, as it found in its NEPA review that it was “not sufficiently causally related” to the project and the issues were “speculative and not reasonably foreseeable.”²⁹

20 *Id.*
 21 *Id.*
 22 *Id.*
 23 *Id.*
 24 *Id.*
 25 *Id.*
 26 *Id.*
 27 *Id.* at 955.
 28 *Id.*
 29 *Id.*

Through past decisions the courts have ruled that to warrant consideration under NEPA, an effect had to be “sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision.”³⁰ Therefore, the court agreed with FERC’s assessment and held that FERC’s NEPA analysis “did not have to address the indirect effects of the anticipated export of natural gas . . . because DOE, not the Commission, has sole authority to license the export of any natural gas going through” the facility.³¹ When an agency “has no ability to prevent a certain effect due to that agency’s limited statutory authority over the relevant action, then that action cannot be considered a legally relevant cause of the effect for NEPA purposes.”³² Since DOE has the legal authority to authorize Dominion’s increase commodity exports, LNG Petitioners are free to raise the issues in a challenge to DOE’s NEPA review of its export decision.³³

The Petitioners also said that FERC failed to use the “social cost of carbon” analytical tool to analyze the environmental impacts of greenhouse gas emissions from the updated facility.³⁴ FERC acknowledged the availability of the carbon tool, but concluded it was not appropriate for the facility for three reasons. First, the “lack of consensus on the appropriate discount rate leads to significant variation in output.”³⁵ Second, the tool “does not measure the actual incremental impacts of a project on the environment.”³⁶ Third, “there are no established criteria identifying the monetized values that are to be considered significant for NEPA purposes.”³⁷ Although other tools are available to calculate the social cost of carbon, there is no “standard methodology to determine how a project’s incremental contribution to greenhouse gas emissions would result in physical effects on the environment.”³⁸ The Petitioners did not identify another method FERC could have used, and therefore provided no reason to doubt the reasonableness of FERC’s conclusion.³⁹

B. Remaining Challenges to the adequacy of FERC’s NEPA’s analysis

The court did not uphold the Petitioner’s remaining challenges to FERC’s NEPA analysis because FERC had met its NEPA obligations by adequately considering the Petitioners’ concerns.⁴⁰

30 *Id.*
 31 *Id.*
 32 *Id.*
 33 *Id.* at 956.
 34 *Id.*
 35 *Id.*
 36 *Id.*
 37 *Id.*
 38 *Id.*
 39 *Id.*
 40 *Id.*

Petitioners contended that FERC arbitrarily minimized the negative impact the unloading of ballast water by maritime vessels at the facility will have on local water quality due to the introduction of invasive species.⁴¹ Petitioners also claimed that new Coast Guard regulations that “provide the best management practices to minimize risks from invasive species and contamination” from foreign vessels, will not be in effect by the time the conversion project is complete.⁴² FERC stated that Dominion’s operators will be subject to the most recent regulations, no matter when they come into effect, and Maryland law does not require more stringent standards than the federal ballast water program to begin with.⁴³ Therefore, FERC had no reason to presume the established regulations were unsatisfactory. FERC also found that because Dominion did not own or control the LNG carriers visiting the facility, they could not require adaptations to the vessels to allow for pumping ballast water into an onshore system.⁴⁴ The court agreed with FERC in that it had reasonably assessed that it had “fairly evaluated possible environmental impacts of ballast water, it had no grounds for requiring more stringent conditions than those required by the Coast Guard and the state of Maryland.”⁴⁵

Petitioners also contended that FERC refused to analyze the impact of maritime traffic on the North American right whale.⁴⁶ Petitioners criticized FERC for relying on an outdated study to make its finding and that FERC should have supplemented the study.⁴⁷ However, FERC found that the Cove Point facility did not affect risks to the whale because FERC was not authorizing any more maritime traffic than previously addressed by existing mitigation measures.⁴⁸ The court agreed with FERC’s conclusion that its analysis sufficiently addressed the risks to the North Atlantic right whale and therefore was not in violation by relying on its finding.⁴⁹

Petitioners further contended that FERC did not adequately consider threats to public safety.⁵⁰ The facility handles dangerous chemicals on a small area of land close to residential areas, which the Petitioners stated amplified the possibility of a safety incident.⁵¹ FERC stated it acknowledged the public safety concerns and included a detailed overview of the facility in its EA.⁵² The Petitioners stated that FERC had a responsibility to conduct an independent public safety evaluation.⁵³

41 *Id.*
42 *Id.* at 957.
43 *Id.*
44 *Id.*
45 *Id.*
46 *Id.* at 958.
47 *Id.*
48 *Id.*
49 *Id.*
50 *Id.*
51 *Id.*
52 *Id.* at 958-59.
53 *Id.* at 959.

However, the court found that FERC conducted “an extensive independent review of safety considerations; the options and standards of—and Dominion’s future coordination with—federal and local authorities were one reasonable component.”⁵⁴

IV. CONCLUSION

The court found that the Petitioners failed to show that FERC’s NEPA analysis for the Cove Point conversion project was deficient by failing to consider indirect effects or consider remaining concerns.⁵⁵ Therefore, the court denied the petition for review.⁵⁶ The conclusion of the court was not unusual as it made similar decisions in *Sierra Club v. FERC (Freeport)* where the court stated that FERC was not required to examine every conceivable “but-for cause” in its NEPA evaluation, but just effects that a person of “ordinary prudence” would take into account and that were “sufficiently likely to occur.”⁵⁷ The court reached the same conclusion regarding the scope of FERC’s NEPA analysis in *Sierra Club v. FERC (Sabine Pass)* when it rejected the indirect effects of increasing production capacity at another LNG terminal.⁵⁸ However, this is the first case to specifically state that a challenge to a LNG export project should target the DOE, not FERC.⁵⁹

54 *Id.*
55 *Id.*
56 *Id.*
57 *Id.* at 955.
58 *Id.* at 952.
59 Goldberg, *supra* note 2.