Natural Gas Pipeline Trends

Regulation, Litigation, and the Effect of the Presidential Election

By Scott M. Press and Larry D. Mason

Changes in presidential administrations often alter environmental policy and regulatory direction when the newly elected president's party affiliation differs from his or her predecessor's.

According to the United States Energy Information Administration (EIA), approximately 30 trillion cubic feet of natural gas was consumed in 2018, which comprised 31 percent of total U.S. primary energy consumption. Use of Natural Gas, US Energy Inform. Admin., **https://www.eia.gov**. Transportation of the energy source occurs by way of a vast network of nearly three million miles of pipelines connecting the collection, production, and storage of natural gas with its end users. Natural Gas Pipelines, US Energy Inform. Admin., **https://www.eia.gov**. To put that distance into perspective, the Moon is approximately 238,855 miles from the Earth. The network of pipelines has rapidly expanded as a result of declining prices and increased demands, all of which stem from technological advances leading to the increased production of natural gas. *Id.*

Advocates of natural gas as a clean energy source argue that the reduction in carbon dioxide (CO_2) emissions that result from burning natural gas make it a cleaner fossil fuel than the more traditional fuel sources of oil and coal, while environmentalists and clean-energy advocates note that the CO_2 emissions from natural gas use are still relatively high, and the industry still has a negative environmental impact when considering methane emissions from leaks, burning of natural gas from flares when it is not feasible to transport, and other effects due to continued exploration. Natural Gas and the Environment, US Energy Inform. Admin., **https://www.eia.gov**. The debate over natural gas use and regulation will continue to heat up as the 2020 presidential election nears, with differing views about the industry evident between the two major political parties.

This article will provide a historical overview of the statutory and regulatory

■ Scott M. Press is a Senior Associate at Goldberg Segalla LLP, based in White Plains and Manhattan, with a practice devoted to representing clients in complex environmental litigation claims, regulatory and compliance counseling, development, and enforcement issues relating to state and federal environmental laws and regulations. Larry D. Mason is a Goldberg Segalla LLP partner, based in Chicago and Manhattan, where he dedicates his practice to first-party and third-party coverage, reinsurance, and defense issues, including environmental and toxic torts, product liability, professional liability for clients in construction, environmental and related industries, complex commercial litigation, and assistance to underwriters regarding policy drafting and strategy.

authority that enables developers to lay pipelines throughout the country and discuss the ramifications of proposed regulatory changes announced by the Trump administration that could further natural gas pipeline expansion. We will also analyze the increase in eminent domain litigation stemming from the rise of pipeline development, which affects state sovereignty and private property rights. Finally, we will address the effect that the 2020 presidential election could have on the natural gas industry.

Regulatory History

The federal statutory authority governing pipeline laying discussed here derives from the Natural Gas Act and is subject to the environmental review process under the National Environmental Policy Act. Today, regulatory authority over interstate pipeline development under the Natural Gas Act is vested with the Federal Energy Regulatory Commission, although the act originally vested authority over interstate pipeline development with the Federal Power Commission. The Council on Environmental Quality is responsible for the oversight of National Environmental Policy Act implementation.

Pipeline Permitting Process: Certificate of Public Convenience and Necessity

Pursuant to the Natural Gas Act (NGA), a natural gas pipeline-siting project requires specific approval from the federal government. *See* 15 U.S.C. §717f(c). The first regulatory task in the checklist for a person seeking to construct, extend, acquire, or operate an interstate natural gas pipeline is obtaining a "certificate of public convenience and necessity" from the Federal Energy Regulatory Commission (FERC). *Id*. (As mentioned, the NGA originally vested authority over interstate pipeline development with the Federal Power Commission, and the power was transferred to FERC in the Department of Energy Organization Act of 1977. 42 U.S.C. §7172(a)(1)(D)). A "certificate of public convenience and necessity" "shall" be issued to

> any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied.

15 U.S.C. §717f(e).

Counsel should be knowledgeable about FERC's 1999 policy statement on pipeline certificates because it details how applications for public convenience and necessity certifications are evaluated. *See* Fed. Energy Reg. Comm'n, Certification of New Interstate Natural Gas Pipeline Facilities Policy Statement, 88 FERC ¶61,227 (Sept.15, 1999), *clarified*, Order Clarifying Policy Statement, 90 FERC ¶61,128 (February 9, 2000), *further clarified*, Order Further Clarifying Policy Statement, 92 FERC ¶61,094 (July 28, 2000). A key component to the certification process is an evaluation that includes determining whether a project's public benefits (i.e., lowering gas prices, increasing competition) outweigh adverse impacts on landowners and the environment.

Critically, the recipient of a certificate of public convenience and necessity under section 7 of the NGA also enjoys the benefit of eminent domain power, which serves as a powerful mechanism for developers of pipeline projects and a huge hurdle for opponents. 15 U.S.C. §717f(h) ("When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas… it may acquire the same by the *exercise of the right of eminent domain* in the district court of the United States for the district in which such property may be located….")(emphasis added). Notably, eminent domain power is not vested in pipeline developers with projects approved for foreign commerce under section 3 of the NGA. 15 U.S.C. §717b.

National Environmental Policy Act

Another hurdle, which developers should not consider a rubber stamp in the regulatory approval process, is the National Environmental Policy Act (NEPA) environmental review. Certificates of public convenience and necessity issued by FERC under section 7 of the NGA are subject to an environmental analysis as required by NEPA. 42 U.S.C. §4321 et seq. NEPA requires federal agencies to consider the potential environmental impact of "federal actions." 42 U.S.C. §4332. The issuance of a certificate of public convenience and necessity is a "federal action" subjecting FERC to NEPA review. *See* 40 C.F.R. §1508.18(a), (b)(4).

In compliance with NEPA, if the issuance of a certificate of public convenience and necessity is likely to have a significant impact on the human environment, FERC must prepare an environmental impact statement (EIS) that addresses the following:

(i) the environmental impact of the proposed action,
(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
(iii) alternatives to the proposed action,
(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

42 U.S.C. §4332(C). As part of the preparation of the EIS, developers must be aware that the NEPA review requires FERC to consider both direct and indirect environmental effects of the project under construction. *See* 40 C.F.R. §1502.16. "Indirect effects" are those that "are caused by the [project] and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. §1508.8(b).

Preparing an EIS is not uncommon in natural gas pipeline projects because the process provides an opportunity for stakeholders and interested parties to comment on the environmental issues posed by a particular project. *See* 40 C.F.R. §1501.7. Once the NEPA review is complete and a certificate of public convenience and necessity is issued, a developer can begin the process of securing the various rights-

of-way needed to construct, operate, and maintain a pipeline.

Challenging the Issuance of a Certificate of Public Convenience and Necessity

As will be detailed below, once a certificate of public convenience and necessity has been issued and eminent domain proceedings have begun, practitioners should understand that aggrieved parties face an uphill battle in halting the development of a natural gas pipeline. "Aggrieved parties" include challengers to FERC orders under NEPA who assert an environmental harm (*see Gunpowder Riverkeeper v. FERC*, 807 F.3d 267, 273–74 (D.C. Cir. 2015)), as well as landowners forced to choose between selling to a pipeline developer and undergoing eminent domain proceedings. *See B & J Oil & Gas v. FERC*, 353 F.3d 71, 75 (D.C. Cir. 2004).

Counsel representing a party seeking to challenge a pipeline project must be well versed in the strict jurisdictional requirements that come with the process. Prior to the issuance of a certificate of public convenience and necessity, FERC conducts a hearing on reasonable notice to all interested parties. 15 U.S.C. §717f(c)(1)(B). An aggrieved party that may be affected by the project can seek a rehearing within thirty days of the issuance of the order. *Id.* at §717r(a). Practitioners need to understand that the rehearing request is imperative because it is a jurisdictional prerequisite to judicial review. *Id.* ("No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon."). Once FERC acts on the rehearing request, an aggrieved person may seek judicial review of the decision in either the U.S. Court of Appeals for the District of Columbia, or the U.S. court of appeals for the circuit where the natural gas company is located or has its principal place of business, "within sixty days after the order of the Commission upon application for rehearing." *Id.* at §717r(b).

Therefore, it is critical first to mount a challenge at the certificate-issuance stage, particularly to preserve an opportunity for judicial review. Further, when a rehearing request is made, this should serve as a signal to pipeline developers of likely, or at least potential, court action. Nevertheless, if an aggrieved party fails to seek a rehearing before FERC, the court of appeals will not have jurisdiction to consider an appeal.

Climate Change NEPA Challenges

While the expanse of challenges to the issuance of a certificate of public convenience and necessity is beyond the scope of this article, a particular challenge to look out for, which has gained some traction in recent years, is an environmental NEPA challenge premised on FERC's failure to quantify the effects of a pipeline on climate change. Although historically these challenges were of minimal concern to developers, this is an issue that should no longer be overlooked.

NEPA climate change challenges first gained traction when the D.C. Circuit Court of Appeals vacated FERC's approval of the 500-mile Sabal Trail pipeline passing through Alabama, Georgia, and Florida in *Sierra Club v. Fed. Energy Regulatory Comm'n*, 867 F.3d 1357 (D.C. Cir. 2017), because the court determined that FERC's EIS failed to consider the downstream effects of greenhouse-gas (GHG) emissions. The court explained that the downstream ramifications of GHG emissions from the combustion of the transported gas were a reasonably foreseeable, indirect effect of the project that FERC should have considered under NEPA. *Id.* at 1374 (concluding that the developer "should have either given a quantitative estimate of the downstream greenhouse emissions that will result from burning the natural gas that the pipelines will transport or [should have] explained more specifically why it could not have done so"). On remand, FERC was directed to address the environmental effects of downstream emissions and opine as to the usefulness of the "social costs of carbon" methodology (a tool that puts a dollar value on the long-term harm caused by each ton of carbon emitted). *Id.* at 1375.

Subsequently, in *Birckhead v. Fed. Energy Regulatory Comm'n*, although the court upheld FERC's order authorizing the construction of a new natural gas compressor facility, it explained that FERC should have collected certain missing upstream and downstream GHG emissions data as part of the NEPA review, and the court suggested that FERC should at least *attempt* to get such data as part of its statutory responsibilities. 925 F.3d 510 (D.C. Cir. 2019).

Therefore, a key takeaway from *Sierra Club* and *Birckhead* for litigants opposing a pipeline project is that these cases provide a basis to challenge the sufficiency of FERC's NEPA review in instances in which the environmental effects of GHG emissions are not considered. However, despite these rulings, there have been numerous FERC orders that failed to consider the effects of projects on climate change, as directed by the D.C. Circuit in *Sierra Club* and *Birckhead*, making this challenge ripe for judicial review.

Litigation Trends

As mentioned, the Natural Gas Act expressly allows a holder of a certificate of public convenience and necessity to exercise eminent domain to construct a natural gas pipeline, and courts generally have upheld the right, except where a state has owned some of the land sought, or the pipeline developer has initiated a "quick taking."

Eminent Domain

Section 717f(h) of the NGA grants the holder of a certificate of public convenience and necessity the ability to exercise eminent domain power to construct a natural gas pipeline. The power gives private developers the ability to seek condemnation of private property for purposes of constructing natural gas pipeline projects. The statute expressly allows a holder of a certificate of public convenience and necessity to exercise the right of eminent domain in the federal district court where the property is located, and there have been limited challenges to the ability to exercise this right.

Furthermore, the constitutionality of this provision of the NGA was upheld by the Fifth Circuit Court of Appeals in *Thatcher v. Tennessee Gas Transmission Co.*, 180 F.2d 644 (5th Cir. 1950). The court there recognized that Congress may delegate the power of eminent domain to a private corporation because of the "nature and utility of the business functions it discharges, as a public utility." *Id.* Thus, it found that the grant of the power of eminent domain provided by the NGA was a constitutional regulation of interstate commerce. The constitutionality of this power has not

been subject to any significant constitutional challenge since *Thatcher*. *See, e.g.*, *Equitrans, L.P. v. 0.56 Acres More or Less of Permanent Easement Located in Marion Cty., W. Virginia*, 145 F. Supp. 3d 622, 630 (N.D.W. Va. 2015) (rejecting a landowner's argument that the condemnation of its property under the Natural Gas Act is an unconstitutional taking).

State-Owned Land

While the constitutionality of this practice has generally been upheld, there have been recent challenges to the private exercise of eminent domain where the subject property includes state land. The Third Circuit Court of Appeals recently denied the ability of a private developer to exercise its right to take land owned by the State of New Jersey to construct a natural gas pipeline. *In re Penneast Pipeline Company, LLC*, 938 F.3d 96 (3d Cir. 2019), *as amended* (Sept. 19, 2019), *pet. for cert. filed* (U.S. Feb. 18, 2020) (No. 19-1039). In that case, PennEast Pipeline Company LLC sought orders of condemnation and preliminary injunctive relief authorizing immediate access to, and possession of, rights-of-way over 131 properties for the purpose of constructing and operating a new 116-mile, 36-inch-diameter pipeline system: this included forty-two property interests held by arms of the State of New Jersey. After FERC granted a certificate of public convenience and necessity, PennEast sought an order granting condemnation of the rights-of-way under the NGA. However, several State of New Jersey defendants opposed this application, seeking to invoke the state's sovereign immunity from suit in federal courts under the Eleventh Amendment of the United States Constitution. The U.S. District Court for the District of New Jersey granted PennEast's condemnation and found that the Eleventh Amendment immunity was inapplicable because the NGA had vested PennEast with the federal government's eminent domain powers "in the shoes of the sovereign." *See In re Penneast Pipeline Company, LLC*, 2018 WL 6584893 (D.N.J. Dec. 14, 2018), *vacated and remanded sub nom. In re PennEast Pipeline Co., LLC*, 938 F.3d 96 (3d Cir. 2019), *as amended* (Sept. 11, 2019), *as amended* (Sept. 19, 2019), *pet. for cert. filed*, (U.S. Feb. 18, 2020) (No. 19-1039). However, the U.S. Court of Appeals for the Third Circuit *reversed*, holding that "[a] private party is not endowed with all the rights of the United States by virtue of a delegation of the government's power of eminent domain." Thus, it determined that the NGA did not delegate the federal government's exemption from Eleventh Amendment immunity to private entities, and the court directed a dismissal of the condemnation claims against the state. *Id.*

The *PennEast* decision is not the only case where a federal court denied a developer's action seeking condemnation of state-owned land under the NGA. Last year, the U.S. District Court for the District of Maryland, Northern Division, declined to grant a condemnation of state-owned land. *Columbia Gas Transmission, LLC v. .12 Acres of Land, CA No. GLR-19-1444* (D. Md. Aug. 22, 2019). Similar to the Third Circuit, the court there held that the NGA did not abrogate state sovereign immunity or delegate the United States' state sovereign exemption to permit Columbia Gas Transmission LLC the ability to sue the State of Maryland to condemn state-owned land for a right-of-way easement. *Id.* Additionally, the U.S. District Court for the Eastern District of Texas has held that the Eleventh Amendment barred a condemnation suit brought by a natural gas company seeking to renew a right-of-way on land that had transferred in ownership from a private individual to a state agency. *Sabine Pipe Line, LLC v. A Permanent Easement of 4.25+/ Acres of Land in Orange County, Tex., et al.,* 327 F.R.D. 116 (E.D. Tex. 2017).

On February 18, 2020, PennEast filed a petition for writ of certiorari to the U.S. Supreme Court, seeking review of the Third Circuit's decision. Cert. Pet., *PennEast Pipeline Company, LLC v. State of New Jersey, et al.* (U.S. Feb. 18, 2020) (No. 19-1039). In its petition, PennEast relied on a FERC declaratory order issued on January 30, 2020. In a split-panel decision, FERC issued its declaratory order interpreting the NGA as follows:

> We here confirm our strong belief that NGA section 7(h) empowers natural gas companies, and not the Commission, to exercise eminent domain and that this authority applies to lands in which states hold interest. A contrary finding would be flatly inconsistent with Congressional intent, as expressed in the text of NGA section 7(h), which is also supported by the legislative history.

Fed. Energy Reg. Comm'n Declaratory Order, 170 FERC ¶25 (Jan. 30, 2020).

FERC Commissioner Richard Glick dissented, opining that FERC should not insert itself into a primarily constitutional question that is already being appropriately litigated in the federal courts and further noting that it is unclear whether Congress intended the NGA to apply to state lands. *Id.* at ¶1 (Glick, C., dissenting). In its petition, PennEast mirrored FERC's declaratory order, arguing that the Third Circuit reached a conclusion that is contrary to the legislative intent of the NGA, and which "effectively invalidated an Act of Congress and upset a century of settled industry practice." Cert. Pet., *PennEast Pipeline* (U.S. Feb. 18, 2020) (No. 19-1039).

While the *PennEast* litigation continues to run its course (the deadline for the State of New Jersey's brief in response to PennEast's Petition for a writ of certiorari is June 2, 2020), natural gas developers will need to remain wary about the potential for a state to assert sovereign immunity as a shield against property condemnation for pipeline construction on state lands. Indeed, the *Columbia Gas Transmission* case makes clear that seeking a right-of-way over even a sliver of state land has the potential to derail a pipeline-development project before it even begins. This is not to say that developers should completely avoid siting all future projects on state-owned land; indeed, there is nothing prohibiting them from coming to a contractual agreement with a state to acquire the rights over such land, since this is contemplated as a precursor to a condemnation action by section 717f(h).

"Quick-Take" Litigation

Another issue of concern in relation to the exercise of eminent domain for construction of a natural gas pipeline arises from the practice of "quick takings." This is the practice of a natural gas developer taking immediate possession of property through the exercise of eminent domain *before* providing compensation to the landowner. In *East Tennessee Natural Gas Co. v. Sage,* 369 F.3d 357 (4th Cir. 2004), the Fourth Cir-

cuit Court of Appeals upheld this practice, stating that "once a district court determines that a gas company has the substantive right to condemn property under the NGA, the court may use its equitable power to grant the remedy of immediate possession through the issuance of a preliminary injunction." A court will analyze whether to grant a preliminary injunction for immediate possession under a four-factor analysis as set forth in *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008). A preliminary injunction will be deemed proper when the plaintiff can establish (1) the likelihood of success on the merits; (2) the likelihood of suffering irreparable harm in the absence of preliminary relief; (3) the balance of equities weighs in the plaintiff's favor; and (4) an injunction is in the public interest. *Id.*

Challenges in this area of natural gas litigation have arisen because the NGA does not expressly grant the power to institute a "quick take" before payment of just compensation. Litigants in various jurisdictions have staged challenges to the constitutionality of the "quick-take" practice on the grounds of separation of powers—with little success. *See, e.g., Mountain Valley Pipeline, LLC v. 6.56 Acres of Land, Owned by Sandra Townes Powell,* 915 F.3d 197, 215 (4th Cir. 2015)*, cert. denied sub nom. Givens v. Mountain Valley Pipeline, LLC,* 140 S. Ct. 300, 205 L. Ed. 2d 199 (2019) ("*Sage* squarely forecloses the Landowners' argument that the district courts lacked the authority to grant immediate possession in a Natural Gas Act condemnation."); *Mountain Valley Pipeline, LLC v. W. Pocahontas Properties Ltd. P'ship*, 918 F.3d 353 (4th Cir. 2019); *Nexus Gas Transmission, LLC v. City of Green, Ohio*, 757 Fed.Appx. 489 (6th Cir. 2018); *Transcon. Gas Pipe Line Co., LLC v. Permanent Easements for 2.14 Acres in Conestoga Twp., Lancaster Cty., Pennsylvania*, 907 F.3d 725 (3d Cir. 2018); *Transcon. Gas Pipe Line Co., LLC v. 6.04 Acres, More or Less, Over Parcel(s) of Land of Approximately 1.21 Acres, More or Less, Situated in Land Lot 1049,* 910 F.3d 1130, 1152 (11th Cir. 2018)*, cert. denied sub nom. Goldenberg v. Transcon. Gas Pipe Line Co., LLC,* 139 S. Ct. 1634, 203 L. Ed. 2d 901 (2019).

Notwithstanding the general trend of upholding *Sage* and the quick-take practice, at least one district court has held that the NGA does not grant private gas companies the right to take immediate possession of land without just compensation. *See Transwestern Pipeline Co., LLC v. 9.32 Acres, More or Less, of Permanent Easement Located in Maricopa Cty.,* 544 F. Supp. 2d 939 (D. Ariz. 2008)*, aff'd sub nom. Transwestern Pipeline Co. v. 17.19 Acres of Prop. Located in Maricopa Cty.,* 550 F.3d 770 (9th Cir. 2008). In *Transwestern Pipeline Co.*, the U.S. District Court for the District of Arizona held that while section 717f(h) of the NGA "grants private gas companies the right to exercise eminent domain through condemnation proceedings[,] it does not grant private gas companies the right to exercise quick-take power." 544 F. Supp. 2d at 949. Although this decision discusses the justification for denying quick-take practice by natural gas companies—that is, that there is no explicit provision of the NGA stating that the holder of a FERC certificate has a right to immediate possession of property—it is the outlier. Landowners are likely to continue to challenge the constitutionality of quick-take practice on a case-by-case basis unless and until the U.S. Supreme Court takes up the issue of whether the *Sage* school of thought is constitutional. Alternatively, though unlikely, Congress may directly provide clarification through an amendment to the NGA indicating whether the holder of a certificate of public convenience and necessity automatically has the right to immediate possession following a condemnation action in the district court.

Pipeline Politics in a Presidential Election Cycle

As with any major political topic, a presidential election could lead to significant changes in the natural gas pipeline industry. Climate change, the environment, and the development of renewable energy sources were constant topics of discussion during the Democratic Party presidential debates, but no consistent position emerged among the candidates at the time. Meanwhile, President Trump has sought to increase exploration and production of natural gas as a major component of the United States' energy infrastructure. In this section, we forecast how the results of the upcoming election may affect the development of natural gas pipeline projects over the course of the next few years by way of regulatory and policy changes.

Trump Administration: NEPA Reform

President Trump has taken an aggressive approach to roll back some of the policies of the Obama administration. In March 2017, President Trump issued Executive Order 13,783, which rescinded various energy and climate-related presidential directives and regulatory actions affecting the natural gas industry. This included the rescission of a Council on Environmental Quality (CEQ) guidance document pertaining to the consideration of greenhouse gas emissions and climate change in NEPA reviews.

In August of 2017, President Trump issued Executive Order 13,807, which called for the CEQ—that oversees NEPA implementation through the promulgation of regulations—to enhance and modernize the federal environmental review and authorization process under NEPA. Exec. Order No. 13,807, at §5(e)(i). Thereafter, the CEQ published an advance notice of proposed rulemaking in June 2018, requesting comment on potential regulation updates. *See* 83 Fed. Reg. 28,591 (June 20, 2018). Subsequently, on January 9, 2020, it released a notice of proposed rulemaking to update the NEPA regulations. *See* Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 1684 (Jan. 10, 2020). The stated goal of the proposed NEPA regulatory reform is to modernize and simplify the rules so as to facilitate more efficient, effective, and timely NEPA reviews.

The proposed rulemaking notice includes revisions to the definitions in part 1508 of the CEQ regulations, and specifically, a change to the definition of "effects" that strikes the specific references to direct, indirect, and cumulative effects, in an effort to reduce litigation over the terms. 85 Fed. Reg. 1684, 1707–08. The proposed rulemaking notice proposes a definition that "effects must be reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives." *Id.*

The Trump administration has been a major proponent of increasing the country's natural gas pipeline infrastructure, and the NEPA reform measures would

fast-track new projects. The proposed reforms would make it harder for opponents of projects to raise climate change challenges to the issuance of certificates of public convenience and necessity under the regulations. However, the limited environmental review that would be required under the reform measures could also expose new projects to challenges in court in which opponents would argue that the environmental analysis is too limited to be supportable.

The above-mentioned actions illustrate how the current administration attempted to rollback policies and directives affecting natural gas development. If reelected, President Trump is likely to continue the trend of removing perceived regulatory restrictions to facilitate further natural gas pipeline development. However, should the 2020 election result in a Democratic administration, it is important to recognize the potential shift in federal policy and regulation.

Prospective Changes Due to a Democratic Presidency After the 2020 Election

First, it is likely that as the potential Democratic president-elect, Joe Biden would seek to reinstate the policy of requiring consideration of GHG emissions and the long-term climate change effects of natural gas projects into the application review process. While such requirements would not necessarily reverse course on any purported efficiencies in the currently proposed NEPA revisions, it would require the CEQ to consider the indirect effects of a natural gas project during preparation of an EIS when evaluating a proposed action. Additionally, Mr. Biden would likely nominate FERC commissioners who more directly align with the Democratic party's policy positions. It is likely that such nominations would lead to a decrease in the number of certificates of public convenience and necessity that are ultimately granted by the agency.

Furthermore, some commonly proposed policies by the Democratic presidential candidates before Mr. Biden emerged as the presumptive presidential nominee included proposed bans on the issuance of any new oil or gas leases on federal land, as well as encouraging shifting the country to become one-hundred percent reliant on "clean energy" by 2050. Altogether, these policies would likely result in fewer new natural gas pipeline permits, diminished cooperation among FERC and other federal agencies in promoting natural gas development on federal lands, and a prioritization of federal land allocation for purposes of renewable energy development. From a litigation standpoint, the new landscape would essentially reverse the role for the natural gas developers, forcing them to challenge FERC decision-making instead of reaping the benefits of it.

Conclusion

As we usher in a new decade, the importance of sound energy and environmental policy cannot be stressed enough. The executive office has significant ability to shape the regulatory landscape affecting natural gas development in the United States. While there will undoubtedly never cease to be challenges at the permitting stage, we anticipate that the result of the presidential election will either lead to an uptick in newly approved projects, or a more stringent regulatory process aimed at reducing natural gas development in favor of alternative energy sources. Regardless of any policy shift, litigators will continue to challenge the issuance of section 7 certificates by urging FERC to consider a project's effect on climate change in the decision-making process.

Further, it appears that states will still have a sword in the fight, at least for now, by staging constitutional challenges during the eminent domain proceedings. One thing is for sure: pipeline developers will continue to seek section 7 certificates while natural gas is still viewed as a viable energy source, and litigators should be cognizant of the different stages in the permitting and approval process where they can expect challenges from landowners, states, and other interested parties. FD