



Texas Environmental Law Roundtable

The Litigation Landscape in 2018

November 7, 2018

The Houston Club
Houston, TX

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NEPA Litigation Update & Regulatory Outlook

Texas Environmental Law Roundtable

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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.

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 - Rescinded guidance directing consideration of downstream GHG emissions
 - Rescinded Social Cost of Carbon tool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.

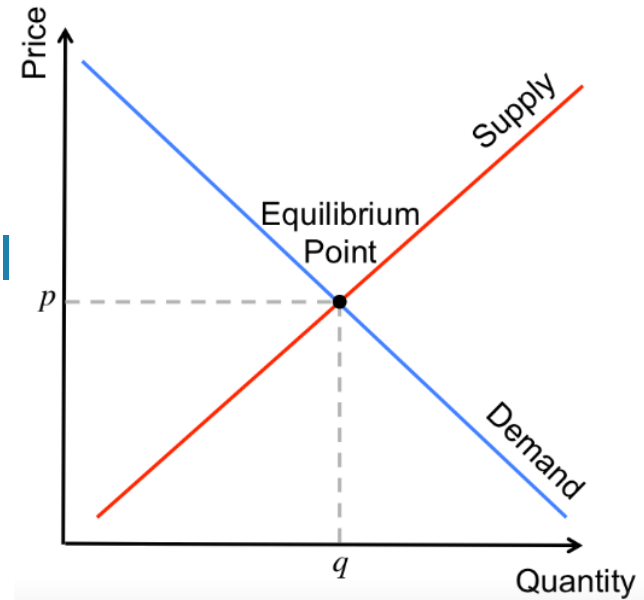
WildEarth Guardians v. US Forest Service **(10th Cir. 2017)**

- 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.”



Montana Environmental Information Center v. U.S. Office of Surface Mining (D. Mont. 2017)

- 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.



Montana Environmental Information Center v. U.S. Office of Surface Mining (D. Mont. 2017)

- 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.

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.”



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

OFD Memorandum of Understanding

- 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.

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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