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U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA STRIKES DOWN CHALLENGES TO 300-MILE MOUNTAIN VALLEY PIPELINE

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The DC Circuit Court of Appeals issued an opinion in a major NEPA case last month. On February 19, 2019, the United States Court of Appeals for the District of Columbia issued an unpublished opinion rejecting multiple petitions for review filed by environmental groups such as Appalachian Voices, Chesapeake Climate Action Network, and the Sierra Club. The case centers around a 300-mile natural gas pipeline extending from Wetzel County, West Virginia to Pittsylvania County, Virginia.

The case arose in December 2017, following the publication of the Federal Energy Regulatory Commission's (FERC) environmental assessment of the project and subsequent issuance of the certificate of "public convenience and necessity" authorizing Mountain Valley to construct and operate the pipeline. Shortly after the issuance of the certificate for the 300-mile long pipeline, the environmental groups petitioned the United States Court of Appeals for review, raising sixteen different challenges. Among their complaints, petitioners allege that "FERC lacked sufficient evidence of market demand to support a finding of Public Convenience and Necessity, FERC's Environmental Impact Statement does not satisfy the National Environmental Policy Act (NEPA), FERC violated NEPA by failing to adequately analyze the [project's] climate impacts, and that petitioners will suffer irreparable harm in the absence of a Stay."

One of the environmental groups' central arguments was that FERC's analysis of the environmental impacts of the project was inadequate with the standards set by NEPA. According to their complaint, petitioners claim NEPA requires that "the agencies … assess not only the direct effects of a proposed action, but also the indirect and cumulative effects." Petitioners allege that FERC's decision not to consider downstream greenhouse gas emissions as indirect effects of the product goes against the precedent set in *Sierra Club v. FERC* ("Sabal Trail"), which established that "greenhouse gas emissions from end use of natural gas are causally related and reasonably foreseeable indirect effects of permitting a pipeline intended to deliver that gas."

The Court rejected the argument that the FERC did not properly consider the climate change impacts of downstream greenhouse gas emissions. Furthermore, the Court found that it "need not consider that argument, however, because even if petitioners are correct, FERC provided an estimate of the upper bound of emissions resulting from end-use combustion, and it gave several reasons why it believed petitioners' preferred metric, the Social Cost of Carbon tool, is not an appropriate measure of project-level climate change impacts and their significance under NEPA or the Natural Gas Act."

The Court also addressed the environmental groups' claims that FERC lacked sufficient evidence of market demand to support a finding of Public Convenience and Necessity. Petitioners allege FERC lacked a rational basis for its conclusion to issue the certificate and that, due to this fact, the subsequent taking of private property for the project violates the Fifth Amendment. The Court, finding that "FERC's conclusion that there is a market need for the Project was reasonable and supported by substantial evidence, [ruled] Mountain Valley's exercise of eminent domain authority for purposes of this project poses no Takings Clause problems from either a 'public use' or 'just compensation' perspective." The Court considered petitioners' remaining arguments and found them without merit.

The environmental attorneys at Bick Law LLP will continue to monitor environmental litigation and the potential effects it may have on businesses across the country.