

Overview

- Introduction
- Case study: *Sierra Club v. FERC*
- Policy updates
- Evaluating the impact of expanded environmental review
- Conclusion



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What is Climate Change?

“Climate change is an inevitable and urgent **global challenge** with **long-term** implications for the sustainable development of all countries.”

United Nations, Division for Sustainable Development



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Source: <http://research.un.org/en/climate-change>

National Environmental Policy Act (NEPA)

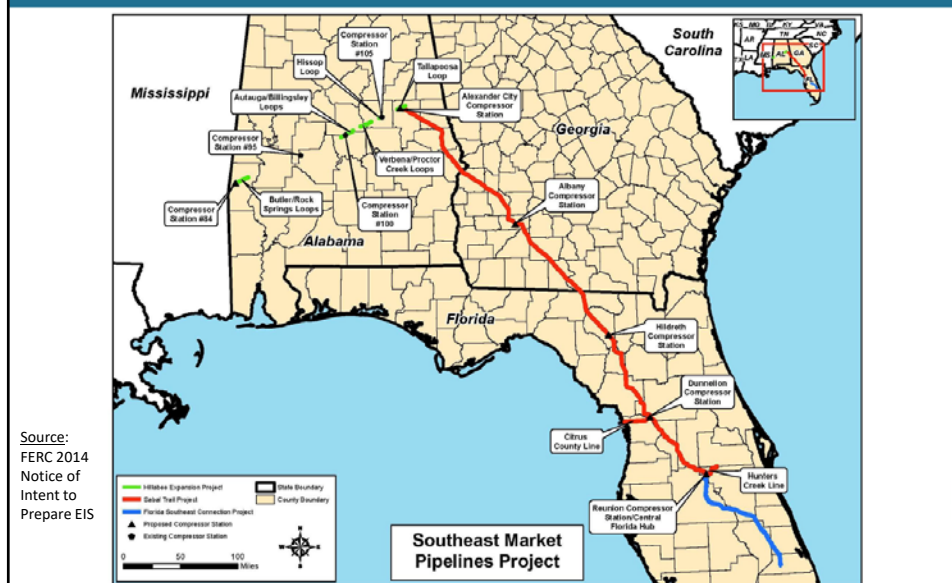
- Procedural statute – no particular outcome required
- Triggered by major Federal action significantly affecting quality of human environment
- Agency must take a “**hard look**” at the environmental consequences of its decision
 - Consider indirect effects that are “reasonably foreseeable”
- Public participation

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Sierra Club v. FERC – Background



Sierra Club v. FERC – Background

- December 2015: Final EIS
- February 2016: Section 7 certificates issued
- August 2016: Project construction begins
- September 2016: FERC administrative rehearing denied and lawsuit filed by Sierra Club, et. al

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Sierra Club v. FERC – D.C. Circuit Opinion

- *Sierra Club v. FERC*, D.C. Cir. No. 16-1329 (Aug. 22, 2017)
 - “...at a minimum, FERC should have estimated the **amount** of power-plant carbon emissions that the pipelines will make possible.”
 - EIS “needed to include a discussion of the ‘**significance**’ of this indirect effect...”
 - Remanded to FERC for preparation of new EIS
 - Vacated the Section 7 certificates

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Sierra Club v. FERC – Aftermath

- September 2017: Draft Supplemental EIS
- February 2018: Final Supplemental EIS
- March 2018: FERC reinstates Section 7 certificates



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Source: <https://www.ferc.gov/about/com-mem.asp>

Sierra Club v. FERC – Aftermath



“[FERC] is **nothing but a rubber stamp** for polluting corporations...

These dirty, dangerous pipelines threaten our health, climate, and communities, and it's irresponsible to build them at a time when clean, renewable energy is abundant and affordable.”

Sierra Club, Beyond Dirty Fuels Campaign

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Source: <https://www.sierraclub.org/press-releases/2018/03/sabal-trail-ferc-again-earns-rubber-stamp-reputation>

Additional Cases for Further Reading

- Conference paper identifies 8 other example cases
- NEPA review of coal leases, gas pipelines, etc.
- Project-level and programmatic decisions
- Courts expect agencies to meaningfully consider climate change or justify why it cannot be done

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Noteworthy Policy Updates

- Exec. Order 13783, “Promoting Energy Independence and Economic Growth” (Mar. 2017)
 - Rescinded CEQ guidance for GHGs in NEPA reviews
 - Disbanded Interagency Working Group on GHGs
 - Withdrew social cost of carbon documents
- Exec. Order 13807, “Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure” (Aug. 2017)



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Source: <https://www.whitehouse.gov/people/donald-j-trump/>

Noteworthy Policy Updates

- FERC Notice of Inquiry (Apr. 2018)
 - Should FERC revise its approach to certifying new natural gas transportation facilities?
 - Responding to “increased interest” in FERC’s evaluation of GHG emissions and global climate change
 - Public comments due June 25, 2018



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Evaluating the Impact of Expanded Review

- What is the standard?
 - Scope: which emissions should be considered?
 - Quantify: how should we measure emissions?
 - Attribute: will project emissions impact the global climate?
 - Value: what level of GHG emissions is too much?



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Evaluating the Impact of Expanded Review

- Consequences for agencies and industry
 - GHG emissions in project application
 - Coordination between multiple agencies
 - Environmental group activity
 - Judicial scrutiny of administrative record

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Evaluating the Impact of Expanded Review

“The **people have a right** to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment.

Pennsylvania’s **public** natural resources are the **common property** of all the people, including generations yet to come.

As trustee of these resources, the Commonwealth shall **conserve and maintain** them for the benefit of all the people.”

Pennsylvania Constitution, Article I, Section 27

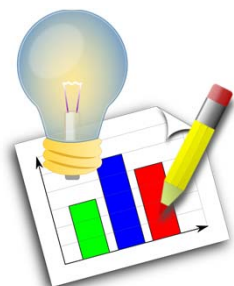


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Project Planning Considerations

- Any “public interest” standard for agency review is potentially at risk of encompassing climate change
- Anticipate scrutiny for large-scale, high-profile fossil fuel projects
- Demonstrate need (social utility) for the project



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Conclusion

- Climate change is a global issue
- Challenging for project-level environmental review
 - Lack of consensus re. standards
 - Consequences for agencies and industry
- Courts expect agencies to consider climate change in NEPA reviews, despite uncertainties

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