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Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827 (D.D.C. 1972)

Council on Environmental Quality, *CEQ–2021–0002, National Environmental Policy Act Implementing Regulations Revisions* (2021).

40 C.F.R. § 1508.8

Exec. Order No. 13,990, 86 Fed. Reg. 7037 (Jan 20, 2021).

Montana Environmental Information Center v. U.S. Office of Surface Mining, 274 F. Supp. 3d 1074 (D. Mont. 2017)

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Standing Rock III, 255 F. Supp. 3d at 111–12.

National Parks, 916 F.3d at 1084–85.

North Carolina v. Federal Aviation Administration, 957 F.2d 1125, 1131–33 (4th Cir. 1992).

Argument

I. FERC fails to include an adequate range of alternatives.

FERC’s discussion of alternatives in NEPA requires consideration of alternative means to resolve the same ends the oil pipeline is trying to address. In *Natural Resources Defense Council, Inc. v. Morton*, the court established the necessity of considering onshore drilling as an alternative way to offshore drilling to resolve the energy crisis.¹ A mirroring consideration in FERC’s case can be made for renewable energy sources instead of pipelines in Texas. The defendant may argue those are impractical alternatives, but in *Natural Resources*, the court concluded that still “these alternatives must be explored and discussed

¹ Page 12, *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827 (D.D.C. 1972).

thoroughly in order to comport with the intent and requirements of Section 4332(2) (C) of NEPA.”²

While this is a district court case it is a predictable standard to follow as the pertinence of renewable consideration has been emphasized in Biden’s administration. Specifically, the revisions include “direct” and “indirect” effects which means considering renewable energy to mitigate the impacts of emissions.³ Meaning, in any case FERC’s EIS is insufficient absent renewable consideration.

II. FERC has not considered impacts on climate change.

FERC contends the economic and environmental impacts of a pipeline around tribal land is minimal but does not include indirect and cumulative effects such as emissions required by NEPA.⁴ Although Trump removed cumulative effect assessment from NEPA, Biden issued an executive order that revokes Trump’s CEQ expedition and requires the explicit assessment of greenhouse cases.⁵

Infact, it is reasonable to assess the effects of emissions when looking at predictable mechanisms of resource transportation. In *Montana Environmental Information Center v. U.S. Office of Surface Mining* the district court rejected the OSM’s argument that emissions analysis would be speculative because limited means of transporting coal through railroads meant “a degree of reasonable foreseeability exists.”⁶ Similarly, FERC’s assertion that indirect assessment is unreasonable, should be rejected on the basis that FERC’s transportation is limited and therefore reasonable foreseeability exists. Additionally, the case concluded that emissions from estimating coal burning were predictable.⁷ The same can be said for analyzing oil usage. FERC could argue that emissions are too indirect to consider on the basis of *Sierra Club v. FERC* but given that both arguments on either side are district court cases, Biden’s executive order should be a reasonable tie-breaker.⁸

III. Pipelines on lands adjacent to tribes violate environmental justice and require special consideration under NEPA.

² Page 3, *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827 (D.D.C. 1972).

³ Council on Environmental Quality, *CEQ–2021–0002, National Environmental Policy Act Implementing Regulations Revisions* (2021).

⁴ 40 C.F.R. § 1508.8

⁵ Exec. Order No. 13,990, 86 Fed. Reg. 7037 (Jan 20, 2021).

⁶ Page 1092, *Montana Environmental Information Center v. U.S. Office of Surface Mining*, 274 F. Supp. 3d 1074 (D. Mont. 2017).

⁷Page 1084, *Montana Environmental Information Center v. U.S. Office of Surface Mining*, 274 F. Supp. 3d 1074 (D. Mont. 2017).

⁸ *Sierra Club v. FERC*, 867 F.3d 1357, 1371 (D.C. Cir. 2017).

It is indisputable that FERC has failed to take into consideration the environmental justice effects of its actions regarding tribal lands. Even though the supplementary EIS considers environmental and economic impacts in a vacuum, in *Standing Rock Sioux Tribe v. United States Army Corps of Engineers* the district court required EIS concerning harms to tribal lands to answer 3 questions: whether the project's effects were "highly controversial," the impact of a spill on the Tribes' fishing and hunting rights, and environmental-justice effects.⁹ FERC's analysis of just economic and environmental impacts fails to assume the gravity of infringing upon tribal sovereignty.

While none of those questions have been assumed by FERC, the district court's ruling has provided significant steps to clarifying tribal environmental justice issues. *Standing Rock Sioux Tribe* identified in *National Parks*, (finding "legitimate controversy" where "[s]tate, local and federal officials, interested individuals," and a federal agency "expressed concern"), "The Tribes are of at least equivalent status" for defining controversy.¹⁰ Consequently, ignoring the controversy of Tribes is a violation of their rights. Finally, even if *Standing Rock* is about oil pipelines on Tribal Lands, the court's concerns were over its effects on those lands which FERC's adjacent pipeline surely will have.

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⁹ Page 3, *Standing Rock Sioux Tribe v. United States Army Corps of Engineers*, 985 F.3d 1032 (D.D.C. 2021) see also; *Standing Rock III*, 255 F. Supp. 3d at 111–12.

¹⁰ *National Parks*, 916 F.3d at 1084–85; see also *North Carolina v. Federal Aviation Administration*, 957 F.2d 1125, 1131–33 (4th Cir. 1992).