

## **GHG Metric Ruling Won't Thwart FERC Pipeline Review Shift**

By **Keith Goldberg**

*Law360 (February 16, 2022, 7:14 PM EST)* -- The Federal Energy Regulatory Commission's move to bolster climate change reviews of natural gas projects won't be derailed by a recent court decision blunting a government tool for gauging greenhouse gas pollution costs, although the legal uncertainty may affect how aggressively FERC uses that tool, agency watchers say.

FERC is scheduled to unveil a long-awaited revision of its 1999 pipeline approval policy at its monthly open meeting on Thursday along with a policy outlining how the agency should consider GHG emissions in its gas infrastructure project reviews. FERC sought extensive feedback on climate issues in a lengthy public comment process during the review of its 1999 certification policy statement, including whether it can use the so-called social cost of carbon to help estimate a project's GHG impacts.

Last Friday, a Louisiana federal judge issued a preliminary injunction blocking the White House's attempt to increase the estimated social cost of carbon. While the ruling is assuredly on the radar of FERC commissioners as they prepare to vote on a revised pipeline approval policy, attorneys don't expect it to restrain the agency in its push for meatier climate reviews.

"The social cost of carbon is a tool for measuring the impacts of greenhouse gas emissions, but it's not the only tool," said Day Pitney LLP energy regulatory partner Joe Fagan. "I'm assuming they're not putting all their eggs in the social cost of carbon basket."

The social cost of carbon is the estimate of economic damages resulting from an extra ton of carbon being emitted into the atmosphere. It factors in climate change and socioeconomic projections, climate change benefits and costs, as well as discounts for policies enacted to stave off future climate damage.

The Biden administration undid a Trump-era move changing the way the government calculated the social cost of carbon, returning to a more expensive approach developed by the Obama administration while pledging to develop its own formula.

FERC has been mulling a revision of its 1999 pipeline policy statement since 2018. But last year, the agency issued an expanded notice of inquiry seeking feedback on the potential scope of its review of a project's climate change and environmental justice impacts.

Two of those questions dealt with the social cost of carbon. One was whether the Natural Gas Act, National Environmental Policy Act or any other federal statute allows the agency to use the social cost of carbon, or SCC, in its reviews, and the other was how FERC should use the SCC to help it determine

whether a project is needed and in the public interest.

Responses were clearly split. Gas industry groups and several Republican-led states — including states that persuaded U.S. District Judge James Cain Jr. last week to enjoin the Biden administration's use of interim social cost of carbon metrics while it crafts a final version — argued that FERC isn't authorized to use the SCC and urged a more limited consideration of GHG impacts.

But environmental advocates and Democratic-led states encouraged FERC to use the social cost of carbon as part of a more robust GHG review.

In light of the uncertainty created by Friday's injunction, FERC could decide to hedge its bets on the social cost of carbon and punt on its usage until the Biden administration's Interagency Working Group comes up with a final, vetted version of the metrics, said Kirstin Gibbs, who co-leads Morgan Lewis & Bockius LLP's energy industry group.

"That, to me, would not be inconsistent with what the [Louisiana federal] court said," Gibbs said.

But attorneys also wonder whether FERC has to take such a step. For starters, there's a question of whether the injunction even applies to the agency. FERC is an independent agency housed within the U.S. Department of Energy, and the department is an Interagency Working Group member named in the injunction. But all of FERC's oversight and authority flow from Congress and federal statutes such as the NGA.

Attorneys also noted that Friday's preliminary injunction is temporary and appealable and that it only blocks the usage of the interim SCC metric created by the working group as a result of a Biden executive order issued in January 2021. The previous SCC metric on the books, albeit less stringent, remains valid.

"I think FERC has a lot of runway to address the question of how, when or why to use the social cost of carbon on gas infrastructure," said Gibbs of Morgan Lewis. "It's an interesting data point, but I'm not sure this is going to cause a lot of late-night backroom decisions."

While the SCC is a handy tool to quantify the impacts of GHG pollution, it doesn't make or break FERC's ability to perform more comprehensive GHG reviews of gas projects, attorneys say. There are plenty of other factors that the agency can consider, from whether new projects are consistent with the Paris climate agreement's goal of keeping global average temperatures from rising by 1.5 degrees Celsius above preindustrial levels, to whether projects are consistent with the increasing number of state mandates to slash GHG emissions.

"You can have these conversations and get at the same things, even if you're not converting it down to dollars and cents using the social cost of carbon," said Earthjustice senior attorney Moneen Nasmith, who works on FERC pipeline matters.

And attorneys say an injunction from a single district court doesn't outweigh D.C. Circuit decisions in recent years that have faulted FERC for performing inadequate climate analyses of gas projects and, in some cases, have invalidated project approvals.

The D.C. Circuit trend began with 2017's *Sierra Club v. FERC*, in which the appellate court said the National Environmental Policy Act requires the agency to review indirect environmental impacts that are "reasonably foreseeable" and ordered FERC to review the downstream GHG impacts of the Sabal Trail

pipeline, which runs from Alabama to Florida. Most recently, the appeals court dinged FERC for failing to adequately review the climate impacts of two liquefied natural gas projects in August's decision in *Vecinos para el Bienestar de la Comunidad Costera et al. v. FERC*.

"The [injunction] order cannot, and does not, overrule the D.C. Circuit precedent that is in no small part driving the reform efforts at FERC," Nasmith of Earthjustice said.

So while Thursday's revelation of the revised pipeline approval policy may help indicate how enthusiastic FERC is about employing SCC in light of fresh legal uncertainty, attorneys say it won't change the reality that more comprehensive climate reviews of gas projects are on the table.

"From the FERC point of view, that decision [last Friday] is something they have to think about," said Fagan of Day Pitney. "But I don't think it will necessarily handcuff them in a material way going forward."

--Editing by Jill Coffey and Michael Watanabe.

---

All Content © 2003-2022, Portfolio Media, Inc.