

## State Environmental Regulation

## Expert Analysis

# Agency Ruling Signals State Power on Greenhouse Gases

The decision issued at the end of August by the New York State Department of Environmental Conservation (NYSDEC) denying certain approvals in connection with a proposed natural gas pipeline that would fuel a major new power plant under construction in Orange County may have been seen by environmental activists as a mechanism for local and state regulators to control greenhouse gases (GHG) in place of a recalcitrant federal government. The euphoria of environmental activists statewide, however, may have been tempered by a subsequent order of the Federal Energy Regulatory Commission (FERC) issued in mid-September, although the NYSDEC's reasoning still offers a viable roadmap for state and local control of GHG.

### The Project

The Orange County project, known as the "Valley Lateral Project," proposed

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by Millennium Pipeline Company, is located in the upstate New York towns of Wawayanda and Minisink. See generally Millennium Pipeline Company, Valley Lateral Project. Millennium proposes to construct a new 7.8 mile, 16-inch diameter natural gas pipeline that would extend from Millennium's existing main line pipeline north to a new 650-megawatt gas-powered Competitive Power Ventures (CPV) Valley Energy Center, currently being constructed by CPV Valley in Wawayanda, and for ancillary above-ground facilities. See generally Competitive Power Ventures, CPV Valley Energy Center Approval Process.

The proposed pipeline would provide about 130 million cubic feet per day of natural gas to the CPV Valley Energy Center to be used as the primary fuel

for that plant. CPV Valley also can use ultra-low sulfur distillate oil as a back-up fuel, but its use is limited.

Millennium's Valley Lateral Project requires approval from FERC. On Nov. 13, 2015, Millennium filed its application with FERC seeking a certificate of public convenience and necessity pursuant to §7(c) of the Natural Gas Act (NGA) to construct, install, own, operate, and maintain the Valley Lateral Project. Pursuant to the NGA and the National

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The Sierra Club decision and the NYSDEC reasoning in its decision may be followed by state and local regulators intent on ensuring that GHG emissions are considered when projects such as the Valley Lateral Project are proposed.

Environmental Policy Act (NEPA), FERC conducted an environmental review of the project.

On Nov. 9, 2016, FERC issued an order granting the requested certificate of public convenience and

necessity, incorporating the findings of its environmental assessment and imposing various conditions. Among other things, FERC required that Millennium obtain certain authorizations from the NYSDEC, including a water quality certificate (WQC pursuant to Section 401 of the Clean Water Act (CWA) indicating that the Valley Lateral Project would comply with New York state water quality standards. These NYSDEC-issued approvals were applied for by Millennium back in November 2015. The environmental review conducted by FERC under NEPA applied to these NYSDEC approvals.

In contrast, the environmental review of the CPV Valley Energy Center was conducted by the town of Wawayanda planning board as the lead agency under the State Environmental Quality Review Act (SEQRA). In May 2012, that planning board enacted a resolution adopting a findings statement under SEQRA for that power plant.

Upon receipt and review of Millennium's application in November 2015 for the WQC and related approvals for the Valley Lateral Project, the NYSDEC determined that the application was incomplete for multiple reasons. It issued two notices of incomplete application, on Dec. 7, 2015 and June 17, 2016. The first notice relied on the fact that FERC had not completed the NEPA-mandated environmental review. That was addressed on May 9, 2016, when FERC issued its environmental assessment. The second notice requested more information about potential impacts. Millennium provided the

requested information to the NYSDEC by Aug. 31, 2016.

### The D.C. Circuit's Decision

While the NYSDEC reviewed Millennium's application, the District of Columbia Circuit Court decided *Sierra Club v. Federal Energy Regulatory Comm'n*, No. 16-1329 (D.C. Cir. Aug. 22, 2017). That decision became pivotal in the NYSDEC's deliberations on the WQC and related approvals.

That case arose when the Sierra Club and other environmental groups (collectively, the Sierra Club) challenged FERC's decision to approve the construction and operation of three interstate natural gas pipelines in the southeastern United States known as the Southeast Market Pipelines. Those pipelines are under construction in Alabama, Georgia, and Florida and are intended to provide natural gas to a single power plant in Martin County, Florida.

The environmental groups claimed that increased burning of natural gas would hasten climate change and its potentially catastrophic consequences. Sierra Club argued, among other things, that FERC's environmental impact statement (EIS) failed to adequately consider the project's contribution to GHG emissions. A divided circuit court agreed with the Sierra Club.

The majority explained that the natural gas that would be traveling through the new pipelines would be going to Florida and burned, "generating both electricity and carbon dioxide." Once in the atmosphere, that carbon dioxide

would "add to the greenhouse effect"—which, the circuit court observed, the EIS described as "the primary contributing factor" in global climate change.

It then ruled that, at a minimum, the EIS for the Southeast Market Pipelines project needed to discuss these "downstream" effects of the pipelines and the natural gas they would carry by estimating "the amount of power-plant carbon emissions" that the pipelines would make possible.

Specifically, the circuit court concluded that the EIS for the project either should have given a "quantitative estimate of the downstream greenhouse emissions" that would result from burning the natural gas that the pipelines would transport or should have explained more specifically why it could not have done so. According to the circuit court, the agency conducting a NEPA review had to consider not only the direct effects but also the indirect environmental effects of the project under consideration. GHG emissions, the circuit court concluded, were an "indirect effect of authorizing this project," which FERC could reasonably foresee and which it had legal authority to mitigate. Importantly, the circuit court declared that FERC would not be excused from making emissions estimates just because the emissions in question might be partially offset by reductions elsewhere.

The circuit court did not hold that quantification of GHG emissions was required every time those emissions were an indirect effect of an agency action. Rather, the circuit court

recognized that, in some cases, quantification might not be feasible. In the *Sierra Club* case, it ruled that FERC had not provided a satisfactory explanation for why quantification might not be feasible and remanded the matter back to FERC to prepare a “conforming” EIS. Interestingly, the circuit court ruled in favor of FERC on all other claims. For example, the *Sierra Club*’s assertions about aesthetics, recreational resources, environmental justice, and alternative routes were rejected by the circuit court.

### The NYSDEC’s Decision

Only days after the circuit court’s *Sierra Club* opinion, the NYSDEC issued its decision denying Millennium’s WQC application and prohibiting it from beginning construction on the Valley Lateral Project. See NYSDEC, Valley Lateral Pipeline Decision Letter, Aug. 30, 2017. The NYSDEC explained that FERC’s environmental review of the Valley Lateral Project was “inadequate and deficient,” citing *Sierra Club* and characterizing the opinion as “a material change in applicable law.” The NYSDEC determined that FERC “failed to consider or quantify the indirect effects of downstream GHG emissions in its environmental review of the [Valley Lateral] Project that will result from burning the natural gas that the [Valley Lateral] Project will transport to CPV Valley Energy Center.”

Contemporaneous with its denial of Millennium’s application, the NYSDEC submitted a motion to FERC to reopen or stay, or alternatively to rehear and

stay, FERC’s Nov. 9, 2016 approval on the Valley Lateral Project in light of *Sierra Club*. The NYSDEC argued in its motion that FERC must reopen the evidentiary record to take additional evidence—specifically, the quantification of GHG emissions associated with the combustion of the natural gas being transported by the Valley Lateral Project that would be used at the CPV Valley Energy Center.

### FERC’s Order

In December 2016, Millennium filed a petition with the District of Columbia

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Circuit Court to review the NYSDEC’s alleged failure to timely act on the WQC application. In late June 2017, the circuit court dismissed the petition, noting that Millennium needed to seek relief from FERC before bringing the petition to the court. In July 2017, Millennium did just that, by filing a request to proceed to construct the pipeline with FERC. This request requires an applicant to demonstrate either that it had obtained all required approvals or a waiver of certain approvals.

In this case, Millennium argued that the NYSDEC had waived its authority to issue the WQC because the NYSDEC had failed to act within the one-year mandated deadline.

In a decision issued Sept. 15, 2017, FERC agreed with Millennium that the one-year period had begun upon the receipt of the application by the NYSDEC in November 2015, rather than the date when the NYSDEC deemed the application complete in August 2016, as argued by the NYSDEC, relying upon the word “receipt” that appears in the pertinent statutory provision and on prior FERC decisions. As a result, FERC determined that the NYSDEC had waived its WQC authority.

Still pending as of this writing is the NYSDEC’s motion before FERC to reopen the matter. However, in light of its September 15th ruling, that motion is likely to be rejected by FERC.

### Conclusion

Whether the NYSDEC is ultimately able to stop the Valley Lateral Project is unclear. The *Sierra Club* decision and the NYSDEC reasoning in its Aug. 30 decision, however, may be followed by state and local regulators intent on ensuring that GHG emissions are considered when projects such as the Valley Lateral Project are proposed.