



# FERC Issues Long-awaited Remand Order Responding to *Delaware Riverkeeper v. FERC*

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On November 19, 2015, the Federal Energy Regulatory Commission (“FERC”) issued its long-awaited [Order on Remand](#) responding to the Court of Appeals for the District of Columbia Circuit’s (“D.C. Circuit”) decision in *Delaware Riverkeeper Network v. FERC* (“*Delaware Riverkeeper*”). The court remanded the FERC’s Order Issuing Certificate for Tennessee Gas Pipeline Company, L.L.C.’s (“Tennessee”) Northeast Upgrade Project. *Tennessee Gas Pipeline Company, L.L.C.*, 139 FERC ¶ 61,161 (2012), *order on reh’g*, 142 FERC ¶ 61,025 (2013), *petition on review granted sub. nom.*, *Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304 (D.C. Cir. 2014), *order on remand*, *Tennessee Gas Pipeline Company, L.L.C.*, 153 FERC ¶ 61,215 (2015).

In *Delaware Riverkeeper*, the D.C. Circuit held that FERC violated the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321-4370h (2012), by: (1) segmenting its environmental review of the Tennessee’s Northeast Upgrade Project from that of three other Tennessee pipeline projects on Tennessee’s 300 Line in Pennsylvania and New Jersey; and (2) failing to provide a meaningful analysis of the cumulative impacts of the four projects to show that the impacts would be insignificant.

On remand, FERC stated that it had directed its Staff to perform a supplemental environmental analysis to examine the additive environmental impacts of the four projects, as well as to incorporate the other three projects into the cumulative impacts analysis performed in the Environmental Assessment for the Northeast Upgrade Project. The supplemental analysis concluded that when the four Tennessee projects are considered additively, none of the resource impacts escalated to a significant level or required additional mitigation. The supplemental analysis further concluded that there were no cumulatively significant environmental impacts. FERC reviewed Staff’s supplemental analysis and adopted these conclusions. FERC held that no additional mitigation is required for authorization of Tennessee’s Northeast Upgrade Project. As a result, the certificate of public convenience and necessity FERC issued for the Northeast Upgrade Project is unaffected.

The Order on Remand provides guidance on how FERC will conduct a cumulative impacts analysis. Quoting from Council on Environmental Quality (“CEQ”) regulations, FERC explains that a cumulative impact “results from the incremental impact of the [proposed] action when added to other past, present, and reasonably foreseeable future actions.” Order on Remand at P 26. Continuing, FERC notes that when performing a cumulative impacts analysis consistent with CEQ guidance, FERC Staff establishes a “region of influence” to define the area affected by the proposed action in which existing and reasonably foreseeable future actions may also result in cumulative impacts. This region of influence is established on a project-by-project basis and is specific to the resource affected and the magnitude of other projects being considered. Based on this framework, the supplemental environmental analysis performed by FERC Staff in this case analyzed the cumulative impacts of the four projects. The supplement concluded that there were no cumulatively significant impacts and that no additional mitigation was required beyond the mitigation measures contained in the original 2012 certificate order.

The Order on Remand also provides some guidance on what actions FERC considers “connected” for the purpose of combining the environmental review of proposed pipeline projects. FERC notes that “[b]ecause pipelines are integrated systems, the engineering design of any additions to a pipeline system is necessarily reflective (or ‘dependent’) on the then-existing or anticipated state of the system to which they are being added. However, the fact that the engineering of one expansion recognizes components proposed in another, does not, in and of itself, compel a finding that the two projects are interdependent or connected for purposes of regulatory review.” Order on Remand at n.35.

The supplemental environmental analysis attached to the Order on Remand offers additional discussion of FERC's cumulative impacts analysis. The supplement outlines a four step process for performing a cumulative impacts analysis: (1) identify the significant cumulative effects issues associated with the proposed action; (2) establish the geographic scope for analysis; (3) establish the time frame for analysis, equal to the timespan of a proposed project's direct and indirect impacts; and (4) identify other actions that potentially affect the same resources, ecosystems, and human communities that are affected by the proposed action. FERC's articulation of this cumulative impacts analysis does not represent a significant departure from its current practice.

Because the Order on Remand essentially formalizes current FERC practice, there is likely little immediate impact from the Order on Remand. Since issuance of the *Delaware Riverkeeper* decision last year, FERC Staff has required pipeline project applicants to provide more information on cumulative impacts so that FERC can include a more robust cumulative impacts analysis in its environmental review documents. Pipeline proponents can assist FERC's environmental review by providing more a complete cumulative impacts analysis. An environmental analysis that contains a stronger cumulative impacts review is more likely to withstand judicial scrutiny.

### **For more information**

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