CERTAIN UNCERTAINTY AT FERC: AREAS TO WATCH IN 2020 FOR NATURAL GAS PIPELINES AND LNG AND HYDROPOWER FACILITIES

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As we step into the second month of the New Year, we take a fresh look at areas of potential uncertainty percolating at and around the Federal Energy Regulatory Commission ("FERC" or the "Commission") that could impact participants in the interstate natural gas pipeline industry, liquefied natural gas ("LNG") projects, and hydropower industry. Below we highlight six of these areas of developing uncertainty that we think could have a significant impact in 2020 and that we will be watching:

- FERC's Tolling Order Practice
- The Exercise of Eminent Domain Authority
- Clean Water Act Section 401 Certificates
- FERC's Certificate Policy Statement
- The Scope of FERC's NEPA Review
- FERC & the 2020 Presidential Election

FERC'S TOLLING ORDER PRACTICE

Background. On December 5, 2019, the U.S. Court of Appeals for the District of Columbia Circuit ("DC Circuit") indicated that it may reconsider its past approach to FERC's practice of issuing tolling orders in response to requests for rehearing in the context of an interstate natural gas pipeline project.[1] Briefing deadlines were set for January and February 2020, with a hearing before the full (*en banc*) court in March 2020.

FERC uses tolling orders widely, including in dockets related to LNG export facilities, interstate natural gas pipeline facilities, and the rates and terms and conditions of service under the Natural Gas Act ("NGA"), as well as in hydropower dockets under the Federal Power Act ("FPA"). Overturning or modifying FERC's tolling order practice could result in significant changes to permitting and construction timelines for FERC-regulated pipelines and LNG facilities.[2]

What We're Watching. Thus far in 2020, FERC already has taken action to modify its process for issuing orders on rehearing in response to landowner concerns. At its January 2020 monthly meeting, all three commissioners expressed an openness to Congressional modification of the NGA to address tolling orders and to set a deadline by which an order on rehearing must be issued, particularly where landowners' ability to file an appeal may be

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impacted.[3] In addition, on January 31, 2020, FERC announced that it will create a new Rehearings section within its Office of General Counsel to help expedite processing of affected landowners' rehearing requests of interstate natural gas pipeline orders. The Rehearings section will include a Landowner Rehearings group that will give priority to landowner rehearing requests and will process other rehearing requests "only as time allows," as well as a General Rehearings group.[4]

Whether these changes will be sufficient for the DC Circuit and whether additional modifications to FERC's tolling order practice will emerge remains to be seen.

THE EXERCISE OF EMINENT DOMAIN AUTHORITY

Background. A cornerstone of the NGA is its grant of eminent domain authority to interstate natural gas pipelines.[5] Similar rights exist for hydropower project developers under the FPA.[6] Once certain conditions are met, that statutory authority allows natural gas pipeline companies and hydropower project licensees to acquire the necessary rights-of-way to construct, operate, and maintain the authorized facilities. The NGA and FPA further allow pipeline companies and hydropower licensees, at their election, to file suit in either U.S. District Court or state court to exercise their eminent domain authority.[7]

Questions recently have emerged about whether and how an interstate natural gas pipeline company can exercise its eminent domain authority on state-owned land given that the U.S. Constitution's 11th Amendment provides immunity to states against private suits in federal court absent the state's consent.[8] In its decision in *PennEast*, the U.S. Court of Appeals for the Third Circuit ("Third Circuit") found that the NGA does not provide pipeline companies with the ability to bring states into federal court and instead held that companies must file suit in state court to seek to enforce their eminent domain authority on land that is owned by the state. On November 5, 2019, the Third Circuit denied PennEast's request for rehearing. For more on the Third Circuit's decision, see our client alert.

What We're Watching. PennEast filed a Petition for Declaratory Order on October 4, 2019, requesting that FERC find that Congress's delegation of eminent domain authority to certificate holders through the NGA included delegation of the federal government's exemption from states' sovereign immunity claims. In a rare occurrence for a Petition for Declaratory Order, FERC held an open Commission meeting to discuss PennEast's Petition on January 27, 2020. The Commission then issued a 2-1 Declaratory Order in response on January 30, 2020, interpreting the NGA to provide such delegation.[9] Commissioner Glick argued in his dissent that the majority's decision is not owed judicial deference because the scope of eminent domain authority is not a question that Congress delegated to FERC. Requests for rehearing of the Declaratory Order are due March, 2, 2020.

PennEast has stated that it will file a petition for writ of certiorari with the U.S. Supreme Court to seek review of the Third Circuit's decision. Recognizing FERC's January 27 open meeting, the Supreme Court moved the deadline for filing back from February 3, 2020 to March 4, 2020.

The outcome of these proceedings could determine whether project developers will be able to file suit in federal courts to exercise eminent domain[10] over state lands or if the cases will be left to the states to decide, and could impact how and where interstate natural gas pipeline companies. Hydropower project developers could be

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affected as well when state lands are a necessary project component. In addition, if PennEast files a petition for writ that the Supreme Court grants, the Court's decision could further define the scope of deference that applies when agencies interpret the statutes that they administer.

CLEAN WATER ACT SECTION 401 CERTIFICATES

Background. As noted in our 2017 client alert, the need to obtain a Water Quality Certification ("WQC") under Section 401 of the Clean Water Act ("CWA") and states' failure to timely issue WQCs can significantly impact project developers' construction timelines. Section 401 requires that agencies act on a request for a WQC "within a reasonable period of time," not to exceed one year.[12] If an agency fails to act within one year, the permit is deemed waived and construction may commence without such permit. To avoid waiver and restart the one-year clock, states and applicants have engaged in a practice of withdrawing and resubmitting WQC applications.

The DC Circuit recently considered whether the withdrawal and resubmission practice in fact restarts the one-year review period or if it instead results in waiver.[13] In *Hoopa Valley*, the court found that the one-year statutory limit was not extended by the withdrawal and resubmission of the application pursuant to a written agreement, explaining that Section 401 "cannot be reasonably interpreted to mean that the period of review for one request affects that of any other request."[14] However, the court also explicitly declined to address "how different a request must be to constitute a 'new request' such that it restarts the one-year clock."[15] FERC has issued several orders applying *Hoopa Valley* to interstate natural gas pipeline applications in varying factual situations and finding state waiver.[16] These orders have spurred debate at FERC and in the appellate courts, particularly around when a resubmission is a "new request."[17]

In response to an April 10, 2019 Executive Order[18] the U.S. Environmental Protection Agency ("EPA") issued updated guidance on CWA Section 401.[19] The guidance seeks to provide clarification of the requirements and procedures applicable to state review of Section 401 applications—particularly on the question of waiver. In further response to the Executive Order, EPA issued a Notice of Proposed Rulemaking ("NOPR") on August 22, 2019, that would "replace and modernize" the existing regulations implementing Section 401.[20] Over 120,000 public comments were received in response to the NOPR.

What We're Watching. We foresee additional FERC orders seeking to define the scope of *Hoopa Valley*'s extension, as well as continued debate among the Commissioners and potentially additional decisions on point from federal appeals courts. Somewhat in parallel, we anticipate that EPA will issue a Final Rule in its NOPR process in 2020, streamlining and modernizing the Section 401 process to reduce delays in WQC issuances. This also may result in federal appeals related to Section 401, as parties could seek to challenge the agency's rulemaking process. Importantly, the Supreme Court denied certiorari on *Hoopa Valley* on December 9, 2019, removing the potential that the EPA's NOPR process would run contemporaneous with the Supreme Court's review of Section 401 waiver questions.

FERC'S CERTIFICATE POLICY STATEMENT

Background. FERC's 1999 Certificate Policy Statement[21] established the framework that applies to the agency's decisions on applications to construct new interstate natural gas pipeline infrastructure. The Commission issued a Notice of Inquiry ("NOI") on April 19, 2018, soliciting comments on potential changes to the Certificate Policy Statement. At a high level, the NOI sought comments on: (1) the reliance on precedent agreements to

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demonstrate need for a proposed project; (2) the potential exercise of eminent domain and landowner interests; (3) the Commission's evaluation of alternatives and environmental effects under NEPA and the NGA; and (4) the efficiency and effectiveness of the Commission's certificate processes. Over 2,900 comments were submitted in response. For more information on the NOI, see our client alert.

What We're Watching. Although there has been no further action since the issuance of the NOI, changes to the Certificate Policy Statement could have significant impacts on the ability to obtain authorization for new interstate natural gas pipeline infrastructure, including on the engagement of opponents to natural gas infrastructure. FERC Chairman Chatterjee has stated that FERC will not take up review of the Certificate Policy Statement until it has a full panel of five commissioners,[22] the timing of which remains unclear. Given its importance, the Certificate Policy Statement presents a prime opportunity for the Trump Administration to demonstrate support for the industry by taking the lead on revisions while it has the majority at the Commission.

In addition, the January 28, 2020 discussion draft of the CLEAN Future Act included a definition of the public interest that would apply to review of interstate natural gas pipeline applications, providing potential insight into what we may see if Democrats take control of both the House and Senate.[23]

SCOPE OF NEPA REVIEW

Background. There has been an ongoing debate about how far upstream and downstream FERC's environmental review under the National Environmental Policy Act ("NEPA") should extend when the Commission is reviewing applications for interstate natural gas pipeline and LNG infrastructure. In 2017, the DC Circuit struck down FERC's review and authorization of three interstate natural gas pipelines for failure to analyze the greenhouse gas emissions from the combustion of the transported gas in the Florida power plants for which the pipelines were built.[24]

Questions surrounding the application of the DC Circuit's 2017 decision to other projects that present different factual circumstances and the appropriate scope of the Commission's NEPA review have persisted. In 2019, that debate resulted in numerous dissenting opinions from Commissioner Glick arguing for an expansion of FERC's review, comments in dicta from the DC Circuit,[25] and a 37-page concurring opinion from Commission McNamee laying out legal arguments in opposition to an expansion of the current scope of FERC's NEPA review.[26]

What We're Watching. We anticipate this debate will persist, and possibly sharpen, as the 2020 Presidential election approaches. We also may see new federal appellate decisions in 2020 that continue to define the contours of the scope of FERC's NEPA review. In addition, several of the cases that are fundamental to the arguments on both sides of the debate were issued by the Supreme Court. As a result, it is possible that we may see calls for the Supreme Court to weigh in as well and interpret its own precedent as applied to FERC's authority under the NGA and responsibilities under NEPA. Furthermore, on January 10, 2020, the White House Council on Environmental Quality ("CEQ") issued a notice of proposed rulemaking seeking feedback on a number of changes to its regulations implementing NEPA.[27] The outcome of this rulemaking process, which will impact more than 80 federal agencies, seems likely to narrow the scope of agencies' NEPA reviews, could shift or possibly moot the debate, and inevitably will be the subject of significant litigation for years to come.

FERC AND THE 2020 PRESIDENTIAL ELECTION

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Background. There has been significant discussion over the last two years regarding what some have called the politicization of FERC. With the looming U.S. presidential elections in November 2020, these concerns are likely to remain as there is an increasing focus on FERC and the role it plays in setting American energy policies and priorities. There are a number of potential candidates among the Democratic challengers to President Trump who are staking out positions and announcing policies that target traditional fossil fuels, including natural gas, as a way to combat climate change. Some of the positions are extreme and would upend fundamentally the U.S. energy landscape and likely have a major negative impact on the U.S. economy in the short- to medium-term.

In addition, FERC's commitment to enforcement of energy markets was called into question last year when a group of five Democratic and Independent senators sent a letter to the Commission expressing significant concern that FERC “may not be fully committed” to preventing, stopping, and punishing market manipulation under the NGA and FPA.

Further, FERC continues to operate with only three commissioners, the minimum required for a quorum for FERC to issue decisions on matters before the agency. The White House renominated FERC's current General Counsel, James Danly, for the position of FERC Commissioner on February 12, 2020. Danly had been nominated for the position on October 15, 2019, and the Senate Energy and Natural Resources Committee voted on November 19, 2019 to advance Danly's nomination. However, Danly's nomination was returned to the White House for re-nomination on January 3, 2020, as a result of the Senate's failure to act on the nomination within the timeframe required under the Rules of the Senate.[28] Danly's renomination is a positive development and, given that the Senate Energy and Natural Resources Committee's vote on his prior nomination was recent, it is possible that the committee will forego voting this time and report his nomination out to the full Senate directly. In addition, at its January 2020 monthly meeting, Commissioner McNamee announced that he will not plan to seek another term when his term expires on June 30, 2020. Technically, Commissioner McNamee would be permitted to stay on until the earlier of the confirmation and swearing-in of his replacement or the expiration of the then-current congressional term.[29]

What We're Watching. The 2020 Presidential elections will be deeply impactful for U.S. energy markets and FERC, regardless of the outcome. If President Trump is reelected, it appears likely that infrastructure will remain a major focus of the administration. Under a continuing Republican majority at FERC, we expect that there will be significant further development of natural gas infrastructure, including pipelines, LNG and CNG facilities for exports and domestic use. With the proposed changes to the NEPA regulations discussed above and a secure Republican majority at FERC, natural gas and hydropower infrastructure developers may be in a position to execute on projects much more quickly.

If the 2020 Presidential election results in a party change in the White House, Democrats would have the ability to fill a majority of the Commissioner seats at FERC, as well as the ability to name a Democrat to the chair position.[30] Because FERC Commissioners are nominated by the President and confirmed by the Senate, the road to confirmation of increasingly liberal FERC nominees could become much smoother if 2020 brings both a change in the Senate majority and the White House. Commissioner Glick, currently the sole Democrat on the Commission, may be a bellwether for FERC positions on natural gas infrastructure projects in a Democratic FERC. As noted above, Commissioner Glick has dissented in nearly every natural gas pipeline and LNG export facility proceeding before the Commission during his tenure, arguing for a more fulsome environmental review and inclusion of a greenhouse gas emissions analysis and mitigation measures reaching upstream and

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downstream. Even if Commissioner Glick was not named chairman of FERC in a Democratic presidential administration, it would be highly unlikely that a Democratic president would nominate a chairperson who would be a fossil fuel champion, particularly in light of the increasingly extreme positions of the Democratic candidates. Changes in leadership at the Commission also could result in changes in FERC's enforcement division and practices, with a heavier handed policing of gas and power markets by FERC under FERC's market manipulation authority.

In addition, as long as there are only three Commissioners, the potential for loss of quorum remains—either as a result of a Commissioner leaving FERC or declining to participate in a vote. With the approaching election, it remains unclear whether and when Danly's nomination will be brought to the Senate floor. If he is confirmed and takes the oath before McNamee departs, Danly will provide FERC with a full slate of majority seats, easing the risk of loss of quorum.

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We believe that 2020 is likely to be a momentous year for the U.S. energy industry, and the issues outlined above—whatever each individual outcome may be—will be at the core of any developments or setbacks for the industry. Engagement with regulators and policy makers will be critical to help set the right path for the continued advancement of the energy industry in America.

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[1] *Allegheny Defense Project, et al. v. FERC*, 943 F.3d 496 (D.C. Cir. 2019). Under the NGA, FERC must issue an order in response to a request for rehearing within 30 days. If it does not, the request will be deemed denied by operation of law. 15 U.S.C. §717r(a); and 16 U.S.C. §825l(a). FERC has established the practice of issuing procedural orders within this 30-day period (often referred to as “tolling orders”) that operate to prevent rehearing requests from being denied and provide FERC with additional time to review the substance of a rehearing request and issue a substantive order on rehearing.

[2] Provisions of the discussion draft of the CLEAN Future Act, issued on January 28, 2020, propose to significantly modify the timing of certificate holders' ability to exercise their eminent domain rights. Climate Leadership and Environmental Action for our Nation's (CLEAN) Future Act, H.R. __, 116th Cong. §§ 215-16 (discussion drft. 2020).

[3] We note that at the same meeting the Commissioners issued an order on rehearing in the Rio Grande LNG export project docket, acting on the requests for rehearing in only 31 days.

[4] News Release, FERC, FERC Chairman Reorganizes OGC to Speed Landowner Rehearing Process (Jan. 31, 2020).

[5] 15 U.S.C. §717f(h).

[6] 16 U.S.C. §814.

[7] 15 U.S.C. §717f(h); and 16 U.S.C. §814.

[8] *In re PennEast Pipeline Co. LLC,* 938 F.3d 96 (3d Cir. 2019), as amended (Sept. 11, 2019), as amended (Sept. 19, 2019).

[9] *PennEast Pipeline Company, LLC*, 170 FERC ¶ 61,064 (2020).

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[10] The discussion draft of the CLEAN Future Act includes provisions that would modify NGA pipeline certificate holders' eminent domain authority. Climate Leadership and Environmental Action for our Nation's (CLEAN) Future Act, H.R. __, 116th Cong. §216 (discussion drft. 2020). This discussion draft provides a look into what may be on the horizon if the Democrats take control of both chambers in the 2020 elections, and particularly if that shift in power includes a flip in the White House.

[11] Certification under CWA Section 401 is required before project developers can commence construction that may result in discharge into the navigable waters of the United States. Authority to issue Section 401 WQCs is delegated to the states.

[12] 33 U.S.C. § 1341(a)(1).

[13] *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019), *cert. denied*, 2019 WL 6689876 (Dec. 9, 2019). In *Hoopa Valley Tribe*, a settlement agreement between the hydropower licensee and Oregon and California expressly required the licensee to withdraw and refile its applications for water quality certifications to avoid waiver of the states' authority. Pursuant to that agreement, the licensee withdrew and resubmitted its application each year for over a decade. Since the decision in *Hoopa*, FERC has applied the court's holding to fact patterns that involve less formal arrangements of withdrawing and resubmitting applications, indicating that an express agreement is not necessary for waiver to be found.

[14] *Hoopa Valley Tribe v. FERC*, 913 F.3d at 1104.

[15] *Id.*

[16] *See, e.g., McMahan Hydroelectric, LLC,* 168 FERC ¶ 61,185 (2019); and *Constitution Pipeline Co., LLC*, 169 FERC ¶ 61,199 (2019).

[17] *See, e.g., Constitution Pipeline Co., LLC*, 169 FERC ¶ 61,199 (2019) (reaffirming a finding that New York had waived its Section 401 authority, with Glick, Comm'r, dissenting at PP 1 and 11 (noting that he would direct briefing on whether an applicant's filing of additional information with the state rendered its resubmission "sufficiently 'different'" and thus restart the one-year clock)). On December 30, 2019, the New York Department of Environmental Conservation, which is responsible for issuing the Section 401 permit in New York, filed an appeal of FERC's decision in the U.S. Court of Appeals for the Second Circuit. New York State Dep't of Env't Conservation v. FERC, *appeal docketed*, No. 19-4338 (2d Cir. Dec. 30, 2019).

[18] Exec. Order No. 13,868, 80 Fed. Re. 15,495 (Apr. 15, 2019).

[19] U.S. Envt'l Protection Agency, Clean Water Act Section 401 Guidance for Federal Agencies, States, and Authorized Tribes (2019), *available at* https://www.epa.gov/cwa-401/clean-water-act-section-401-guidance-federal-agencies-states-and-authorized-tribes.

[20] Updating Regulations on Water Quality Certification, 84 Fed. Reg. 44,080 (proposed Aug. 22, 2019) (to be codified at 40 C.F.R. 121).

[21] Certification of New Interstate Natural Gas Pipeline Facilities, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000), at 21–24.

[22] Keith Goldberg, *FERC Unlikely To Act Soon On Pipeline Policy, Chairman Says,* Law360 (Oct. 21, 2019).

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[23] Climate Leadership and Environmental Action for our Nation's (CLEAN) Future Act, H.R. __, 116th Cong. § 215 (discussion drft. 2020).

[24] *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017).

[25] *Birckhead v. FERC*, 925 F.3d 510 (D.C. Cir. 2019).

[26] *El Paso Natural Gas Co., LLC*, 169 FERC ¶ 61,133 (2019) (McNamee, Cmm'r, concurring).

[27] Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 1,684 (proposed Jan. 10, 2020) (to be codified at 40 C.F.R. 1500-1508). This proposed rulemaking follows from President Trump's One Federal Decision policy, established in Executive Order 13807. 82 Fed. Reg. 40,463 (Aug. 24, 2017). Preceding the January 10, 2020 issuance, CEQ issued an advanced notice of proposed rulemaking on June 20, 2018, and received over 12,500 comments. 83 Fed. Reg. 28,591 (proposed June 20, 2018). When issued, the final rules will be only the second modification to the CEQ NEPA regulations since NEPA was enacted in 1978. The comment deadline is March 10, 2020.

[28] Rules of the Senate, Rule XXXI: Executive Session - Proceeding on Nominations, para. 6, *available at* https://www.rules.senate.gov/.

[29] 42 U.S.C. § 7171(b)(1).

[30] 42 U.S.C. §7171.

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