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## Proposed Upgrades to Two New England Natural Gas Pipeline Systems Upgrades: D.C. Circuit Court of Appeals Addresses Challenge to Federal Energy Regulatory Commission Approval

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The United States Court of Appeals (District of Columbia Circuit) (“Court”) in a December 27th Judgment addressed an appeal of the Federal Energy Regulatory Commission (“FERC”) approval of proposed upgrades to two New England natural-gas pipeline systems.

Two natural-gas pipeline companies – Algonquin Gas Transmission, LLC, and Maritimes & Northeast Pipeline, LLC, – proposed upgrades which are stated to have entailed:

... replacing existing pipeline, modifying certain facilities, and building a new compressor station in Weymouth, Massachusetts.

The pipeline companies were required to apply to the FERC for a Certificate of Public Convenience and Necessity under section 7(c) of the Natural Gas Act (“NGA”).

The Town of Weymouth and several environmental groups (collective “Petitioners”) opposed granting the certificate. They subsequently petitioned the Court challenging the FERC’s approval.

The Petitioners raised five substantive challenges.

First, they argued the FERC violated the NGA by approving a project that does not serve the public convenience and necessity. This was based on the contention that the FERC ignored certain safety risks.

The Court rejected this argument, concluding the FERC’s environmental assessment (“EA”) addressed each of the identified risks. It also rejected the argument that the FERC could not rely on the pipeline companies’ assertions that they would comply with certain federal safety regulations. The agency was entitled “absent evidence to the contrary,” to “assume that the companies would exercise good faith.”

Second, Petitioners argued that the project does not serve the public convenience and necessity since approximately half of its natural gas would be exported to Canada. The Court, in discounting this argument, noted that therefore half of the gas would be used for domestic consumption. It stated that export of natural gas pursuant to a free trade agreement can be consistent with the public interest.

Third, it was argued that the FERC violated the National Environmental Policy Act (“NEPA”). Various environmental effects were stated to have been inadequately considered.

NEPA requires federal agencies to include environmental values and issues in their decision-making processes. This federal mandate is accomplished by agency consideration of environmental impacts of proposed actions and reasonable alternatives to those actions. The statute requires federal agencies in certain instances to prepare a detailed Environmental Impact Statement (“EIS”). However, the requirement to produce this document is only triggered in the event of a major federal action that will significantly affect the environment.

NEPA differs from action enforcing environmental statutory programs such as the Clean Air Act or Clean Water Act. It does not impose substantive mandates. Instead, it is limited to requiring federal agencies to meet procedural requirements such as preparation of an EA or EIS in certain defined instances. As a result, NEPA does not require a certain alternative or meet a particular standard.

The Court rejected the NEPA challenge, listing the FERC’s efforts in reviewing the various environmental issues. These included the FERC’s quantification of the project’s expected greenhouse gas emissions and how it would interact with Massachusetts’ climate-change goals.

Fourth, an additional NEPA argument was rejected. The Court disagreed that the FERC was required to prepare an Environmental Impact Statement (“EIS”) rather than just an EA. It cited the FERC’s regulations which note that an EIS is not required for:

. . . the construction, replacement, or abandonment of compression, processing, or interconnecting facilities.

Instead, an EA is appropriate according to the referenced regulations.

Finally, the Court concluded that the FERC did not violate the Coastal Zone Management Act.

This statute provides that a federal permit “to conduct an activity. . . affecting . . . the coastal zone” shall not be granted “until the state . . . has concurred with the applicant’s certification.” The FERC’s certificate was noted to prohibit construction until approval is obtained from Massachusetts.

A copy of the opinion can be found [here](#).