

# Should FERC Have Exercised Jurisdiction Over an Intrastate Pipeline Segment?: D.C. Court of Appeals Decision



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The D.C. Circuit Court of Appeals (“Court”) in a July 17th opinion addressed a challenge to two Federal Energy Regulatory Commission (“Commission”) Orders authorizing facilities to export natural gas from the United States to Mexico. See *Big Bend Conservation Alliance v. Federal Energy Regulatory Commission*, No. 17-1002, 2018 WL 3431729 (D.C. Cir. Jul. 17, 2018).

Big Bend Conservation Alliance (“Big Bend”) raised two issues in its challenge:

1. FERC should have exercised jurisdiction over the intrastate pipeline delivering gas to the border; and
2. regardless of the FERC’s jurisdiction under the Natural Gas Act (“Act”), an expanded review was required by the National Environmental Policy Act (“NEPA”).

The Act regulates transporting and selling natural gas in interstate commerce, as well as, importing and exporting natural gas in foreign commerce.

Section 3 of the Act prohibits the export or import of natural gas, to or from a foreign country, without prior authorization by the Commission. Section 7 of the Act prohibits constructing or operating a facility to transport or sell natural gas in interstate commerce without a certificate of public convenience and necessity from the Commission. However, Section 311 of the Act permits the Commission to authorize any intrastate pipeline to transport natural gas on behalf of any interstate pipeline at prices deemed by the Commission to be fair and equitable.

Trans-Pecos Pipeline, LLC (“Trans-Pecos”) sought in the prior proceeding authorization under section 3 of the Act to construct and operate an export facility consisting of a pipeline running from Presidio County, Texas to the international border. At the same time, Trans-Pecos undertook to construct and operate an intrastate pipeline (“Trans-Pecos Pipeline”) that would transport natural gas produced in Texas to the international border. At the upstream end, this pipeline would connect with other intrastate pipelines in West Texas, and may later connect with interstate pipelines.

Big Bend intervened and argued that the Trans-Pecos Pipeline was an interstate pipeline covered by Section 7 and, alternatively, that the pipeline should be subject to NEPA review because the Commission

effectively controlled it. The Commission concluded that the export facility on the international border was subject to Section 3, but the pipeline is an intrastate pipeline and, therefore, not subject to Section 7.

The Commission also concluded that even if the pipeline was later authorized to transport interstate gas, its jurisdiction under the Act would extend only to that service and would not trigger Section 7. Further, the Commission concluded that there was insufficient federal control over the pipeline to warrant National Environmental Policy Act (“NEPA”) review.

Because the Commission concluded that the pipeline was intrastate, the NEPA Environmental Assessment (“EA”) did not analyze its environmental impacts. Further, it concluded an Environmental Impact Statement (“EIS”) was not required because approval of the export facility would not constitute a major federal action significantly affecting the quality of the human environment – thus not requiring an EIS.

Big Bend argued on appeal:

1. that the Trans-Pecos Pipeline is itself an export facility subject to Section 3 of the Natural Gas Act;
2. that the pipeline is an interstate pipeline subject to Section 7; and
3. that even if the pipeline were not subject to the Commission’s direct regulatory authority, it should nonetheless have been subject to NEPA review.

The Court determined that it lacked jurisdiction to address “1” because Big Bend failed to present the argument to the Commission on rehearing.

The Court affirmed the Commission’s refusal to exercise jurisdiction over the pipeline. Big Bend asserted that the pipeline is interstate. However, substantial evidence was deemed to support the Commission’s conclusion that the pipeline initially will only transport natural gas produced in Texas and received from other Texas intrastate pipelines or Texas processing plants. The Court noted that the pipeline is located entirely in Texas and would only carry gas produced within the state.

Big Bend also contended that the pipeline is interstate because Trans-Pecos anticipated using it to transport gas produced outside of Texas. The Court, again noted, that the Commission found no evidence that building the pipeline would frustrate the process of the Act. In addition, the Commission did not find any effort to evade the Act. As such, the Court affirmed the Commission’s refusal to exercise jurisdiction over the pipeline.

Finally, Big Bend contended that even if the pipeline was not subject to the Commission’s direct regulatory authority, the agency should have included it in its NEPA review because the projects were impermissibly segmented. In other words, Big Bend argued it should be federalized for NEPA purposes. The Commission rejected such theories.

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.

As opposed to an EIS, which is a much more detailed document, an environmental assessment (“EA”) provides sufficient evidence and analysis for determining whether a finding of no significant impact for an EIS should be prepared. Neither an EA nor an EIS need be prepared if a particular federal action falls within the scope of a NEPA categorical exclusion. Categorical exclusions are promulgated by the federal agencies and are described actions which have been determined to not involve significant environmental impacts.

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.

Council of Environmental Quality regulations require federal agencies to consider connected actions in conducting NEPA reviews. Actions are considered connected if they are interdependent parts of a larger action and depend on the larger action for their jurisdiction. The purpose of the doctrine is to prevent the government from segmenting its own federal actions into separate projects. Doing so is argued to lead to a failure to address the true scope and impact of the activities that should be considered. The Court had explained in a previous decision that the connected actions doctrine does not require the aggregation of federal and non-federal actions. Such reasoning was held to apply to the present case. While the export facility was subject to the Commission's jurisdiction, the pipeline was not.

Alternatively, Big Bend argued that the Commission's involvement in authorizing the export facility was enough to federalize the pipeline. The court declined to adopt that theory because the federalization theory lacks vitality today and the Court rejected Big Bend's but-for theory.

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