Going Global: Expanding the Scope of Environmental Review for the Energy Sector

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I. Introduction

On August 22, 2017, the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") rendered an opinion which highlighted a decades-old problem: how far must an administrative agency go when considering the possible environmental impacts of a proposed project? The case involved a decision by the Federal Energy Regulatory Commission ("FERC" or "Commission") to approve a major interstate pipeline project that would deliver natural gas to power plants in Florida. The central question in the case was whether FERC was obligated to evaluate the greenhouse gas ("GHG") emissions that would result from burning the natural gas in the downstream power plants. Under the circumstances, the connection between the pipeline project under review and the downstream GHG emissions is obviously attenuated. Nevertheless, in *Sierra Club v. FERC*, a panel of the D.C. Circuit held that yes, FERC's environmental review must go that far.

While this case was largely about the *scope* of environmental review, it invites a broader discussion about *how* agencies and project developers are to evaluate GHG emissions and *what level* of GHG emissions is too harmful in the context of climate change. Climate change is inherently an issue of global concern. It is also increasingly the subject of public attention and debate, particularly with respect to energy sector projects like pipelines and mining leases. Environmental groups seeking to pull the plug on fossil fuel development celebrated the *Sierra Club v. FERC* decision as a significant "win," perhaps setting the stage for future challenges. This paper provides an overview of *Sierra Club v. FERC* (including FERC's action on remand), highlights similar cases which may be of interest, and examines what expanding environmental review to include climate change could mean for agencies and energy developers alike.

II. Case Study: *Sierra Club v. FERC*

a. Background

The first major environmental law in the United States, known as the National Environmental Policy Act of 1969 ("NEPA"), established a broad national framework for protecting the environment. NEPA is a procedural statute that requires federal agencies to evaluate the environmental and related social and economic impacts of proposed actions prior to making decisions. It requires agencies to follow certain procedures, gather public input and take a "hard look" at various factors, but it does not require a particular substantive decision or outcome. NEPA can apply to a wide range of federal actions, including but not limited to permit

approvals. Private companies frequently become involved in the NEPA process when they need a permit issued by a federal agency, such as FERC or the U.S. Army Corps of Engineers.

Depending on the circumstances of a project, the reviewing agency may be required to prepare a NEPA decision document known as an environmental impact statement ("EIS"). NEPA requires the preparation of an EIS for "major Federal actions significantly affecting the quality of the human environment."[1] Decades of case law have developed around the meaning of this statutory obligation. It presents an ongoing challenge for agencies as they seek to define the scope of information that must be considered when evaluating a proposed project.

Pursuant to Section 7 of the Natural Gas Act, a pipeline developer must obtain a certificate of public convenience and necessity (also known as a "Section 7 certificate") from FERC prior to constructing an interstate natural gas pipeline.[2] The certificate authorizes the holder to acquire rights-of-way from unwilling landowners through eminent domain proceedings.[3]

On February 2, 2016, FERC issued the Section 7 certificates for the Southeast Market Pipelines ("SMP") Project. Scheduled for completion in 2021, the project consists of three separate but connected natural gas transmission pipelines in Alabama, Georgia and Florida. One of these pipelines, Sabal Trail, is a 515-mile interstate pipeline transporting natural gas to Southeast markets, including natural gas-fired power generators in Florida. Sabal Trail is considered the "linchpin" of the overall project because it connects the Hillabee Expansion Project in Alabama (upstream) with the Florida Southeast Connection Project in Florida (downstream).

Environmental groups and landowners who opposed the SMP Project asked FERC for a rehearing with respect to the Section 7 certificates as well as a stay of construction. FERC denied the stay and project construction began in August 2016. Shortly thereafter, on September 7, 2016, FERC denied the request for rehearing.

The landowners and environmental groups, led by the Sierra Club, petitioned the D.C. Circuit for review of FERC's decision to approve the SMP Project. The petitioners argued that the NEPA analysis performed by FERC was deficient. In relevant part, the Sierra Club alleged that FERC should have estimated the GHG emissions from natural gas-fired power plants downstream in Florida and considered the effects that those emissions will have on climate change. Although FERC did discuss GHG emissions and climate change to some extent in the final EIS issued for the project in December 2015 ("2015 FEIS"), the agency had declined to engage in "speculative analyses" concerning the "relationship between the proposed project and upstream development or downstream end-use."[4] Thus, while the 2015 FEIS did quantify the direct construction and operation-related GHG emissions from the SMP Project, it did not analyze downstream GHG emissions generated by end users of the natural gas. FERC noted in the 2015 FEIS that "there is no standard methodology to determine how the proposed SMP

[1] *See* 42 U.S.C. § 4332(2)(C).
[2] *See* 15 U.S.C. § 717f.
[3] *See id.* at § 717f(h).
[4] FERC, Southeast Market Pipelines Project—Final Environmental Impact Statement, Vol. 1, 3-297 (Dec. 2015).

Project's incremental contribution to GHGs would translate into physical effects of the global environment."[5] Overall, FERC concluded in the 2015 FEIS that the SMP Project "would not result in a significant impact on the environment."[6]

b. August 2017 D.C. Circuit Opinion

On August 22, 2017, a panel of D.C. Circuit judges vacated the Section 7 certificates for the SMP Project and remanded the matter to FERC for preparation of a new EIS. The court agreed with the Sierra Club, finding that "FERC's environmental impact statement did not contain enough information on the greenhouse-gas emissions that will result from burning the gas that the pipelines will carry."[7] The court observed that the natural gas traveling through the SMP Project pipelines will be going to power plants in Florida, where it will be burned, resulting in carbon dioxide emissions to the atmosphere that add to the greenhouse effect—the primary contributing factor in global climate change.[8] According to the court, FERC must *quantify* and consider the *significance* of the power plant emissions that will be made possible by the pipelines or explain in more detail why such analysis cannot be done.[9] Without quantifying the SMP Project's GHG emissions and comparing them to regional emission reduction goals, for example, the court said it would be impossible for FERC and the public to engage in the kind of informed review that is required by NEPA.[10] The court also specifically directed FERC to explain on remand the agency's current position on the use of a "social cost of carbon" protocol developed by an interagency working group to monetize the harm associated with an incremental increase in emissions.[11]

When an agency conducts a NEPA review, it must consider both the direct and indirect environmental effects of the project under review.[12] By definition, indirect effects are those which are "caused by the [project] and are later in time or farther removed in distance, but are still *reasonably foreseeable*."[13] The critical question posed to the court in *Sierra Club v. FERC*

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[5] *Id*.
[6] *Id*. at 5-1. FERC assumed that the SMP Project would comply with all applicable laws and that the companies would implement various measures to avoid, minimize and mitigate impacts, including measures recommend by FERC.
[7] 867 F.3d 1357, 1363 (D.C. Cir. 2017).
[8] *See id.* at 1371.
[9] *See id.* at 1374.
[10] *See id.*
[11] *See id.* at 1375. In 2010, a federal interagency working group issued a social cost of carbon technical support document to inform agencies' cost-benefit analyses in the rulemaking process. The 2010 technical support document was later revised. *See, e.g.*, Interagency Working Group on Social Cost of Greenhouse Gases, "Technical Support Document: Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866" (Aug. 2016), *available at* https://19january2017snapshot.epa.gov/climatechange/social-cost-carbon-technical-documentation_.html (last visited Apr. 24, 2018).
[12] *See* 40 C.F.R. § 1502.16.
[13] *Id*. at § 1508.8(b) (emphasis added). The definition of "effects" at 40 C.F.R. § 1508.8 includes the following commentary: "Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial."

was: "[w]hat are the 'reasonably foreseeable' effects of authorizing a pipeline that will transport natural gas to Florida power plants?"[14]

It was certainly foreseeable that the gas will be burned in the Florida power plants. This was, in fact, the primary purpose of the SMP Project. (At the time of the D.C. Circuit opinion, two major Florida utility companies had already committed to purchasing almost all the gas that would be transported by the SMP Project.[15]) The court said it was also foreseeable—and FERC did not dispute—that burning the gas in the power plants will emit "carbon compounds that contribute to climate change."[16] However, the pipeline developers argued that because FERC had no real legal authority to prevent these emissions from happening, FERC was not obligated to consider them in its NEPA analysis. Rejecting this argument, the court determined that the GHG emissions from existing and proposed downstream power plants "are an indirect effect of authorizing this project, which FERC could reasonably foresee, and which the agency has legal authority to mitigate."[17] The court reasoned that under the Natural Gas Act, FERC could deny a Section 7 certificate if it concluded that a pipeline project presented too much harm to the environment. Therefore, according to the court, FERC is a "legally relevant cause" of the indirect effects of a pipeline it approves.[18]

Judge Janice Rogers Brown authored the lone dissent, stating that the majority misunderstood the concept of "reasonably foreseeable."[19] In Judge Brown's opinion, FERC was not a legally relevant cause of the GHG emissions from downstream power plants. A critical fact in this case is that power plants downstream of the SMP Project are regulated by state agencies. Under the Florida Power Plant Siting Act, for example, a power plant cannot be built or expanded in the state of Florida unless a license is first obtained from the Florida Power Plant Siting Board. According to Judge Brown, "[t]his breaks the chain of causation" between FERC's decision to approve the SMP Project and the GHG emissions from downstream power plants.[20] FERC ultimately had no authority to control whether the power plants would actually be built or continue to operate, and therefore could not prevent the GHGs from being emitted. On this critical point, she noted, the majority departed from recent controlling precedent involving FERC's review of liquified natural gas terminals.[21] Judge Brown concluded that the SMP Project 2015 FEIS was reasonable in scope and entitled to deference. In her view, "when the occurrence of an indirect environmental effect is contingent upon the issuance of a license from a separate agency, the agency under review is not required to address those indirect effects in its NEPA analysis."[22]

c. Aftermath and FERC's Action on Remand

[14] 867 F.3d at 1371-72.
[15] *Id*. at 1364.
[16] *Id*. at 1372.
[17] *Id*. at 1374.
[18] *Id.* at 1373.
[19] *See id*. at 1380.
[20] *Id*. at 1382.
[21] *See id.* at 1381-83 (citing *Sierra Club v. FERC (Freeport)*, 827 F.3d 36 (D.C. Cir. 2016), *Sierra Club v. FERC (Sabine Pass)*, 827 F.3d 59 (D.C. Cir. 2016), *EarthReports, Inc. v. FERC*, 828 F.3d 949 (D.C. Cir. 2016), and *Sierra Club v. FERC*, 672 Fed. Appx. 38 (D.C. Cir. 2016)).
[22] *Id.* at 1380.

FERC acted quickly in response to the D.C. Circuit opinion. On September 27, 2017, FERC staff issued a draft supplemental environmental impact statement ("SEIS") which incorporated by reference and expanded upon the GHG emissions analysis presented in the 2015 FEIS for the SMP Project. The "SEIS estimates the greenhouse gas emissions generated by the SMP Project's customers' downstream facilities, describes the methodology used to determine these estimates, discusses context for understanding the magnitude of these emissions, and addresses the value of using the social cost of carbon tool."[23] By this time, completed portions of the SMP Project had already been authorized to commence service.[24] FERC subsequently received 111 comment letters concerning the draft SEIS.

Meanwhile, the SMP Project developers and FERC filed petitions for rehearing with the D.C. Circuit in early October 2017. These petitions were denied in late January 2018. On February 5, 2018, FERC issued the final SEIS, including therein its responses to the public comments. Interestingly, FERC quantified worst-case scenario GHG emissions, *i.e.*, assuming combustion of all natural gas that could possibly be transported by the SMP Project, and still concluded that the SMP Project is an environmentally acceptable action. Furthermore, although FERC "recognize[d] that fossil fuel GHG emissions are the primary driver of climate change; [FERC] could not find a suitable method to attribute discrete environmental effects to GHG emissions."[25] There was no reliable way to connect SMP Project-related emissions to climate impacts on a global, regional or local scale. Likewise, FERC noted that "[t]here are no widely accepted international, federal, or state definitions of what is considered a 'significant' emission rate for GHG emissions."[26] Finally, FERC maintained its position that the social cost of carbon protocol is "not appropriate for use in project-level NEPA reviews."[27]

The following day, February 6, 2018, the SMP Project developers and FERC filed motions to stay the D.C. Circuit mandate to give FERC sufficient time to issue a new Section 7 certificate order on remand. Otherwise, absent a stay of the mandate, the D.C. Circuit order which vacated the previously issued Section 7 certificates would go into effect, obligating the SMP Project pipelines to cease operation and potentially disrupting natural gas and electricity service in Florida. The notice of availability for the final SEIS was published on February 13, 2018.[28] FERC's request for a stay of the mandate was later granted.[29]

On March 14, 2018, the FERC commissioners voted 3-2 to affirm the conclusion in the SEIS that the SMP Project is an environmentally acceptable action, and on that basis the Commission reinstated the project authorization. The 26-page majority opinion discusses at

[23] 82 Fed. Reg. 46233 (Oct. 4, 2017).
[24] According to the draft SEIS, "in June and July 2017, Commission staff authorized the pipelines to commence service on completed facilities." FERC, Southeast Market Pipelines Project—Draft Supplemental Environmental Impact Statement, 1 (Sept. 2017).
[25] *See* FERC, Southeast Market Pipelines Project—Final Supplemental Environmental Impact Statement, 6 (Feb. 2018).
[26] *Id*. at 7.
[27] *Id*. at 8.
[28] *See* 83 Fed. Reg. 6172.
[29] The D.C. Circuit eventually issued its mandate to FERC on March 30, 2018, effectively ending the D.C. Circuit proceedings.

length FERC's responsibilities and jurisdiction under the Natural Gas Act and NEPA. The Commission took issue with the D.C. Circuit's apparent view that FERC's jurisdiction under Section 7 of the Natural Gas Act extends to the end use of natural gas. Recall that the D.C. Circuit determined that FERC is a legally relevant cause of the environmental effects of the pipelines it approves because FERC could deny a Section 7 certificate upon concluding that a pipeline project presented too much harm to the environment. In the Commission's remand opinion, the majority posits that if FERC was "to deny a pipeline certificate on the basis of impacts stemming from the end use of the gas transported, that decision would rest on a finding not 'that the *pipeline* would be too harmful to the environment,' [as the D.C. Circuit presumed], but rather that the *end use* of the gas would be too harmful to the environment."[30] According to the Commission, this determination is beyond the scope of FERC's authority under the Natural Gas Act. Policy issues surrounding the use of gas should be decided by Congress or the Executive Branch at the national level, not FERC in the context of a specific project. The Commission also used its opinion to more fully explain why the social cost of carbon protocol is not appropriate for environmental review of natural gas infrastructure projects. For instance, the Commission noted that FERC does not (and is not required to) conduct a monetized cost-benefit analysis in its NEPA review, in part because siting gas infrastructure involves qualitative judgments.[31] Commissioners Cheryl LaFleur and Richard Glick each authored a dissenting opinion, rejecting the contention that FERC cannot meaningfully evaluate the significance of downstream GHG emissions.

III. Noteworthy Policy Updates

When Donald Trump assumed the role of President in early 2017, the new administration quickly set in motion plans to reverse course on Obama-era climate change initiatives and to reduce regulatory burdens for industry. For example, on March 28, 2017, President Trump signed Executive Order ("EO") 13783 entitled, "Promoting Energy Independence and Economic Growth," to promote domestic energy development and avoid regulatory burdens that "unnecessarily encumber energy production, constrain economic growth, and prevent job creation."[32] Among other things, EO 13783 disbanded the Interagency Working Group on Social Cost of Greenhouse Gases ("IWG") and withdrew certain social cost of carbon-related documents issued by the IWG as "no longer representative of governmental policy."[33] Instead, for purposes of "monetizing the value of changes in greenhouse gas emissions resulting from regulations," EO 13783 directed agencies to rely on the Office of Management and Budget's "Circular A-4" (dated September 17, 2003), which provides a general framework for cost-benefit analyses.[34] EO 13783 also directed the Council on Environmental Quality to rescind its guidance document entitled, "Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews" ("CEQ Guidance").[35] Interestingly, the D.C. Circuit made

[30] Order on Remand Reinstating Certificate and Abandonment Authorization, 162 F.E.R.C. ¶ 61,233, 13 (Mar. 14, 2018).
[31] *Id*. at 18.
[32] 82 Fed. Reg. 16093, 16093 (Mar. 31, 2017).
[33] *Id*. at 16095.
[34] *Id*. at 16096.
[35] *Id*. at 16094.

no mention of EO 13783 or the withdrawal of these key policy documents when it rendered the *Sierra Club v. FERC* decision a few months later.

Another example of Trump's deregulatory efforts is EO 13807 ("Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure"), signed in August 2017. The stated purpose of EO 13807 is "to ensure that the Federal environmental review and permitting process for infrastructure projects is coordinated, predictable, and transparent."[36] Twelve federal agencies, including FERC, signed a memorandum of understanding on April 9, 2018 to implement EO 13807 by establishing a coordinated and timely environmental review process for major infrastructure projects.[37]

In December 2017, shortly after the *Sierra Club v. FERC* decision, FERC announced that it will revisit its existing policy regarding review of proposed natural gas pipelines. Specifically, FERC plans to review the "Policy Statement on Certification of New Interstate Natural Gas Pipeline Facilities" issued by the agency in 1999. According to FERC Chairman Kevin McIntyre, "Much has changed in the energy world since 1999, and it is incumbent upon us to take another look at the way in which we assess the value and the viability of our pipeline applications."[38] On April 19, 2018, FERC issued a notice of inquiry ("NOI") to be published in the *Federal Register* seeking public comment on, among other issues, how the agency evaluates the environmental impact of a proposed project.[39] The NOI acknowledges "an increased interest regarding the Commission's evaluation of the impact that greenhouse gas (GHG) emissions associated with a proposed project have on global climate change."[40] Comments are due 60 days after publication.

IV. Additional Cases for Further Reading

Like *Sierra Club v. FERC*, the following cases address issues related to climate change and the scope of agency review. This section includes a sample of recent cases for the general interest of the reader and is not intended to provide an exhaustive list of relevant precedent.

a. *WildEarth Guardians v. U.S. Bureau of Land Mgmt.*, 870 F.3d 1222 (10th Cir. 2017)

Environmental groups challenged the NEPA analysis associated with a decision by the U.S. Department of the Interior, Bureau of Land Management ("BLM") to approve four coal leases in Wyoming's Powder River Basin, claiming that BLM failed to appropriately consider the impact of the leases on national carbon dioxide emissions. The federal district court ruled in

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[36] 82 Fed. Reg. 40463, 40463 (Aug. 24, 2017).
[37] News Release, "EPA Administrator Pruitt Praises Permitting MOU to Accelerate Crucial Infrastructure Projects," (Apr. 9, 2018), *available at* https://www.epa.gov/newsreleases/epa-administrator-pruitt-praises-permitting-mou-accelerate-crucial-infrastructure (last visited Apr. 24, 2018).
[38] News Release, "FERC to Review its 1999 Pipeline Policy Statement," (Dec. 21, 2017), *available at* https://www.ferc.gov/media/news-releases/2017/2017-4/12-21-17.asp#.Wtyf4S-ZNBw (last visited Apr. 24, 2018).
[39] *See* News Release, "Commission Initiates Notice of Inquiry into Pipeline Certificate Policy Statement," (Apr. 19, 2018), *available at* https://www.ferc.gov/media/news-releases/2018/2018-2/04-19-18-C-1.asp#.Wtyeei-ZNBw (last visited Apr. 24, 2018).
[40] Notice of Inquiry, Certification of New Interstate Natural Gas Facilities, 163 F.E.R.C. ¶ 61,042, 2-3 (Apr. 19, 2018).

favor of BLM.[41] On appeal, the U.S. Court of Appeals for the Tenth Circuit ("10th Circuit") decided on September 15, 2017 to reverse and remand to BLM for a revised NEPA analysis. The 10th Circuit rejected BLM's substitution theory, *i.e.*, that coal would be sourced from *somewhere* if not from the proposed leases, and that the impact on national emissions therefore did not vary between BLM's decision and the "no action" alternative. Despite rejecting the NEPA analysis, the 10th Circuit declined to vacate the leases.

b. *Montana Envtl. Info. Ctr. v. U.S. Office of Surface Mining*, 274 F. Supp. 3d 1074 (D. Mont. 2017), *amended in part, adhered to in part by Montana Envtl. Info. Ctr. v. U.S. Office of Surface Mining*, No. 15-cv-106 (D. Mont. Nov. 3, 2017)

On August 14, 2017, a Montana federal district court ruled that the U.S. Department of the Interior, Office of Surface Mining Reclamation and Enforcement ("OSM") unreasonably limited the scope of its NEPA review in support of a coal mine expansion project, because OSM failed to sufficiently evaluate the indirect and cumulative effects of coal transportation, coal combustion and greenhouse gas emissions.[42] The court vacated the environmental assessment ("EA") prepared under NEPA, remanded to OSM and enjoined mining activity pending compliance with NEPA.[43] On October 31, 2017, the court narrowed the scope of the injunction to allow for limited mining activity. The remainder of the court's August 14th judgement continued in effect.[44]

c. *High Country Conservation Advocates v. U.S. Forest Serv.*, No. 17-cv-3025 (D. Col. appeal filed Dec. 15, 2017)

In 2014, a federal district court in Colorado held that it was arbitrary and capricious for the U.S. Forest Service ("USFS") and BLM to open a National Forest roadless area to coal mining without adequately justifying why the social cost of carbon protocol was not used for the final EIS.[45] (The agency action was particularly suspect because the social cost of carbon analysis was included in a preliminary EA for the same project.) Following the district court opinion, the agencies conducted a new NEPA analysis and ultimately approved the mine expansion project. In December 2017, environmental groups appealed the agencies' more recent actions as arbitrary and capricious, alleging NEPA violations, including that USFS failed to properly analyze the "reasonably foreseeable" effect of adding more coal to the market and thus encouraging demand for coal-fired electricity (resulting in more climate pollution).[46] The environmental groups also alleged that the agencies again failed to use "scientifically valid and available tools (the social cost of carbon protocol) or provide a rational explanation for why that approach is not appropriate" when evaluating the climate impacts of the project.[47]

d. *AquAlliance v. U.S. Bureau of Reclamation*, 287 F. Supp. 3d 969 (E.D. Cal. 2018)

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[41] *See WildEarth Guardians v. U.S. Forest Serv.*, 120 F. Supp. 3d 1237 (D. Wyo. 2015).
[42] *See Montana Envtl. Info. Ctr. v. OSM*, 274 F. Supp. 3d 1074 (D. Mont. 2017).
[43] *Id*.
[44] *See Montana Envtl. Info. Ctr. v. OSM*, No. 15-cv-106 (D. Mont. Nov. 3, 2017).
[45] *See High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1193 (D. Colo. 2014).
[46] Complaint at 3-4, *High Country Conservation Advocates v. U.S. Forest Serv.*, No. 17-3025 (D. Colo. Dec. 15, 2017).
[47] *Id*. at 4.

Water resource management and environmental organizations challenged several agencies' collective review and approval of a 10-year water transfer program in California. The environmental impacts of the program were assessed in an "Environmental Impact Statement/Environmental Impact Report" prepared pursuant to NEPA and the California Environmental Quality Act ("CEQA"), a state law which is similar to NEPA. Plaintiffs argued that the environmental review document failed to meaningfully assess impacts associated with climate change, such as sea level rise, in violation of both NEPA and CEQA. On February 15, 2018, the federal district court, in relevant part, granted the plaintiffs' motion for summary judgment that the analysis of climate change violates NEPA, but denied the motion with respect to CEQA.[48]

e. *Appalachian Voices v. FERC*, No. 17-1271 (D.C. Cir. appeal filed Dec. 22, 2017)

Following the D.C. Circuit's decision in *Sierra Club v. FERC*, environmental groups challenged FERC's approval for the development of the Mountain Valley Pipeline through Virginia and West Virginia. Plaintiffs claim that FERC violated NEPA by failing to appropriately evaluate the climate change impacts of the end use of the natural gas transported by the pipeline.[49] In February 2018, FERC asked the D.C. Circuit to hold the litigation in abeyance while it responds to pending requests for administrative rehearing.

f. *W. Org. of Res. Councils v. BLM*, No. 16-cv-21, 2018 WL 1475470 (D. Mont. Mar. 26, 2018)

Environmental groups challenged BLM's NEPA review surrounding Resource Management Plans ("RMPs") for the Powder River Basin in Wyoming and Montana, arguing that BLM failed to consider: "(1) alternatives that would reduce the amount of coal available for leasing in each field office; (2) measures that would reduce methane emissions from resource development; (3) direct, indirect, and cumulative impacts of the fossil fuel development under the plans."[50] An RMP is a programmatic document required by the Federal Land Policy and Management Act of 1976 to guide the management of federal lands. In March 2018, the federal district court held that "[i]n light of the degree of foreseeability and specificity of information available to the agency while completing the EIS, NEPA requires BLM to consider in the EIS the environmental consequences of the downstream combustion of the coal, oil and gas resources potentially open to development under these RMPs."[51] However, the court also held that "BLM's failure to measure the cumulative impacts of its fossil fuel management by either of Plaintiffs' suggested metrics [such as the social cost of carbon protocol] does not present a 'clear error of judgment.'"[52]

g. *W. Org. of Res. Councils v. Zinke*, No. 15-5294 (D.C. Cir. appeal filed Oct. 28, 2015)

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[48] *See AquAlliance v. U.S. Bureau of Reclamation*, 287 F. Supp. 3d 969, 1023-1032 (E.D. Cal. 2018).
[49] *See* Petitioners' Preliminary Statement of Issues at 3, *Appalachian Voices v. FERC*, No. 17-1271 (D.C. Cir. Feb. 5, 2018).
[50] *W. Org. of Res. Councils v. BLM*, No. 16-cv-21, 2018 WL 1475470, *1 (D. Mont. Mar. 26, 2018).
[51] *Id*. at *13.
[52] *Id*. at *14.

In 2015, the U.S. District Court for the District of Columbia held that BLM had "no duty to supplement the 1979 programmatic EIS for the federal coal management program because there is no remaining or ongoing major federal action."[53] Shortly thereafter, environmental groups appealed to the D.C. Circuit, alleging that BLM violated NEPA by failing to either: (1) supplement the 1979 EIS in light of new circumstances and information, particularly information related to climate change, or (2) prepare a new programmatic EIS for the federal coal management program.[54] Oral argument was held before the D.C. Circuit on March 23, 2018.

In 2016, the Obama Administration began preparation of a programmatic EIS for the federal coal management program to update the 1979 analysis and imposed a moratorium on most new leasing until the NEPA review is complete. However, in March 2017, the Trump Administration repealed the moratorium without completing the programmatic EIS. Environmental groups challenged this repeal, arguing that BLM must evaluate impacts from climate disruption caused by extracting and burning fossil fuels.[55]

h. *Weymouth v. FERC*, No. 17-1135 (D.C. Cir. appeal filed May 24, 2017)

The town of Weymouth, Massachusetts, as well as environmental and municipal groups filed suit in May 2017 to challenge FERC's review of the Atlantic Bridge natural gas pipeline project in New York and New England. Challengers argued that FERC erred in preparing an EA in lieu of a more stringent EIS and failed to adequately consider GHG emissions.[56] As of April 2018, final briefs are due in August 2018.

V. Evaluating the Impact of Expanded Environmental Review

a. What is the Standard?

The *Sierra Club v. FERC* case and others like it present a challenging question for energy sector projects: to what extent should climate change be incorporated into environmental reviews? Climate change is a hotly debated topic with global reach and long-term consequences. How far in time and space may or must an agency go when evaluating greenhouse gas emissions? At what point will the inquiry end?

There will likely be continued debate over what impacts may be considered reasonably foreseeable for the energy sector. In *Sierra Club v. FERC*, the natural gas was being transported primarily to power plants. It is not clear if the downstream environmental effects of gas transported by a pipeline for *other* end uses (e.g., feedstock at a chemical plant) would also be considered reasonably foreseeable. How might the *Sierra Club v. FERC* decision influence other industries? Imagine a federal agency decision to approve a major interstate highway project which is expected to increase the number of vehicles on the road. Are the vehicle GHG emissions reasonably foreseeable? Probably; fuel-combusting vehicles are widely acknowledged

[53] *W. Org. of Res. Councils v. Jewell*, 124 F. Supp. 3d 7, 13 (Dist. D.C. 2015).
[54] Statement of Issues to be Raised, *W. Org. of Res. Councils v. Zinke*, No. 15-5294 (D.C. Cir. Nov. 25, 2015).
[55] *See Citizens for Clean Energy v. BLM*, No. 17-cv-30 (D. Mont. appeal filed Mar. 29, 2017).
[56] Petitioners' Nonbinding Statement of Issues at 2, *Weymouth v. FERC*, No. 17-1135 (D.C. Cir. July 4, 2017).

as a major source of domestic GHG emissions. What about GHG emissions associated with the landfill disposal of the additional vehicles per year that will be "totaled" due to collisions on the new highway system?

Another key question is: what metric should reviewing agencies use to measure climate impacts? Is there a best approach for quantifying emissions? How do we *attribute* discrete impacts on the global environment to GHG emissions associated with a site-specific project? Many would argue that it is impossible to link project emissions to global impacts without relying on mere opinion and subjective analyses. Others would say there is plenty of reliable science available to support this calculation.

Even if it is possible to measure climate impacts, there is also a qualitative question of what level of GHG emissions is too much. There is currently no universally accepted, objective standard for defining what constitutes a *significant* climate impact. Admittedly, there are some tools available. The plaintiff environmental groups in *Western Organization of Resource Councils v. BLM* offered that the agency could have used the social cost of carbon protocol or a "global carbon budget."[57] The carbon budget approach "caps the amount of greenhouse gases that may be emitted worldwide to stay below a certain warming threshold," beyond which the plaintiffs argued may result in severe and irreparable harm.[58] For better or worse, President Trump's EO 13783 withdrew the social cost of carbon-related policy documents and disbanded the interagency working group that developed them. The CEQ Guidance was also withdrawn. Whatever the controlling standard for agency review is or becomes, it seems most logical that it be on a project-level basis. FERC noted in the SMP Project final SEIS that "global models are not suited to determine the incremental impact(s) of individual projects, due both to scale and overwhelming complexity."[59] The CEQ Guidance contemplated site-specific project review, but it is no longer recognized as official government policy. While some of the analytical tools and policies championed by environmental groups may be useful for rulemakings or broadly applicable policy decisions, they may fall short when it comes to estimating a site-specific project's impacts on the environment.

As illustrated by the case law developing around the issue of climate change impacts in environmental review (see Section IV above), there is no consensus on how to evaluate GHG emissions. Disagreements abound on how the emissions are to be measured and assessed. The cases reviewed indicate that where courts have been critical of agency efforts (or lack thereof) to consider climate change impacts they have not offered a clear guiding standard for how the agency ought to proceed. Unfortunately, this area of environmental law appears to be riddled with more questions than answers, at least for now.

b. Consequences for Agencies and Industry

Following *Sierra Club v. FERC*, it is likely that federal agencies may take a broader approach to NEPA reviews and devote additional attention to GHG emissions. A lack of consensus regarding the appropriate standard for agency review creates uncertainty for the

[57] *See W. Org. of Res. Councils v. BLM*, No. 16-cv-21, 2018 WL 1475470, *14 (D. Mont. Mar. 26, 2018).
[58] *Id*.
[59] FERC, Southeast Market Pipelines Project—Final Supplemental Environmental Impact Statement, 6 (Feb. 2018).

energy industry. It also puts permitting agencies in the difficult position of having to develop an administrative record that can withstand judicial scrutiny, a job that can entail multiple years of data collection, consultation, and assessment. Applicants may be asked to submit more expansive and detailed information to support an agency's analysis. Even in situations where it is not feasible to evaluate indirect GHG emissions, the evolving case law suggests that the agency must still provide a satisfactory explanation for its feasibility determination. Meanwhile, courts are left with significant discretion to decide whether an agency's environmental review missed the mark. Judicial opinions which insist that agencies evaluate climate change impacts seem entirely at odds with Trump Administration efforts to ease permitting burdens for industry.

For large-scale, high-profile projects, an applicant may anticipate scrutiny regarding GHG emissions, in which case it might be appropriate to include a supportive climate impacts analysis in the application. Consider whether it is possible to promote any *benefits* that the proposed project may have with respect to climate change. In the case of *Sierra Club v. FERC*, for example, project developers were able to tout the indisputable demand for natural gas in the State of Florida and the fact that coal and oil-fired power plants in Florida were either retiring or converting in response to the increased availability of gas. At the same time, however, applicants should be careful to avoid raising an issue that would otherwise go unnoticed. Perhaps stakeholders are only interested in endangered species or water quality issues. In this situation it may be best to present climate change information only upon request.

Many environmental permitting decisions implicate both federal and state agencies. For example, an energy project that will impact water bodies in Pennsylvania may trigger joint review by the Pennsylvania Department of Environmental Protection and the U.S. Army Corps of Engineers. If climate change is a project risk that must be studied exhaustively, which agency will decide when enough is enough? *Sierra Club v. FERC* presented a situation in which the primary reviewing agency, FERC, was obligated to consider impacts that arguably exceeded the scope of its statutory authority. Both the final SEIS for the SMP Project and the Commission's majority opinion emphasized that federal and state regulatory agencies *other than FERC* are responsible for regulating downstream GHG emissions. If a reviewing agency is forced to consider impacts beyond its authority, the agency may be ill-equipped to do so. The review may be duplicative of another agency's work and therefore inefficient. It may also require additional agency coordination that could extend the length of the permitting process.

The *Sierra Club v. FERC* decision could also influence the broader discussion (beyond the NEPA context) about how climate change concerns play into agency decision making. In theory, any permitting program in which the reviewing agency is obligated to consider the "public interest" is at risk of being interpreted as encompassing climate change considerations. In the Commonwealth of Pennsylvania, for example, the state constitution includes a broad "Environmental Rights Amendment" ("ERA") which provides:

> 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.

Recent developments in Pennsylvania case law suggest that Commonwealth agencies will need to take a fresh look at how their decision to approve a proposed project satisfies the ERA.[60] The practical problem with this shift in jurisprudence is that it opens a Pandora's box of possible impacts that a reviewing agency may need to consider. Environmental groups are already criticizing agency actions for failing to adequately address harms such as groundwater degradation associated with a landfill.[61] It seems like only a matter of time before environmental advocates claim that GHG emissions from a project will negatively impact the global climate in violation of Pennsylvanians' rights under the ERA.[62]

Finally, the *Sierra Club v. FERC* decision will likely continue to bolster environmental groups seeking to challenge industrial and commercial development in general. Public interest groups like Sierra Club are increasingly active in challenging permitting decisions based upon GHG implications of fossil fuel development. The *Appalachian Voices* case described in Section IV above (in which plaintiffs claim that FERC should have considered downstream GHG emissions) is a testament to the fact that *Sierra Club v. FERC* has added fuel to the fire.

VI. Conclusion

Expanding the scope of environmental review to include a project's possible impacts on the global climate invites an untethered analysis. Unfortunately, the trending case law suggests that courts (for the foreseeable future, at least) may be unlikely to put bounds on this analysis. At the same time, however, it appears that courts expect agencies to seriously consider the climate change impacts of a proposed project. Developers who are involved in major energy projects and know they will be subject to NEPA-like review would be wise to proactively establish an administrative record that (1) demonstrates the need for the project and (2) addresses climate change impacts. Courts will expect more than a cursory examination of the issue, despite the many uncertainties and variables associated with evaluating climate change. While there is no such thing as a "perfect" energy source, in terms of environmental impact, environmental groups focused on climate change will no doubt continue to use litigation to push for an end to fossil fuel development.

[60] *Pennsylvania Envtl. Def. Found. v. Commonwealth*, 161 A.3d 911 (Pa. 2017).
[61] *See Friends of Lackawanna v. Commonwealth*, EHB Docket No. 2015-063 (Nov. 8, 2017).
[62] *See, e.g., Funk v. Wolf*, 144 A.3d 228 (Pa. Commw. Ct. 2016) (dismissing petition of interest group which alleged that state government's failure to develop and implement a comprehensive plan to regulate carbon dioxide emissions violated the ERA).