Texas Environmental Law Roundtable

The Litigation Landscape in 2018

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The Houston Club
Houston, TX

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NEPA Litigation Update & Regulatory Outlook

Texas Environmental Law Roundtable

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November 7, 2018
Agenda

• 2-Minute NEPA Overview
• Downstream GHG Litigation
• Trump Administration NEPA Reform
• Takeaways + What’s Ahead
NEPA Basics

• Among first major US enviro. Statutes (1970)
• Evaluate environmental impacts + engage the public
• Implementing Rules: CEQ + other federal agencies & departments
NEPA Basics

• Environmental Impact Statement ("EIS")
  – Major federal actions significantly affecting the quality of the human environment

• Must consider:
  – (1) direct effects,
  – (2) indirect effects, and
  – (3) cumulative effects.
Modern NEPA Hurdles

- Failure by lead and resource agencies to act timely
- Adversarial agencies with overlapping jurisdiction pursuing different agendas
- Lack of federal/state coordination
- Duplication of effort
- Strategically timed litigation by project opponents
Litigation Risks

• NEPA is a purely procedural statute (does not require a specific outcome), but . . .

• Litigation risks include:
  – Preliminary Injunction
  – Remand
  – Supplemental NEPA
  – Delay . . .
NEPA and Climate Change

• Trends toward greater and more nuanced inclusion of climate change impacts.

• 2007 – Present: Climate change increasingly incorporated into case law, regulations, guidance, at state and federal level.

• Now facing stiff climate change headwinds at federal level impeding planning and projects—but not permanent or uniform.

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NEPA and “Downstream” GHGs

• Courts have consistently held that climate change impacts must be presented in an EIS.

• More recently, requiring EIS account for so-called “downstream” emissions of fossil fuel infrastructure projects.
NEPA Guidance on Downstream GHGs

• 2016 CEQ guidance: GHG analysis should include evaluation of downstream emissions.

• Social Cost of Carbon – protocol developed by Obama administration to quantify and monetize the impacts of GHG emissions.
Trump Administration Rescinds Guidance

• March 2017 – Executive Order No. 13783, Promoting Energy Independence and Economic Growth
  – Rescinded guidance directing consideration of downstream GHG emissions
  – Rescinded Social Cost of Carbon tool
LNG Terminal Trilogy (D.C. Cir. 2016)

• Three cases related to FERC decisions licensing liquefied natural gas (“LNG”) terminals.

• Environmental groups argued for NEPA analysis of downstream GHG impacts.
LNG Terminal Trilogy (D.C. Cir. 2016)

• FERC has no NEPA obligation stemming from downstream GHG effects.

• Court also accepted FERC’s decision not to use Social Cost of Carbon tool to evaluate GHG direct impacts.
WildEarth Guardians v. US Forest Service (10th Cir. 2017)

• Downstream GHGs from PRB coal leases.

• BLM quantified downstream emissions, but concluded no difference with “no-action” alternative.

• Plaintiffs argued “no-action” alternative would decrease supply → increase price → decrease GHGs.
**WildEarth Guardians v. US Forest Service (10th Cir. 2017)**

- 10th Cir. rejected “perfect substitution” argument.
- Removing 20% of national coal supply would incentivize alt. energy and reduce GHGs.
- Climate change no longer a “frontier of science.”

• Mining plan expansion for federal coal lease.

• Alleged failure to adequately assess indirect/cumulative impacts of GHGs.

• EA quantified GHGs and concluded cumulative impact negligible.

• EA quantified benefits (e.g. local payroll, tax revenues) but not costs of GHGs.

• Failure to quantify costs when tool (SCC Protocol) available was arbitrary and capricious.
Southeast Market Pipeline (D.C. Cir. 2017)

- NG pipeline → combustion in FL power plants.

- Court held FERC should have quantified GHG emissions.

- FERC action a “legally relevant cause” of direct/indirect environmental effects.
Southeast Market Pipeline (D.C. Cir. 2017)

• Distinguished LNG Trilogy cases.

• Remanded EIS to FERC to quantify GHGs (or explain why it can’t) and explain lack of SCC estimate.

• "En banc" review denied January 2018.
Seeking to Narrow Judicial Requirement of GHG Analysis

- June 2018 – FERC denied a request for rehearing on a certificate granted to the Mountain Valley Pipeline.
- Parties argued that FERC failed to analyze and quantify climate change impacts of downstream GHGs.
- FERC distinguished *Southeast Market Pipeline*: delivering to marketplace vs. identifiable electric generating plants.

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Downstream GHG Litigation Takeaways

• Growth in NGO/citizen suits against projects based on NEPA/climate change claims.

• Courts continue to demand climate analysis; uncertainty as to whether and to what degree downstream impacts must be analyzed.

• Withdrawal of guidance on how to analyze GHG impacts doesn’t overcome line of cases saying you must analyze impacts commensurate with level of that impact.
Trump Administration & NEPA Reform

• E.O. 13807 Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects issued on August 15, 2017

• Requires major infrastructure projects be processed as “One Federal Decision.”

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Key Aspects of One Federal Decision

• Develop an environmental review and authorization decision schedule for that project;
• Develop single Permitting Timetable for the necessary environmental review and authorization decisions;
• Prepare single EIS;
• Sign single record of decision (ROD);
• Issue all necessary authorization decisions within 90 days of ROD issuance
April 9, 2018: Memorandum of Understanding signed on by twelve Federal agencies implementing the OFD policy established in Executive Order 13807.

Outlines how signatory agencies will jointly and cooperatively process environmental reviews and make authorization decisions.
NEPA Advanced Notice of Proposed Rulemaking (June 2018)

- **Advance Notice of Proposed Rulemaking (ANPRM):** “Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act.”

- **Scope:** 20 Qs related to updating the provisions of the regulations related to the NEPA process and the scope of NEPA review.
Scope of NEPA Review

- Potential revisions to the definitions of key terms.
- Issues to be considered in NEPA documents.
- Range of alternatives that must be considered.
- Timing and preparation of NEPA documents.
- Interagency coordination.
Industry Comments – Increase Streamlining

• EIS takes 5-6 years and thousands of pages.

• Lack of clarity on what should be analyzed.

• Agencies taking a “kitchen-sink” approach to avoid litigation.

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Industry Comments – Increase Streamlining

• Put deadline on finalization of NEPA documents; page limits.

• Provide clarity on what exactly should be analyzed at what level of detail and by who.

• Avoid redundant analyses by agencies.
Industry Comments – Remove Wall Between Agency and Applicant

• Some agencies interpret NEPA as prohibiting any coordination with the applicant.

• Applicant typically knows the project better than the agency.

• Change CEQ rules so that applicant does not have to be kept at arms-length.
Takeaways – NEPA Reform

• ANPR extremely broad scope; rulemaking lengthy process subject to litigation.

• Remain engaged in public comment process.

• Engage agencies quickly; outline potential avenues for streamlining.
Questions

Thank you!

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