

# Environmental Justice Takes Center Stage At FERC

By **Emily Mallen, Ben Reiter and Angelica Gonzalez** (June 8, 2023)

On April 21, the Federal Energy Regulatory Commission issued a pair of decisions that grappled with the effects of two proposed liquefied natural gas export terminal authorizations on environmental justice communities in the projects' vicinities near Brownsville, Texas.

In Texas LNG Brownsville LLC and Rio Grande LNG LLC, FERC for the first time conditioned a Natural Gas Act Section 3 authorization on the implementation of mechanisms specifically designed to protect nearby environmental justice communities.[1]

The conditions include ongoing air quality monitoring and mitigation during terminal construction and operation to be coordinated among and between the two LNG terminal project developers.

At FERC's April open meeting announcing the orders, Acting Chairman Willie Phillips proclaimed that this condition marked the first time that FERC was "requiring that the project sponsors ensure that the overlapping construction and operation of [their] project[s] do not cause any significant air quality impacts on environmental justice communities."

Another nod to environmental justice communities was a new requirement that the projects update their emergency response plans to protect nearby communities, to include, among other things, training materials in English and Spanish.

FERC's decisions in Texas LNG and Rio Grande mark a new era in which FERC orders more strenuously engage with environmental justice issues.

However, it is unclear whether Texas LNG and Rio Grande will be the template that FERC follows in subsequent natural gas infrastructure decisions. For example, FERC delayed the issuance of additional LNG terminal authorization and pipeline certificate orders at its May open meeting that could have built upon Texas LNG and Rio Grande.

Following May's open meeting, Phillips indicated that a policy document advising stakeholders on FERC's environmental justice expectations in evaluating applications likely was forthcoming.

It is expected that this policy document will respond to comments received during and following FERC's first Technical Conference on Environmental Justice and Equity in Infrastructure Permitting.[2]

FERC took live testimony from stakeholders at a roundtable held in late March and accepted written comments from industry, environmental, labor and community groups through mid-May that reflected a range of views on how FERC should engage with these issues.



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This forthcoming policy document could play a key role in informing how developers and affected communities approach energy projects for years to come.

### **What Is Environmental Justice?**

The U.S. Environmental Protection Agency defines environmental justice as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies."<sup>[3]</sup>

President Joe Biden has made the pursuit of environmental justice a key element of his domestic policy agenda.

On the same day FERC published Texas LNG and Rio Grande, Biden issued Executive Order 14096 — titled "Revitalizing Our Nation's Commitment to Environmental Justice for All."<sup>[4]</sup>

The executive order expands upon prior environmental justice and equity executive orders issued by Biden, including 13985 and 14008 from January 2021, and Executive Order 12898, the first executive order on environmental justice signed in 1994 by President Clinton.<sup>[5]</sup>

Executive Order 14096 asks each federal agency to "make achieving environmental justice part of its missions," including through the National Environmental Policy Act, or NEPA, by providing "opportunities for early and meaningful involvement in the environmental review process by communities with environmental justice concerns potentially affected by a proposed action."

As an independent agency, FERC often has viewed itself as not being subject to executive order edicts.

Regardless, FERC is likely to take note of executive order 14096's emphasis on NEPA as a framework for community input in agency decision making, and the executive order may provide additional fodder for parties challenging FERC infrastructure permitting decisions.

### **FERC's Authority To Engage on Environmental Justice Community Effects**

FERC's focus on environmental justice rose to prominence after the decision in *Vecinos Para el Bienestar de la Comunidad Costera v. FERC*<sup>[6]</sup> — a decision by the U.S. Court of Appeals for the District of Columbia Circuit in 2021 that remanded FERC's initial 2019 orders authorizing the Texas LNG and Rio Grande projects on two narrow grounds.

The court ordered FERC to better explain: (1) whether a specific NEPA regulation required FERC to adopt a more fulsome analysis of the projects' climate change impacts; and (2) why FERC's analysis of the projects' cumulative impacts on environmental justice communities was limited to a 2 mile radius when FERC had found that environmental effects related to air quality would extend out 50 kilometers.

In addition, with the support from these updated analyses, FERC was ordered to revisit its public interest determination for the terminal facilities under NGA Section 3, as well as its analysis under NGA Section 7 for a pipeline FERC authorized in Rio Grande to serve that particular terminal project.

While FERC is no stranger to appeals focused on its approach to greenhouse gas emissions

under NEPA, the Vecinos case was the first time the D.C. Circuit directed FERC to reconsider its approach to environmental justice community impacts under NEPA, and how that might interplay with its statutory authority under the NGA.[7]

Additional litigation is expected, as forecasted by FERC Commissioner Allison Clements in a dissent she filed in Texas LNG and Rio Grande, arguing that Vecinos necessitated that FERC engage in a deeper NEPA review, including preparation of a supplemental environmental impact statement available for public comment by the affected environmental justice communities that were identified by FERC following the court's remand.

Her statements were echoed in rehearing requests of the two orders filed by a coalition of environmental and community groups on May 22.

The groups argue that this "procedural shortcut itself renders FERC's inaction invalid" and that "FERC's decision to skip legally required steps and analysis will further postpone the project[s], if it takes litigation and a court order to compel FERC to do what FERC should have done ... in the first place." [8]

FERC orders may also lead to future challenges on behalf of project sponsors, including on whether FERC has authority to require the air quality monitoring and mitigation as a certificate condition, or whether that role belongs with the state agencies implementing the Clean Air Act.

Indeed, Phillips' concurrences referenced the new conditions as "unprecedented." It remains to be seen whether unprecedented is synonymous with unauthorized.

### **Possible Clarifying Role of an Environmental Justice Policy Statement**

In February 2022, FERC issued a policy statement to govern how it would discharge its duties under NGA Sections 3 and 7 to authorize new LNG terminal and interstate pipeline infrastructure.[9]

This proposed policy statement would have made environmental justice community impacts part of the agency's public interest determination under the NGA. FERC pulled the policy back in March 2022, and deemed it to be a draft [10] after considerable criticism from industry stakeholders and members of Congress that FERC was acting *ultra vires*.

Phillips' announcement that a new policy statement specific to environmental justice impacts was forthcoming suggests that the March 2022 draft policy will be abandoned in favor of something more targeted and possibly more legally durable.

Based upon discussions during the March technical conference, FERC may be seeking tangible solutions to improve the permitting process for environmental justice communities that are within its NGA authorities. This could include earlier and increased engagement with affected front-line communities.

In the written comments, some groups argued that FERC identify particular processes or requirements as part of its public interest determination.

For example, a number of environmental and community groups urged FERC to require project developers to engage affected communities early in the planning process, with one group suggesting community engagement should be required even before substantive project plans are developed.

Other environmental groups requested FERC reevaluate its math for calculating the costs and benefits of a project such that health impacts and loss of cultural heritage were included.

Industry groups pushed back on how far FERC could go while remaining within its statutory authorities, with some acknowledging room for additional community engagement in the pre-filing and environmental review process. Some asked FERC to consider the benefits projects can bring to affected communities, including lower energy bills, jobs, workforce training and increased tax revenues.

### **Environmental Justice at FERC Going Forward**

Based upon the comments submitted to FERC thus far, the agency may require additional statutory authority to implement changes to energy project permitting sought by some members of the environmental justice communities.

Even without additional statutory language, environmental justice impacts — and how they are addressed through NEPA processes — will remain an issue for consideration by FERC and its sister energy and environmental permitting agencies.

If FERC issues a new policy statement on addressing environmental justice community impacts, opportunities for additional legal challenges may be possible if the policy blurs the line too much between FERC's obligations under NEPA and its mandates under the NGA.

Whatever happens, these issues will continue to be raised by stakeholders before FERC and the courts.

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[1] Tex. LNG Brownsville LLC, 183 FERC ¶ 61,047 (2023); Rio Grande LNG, LLC 183 FERC ¶ 61,046 (2023).

[2] Federal Energy Regulatory Commission, Docket No. AD23-5-000, Environmental Justice & Equity in Infrastructure Permitting | FERC Panel Discussion (Mar 30, 2023), available at: <https://www.youtube.com/watch?v=cn1M3xg06xs>.

[3] <https://www.epa.gov/environmentaljustice>.

[4] Exec. Order No. 14096, 88 Fed. Reg. 25251 (2023).

[5] Exec. Order No. 13985, 86 Fed. Reg. 7009 (2021); Exec. Order No. 14008, 86 Fed. Reg. 7619 (2021); Exec. Order No. 12898, 59 Fed. Reg. 7629 (1994).

[6] 6 F.4th 1321, 453 (D.C. Cir. 2021).

[7] Notably, a decision by the U.S. Court of Appeals for the 4th Circuit on environmental justice impacts related to FERC-authorized natural gas infrastructure did not have a similar impact. In *Friends of Buckingham v. State Air Pollution Control Board*, 947 F.3d 68, 92 (4th Cir. 2020), the court noted that "environmental justice is not merely a box to be checked," when it vacated a Clean Air Act permit granted by a state agency for the operation of a pipeline compressor station. FERC was not directly implicated, and the decision did not result in any immediate policy changes at FERC.

[8] *Rio Grande LNG, LLC, Docket Nos. CP16-454, et al., Req. for Reh'g of Vecinos para el Bienestar de la Comunidad Costera, Sierra Club, City of Port Isabel, and the Carrizo/Comecrudo Tribe of Texas* at 1-2 (filed May 22, 2023); *Texas LNG Brownsville LLC, Docket No. CP16-116-002, Req. for Reh'g of Vecinos para el Bienestar de la Comunidad Costera, Sierra Club, and City of Port Isabel* (filed May 22, 2023).

[9] See *Consideration of Greenhouse Gas Emissions in Nat. Gas Infrastructure Project Revs.*, 178 FERC ¶ 61,108 (2022).

[10] See *Certification of New Interstate Nat. Gas Facilities*, 178 FERC ¶ 61,197 (2022).