

## **CHAPTER 8 UPDATE**

### **Status of CEQ's Revised NEPA Regulations (page 815)**

As discussed in this chapter, the Trump administration Council on Environmental Quality (CEQ) in July 2020 promulgated new NEPA regulations that were challenged in numerous courts around the country. While most courts stayed these challenges in light of President Biden's executive order directing CEQ to reconsider them, on June 21, 2021, a federal district court in Virginia denied the Biden administration's request for a stay. The court dismissed a challenge to the regulations finding that the plaintiffs lacked standing and that their claims were not ripe for review because other federal agencies have not adopted procedures to conform to the new CEQ rules. The Biden CEQ then extended the deadline for other federal agencies to adopt procedures to conform to the new NEPA rules for two years (until September 14, 2023). The result is that the Trump CEQ's rules remain in effect, but are not being implemented effect pending reconsideration by the Biden administration CEQ, which considers them to be of questionable legality. The Biden CEQ also has directed federal agencies to "consider all available tools and resources in assessing [GHG] emissions and climate change effects," including specifically NEPA's 2016 GHG Guidance issued during the Obama administration. 81 Fed. Reg. 51866 (2016). See National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions, 86 Fed. Reg. 10252 (Feb. 19, 2021).

### **Sierra Club v. FERC (pages 865-871)**

#### **CONSIDERATION OF ENVIRONMENTAL JUSTICE AND CLIMATE IMPACTS IN AN ENVIRONMENTAL IMPACT STATEMENT (pages 865-874)**

On August 3, 2021, the U.S. Court of Appeals for the D.C. Circuit invalidated approval by the Federal Energy Regulatory Commission (FERC) of construction of a liquid natural gas (LNG) export terminal in Texas. The court ruled that the environmental impact statement (EIS) FERC prepared for the project failed adequately to consider the project's impacts on climate change and environmental justice communities. *Vecinos para el Bienestar de la Comunidad Costera v. FERC*, \_\_\_ F.3d \_\_\_ (D.C. Cir. 2021). In the EIS FERC has quantified the greenhouse gas (GHG) emissions associated with construction and operation of the project, but it had concluded that it was "unable to determine the significance of the Project's contribution to climate change." FERC's EIS explained that "there is no universally accepted methodology to attribute discrete, quantifiable, physical effects on the environment to [the] Project's incremental contribution to [greenhouse gas emissions]," and that therefore "it is not currently possible to determine localized or regional impacts from [greenhouse gas] emissions from the Project." The D.C. Circuit held that the EIS should have explained why it did not use the "social cost of carbon" (SCC) or some other generally accepted methodology to evaluate the impact of the project's contribution to climate change. FERC had concluded that it would not use the SCC because (1) no consensus exists as to the appropriate discount rate for analyses spanning multiple generations; (2) the SCC does not measure the actual incremental impacts of a project on the environment; and (3) there are no established criteria identifying the monetized values considered to be "significant" for the purpose of a NEPA analysis. Although the D.C. Circuit had previously accepted these reasons as excuses for not using the SCC, it held that in this case

FERC had entirely failed to respond to the petitioners' arguments that then-applicable NEPA regulations (40 C.F.R. § 1502.21(c)) required it to use some generally accepted methodology to evaluate the project's impact on climate change.

With respect to the project's impact on environmental justice communities, the court found that FERC had not explained why it only examined impacts on communities within a two-mile radius of the project site even though it had determined that the environmental effects of the project would extend much further. Thus the court found that FERC's "decision to analyze the projects' impacts only on communities in census blocks within two miles of the project sites to be arbitrary." It explained that "[o]n remand, the Commission must explain why it chose to analyze the projects' impacts only on communities in census blocks within two miles of the project site[], or else analyze the project[']s impacts on communities within a different radius of [the] project site." The court also stated that FERC "must explain whether its finding that 'all project-affiliated populations are minority or low-income populations,' is still justified, and, if so, whether its conclusion that the project[] 'would not have disproportionate adverse effects on minority and low-income residents in the area,' still holds."

**Problem Exercise: To What Extent Should a Project's Impact on Greenhouse Gas Emissions and Climate Change Be Considered in an EIS? (pages 871-874)**

As noted above, the Biden CEQ also has directed federal agencies to "consider all available tools and resources in assessing [GHG] emissions and climate change effects," including specifically NEPA's 2016 GHG Guidance issued during the Obama administration. 81 Fed. Reg. 51866 (2016). See National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions, 86 Fed. Reg. 10252 (Feb. 19, 2021). The decision discussed above in *Vecinos para el Bienestar de la Comunidad Costera v. FERC*, \_\_\_ F.3d \_\_\_ (D.C. Cir. 2021) indicates that the D.C. Circuit seems on board with the Biden CEQ's approach to interpreting NEPA.