

On Friday there were two seismic shocks in the world of gas pipeline regulation. FERC has spent years resisting pressure to change the way it licenses new gas pipelines. A whole point of a natural gas pipeline is to deliver the gas to users who will burn it, thereby releasing CO<sub>2</sub> into the atmosphere. FERC has steadfastly refused to take those emissions into account. The DC Circuit [held](#) that position illegal in an opinion released last Friday. That same day by coincidence, FERC published [guidelines](#) in the Federal Register explaining how it proposed to take the emissions into account.

The D.C. Circuit opinion followed up on previous rulings but left no room for doubt about the court's position. The case involved a minor pipeline upgrade by the Tennessee Natural Gas Pipeline Company. As was its practice, FERC refused to take into account "downstream" emissions — that is, emissions by the ultimate users of the gas. The court reiterated that FERC must consider those emissions when they are reasonably foreseeable: "Our precedents establish that downstream emissions are not, 'as a categorical matter, always a reasonably foreseeable indirect effect of a pipeline project.' Rather, foreseeability depends on information about the 'destination and end use of the gas in question.'" Applying that test, the court found that the FERC had plenty of information about potential users and their likely energy use. It brushed aside FERC's claims to the contrary.

Something important happened between FERC's refusal to consider downstream emissions in the DC Circuit case and now: President Biden's appointment of new Democratic commissioners. On Friday, the new FERC majority issued guidance about how it would consider downstream emissions in the future. This guidance has a lot of really interesting features, but in the interest of space I'll mention only three.

First, FERC will require a full-scale environmental impact statement for any project that will result in the emission of the equivalent of 100,000 tons of CO<sub>2</sub> annually. This is the first time a federal agency has defined such a threshold. This will cover three-quarters of FERC-licensed projects. A full-scale EIS is a big undertaking, so this requirement by itself will have an important effect on proposed projects.

Second, in considering whether to approve a license for a project, FERC will also take climate impacts into account. This is important because environmental impact statements themselves are purely informational. In contrast, FERC is now interpreting the Natural Gas Act to make carbon impacts a required consideration in decision making.

Third, in deciding whether to require an impact statement or whether to license a project, FERC will consider mitigation efforts by the project sponsor. Those mitigation efforts could include purchasing allowances from an emission trading system, such as California's or the

northeastern states' RGGI system, purchasing renewable energy credits, or purchasing offsets that are certified by third parties. FERC stresses that it is not requiring these efforts but is simply encouraging them.

The DC Circuit's ruling merely underscores FERC's duty to disclose the impact of downstream emissions in environmental impact statements. FERC's guidelines go beyond what we've seen from federal agencies by working through just how to consider those impacts in making decisions. They're sure to be challenged in court, either immediately or in connection with specific projects. But they're also likely to serve as models for other federal and state agencies.