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More Pipeline Development Projects: What American Needs

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National Environmental Policy Act ("NEPA") challenges to pipeline projects and other natural gas infrastructure have become a commonplace tool in recent years for environmental groups seeking to defeat or delay midstream projects. As direct litigation attacks on upstream drilling have been largely unsuccessful to halt that activity, the litigation tactics of naysayers has shifted to the midstream sector.

Beyond the well-publicized Keystone XL pipeline litigation, other cases have sprung up throughout the United States in recent years challenging pipeline projects. For example, in November 2011, the Sierra Club and Earthjustice challenged the Federal Energy Regulatory Commission's issuance of a certificate of public convenience to the Central New York Oil and Gas Co., alleging that FERC should have prepared an environmental impact statement considering the cumulative impacts from "shale gas development." Instead, FERC issued a less-detailed environmental assessment ("EA"), finding that the project would not constitute major federal action that would significantly affect the quality of the human environment. In February 2012, the U.S. Court of Appeals for the Second Circuit issued a stay of FERC's order, finding that FERC violated NEPA by dismissing the impacts of shale gas development as too speculative to consider in its assessment. The Second Circuit lifted the stay 11 days later after additional briefing, finding that FERC had given careful consideration to the cumulative impacts for the project in the environmental assessment. Our take: While the environmental groups did not succeed in stopping the pipeline, this case underscores the aggressive challenges imposed on pipeline projects affiliated with shale development.

A June 6 decision in the D.C. Circuit expands the NEPA cloud of uncertainty for industry as it tries to build the required infrastructure. In *Delaware Riverkeeper Network v. Federal Energy Regulatory Commission,* 44 ELR 20126 No. 13-1015, (D.C. Cir., June 6, 2014), the court agreed with the environmental groups that the EA, which was prepared by FERC, was insufficient since it did not consider the cumulative impacts on the environment from other related pipeline projects and the pipeline did not have a "substantial independent utility" separate from three related upgrade projects. The case involved Tennessee Gas Pipeline's Northeast Project, one of four separate upgrade projects on the Eastern Leg of the existing 300 Line. The court concluded that FERC had improperly "segmented" its environmental review by evaluating the pipeline projects separately (a theme that has been raised by courts historically on federal highway projects).

Critical to the court's decision to remand the case to FERC for further environmental review was the court's focus on the "interdependence" of the pipeline to other pipelines and ultimately to extraction points. The concept of "interdependence" when evaluating multiple facilities or operations has also played a part in court cases involving the aggregation of air emissions to determine if a Title V permit should be required. In the instant case, the court relied on the fact that the pipeline is "linear and independent" and connected to other pipelines and compressor stations to extraction points beyond Tennessee Gas's Eastern Leg. But reliance on these

factors is questionable since, taken to the extreme, FERC could be required to evaluate the cumulative environmental impacts in 50 states whenever any pipeline is being expanded or constructed because most pipelines are linear and connected to other pipelines as part of a larger network of pipelines. That is an absurd result and clearly not one intended by the statute.

NEPA is not the only tool available to opponents of responsible American energy production. Opponents have also challenged pipeline projects using the Endangered Species Act and the Clean Water Act. For example, in October 2012, the Ninth Circuit in *Center for Biological Diversity v. Bureau of Land Management,* 698 F.3d 1101 (9th Cir. 2012), overturned FERC's approval of the Ruby Pipeline, a 678-mile natural gas pipeline from Wyoming to Oregon. In that case, the Ninth Circuit vacated the Bureau of Land Management's authorization for the project, and the U.S. Fish and Wildlife Service's ("FWS") biological opinion, finding that the opinion was arbitrary and capricious because the measures were not enforceable by FWS and because the opinion failed to account for groundwater pumping during pipeline construction. Meanwhile, in January 2014, Mobile Baykeeper filed a complaint in federal court challenging a nationwide permit issued by the U.S. Army Corps of Engineers regarding an oil pipeline. The complaint alleges that the permit violated the Clean Water Act and the Administrative Procedures Act because there were no public notices or environmental impact studies conducted. Collectively, these cases represent other examples of environmental groups using federal statutes as a vehicle for challenging pipeline projects.

In many cases, the merits of the case are irrelevant to those challenging the project. A commonplace strategy used by environmental groups is to inject sufficient delay and investment uncertainty so that project investors decide to pull the plug. Frivolous lawsuits can accomplish this, as project opponents are well aware.

We need pipelines in this country, make no mistake about it. Shale oil and gas development and production is at its highest levels in decades. But as a recent June 2014 Goldman Sachs Global Markets Institute report ("Unlocking the Economic Potential of North America's Energy Resources") observed: "The 'demand response' phase of the shale revolution is stalling." In short, the report notes that we have a limited window to take advantage of the overwhelming economic benefits that accompany shale development (e.g., more jobs, GDP growth, a reduction in greenhouse gas emissions), but we will lose this opportunity unless we build the necessary infrastructure. Other countries with similar resources will eventually "catch up" to the technological advancements made by industry in the United States, and we will have lost the edge we now have with the shale revolution.

The real question posed by the Goldman Sachs report (and others) is whether we have the national willpower to act as a world leader in responsible energy development and delivery to our own people, or whether we will surrender to being dependent on and being at the mercy of others. Just ask the Ukrainian people how that works. The U.S. Energy Information Administration has now proclaimed that the United States is the largest energy producer in the world, when natural gas and oil are combined. But what difference does production of the resources make if there is insufficient infrastructure (such as pipelines) to get the oil and gas to market? According to a November 2013 study by the Deloitte Center for Energy Solutions ("The Rise of the Midstream: Shale Reinvigorates Midstream Growth"), the need for critical infrastructure may require more than $200 billion in additional pipeline and other midstream projects by 2035.

The bottom line is we have a choice. We can act in our own national interest to develop domestic energy and deliver low-cost affordable energy to our citizens along with a manufacturing and jobs renaissance. Or we can pursue a course of deprivation and denial, i.e., death through a thousand cuts. America needs more pipelines in order to achieve the full potential and benefits of domestic energy production. Time is running out as competitor nations with their own energy plays are not as pusillanimous as we seem to be about acting in their own national interest on the subject of energy development and building infrastructure.

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