

A New Approach To Climate Analysis Under NEPA?

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As we near the end of 2017, we have seen a significant year-over-year increase in the development of large-scale infrastructure projects. For example, government agencies self-reported nearly a dozen permit approvals for major infrastructure projects in 2016, but these approvals more than doubled in 2017.[1] The increase in project approvals may be influenced by a number of factors, including the continued implementation of the Fixing America's Surface Transportation (FAST) Act,[2] signed into law by then-President Barack Obama in 2015, and the more recent executive order issued by President Donald Trump, entitled "Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure." [3] But beyond these statutory and administrative actions are the impacts of the long-standing requirements under the National Environmental Policy Act.

NEPA requires an environmental impact statement (EIS) for each "major Federal action significantly affecting the quality of the human environment." [4] Even for projects with "minimal environmental effects," a federal agency must at least complete a less rigorous, but important environmental assessment.[5] Once a project is designed, it often requires a number of permit approvals to proceed. Before agencies issue these certifications, they must complete the EIS. Unless these reports are complete, projects will remain at a standstill from various NEPA-related challenges, and judicial responses to them.

Despite recent efforts to streamline the permitting process, and a deferential arbitrary and capricious standard of review for agencies,[6] the EIS has been subject to recent challenges in significant cases. These decisions may impact how permit applicants, and federal agencies subject to NEPA requirements, approach the required analysis. In addition, in spite of the current administration's efforts to de-emphasize, or eliminate entirely, consideration of climate change in federal decision-making, judicial decisions are opening a door for challenges. These challenges arise based on allegations of inadequate indirect effects analysis of climate impacts in any given EIS. In response to one such decision from the D.C. Circuit, the Federal Energy Regulatory Commission issued a supplemental EIS — currently open for public comment — that addresses downstream greenhouse gas (GHG) emissions and indirect impacts. This case, and FERC's response to it, point to NEPA as possibly the next legal battleground over how federal agencies consider climate change.



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Indirect Environmental Impacts: Sierra Club v. FERC

In August, the D.C. Circuit held the FERC was required to estimate, and include in its EIS, the amount of carbon emissions that would result from the Southeast Market Pipelines Project.[7] Significantly, the focus was not on the direct impact of GHG emissions, but instead on the indirect effect of those emissions on climate change subsequent to the gas delivery, and while being used for its intended purpose. The decision made clear that indirect environmental impacts on climate change are not beyond the scope of an EIS and that, unless these impacts are quantified and analyzed, projects will be halted.[8]

Sierra Club arose from FERC's approval of three new interstate natural gas pipelines. Collectively, the pipelines would run through Alabama, Florida and Georgia. Certain environmental groups challenging FERC's EIS argued FERC did not discuss the indirect impact of the pipelines on GHG emissions, and therefore acted arbitrarily, capriciously or otherwise contrary to law.

FERC acknowledged its failure to discuss emissions generated by the end-users of the gas, but argued that discussion of such indirect effects was not required as part of its environmental analysis because its authority only extended to permitting the transportation of the gas within the pipeline.[9] FERC tried to support its argument by citing U.S. Department of Transportation v. Public Citizen, in which the U.S. Supreme Court held the Department of Transportation had no obligation to discuss the environmental effects of increased truck traffic between two countries, when it issued safety standards for Mexican trucks operating in the United States.[10] The standards were promulgated in response to the president's plan to lift a moratorium on Mexican motor carriers. The Supreme Court held the agency was under no obligation to discuss the truck traffic because it had no authority to exclude Mexican trucks from the United States.[11]

The court in Sierra Club distinguished Public Citizen by clarifying that something is an "indirect impact," within the meaning of an EIS, if the federal authority in question is the legally relevant cause of the impact, and the impact is "reasonably foreseeable." [12] This means the federal authority must have the ability to grant or deny a permit based on the impact in question. In Public Citizen, increased truck traffic would result regardless of the agency's actions. FERC, on the other hand, had the authority to grant or deny certification based on the impact the pipeline had on emissions; thus, the D.C. Circuit held that FERC had an obligation to either quantify GHG emissions or explain, in detail, why it could not do so.[13]

Importantly, on Sept. 27, 2017, FERC issued a draft supplemental EIS (SEIS) in response to the D.C. Circuit's Aug. 22, 2017, opinion. The SEIS estimated the project's potential to increase the flow of natural gas into Florida, looking both at power plants' potential-to-emit and certain assumptions regarding natural gas use and combustion. The SEIS concluded that, while the construction and operation of the project would necessarily result in both temporary and permanent impacts on the environment, adherence to certain avoidance, minimization and mitigation measures would minimize the project's significant impact on the environment. Notably — and perhaps signifying certain changes made during the Trump administration relating to climate change analysis — FERC stated there was no suitable method to attribute discrete environmental effects to the GHG emissions from the project. The agency further stated it was not possible to determine localized or regional impacts from GHGs using current models. Finally, FERC said the tool developed by the Interagency Working Group on Social Cost of Carbon, to monetize the effects of certain carbon-related emissions, was not appropriate for use in any project-level NEPA analysis.[14] This SEIS is open for public comment until Nov. 20, 2017.

Given the climate-focus of the analysis and findings, the SEIS will likely generate significant attention from environmental organizations and others. It is possible that the SEIS, once finalized following consideration of public comments, will serve as the basis for further challenges to the manner in which the administration uses — or fails to use — certain climate models and the social cost of carbon when conducting NEPA environmental reviews of projects impacting climate change. This case, and its progeny, will likely help define the relevant scope of indirect analysis required under NEPA for downstream GHG emissions.

Conclusion

Despite actions being undertaken by the administration to improve permitting processes and speed up associated environmental reviews, courts continue to play a significant role in determining whether or not significant infrastructure projects, once challenged, may proceed. As this case makes clear, agencies and companies alike should take note of the potential for expanded and detailed disclosures of indirect environmental impacts, particularly in projects that may result in emissions with global warming potential.

NEPA affords procedural opportunities for affected stakeholders to comment on the adequacy of the required analysis. Project applicants and proponents should avail themselves of all such opportunities to scrutinize and impact draft agency environmental reviews to ensure the requisite analysis has been conducted.

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[1] Permitting Dashboard, Permitting Dashboard Full Dataset, Permitting Dashboard (Oct. 22, 2017), <https://data.permits.performance.gov/Permitting-Project/Permitting-Dashboard-Full-Dataset/mcm3-xbid/data>.

[2] See Fixing America's Surface Transportation Act, Pub. L. No. 114-94 (2015) (codified in scattered sections of 23 U.S.C.).

[3] See Exec. Order No. 13,807, 82 Fed. Reg. 40,463 (Aug. 15, 2017).

[4] 42 U.S.C. § 433(2)(C) (2017).

[5] Nicole S. Haiem, Order Restored? Federal Agencies "Accountable" For NEPA, ESA Violations But Project To proceed: Examining Pub. Emps. For Env'tl. Responsibility v. Hopper, 28 Vill. Env'tl. L. J. 207, 215 (2017).

[6] See *Sierra Club v. FERC*, 867 F.3d 1357, 1367 (D.C. Cir. 2017).

[7] See *id.* at 1374.

[8] See id. at 1379.

[9] See id.

[10] See *Department of Transportation v. Public Citizen*, 541 U.S. 752, 770 (2004).

[11] See id.

[12] See *Sierra Club*, 867 F.3d at 1371.

[13] See id. at 1374.

[14] See Federal Energy Regulatory Commission, Draft Environmental Impact Statement, Federal Energy Regulatory Commission (Sept. 27, 2017), <https://www.ferc.gov/industries/gas/enviro/eis/2017/09-27-17-DEIS.asp>.