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2022 NEPA Case Law Update (Webinar)

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*Pam's views are hers alone and do not reflect those of the Dep't of Defense or the Dep't of the Navy.

NEPA Litigation



- There is no NEPA cause of action – challenges to an agency decision not made in accordance with NEPA are brought under the Administrative Procedure Act (APA)
 - “Arbitrary and capricious” standard
- Plaintiffs must show they are within the “zone of interests” protected by NEPA and that they are or would be harmed if the agency’s decision were implemented
 - Plaintiffs must raise their concerns during the agency’s NEPA process

NEPA Remedies

- Typical remedies for violations of NEPA under the Administrative Procedure Act (APA), 5 U.S.C. § 706, include:
 - (1) reversing and remanding without instructions to vacate,
 - (2) reversing and remanding with instructions to vacate,
 - (3) equitable relief (injunction),
 - (4) declaratory relief (declaratory judgment), and
 - (5) mandamus.
- The court may also retain jurisdiction over the matter until resolved

Federal Court System

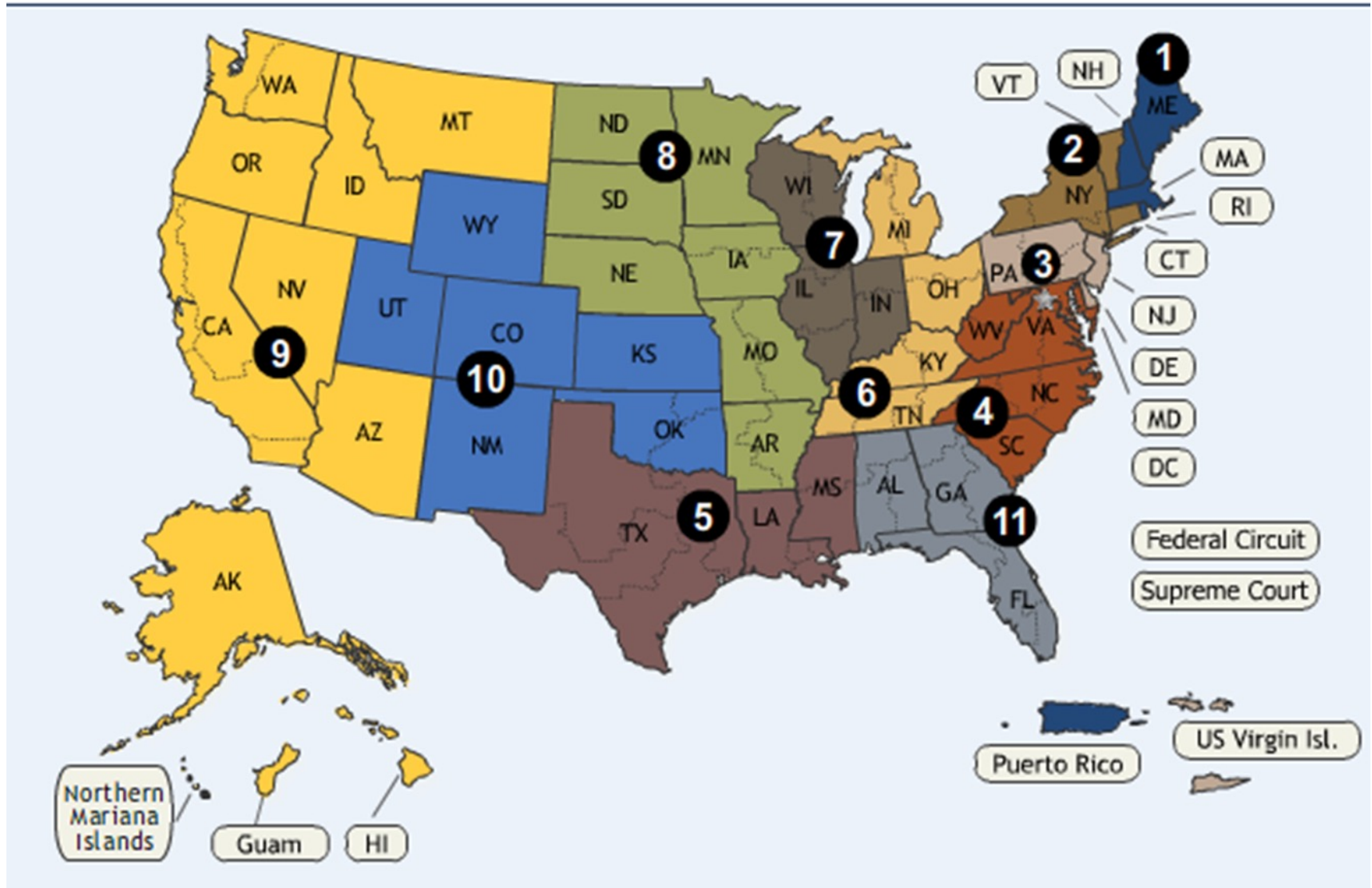
- Challenges to NEPA/APA involve federal actions and are brought in federal court
 - District courts (one or more in each state)
 - Courts of Appeal (several states within one circuit; 11 circuits of general jurisdiction and 1 of special jurisdiction [Federal Circuit])
 - U.S. Supreme Court (only takes cases it agrees to hear – usually to address differences in the circuits or constitutional questions)



Jurisdiction of Federal Courts of Appeal



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2022 NEPA Litigation Statistics



- U.S. Courts of Appeals issued 27 NEPA decisions (where courts reviewed NEPA documents) in 2022, 15 in the 9th, 5 in the D.C. Circuit, and 2 each in the 4th and 10th Circuits, and 1 each in the 6th, 7th, and 11th Circuits
- 6 different agencies:
 - DOI (BOEM, BLM, BSEE, FWS, Lands and Minerals Mgm't, NPS, and OSMRE) – 12 cases (prevailed in all cases but three (and in one case of three it partially prevailed)) (**was co-defendant with USDA (USFS) and DOT (FHWA in two cases)
 - USDA (USFS) – 5 cases (prevailed in all cases but one (where it partially prevailed))
 - DOT (FAA, FHWA) – 4 cases (prevailed in all cases)
 - FERC – 3 cases (prevailed in two cases and partially prevailed in one case)
 - CEQ and NRC – 1 case each where each prevailed
 - TVA – 1 case did not prevail
- Government prevailed in **78% (85% if partial counted)** of the cases

Comparison to Previous Years

| | U.S. Courts of Appeals Circuits | | | | | | | | | | | | |
|-------------------|---------------------------------|-----|-----|-----|-----|-----|-----|-----|-----|------|------|------|-------|
| | 1st | 2nd | 3rd | 4th | 5th | 6th | 7th | 8th | 9th | 10th | 11th | D.C. | TOTAL |
| 2006 | | | | | 3 | | 1 | 1 | 11 | 6 | | 1 | 23 |
| 2007 | 1 | | | | 1 | | | | 8 | 2 | | 3 | 15 |
| 2008 | 1 | 1 | 1 | | | | | 2 | 13 | 3 | 1 | 2 | 24 |
| 2009 | 1 | 3 | 1 | 2 | 1 | 1 | | 1 | 13 | 2 | | 2 | 27 |
| 2010 | | 1 | | | | 2 | 1 | 1 | 12 | 4 | 1 | 1 | 23 |
| 2011 | 1 | | 1 | | | | | | 12 | | | | 14 |
| 2012 | 2 | 1 | 2 | 3 | 1 | | 1 | | 12 | 3 | 2 | 1 | 28 |
| 2013 | 2 | | | 2 | | 1 | 1 | | 9 | 2 | 1 | 3 | 21 |
| 2014 | | | | 2 | | 5 | | | 10 | 2 | | 3 | 22 |
| 2015 | 1 | | | | | 1 | | | 6 | 2 | | 4 | 14 |
| 2016 | | | | 2 | | 1 | 1 | | 14 | 1 | 1 | 7 | 27 |
| 2017 | | 1 | 1 | | 1 | | | | 13 | 1 | | 8 | 25 |
| 2018 | | | 1 | 3 | 2 | 1 | | | 16 | | 3 | 9 | 35 |
| 2019 | | | | 1 | | | 1 | 1 | 9 | 2 | 1 | 6 | 21 |
| 2020 | | 1 | | | 1 | 1 | | | 19 | | 2 | | 24 |
| 2021 | 1 | 1 | | 2 | | | 1 | | 6 | 2 | | 5 | 18 |
| 2022 | | | | 2 | | 1 | 1 | | 15 | 2 | 1 | 5 | 27 |
| TOTAL | 10 | 9 | 7 | 19 | 10 | 14 | 8 | 6 | 198 | 34 | 13 | 60 | 388 |
| Proportion | 3% | 2% | 2% | 5% | 2% | 4% | 2% | 2% | 51% | 9% | 3% | 15% | 100 |

2022 Case Trends

- 27 cases total
 - 5 cases – CATEx (prevailed in all cases)
 - 10 cases – EAs (prevailed in all but four cases)
 - 9 cases – EISs (prevailed in all but one case)
 - 3 cases – No document (prevailed in one case, did not prevail in other case)

2022 Case Trends (con't.)



CEQ 2020 final NEPA regulations: These are the first cases at the federal appellate level in which the CEQ 2020 final NEPA regulations were applied or discussed.

- *Sherwood v. Tennessee Valley Authority*, 46 F.4th 439 (6th Cir. 2022) (comparing and applying new regulations involving programmatic EIS and site specific statements; stating that the new rules make clear that the site-specific statement or assessment does not necessarily need to be an EIS itself—instead, “the tiered document needs only to summarize and incorporate by reference the issues discussed in the broader document” and “shall concentrate on the issues specific to the subsequent action.” 40 C.F.R. § 1501.11(b)).
- *Save our Skies v. Federal Aviation Admin.*, 50 F.4th 854 (9th Cir. 2022) (examining the CEQ 2020 final NEPA regulations when upholding FAA's application of its CE).
- *Wild Virginia v. Council on Env't'l Quality*, 56 F.4d 281 (4th Cir. 2022) (rejecting Plaintiffs' claims; this action has resulted in the enduring portions of the 2020 CEQ final NEPA regulations remaining in effect although CEQ indicated it plans to amend these regulations).
- *Neighbors Against Bison Slaughter v. Nat'l Park Serv.*, No. 21-35144, 2022 WL 1315302 (9th Cir. May 3, 2022) (not for publication) (referring to the 2-year timelines from CEQ 2020 final NEPA regulations).

2022 Case Trends (con't.)

- 19 (of 27) cases involved challenges to impact analysis
 - 5 cases, CATEx
 - 10 cases - direct impacts
 - 4 cases - indirect impacts (GHG)
 - 4 cases - cumulative impacts

Note: Several cases involved challenges in multiple categories.

2022 Case Trends (con't)



- 6 cases involved challenges to the sufficiency of the alternatives considered, and the courts upheld the agencies' selection of the preferred alternative in each case except for one.
- 4 cases involved claims of improper segmentation
- 3 cases alleged that a supplemental statement should have been completed.

2022 Case Trends - CEs



- *Los Padres Forestwatch v. U.S. Forest Serv.*, 25 F.4th 649 (9th Cir. 2022) (defending the agency's application of CE-6 and stating the USFS was not required to examine impacts to public safety or fuelbreak location efficacy in analyzing whether extraordinary circumstances prevented the use of CE-6).
- *Mountain Communities for Fire Safety v. Elliott*, 25 F.4th 667 (9th Cir. 2022) (upholding the application of the USFS CE-6, where the agency analyzed each of the resource conditions listed in extraordinary circumstances and found that the project would have “no significant impact” on each).
- *Safari Club Int'l v. Haaland*, 31 F.4th 1157 (9th Cir. 2022) (criticizing the State and Safari Club when they suggested their opposition to the Kenai Rule and the ensuing public controversy is an extraordinary circumstance that triggered FWS' obligation to prepare an EIS or EA; “[m]ere opposition to an action does not, by itself, create a controversy within the meaning of NEPA regulations.”).
- *Rocky Mountain Peace & Justice Center v. U.S. Fish and Wildlife Serv.*, 40 F.4th 1133 (10th Cir. 2022) (concluding no extraordinary circumstances rendered the 2018 Environmental Action Statement ineligible for the application of the categorical exclusions).
- *Save our Skies v. Federal Aviation Admin.*, 50 F.4th 854 (9th Cir. 2022) (upholding FAA's application of its CE and stating that Save Our Skies did not meaningfully dispute that the orders fall within the scope of the categorical exclusion; the orders did not implicate extraordinary circumstances, so the FAA did not err in relying on the CE).

Impact Assessment

40 C.F.R. §1502.23 Methodology and Scientific Accuracy.

** current 2020 Rule

Agencies shall ~~ie~~nsure the professional integrity, including scientific integrity, of the discussions and analyses in environmental ~~documents~~impact statements. Agencies shall make use of reliable existing data and resources. Agencies may make use of any reliable data sources, such as remotely gathered information or statistical models. They shall identify any methodologies used and shall make explicit reference ~~by footnote~~ to the scientific and other sources relied upon for conclusions in the statement. ~~An agency~~iesy may place discussion of methodology in an appendix. Agencies are not required to undertake new scientific and technical research to inform their analyses. Nothing in this section is intended to prohibit agencies from compliance with the requirements of other statutes pertaining to scientific and technical research.

Impact Assessment (con't.)

40 C.F.R. §1508.1 Effects

- (g) *Effects* or *impacts* means changes to the human environment from the proposed action or alternatives that **are reasonably foreseeable** and include the following:
 - (1) Direct effects, which are caused by the action and occur at the same time and place.
 - (2) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still **reasonably foreseeable**. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

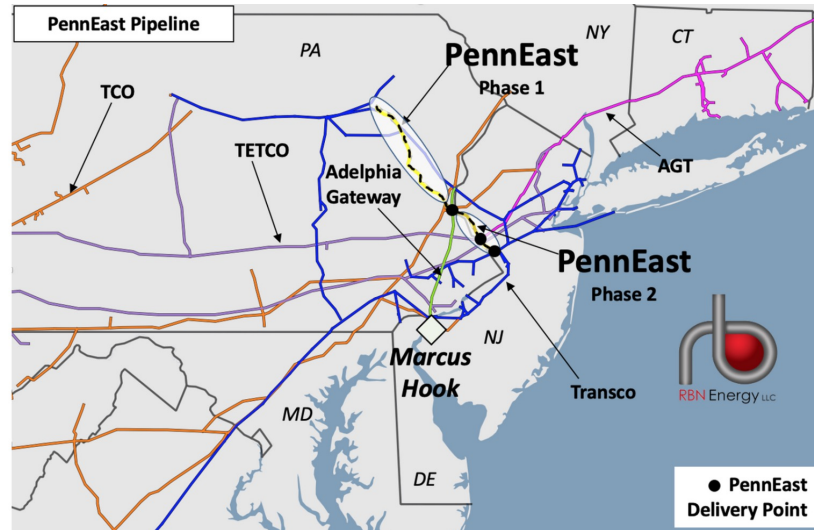
Impact Assessment (con't.)



40 C.F.R. §1508.1 Effects

- (3) Cumulative effects, which are effects on the environment that result from the incremental effects of the action when added to the effects of other past, present, and reasonably foreseeable actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative effects can result from individually minor but collectively significant actions taking place over a period of time.
- (4) Effects include 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 effects will be beneficial.

Impact Assessment (Indirect Impacts): *Delaware Riverkeeper Network v. Fed. Energy Reg. Comm'n*, 45 F.4th 104 (D.C. Cir. 2022¹)



- Proposed Action: FERC certification of Adelpia Gateway LLC proposal to acquire an existing natural gas pipeline system in PA and DE and construct 2 short lateral pipeline segments and compressor station.
- FERC issued EA and FONSI, acknowledging increases in GHG levels but did not calculate downstream emissions because end users not identified. Upstream emissions not considered because out of scope of EA.

Delaware Riverkeeper Network (con't.)



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The NEPA challenge - impact analysis is deficient because FERC failed to consider:

1. Upstream effects of increased gas demand
2. Downstream effects of increased gas consumption, particularly from GHG emissions
3. Effects on climate change from downstream GHG emissions

Delaware Riverkeeper Network (cont.)



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Findings:

1. Upstream effects – petitioners presented no evidence to help FERC predict number and location of any additional wells and no evidence that the gas would not be extracted without project
2. Downstream effects – impacts analyzed for much of subscribed deliveries. Impacts of other downstream emissions not reasonably foreseeable as gas delivered to interstate grid and end users unidentifiable. Petitioner's plea for “full-burn analysis” rejected.

Delaware Riverkeeper Network (con't.)



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Findings:

3. Effects of climate change resulting from downstream emissions – Upheld conclusion in EA that “no scientifically accepted methodology available to correlate specific amounts of GHG emissions to discrete changes” in the human environment and FERC’s rejection of use of Social Cost of Carbon methodology.

***Impact Assessment (Indirect Impacts):
350 Montana v. Haaland, 29 F.4th 1158
(9th Cir. 2022), amended by 50 F.4th
1254 (9th Cir. 2022)***

Proposed Action:
OSMRE and BLM
approval of
expansion of
Federal coal lease
and mine plan at
Bull Mountain No.1
mine in Montana



350 Montana v. Haaland (con't.)



The OSMRE and BLM 2018 EA and FONSI:

- Prepared in response to 2017 Montana District Court ruling on previous OSM EA
- 2018 EA acknowledged GHG emissions as cause of global impacts of climate change and described those impacts. Stated that impacts of GHG emissions from mining and transporting coal to Vancouver BC for export to Japan and Korea were 0.04% of annual US emissions and 6.4% of annual Montana emissions and thus insignificant.

350 Montana v. Haaland (con't.)

The NEPA challenges:

1. Interior failed to take a hard look at the effects of the mine expansion's GHG emissions and failed to provide convincing reasons for FONSI
2. Interior arbitrarily and capriciously failed to use SCC metric to quantify environmental harms of GHG emissions



350 Montana v. Haaland (con't.)



Findings:

1. Total mine expansion emissions of 240 million tons CO₂e, equivalent to 3.33% of annual US emissions, 519% of annual Montana emissions
2. “By relying on an opaque comparison to total global emissions and failing to account for combustion-related emissions in its domestic calculations, the 2018 EA hid the ball and frustrated NEPA’s purpose ... Interior’s FONSI does not measure up to the ‘high quality’ and ‘[a]ccurate scientific analysis’ that NEPA’s implementing regulations demand.”

350 Montana v. Haaland (con't.)



Findings:

3. While NEPA requires high quality information and accurate scientific analysis, it is not the role of the court to prescribe the specific metric – but “Interior must use some methodology that satisfies NEPA and the APA.”

Remedies:

Remanded to district court for additional factfinding on whether preparation of EIS and vacatur of plan approval warranted

350 Montana v. Haaland (con't.)

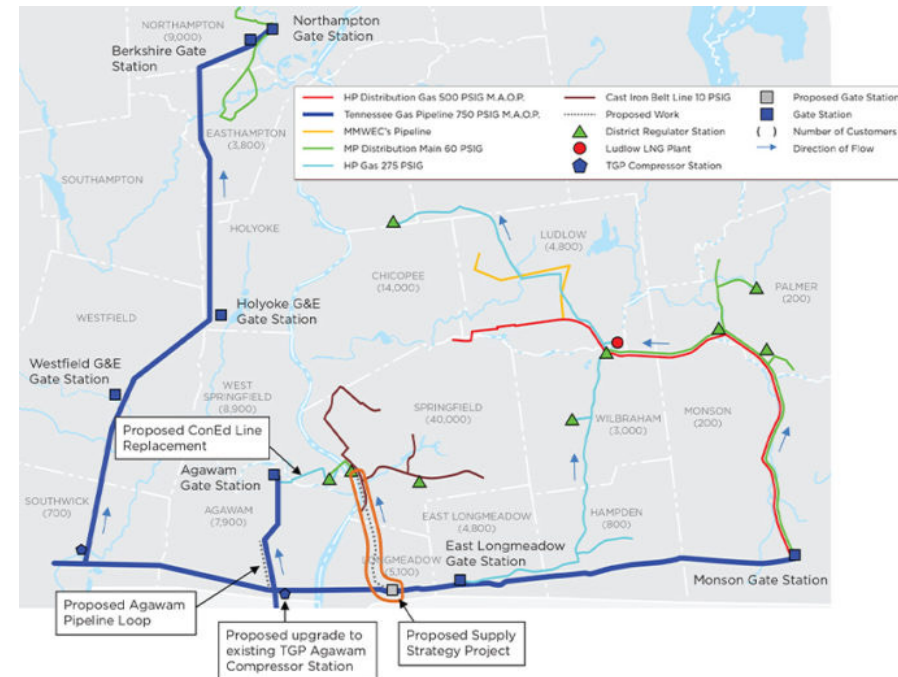


The Afterword:

- In December 2022, OSM committed to prepare an EIS
- In February 2023, the Montana District Court issued the remedy order which acknowledged OSM's decision on EIS and, noting potential significance of the impacts, vacated the mine plan approval.
- The OSM NOI has not yet been published

Impact Assessment (Indirect Impacts): *Food & Water Watch v. Fed. Energy Reg. Comm'n*, 28 F.4th 277 (D.C. Cir. 2022)

- Proposed Action: FERC certification of Tennessee Gas Pipeline Co. proposal to add 2.1 miles of pipeline and new compressor station to its existing facilities in SW Massachusetts to 1) increase transmission capacity; 2) improve reliability; and 3) retire two older, less-efficient compressor units
- FERC issued EA in May 2019 and FONSI and certificate in December 2019
- Food & Water Watch and Berkshire Environmental Action Team denied request for rehearing by FERC



Food & Water Watch v. FERC (con't.)



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- Food & Water Watch and Berkshire petitioned court for review of Certificate Order and Rehearing Order
- Berkshire denied standing and its claims of failure of FERC to adequately address public-health consequences of methane emissions and public safety concerns following recent gas line explosion in Massachusetts dismissed

Food & Water Watch v. FERC (Cont.)



F&WW NEPA challenges

- 1. Failure to address indirect upstream impacts**
- 2. Failure to address indirect downstream impacts from consumption of gas despite knowing that 56% was to supply local distribution system for residential and commercial users**
- 3. Lack of determination, including through potential use of SCC, of the significance of emissions connected to the project**

Food & Water Watch v. FERC (Cont.)



Findings:

- 1. Impacts of upstream emissions not reasonably foreseeable**
- 2. Given that end use of gas is mostly residential and commercial, that the demand for these uses is relatively inelastic, court rejected FERC's argument that end use information was too "generalized" to assess impacts**
- 3. F&WW challenge to FERC finding on significance, including use of SCC, rejected on procedural grounds**

Food & Water Watch v. FERC (Cont.)



Remedies:

1. Remanded to FERC to prepare a conforming EA addressing downstream emissions or explain in more detail why FERC cannot do so
2. F&WW request to vacate FERC orders denied, project construction/operation allowed to continue

**Impact Assessment (Alternatives); Protect
Our Parks, Inc. v. Buttigieg, 39 F.4th 389
(7th Cir. 2022)**



- Proposed Action: Multiple agency approvals related to City of Chicago's plan to site the Obama Presidential Center in Jackson Park on the South Side of Chicago.
- Agency Decisions: NPS – approval of recreational land “conversion” under Urban Parks program; FHWA – approval of road improvements in and around Jackson Park; Army Corps – approval of permit for impact to WOTUS

The Park and Activity Center Where the Community Comes Together



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Children's Play Area and Great Lawn Fun for all Seasons



Protect our Parks, Inc. (con't.)



- Plaintiffs challenged all aspects of joint Environmental Assessment prepared by co-lead agencies
- Tortured litigation history, going all the way to the U.S. Supreme Court
- 7th Circuit ruling affirms lower court's denial of motion for preliminary injunction

Protect our Parks, Inc. (con't.)



- Challenge to adequacy of EA on several grounds:
 - Intensity of impacts required preparation of an EIS
 - Range of alternatives was inadequate because it presumed location of OPC in Jackson Park
 - “Segmentation” of local and federal actions
 - ...and more

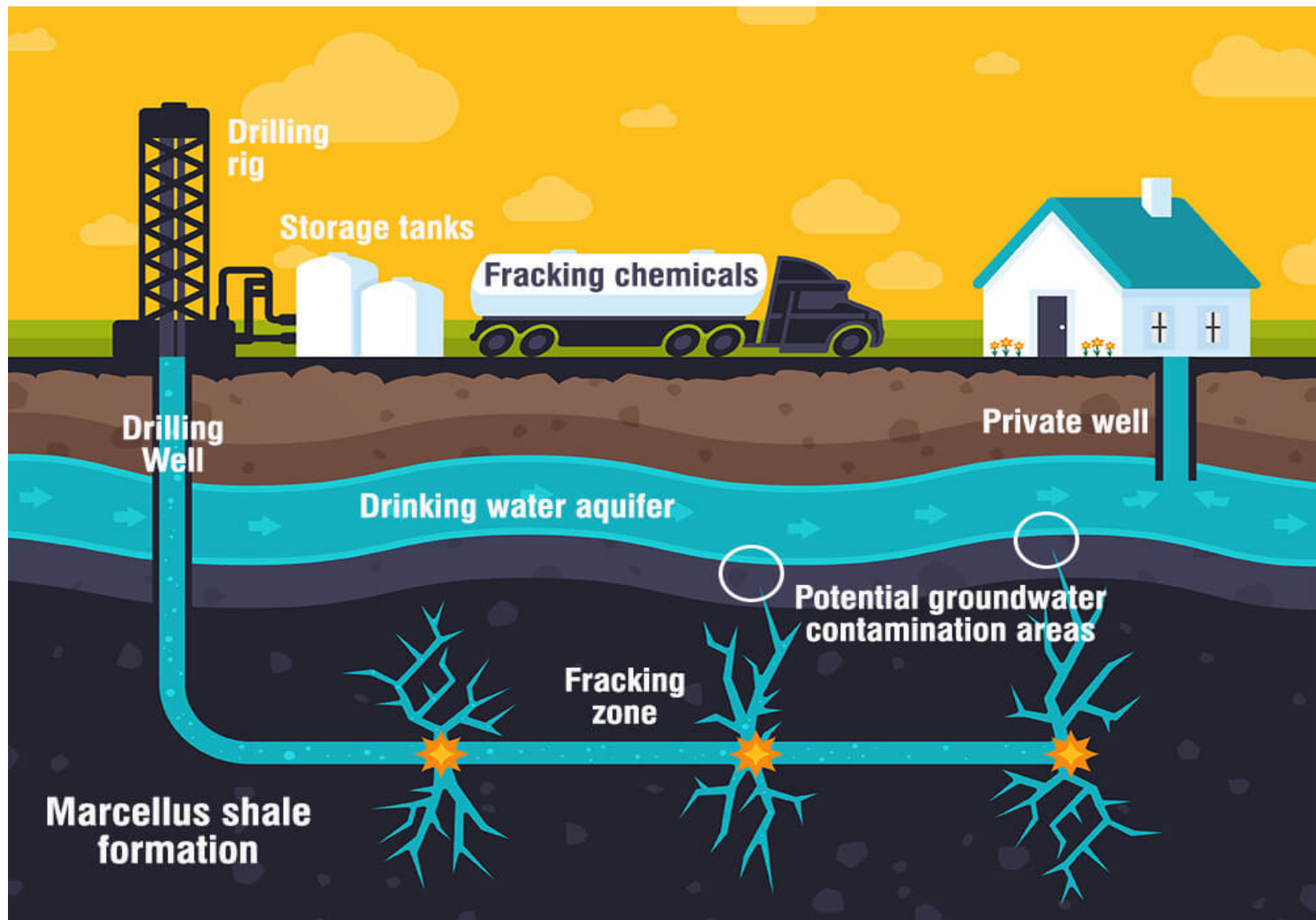
Protect our Parks, Inc. (con't.)



- Findings
 - Analysis of tree impacts in the park was upheld
 - FONSI upheld, even in context of NHPA finding of certain adverse effects to Jackson Park, which is listed on the National Register of Historic Place
 - Alternatives analysis upheld – most interesting part of the project and ruling; with potentially broader implications

Hard Look, Alternatives: ***Environmental Defense Center v.*** ***BOEM, 36 F.4th 850 (9th Cir. 2022)***

- Proposed Action: Pursuant to previous settlement between environmental NGOs and government, BOEM/BSSE prepared an EA evaluating use of offshore well stimulation (fracking)
- Agencies reached a FONSI, concluding that the relatively minimal use of the oil recovery techniques at issue would not cause significant effects



Environmental Defense

Center v. BOEM (con't.)

- Plaintiffs challenged permits under several statutes (ESA, CZMA), as well as challenging NEPA compliance
- Challenges with many aspects of the EA, including the scope of the proposed action, reliance on compliance with EPA permit, crafting of the Purpose & Need, and an inadequate range of alternatives

Environmental Defense *Center v. BOEM (con't.)*

- Ruling: agencies action was invalidated under virtually every raised issue
- Action impacted 23 platforms off the coast of California that had been developed since 1967, and ongoing plans to extract resources from declining reservoirs offshore using fracking techniques



Environmental Defense

Center v. BOEM (con't.)



- Agency has granted 51 permits for this purpose
- EA considered use of well stimulation on 43 active offshore leases on all 23 active platforms

Environmental Defense **Center v. BOEM (con't.)**



- Hard Look challenges
 - Agency relied on unreasonable assumptions regarding the quantity of well stimulation activity in a given year
 - Court accepted Plaintiffs' challenge based on what it felt were faulty historical records of fracking activity, as well as estimates for future activities
 - Rejected conclusion that infrequent use of fracking suggested insignificant impacts

Environmental Defense

Center v. BOEM (con't.)

- Reliance on EPA NPDES general permit under the Clean Water Act was arbitrary and capricious
- General permit conditions were deemed to be insufficient to support a finding of no effect because the court found both the scope of what the permit addresses and the timing of how the permit is implemented did not match up proposed fracking activities
- Court also questioned the role of the lead agencies concerning permit conditions; since BOEM/BSSE did not control the general permit, it was unreasonable to rely on it to presume compliance would result in no significant impacts

Environmental Defense

Center v. BOEM (con't.)



- Government's only win was on the Purpose & Need statement
- Court deferred to the agency, even though the P&N was narrow, it was narrow largely because it followed the terms of the settlement agreement that triggered the NEPA review in the first place

Environmental Defense

Center v. BOEM (con't.)

- Alternatives analysis failed because of the large similarity between the actions proposed
- Court also questioned agencies' rejection of proposed alternatives with different amount of fracking allowed, largely because of its lack of confidence in the agencies' assessment of projected actions
- Finally, court viewed arguments raised by agencies concerning limitation on alternative because of proprietary industry information as post hoc rationalization

Environmental Defense

Center v. BOEM (con't.)

- The Court found multiple reasons why the agency should have prepared a full EIS
 - Potential impacts to endangered species
 - The unique geographic setting of the actions
 - The highly uncertain or unknown risks of the activities (a highly debated topic)

Questions/Comments?



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