NFS Litigation Weekly

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Ecosystem Management Coordination

Court Decisions

1. None to report.

Litigation Update

1. None to report.

New Cases

1. None to report.

Notices of Intent

1. None to report.

Natural Resource Management Decisions Involving Other Agencies

1. Department of Energy (DOE)| Liquid Natural Gas (LNG) exports

The Court of Appeals for the District of Columbia dismissed plaintiff's Natural Gas Act (NGA) and National Environmental Policy Act (NEPA) claims against the DOE's grant of an application to export LNG using terminal and liquefaction facilities on Quintana Island, Texas, in *Sierra Club v. United States Department of Energy.* The plaintiff asserted the DOE "did not sufficiently examine the indirect effects of LNG exports … as well as the cumulative effects of other anticipated, pending, or approved export proposals," but the court disagreed.

Beginning with the NEPA claim the court determined the plaintiff's main claim was that the agency did not adequately address the "reasonably foreseeable" indirect effects of the agency's actions, namely increased gas production. The court, however, found the agency "offered a reasoned explanation as to why it believed the indirect effects pertaining to increased gas production were not reasonably foreseeable." As the agency concluded it did not know where production would occur it was reasonable for the agency to determine that the corresponding environmental impacts were not reasonably foreseeable under NEPA.

Photo credit: https://www.nps.gov/planyourvisit/senior-pass-changes.htm

Under the NGA the DOE "shall" authorize exports "unless … it finds that the proposed exportation … will not be consistent with the public interest." Plaintiff asserted the DOE should have weighed environmental concerns more heavily before granting the application. **Construing the NGA to contain a "general presumption favoring [export] authorization" the court determined that the plaintiff failed to overcome this presumption** noting that "even if the Department determined the impacts [of the exports] were significant, it could still find that the public interest weighs in favor of allowing the exports." (15-1489, D.C. Cir.)

2. Office of Surface Mining (OSM)| Coal Transportation and Combustion

The District of Montana found the OSM failed to take a hard look at the indirect and cumulative effects of coal transportation and coal combustion, and failed to take a hard look at the foreseeable greenhouse gas emissions when it approved Signal Peak Energy's application for a federal mining plan modification in *Montana Environmental Information Center v. U.S. Office of Surface Mining, et al.* The mine at issue in this case are located in the Bull Mountains of central Montana, approximately 30 miles north of Billings and 20 miles southeast of Roundup. The mining plan modification would expand the coal development and mining operations at the mine into 2,539.76 acres of federal coal lands.

For coal transportation plaintiff claimed OSM's analysis was arbitrary and capricious because, while it calculated the rail miles the coal extracted from the mine would travel and the greenhouse gas emissions that would result, "it did not assess a number of other indirect effects from coal trains, including the health, economic, and environmental impacts of diesel emissions, noise, vibrations, rail congestion, and coal dust." The court agreed with the plaintiff. Defendants asserted that these effects were discussed in prior analyses, but **the court found the amount of coal being transported under the new plan were between two to five times greater than those completed in the cited earlier analyses** and so concluded that it could not be said the OSM took a hard look at those effects.

Plaintiff next argued the OSM's analysis of the "combustion related impacts" of coal was arbitrary and capricious because the mining plan "failed entirely to assess any non-greenhouse gas pollution impacts that would result," and, "failed to adequately assess the indirect and cumulative impacts of greenhouse gas emissions." The court agreed with the plaintiff. The court found that coal extraction and combustion was not so highly speculative that any analysis of gas emissions would be impractical, "even if the precise locations of combustion are uncertain." That the OSM did not address these impacts, the court found, ignored an important aspect of the problem they were required to consider. For greenhouse gas emissions the court found that **the agency had indeed done an analysis of the costs of greenhouse gas emissions in an earlier analysis but was excluded from the final analysis. Because the final analysis included a cost-benefit analysis for the plan modification that included the benefits, the court concluded that the agency should have also included the costs.** (15-106, D. Mont.)

3. Federal Energy Regulatory Commission (FERC) | Southeast Market Pipelines Project

The Court of Appeals for the District of Columbia ruled that FERC's environmental impact statement (EIS) did not contain enough information on the greenhouse-gas emissions that will result from burning the gas the Southeast Market Pipelines project will carry in *Sierra Club v. FERC.* The project comprises three natural-gas pipelines under construction in Alabama, Georgia, and Florida “to serve Florida’s growing demand for natural gas and the electric power than natural gas can generate.” Plaintiff argued FERC’s EIS “failed to adequately consider the project’s contribution to greenhouse-gas emissions and its impact on low-income and minority communities.” While the court found FERC did all the analysis it was required to do under NEPA regarding the effects of the project on low-income and minority communities, the court concluded FERC did not do so regarding greenhouse gas emissions. “NEPA analysis,” the court stated, “necessarily involves some ‘reasonable forecasting’ and that agencies may sometimes need to make educated assumptions about an uncertain future.” **As the court found FERC had already estimated how much gas the pipelines would transport (about one million dekatherms (roughly 1.1 billion cubic feet per day)) the court ruled that FERC’s EIS “should have either given a quantitative estimate of the downstream greenhouse emissions that would result from burning the natural gas that the pipelines would transport or explained more specifically why it could not have done so.”** (16-1387, D.C. Cir.)