

A POLICY ANALYST'S VIEW ON LITIGATION RISK FACING NATURAL GAS PIPELINES

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Synopsis: As a macro-research analyst, I have spent over two decades following how federal energy and environmental policy impacts publicly traded companies for institutional investors. In my current role I am part of a firm that evaluates legislation, regulation, and politics to inform the decision making of these investors as well as corporate strategists active in the energy sector either as asset owners or as consumers. My practice area focuses on the power sector, pipelines, and pollution control policy.

Between 2012 and 2017, the time I spent following natural gas pipeline issues was heavily concentrated on projecting the potential conclusion of the certificate process at the Federal Energy Regulatory Commission (FERC). This was a pretty straightforward task: once the project received its certificate, money managers who owned the subject company could factor the increase in revenue associated with the project into their forward-looking financial projections, and commodity traders could begin to position around the market impact of new supplies entering a market.

My practice followed the litigation challenging natural gas pipeline certificates for its potential impact on the pace of future project reviews at the Commission, not for the potential risk to the construction schedule litigation might pose. This changed in 2018, not because the FERC began to lose in court, but because pipeline project opponents succeeded in challenging permits issued by other federal agencies. These successes resulted in prohibitions on construction of both the Atlantic Coast Pipeline and Mountain Valley Pipeline and have led to significant revisions to the sponsors' planned in-service dates. The number and variety of the judicial challenges lodged against these two projects resulted in judgements leading to both short- and long-term restrictions on construction activity that also varied in terms of geographic and operational scope, as I'll show.

My firm's institutional investor clients asked why these appeals were successful when others were not and what processes the sponsors and agencies had to traverse to get the project(s) back on track. Our corporate strategist clients asked whether these projects and their litigation challenges were indicative of a

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new trend in stakeholder opposition to energy infrastructure projects and to help them evaluate this new information as inputs into their own analyses. In 2019, I developed ClearView’s proprietary database of pipeline litigation cases to leverage our existing case-by-case analyses.

This article offers a non-attorney’s perspective on (1) the policy shifts during the Trump Administration that appear to have contributed to the success of these appeals; (2) how these cases fit in to the broader trends of the litigation undertaken by natural gas infrastructure opponents; and (3) how insufficiently robust reviews led to significant delays for two prominent natural gas projects.

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I. INTRODUCTION AND CONTEXT

As we explain on our website, ClearView Energy Partners, LLC, is a Washington, D.C.-based research firm that identifies and quantifies non-fundamental energy risks for financial investors and corporate strategists.¹ We write research for major energy producers, consumers, and investors. Our work focuses on underappreciated and sometimes abstruse economic and policy issues that have potential to disrupt supply, demand, and price expectations. The conclusions in this article are based on the research developed by ClearView as a whole and on the sector-specific research I have authored.

A. *ClearView's Perspective – Looking at Outcomes Against a Backdrop of “Enabling” Versus “Limiting” Action*

In analyzing U.S. energy policy, we at ClearView begin with an oversimplified taxonomy that groups government actions into two basic categories: “enabling” actions that primarily facilitate business and economic activity and “limiting” actions that primarily protect health, safety, and public resources.²

My firm considers legislation from Congress to be the most durable government policy action as it tends to be the most difficult to revise.³ Changing the law requires an act of Congress, which to date remains constrained by parliamentary procedures that necessitate supermajority support, such as the Senate’s 60-vote rule on cloture (the filibuster).⁴ In addition, depending on the political orientation of the President and the composition of Congress, the potential for a veto by the Executive Branch could raise the hurdle to statutory revisions.⁵ Laws are also subject to judicial review for consistency with the Constitution.⁶ I would offer the Clean Air Act and Endangered Species Act as examples of “limiting statutes” and the Mineral Leasing Act (MLA) and the Federal Land Policy and Management Act as examples of “enabling” statutes.⁷ In other words, “enabling statutes” represent a “how to get it done” regime of requirements versus “whether it can get done” set of hurdles.

My colleagues and I consider regulations to be the second most durable, as these are promulgated subject to notice and comment procedures pursuant to the

1. CLEARVIEW ENERGY PARTNERS, LLC, <http://site.cvenergy.com/>.

2. See CLEARVIEW ENERGY PARTNERS, LLC, *Energy Policy in Three-Ways Republican Washington* 8-9 (Nov. 9, 2016), https://gallery.mailchimp.com/0554cc7ed0bda904329a48c93/files/9048d64a-8b09-43a9-92a4-939963a5d693/2016_11_09_Energy_Policy_in_3WR_Washington.pdf.

3. JOHN V. SULLIVAN, HOW OUR LAWS ARE MADE, H.R. DOC. NO. 110-49 (2007).

4. CONGRESSIONAL RESEARCH SERV., FILIBUSTERS AND CLOTURE IN THE SENATE (Apr. 7, 2017), <https://www.senate.gov/CRSPubs/3d51be23-64f8-448e-aa14-10ef0f94b77e.pdf>.

5. SULLIVAN, *supra* note 3.

6. Since its 1803 decision in *Marbury v. Madison*, the Supreme Court has found 181 other acts of Congress to be unconstitutional in whole or in part. Since 1974, Congress has averaged 517 enacted laws per two-year convening (ranging between 284 (the 112th Congress) to 804 (the 95th Congress)). CORNELL L. SCH. LEGAL INFO. INST., JUDICIAL REVIEW (June 2019), https://www.law.cornell.edu/wex/judicial_review (citing 5 U.S. (1 Cr.) 137 (1803)).

7. CLEARVIEW ENERGY PARTNERS, LLC, *Energy Policy in Three-Ways Republican Washington*, *supra* note 2.

Administrative Procedures Act (APA).⁸ Regulations (rulemakings) are subject to judicial review for both consistency with the requirements of the APA (i.e., not arbitrary and capricious, supported by substantial evidence, consistent with the underlying law the agency is charged with administering and with the Constitution).⁹ Revising or repealing a regulation may be harder than adopting a new one, as previously explored in depth in the November 2017 edition of the Energy Law Journal.¹⁰

ClearView also posits that regulatory agencies may be inherently “enabling” or “limiting,” depending on the statutes they administer.¹¹ In this context, I would characterize the Environmental Protection Agency (EPA) as inherently limiting.¹² Designated in July 1970 and effective December 2 of that year, the EPA was created to domicile the in-house environmental departments of various federal agencies.¹³ President Richard Nixon explained that “a strong, independent agency is needed. That agency would, of course, work closely with and draw upon the expertise and assistance of other agencies having experience in the environmental area.”¹⁴ Among its first four tasks was “[t]he establishment and enforcement of environmental protection standards consistent with national environmental goals.”¹⁵ A failure to demonstrate that a particular project or activity can meet certain pollution limits can result in a denial of a needed permit.¹⁶

In contrast, I would characterize the FERC, the U.S. Army Corps of Engineers, the Interior Department (Bureau of Land Management), and the Agriculture Department (Forest Service) as generally “enabling” agencies given the premises of the underlying statutes they administer. For example, the Bureau of Land Management (BLM) was created in 1946¹⁷ to administer the MLA, among others.¹⁸ Notwithstanding the multiple-use stipulations of the Federal Land Policy and Management Act, BLM still monetizes federal resources today.¹⁹ In the pipeline context, the FERC addresses energy transportation infrastructure under

8. 5 U.S.C. § 553 (2019).

9. CORNELL L. SCH. LEGAL INFO. INST., *supra* note 6.

10. See Bethany A. Davis Noll & Denise A. Grab, *Deregulation: Process and Procedures that Govern Agency Decisionmaking in an Era of Rollbacks*, 38 ENERGY L.J. 269 (Nov. 16, 2017).

11. CLEARVIEW ENERGY PARTNERS, LLC, *Energy Policy in Three-Ways Republican Washington*, *supra* note 2, at 5-9.

12. EPA.GOV, LAWS AND EXECUTIVE ORDERS, <https://www.epa.gov/laws-regulations/laws-and-executive-orders> (last updated Sept. 14, 2017).

13. EPA.GOV, EPA HISTORY, <https://www.epa.gov/history> (last updated Oct. 4, 2019).

14. EPA.GOV, REORGANIZATION PLAN NO. 3 OF 1970 (July 9, 1970), <https://archive.epa.gov/epa/aboutepa/reorganization-plan-no-3-1970.html>.

15. *Id.*

16. EPA.GOV, WHAT IS A HAZARDOUS WASTE PERMIT?, <https://www.epa.gov/hwpermitting/what-hazardous-waste-permit> (last updated June, 10, 2019).

17. The BLM was created in 1946, when the Interior Department merged two older agencies: the General Land Office, created in 1812 to acquire and then sell public lands to encourage homesteading and settlement. The Grazing Service was created in 1934 to manage grazing on public lands. BLM.GOV, A LAND MANAGEMENT HISTORY, <https://www.blm.gov/about/history>.

18. BLM.GOV, NATIONAL HISTORY, <https://www.blm.gov/about/history/timeline>.

19. *Id.*

the Natural Gas Act (NGA)²⁰ to facilitate the satisfaction of the economy's need for energy while minimizing adverse impacts to the environment and customers.²¹

Regulatory guidance and Executive Orders – on the other hand – can be easier to change and such policy reorientation can occur more quickly.²² Regulatory guidance can shift an agency's approach to implementing the statutes it administers in their existing form by interpreting or enforcing them more strictly or more loosely.²³ The most dramatic changes can occur after elections, when a new administration's political agenda may differ from that of the previous one.²⁴

Guidance documents themselves do not represent binding legal requirements, but they do offer an agency's own interpretation of its regulations.²⁵ While many regulatory guidance changes do include notice and comment, this procedure is not always required.²⁶

Executive Orders are written instructions from the President to the other components of the Executive.²⁷ They reflect priorities of the president, require no notice and comment and can be issued and rescinded at the discretion of the successor to the Oval Office.²⁸ Congress can override Executive Orders through legislation, and federal courts can strike down and nullify those that are inconsistent with the law and/or the Constitution.²⁹ For these reasons, I would describe non-rulemaking guidance and Executive Orders as less durable than the legislation and regulation, in large part because fewer policy makers are usually involved in bringing them into existence.³⁰

Individual agency decisions arising from particular cases can also drive a shift in an agency's implementation of its regulations.³¹ While this can be a

20. 15 U.S.C. § 15b (1938).

21. FERC.GOV, FERC'S MISSION: ECONOMICALLY EFFICIENT, SAFE, RELIABLE, AND SECURE ENERGY FOR CONSUMERS, <https://www.ferc.gov/about/strat-docs/strat-plan.asp> (last updated Oct. 2, 2018).

22. WHITEHOUSE.GOV, THE EXECUTIVE BRANCH, <https://www.whitehouse.gov/about-the-white-house/the-executive-branch/>.

23. GAO.GOV, REGULATORY GUIDANCE PROCESSES: SELECTED DEPARTMENTS COULD STRENGTHEN INTERNAL CONTROL AND DISSEMINATION PRACTICES (Apr. 2015), <https://www.gao.gov/assets/670/669688.pdf>.

24. CLEARVIEW ENERGY PARTNERS, LLC, *Energy Policy in Three-Ways Republican Washington*, *supra* note 2, at 5-9.

25. See William Funk, *Agency guidance documents and NRDC v. EPA*, AM. BAR ASS'N, at 3 (May 1, 2012), https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2011_12/may_june/agency_guidance_documents_nrdc_epa/; see also *Pac. Gas & Elec. Co. v. Fed. Power Com.*, 506 F.2d 33 (D.C. Cir. 1974).

26. See Funk, *supra* note 25, at 3.

27. THE HERITAGE FOUND., EXECUTIVE ORDERS, <https://www.heritage.org/political-process/heritage-explains/executive-orders>.

28. *Id.*

29. *Id.*

30. CLEARVIEW ENERGY PARTNERS, LLC, *Energy Policy in Three-Ways Republican Washington*, *supra* note 2, at 5-9.

31. Charles H. Koch, *Judicial Review of Administrative Policymaking*, 44 WM. & MARY L. REV. 375, 397 (Oct. 2002).

quick way for an agency to modify its implementation of a particular regulation,³² the durability of such decisions may wind up being very reliant on the facts specific to the action at hand which may limit their application over the long term.³³

In this article, I explain how several recent judicial rulings adversely impacting two highly visible energy infrastructure projects – Atlantic Coast Pipeline and Mountain Valley Pipeline – may be examples of when agency strategies to take a more “enabling” approach under existing statutes and regulations can go awry. For these projects, federal agency efforts to accelerate a project’s regulatory review through a more “enabling” interpretation or implementation of the generally “limiting” statutes they each administer resulted in judicial decisions that materially impacted the projects while under construction.³⁴ I explained to our clients that I saw two different sets of errors in these cases: the courts either found that an agency failed to meet its statutory mandate, or the courts found that an agency operated beyond its statutory authority.³⁵ In both cases, substantial delays have occurred.

B. *The Trump Agenda and the Unmaking of a Predecessor’s “Green Legacy”*

During the Obama Administration, U.S. energy fundamentals changed dramatically. Although the Democrats held majorities in the House and Senate, Congress did not amend the Clean Air Act to establish either nationwide or sectoral limits on greenhouse gases (GHGs).³⁶ Congress also did not amend the National Environmental Policy Act (NEPA) during the first two years of President Obama’s term. As a result of the Congressional gridlock during the last six years of President Barack Obama’s tenure, his Administration reinterpreted four decades of scarcity-based energy policy for an age of newfound energy supply adequacy largely via new rulemakings and guidance at the EPA and at the Council on Environmental Quality (CEQ).³⁷ Federal courts – rather than the Congress – became the venue where opponents to the Administration’s policy positions challenged the expression of policy through regulation and guidance.³⁸ In the wake of his successful presidential bid, newly elected President Trump promised

32. Robert L. Glicksman & Richard E. Levy, *Agency-Specific Precedents*, 89 TEX. L. REV. 499, 500 (2011).

33. *Id.* at 555.

34. The analysis that follows details the suspension and/or *vacatur* of federal authorizations required as conditions of the certificate for construction held by both projects resulting in the suspension of various construction activities of different scopes and duration.

35. See CLEARVIEW ENERGY PARTNERS, LLC, *Pipelines & Trend Lines* 9, 13-14 (July 17, 2019), https://gallery.mailchimp.com/0554cc7ed0bda904329a48c93/files/a6ecf435-d481-432d-96fa-3f7b7d6babc3/2019_07_17_Pipelines_and_Trend_Lines.01.pdf.

36. See generally Marianne Lavelle, *2016: Obama’s Climate Legacy Marked by Triumphs and Lost Opportunities*, INSIDE CLIMATE NEWS (Dec. 26, 2016), <https://insideclimatenews.org/news/23122016/obama-climate-change-legacy-trump-policies>.

37. See CLEARVIEW ENERGY PARTNERS, LLC, *The Unmaking of a Green Legacy* (Mar. 28, 2017), https://gallery.mailchimp.com/0554cc7ed0bda904329a48c93/files/1ecb664d-0500-4a9a-b852-5701196d9460/2017_03_28_EIEO.pdf.

38. *Id.*

to follow through on the deregulatory agenda he promised on the campaign trail.³⁹ To accomplish this task, President Trump took the following actions.

1. The “Regulatory Rollback” Begins

On March 28, 2017, President Donald Trump issued Executive Order 13783, Promoting Energy Independence and Economic Growth (March 28 EO),⁴⁰ designed to reverse the Obama Administration’s legacy of integrating climate change mitigation into nearly all aspects of federal energy policy.⁴¹ This particular component of the Trump Administration’s political agenda may be familiar to readers.

First, the March 28 EO directed agencies to identify existing regulations that “unnecessarily obstruct, delay, curtail, or otherwise impose significant costs on the siting, permitting, production, utilization, transmission, or delivery of energy resources.”⁴² The March 28 EO⁴³ directed the Council on Environmental Quality (CEQ) to rescind⁴⁴ the 2016 Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Reviews (2016 GHG Guidance).⁴⁵ The March 28 EO also withdrew the then-recently updated federal Social Cost of Carbon (SCC) and dissolved the federal interagency working group responsible for preparing and updating SCC calculations.⁴⁶ Pipeline opponents relied on the 2016 Guidance in appealing certificate orders for several natural gas pipelines, adding allegations that FERC’s NEPA reviews insufficiently analyzed the impacts of indirect upstream and downstream emissions to their criticisms of the Commission’s certificate pipeline reviews.⁴⁷

39. John W. Schoen, *Regulation buster Trump takes aim at the EPA*, CNBC (Nov. 10, 2016), <https://www.cnbc.com/2016/11/09/regulation-buster-trump-takes-aim-at-the-epa.html>.

40. Exec. Order No. 13783, 82 Fed. Reg. 16,093 (2017).

41. *Id.*

42. *Id.*

43. *Id.* at 16,094.

44. *Id.* (instructing the CEQ to withdraw); see Notice, *Withdrawal of 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*, 82 Fed. Reg. 16,576 (2017) (affecting the CEQ withdrawal).

45. Christina Goldfuss, *Memorandum for Heads of Federal Departments & Agencies*, EXEC. OFF. PRESIDENT CEQ (Aug. 1, 2016), https://ceq.doe.gov/docs/ceq-regulations-and-guidance/nepa_final_ghg_guidance.pdf. The CEQ initially proposed GHG Guidance for federal agency reviews in 2010. Nancy H. Sutley, *Draft NEPA Guidance on Consideration of the Effects of Climate Change and Greenhouse Gas Emissions*, COUNCIL ENVTL. QUALITY (Feb. 1, 2010), <https://obamawhitehouse.archives.gov/sites/default/files/microsites/ceq/20100218-nepa-consideration-effects-ghg-draft-guidance.pdf>. It then proposed them again in 2014 finalizing them in August 2016. COUNCIL ENVTL. QUALITY, DRAFT PUBLISHED FOR PUBLIC REVIEW AND COMMENT (Dec. 2014), https://obamawhitehouse.archives.gov/sites/default/files/docs/nepa_revised_draft_ghg_guidance_searchable.pdf.

46. Exec. Order No. 13783, *supra* note 40, at 16,095.

47. See CLEARVIEW ENERGY PARTNERS, LLC, *Permitting Reform – Promise or Peril for Pipelines?* 3-10 (Feb. 15, 2019), https://gallery.mailchimp.com/0554cc7ed0bda904329a48c93/files/09aa556c-66c2-4611-a6e2-d54529527693/2019_02_15_Promise_Peril_Pipe_Permit_Reform.03.pdf.

The March 28 EO did not leave federal agencies adrift, however. It directed them⁴⁸ to reference the Office of Management and Budget's September 17, 2003 Circular A-4,⁴⁹ which utilizes higher discount rates than those in the SCC analyses, and limits the review of environmental impact to domestic (rather than global) effects if an agency elects to prepare a cost-benefit assessment in its NEPA review that includes GHGs.⁵⁰ While the 2016 GHG Guidance and other Obama-era CEQ guidance encouraged cost-benefit analyses, NEPA does not require it.⁵¹ On September 14, 2017, CEQ issued its response to EO 13807,⁵² announcing plans to review and update various NEPA processes and provide potential overarching reform to the implementing regulations.⁵³

CEQ also announced it was convening a working group to assist in developing potential improvements to interagency consultations, such as for section 7 of the Endangered Species Act,⁵⁴ section 106 of the National Historic Preservation Act,⁵⁵ and permitting and certifications pursuant to the Clean Water Act.⁵⁶ CEQ followed up with an Advanced Notice of Proposed Rulemaking⁵⁷ regarding potential NEPA reforms and solicited comment through August 20, 2018. On June 21, 2019, CEQ released its Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions (Draft Guidance).⁵⁸ Comments closed on August 26, after a 30-day extension.⁵⁹

In addition, the March 28 EO directed the EPA to withdraw and reconsider the Clean Power Plan (CPP) regulations limiting GHG emissions from existing electric generation units.⁶⁰ In October 2017, the EPA issued a formal notice of its plan to repeal that rule (which had been suspended by the Supreme Court pending the outcome of judicial review in February 2016).⁶¹ In December 2017, the EPA undertook an advanced notice of proposed rulemaking to solicit infor-

48. Exec. Order No. 13783, *supra* note 40.

49. OFF. MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, *Circular A-4*, 33 (Sept. 17, 2003), https://www.transportation.gov/sites/dot.gov/files/docs/OMB_Circular_No._A-4.pdf.

50. *Id.* at 44.

51. Cost-Benefit Analysis, 40 C.F.R. § 1502.23 (2019).

52. Notice, *Initial List of Actions to Enhance and Modernize the Federal Environmental Review and Authorization Process*, 82 Fed. Reg. 43,226 (2017).

53. *Id.*

54. 16 U.S.C. § 1536 (2019).

55. 54 U.S.C. § 306108 (2014).

56. 33 U.S.C. §§ 1251-1376 (2019).

57. Notice, *Update to the Regulations for Implementing the Procedural Provision of the National Environmental Policy Act*, 83 Fed. Reg. 28,591 (2018).

58. Draft guidance; request for comment, *Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions*, 84 Fed. Reg. 30,099 (2019).

59. Draft guidance; extension of comment period, *Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions*, 84 Fed. Reg. 35,607 (2019).

60. Exec. Order No. 13783, *supra* note 40, at 16,095.

61. Proposed Rule, *Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 82 Fed. Reg. 48,035 (2017).

mation as to what should appear in any replacement rule.⁶² In August 2018, the EPA proposed a replacement rulemaking⁶³ (the Affordable Clean Energy rule), which it finalized on June 19 after notice and comment.⁶⁴ On July 15, the petitioners and petitioner intervenors in *State of West Virginia, et al. v. EPA* filed a motion to dismiss the long pending litigation challenging the Clean Power Plan as moot.⁶⁵ This motion was granted on September 17.⁶⁶ Appeals challenging the new Affordable Clean Energy rule are now pending.⁶⁷

For natural gas infrastructure sponsors, the modifications to the CEQ regulations for NEPA and the significantly narrower program for GHG emissions for the power sector have shaped the reviews undertaken by the FERC under the Natural Gas Act.⁶⁸ FERC began to limit the scope of its downstream GHG impact analyses to estimating only those emissions it could readily quantify based on expected usage and declining to provide estimates for uses it deemed “speculative.”⁶⁹ The actions taken above have led to what I would characterize as a more “enabling” approach insofar as the scope of the GHG analysis has become narrower.⁷⁰ This shift in stance has not been endorsed by all of the Commission’s current members,⁷¹ although the courts have upheld FERC’s GHG reviews thus far (see Figure 1).⁷²

Pipeline opponents, however, have not limited their challenges to the evolution of FERC’s GHG policy pursuant to NEPA.⁷³ Environmental groups are increasingly challenging permits that other federal agencies issued for failing to meet existing requirements dictated by relevant statute(s) as I discuss further below. In other words, these appeals challenge the more “enabling” approach some federal agencies are applying to their existing statutory obligations prior to any formal regulatory or statutory change.

62. Advanced Notice of Proposed Rulemaking, *State Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units*, 82 Fed. Reg. 61,507 (2017).

63. Proposed Rule, *Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations; Revisions to New Source Review Program*, 83 Fed. Reg. 44,746 (2018).

64. Final Rule, *Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations*, 84 Fed. Reg. 32,520 (2019).

65. Motion of Petitioners to Dismiss as Moot, *State of West Virginia et al. v. EPA*, No. 15-1363 (D.C. Cir. July 15, 2019).

66. Order Granting Motion, *State of West Virginia et al. v. EPA*, No. 15-1363 (D.C. Cir. Sept. 17, 2019) (en banc).

67. Petition for Review, *Am. Lung Assoc. et al. v. EPA*, No. 19-1140 (D.C. Cir. July 8, 2019).

68. CLEARVIEW ENERGY PARTNERS, LLC, *Permitting Reform – Promise or Peril for Pipelines?*, *supra* note 47, at 3-10.

69. *Id.*

70. CLEARVIEW ENERGY PARTNERS, LLC, *Pipelines & Trend Lines*, *supra* note 35, at 13-15.

71. Rich Glick & Matthew Christiansen, *FERC & Climate Change*, 40 ENERGY L.J. 1, 5 (2019).

72. CLEARVIEW ENERGY PARTNERS, LLC, *Pipelines & Trend Lines*, *supra* note 35, at 13-15.

73. *Id.* at 15-19.

C. How the Battlefield at FERC over Natural Gas Pipeline Approvals Changed

The shale boom did not just transform the U.S. energy portfolio, it also changed the nature of U.S. environmental challenges. Prior to the dramatic uptick in U.S. gas, natural gas liquids (NGLs), and crude oil production from shale and tight formations, fossil fuel opponents challenged pipeline approvals occasionally.⁷⁴ Many climate change-oriented efforts targeted upstream producing activities (well permitting) and for a time combusting natural gas as an alternative to coal was part of an overall national GHG emissions reduction strategy.⁷⁵ This began to change in 2012, when the Sierra Club announced a “Beyond Gas” campaign as a complement to its “Beyond Coal” initiative.⁷⁶ Environmentalists have continued to challenge upstream projects since then, but they began to oppose midstream infrastructure in an apparent effort to disconnect upstream resources from downstream markets, that is, to “keep it in the ground” rather than targeting specific well sites and production programs.⁷⁷

Natural gas pipeline projects are subject to oversight by the FERC under the Natural Gas Act and the Natural Gas Policy Act.⁷⁸ These two statutes provide the framework for the Commission’s work as an economic regulator, overseeing the entry and exit of entities into the provision of interstate natural gas transportation, as well as the rates, terms, and conditions of that service.⁷⁹ In 1999, FERC issued its Certificate Policy Statement,⁸⁰ in which the Commission refined its earlier approach to assessing market entry and the default funding mechanisms it would use to evaluate whether pipeline projects were consistent with the public interest. Certificate orders under the NGA are final agency actions that are subject to both the APA and NEPA.⁸¹

In my view, environmental opposition to pipeline infrastructure has evolved substantially, if incrementally, since the Certificate Policy Statement in 1999. Over the last several years, environmental advocates have advanced increasingly

74. See CLEARVIEW ENERGY PARTNERS, *Pipelines & Trend Lines*, *supra* note 35, at 6. Perhaps most notably, this included three District Court cases appealing State Department cross-border crude pipeline approvals (two challenging Keystone Pipeline approvals and one challenging Alberta Clipper’s approval) that fall outside our ClearView’s 2012-2019 date range. They appeals were all filed in 2008 and were resolved in favor of the State Department, although the courts did not rely on identical rationales.

75. See CLEARVIEW ENERGY PARTNERS, LLC, *A Framework for Year Eight* 52 (Jan. 15, 2016), https://gallery.mailchimp.com/0554cc7ed0bda904329a48c93/files/1f1d4c3b-8bbc-4320-b516-b9d95287449e/2016_01_15_A_Framework_for_Year_Eight.pdf.

76. Michael Brune, *The Sierra Club and Natural Gas*, SIERRA CLUB (Feb. 2, 2012), <https://www.sierraclub.org/michael-brune/2012/02/sierra-club-and-natural-gas>.

77. CLEARVIEW ENERGY PARTNERS, LLC, *A Framework for Year Eight*, *supra* note 75, at 56.

78. CLEARVIEW ENERGY PARTNERS, LLC, *Pipelines & Trend Lines*, *supra* note 35, at 1.

79. CLEARVIEW ENERGY PARTNERS, LLC, *Pipelines & Trend Lines*, *supra* note 35, at 5; see generally *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 F.E.R.C. ¶ 61,227 (1999).

80. FERC explained: “the Commission’s goal is to appropriately consider the enhancement of competitive transportation alternatives, the possibility of overbuilding, the avoidance of unnecessary disruption of the environment, and the unneeded exercise of eminent domain.” 88 F.E.R.C. ¶ 61,227 at P 1. See *Order Clarifying Statement of Policy*, 90 F.E.R.C. ¶ 61,128 (2000); see also *Order Further Clarifying Statement of Policy*, 92 F.E.R.C. ¶ 61,094 (2000).

81. CLEARVIEW ENERGY PARTNERS, LLC, *Pipelines & Trend Lines*, *supra* note 35, at 6.

more concrete critiques of projects during FERC review.⁸² At ClearView, we have noted on several occasions that FERC's project dockets include hundreds (sometimes thousands) of postcards or form letters from individuals that decry the use of natural gas generally while failing to raise specific criticisms about the project seeking approval, just as they had in the early 2000s. However, I also began noticing in 2008 that more sophisticated and substantive filings were being made. These included challenges to the scope of the Commission's NEPA review (what impacts were evaluated and how the Commission addressed them) as well as the issues the Commission considered when issuing certificates under the NGA pursuant to the certificate policy statement. For example, stakeholders have challenged the feasibility of siting a pipeline safely in regions where karst formations are prevalent (and therefore potentially unstable)⁸³ or whether the operation of a planned compressor would cause a locality to violate local air quality standards.⁸⁴ This more substantive and sophisticated stakeholder participation led to lengthening review times at the Commission, as both the project sponsor and the regulator responded to more specific criticisms offered during the NEPA review.⁸⁵ That said, once a certificate was issued and a project moved into construction, project delays tended to be weather- or field condition-related, rather than driven by requests for judicial review, requests for stays, or adverse merits rulings.⁸⁶

The first case I followed on this issue was the failed challenge to FERC's certificate for Inergy's MARC I pipeline. Opponents challenged several aspects of the NEPA review, including the omission of an evaluation of upstream GHG emissions.⁸⁷ In July 2019, ClearView published my analysis examining trends in

82. Letter from Rosemarie Sawdon, Chair, Sierra Club, to FERC (Oct. 14, 2001) (on file with FERC, Accession No. 20011106-0270) (providing an early example of a Sierra Club scoping comment for the Patriot Pipeline); Letter from David Hornbeck, Rose Strickland, & David von Seggern, Sierra Club, to Kimberly D. Bose, Sec'y, FERC (Aug. 7, 2009) (on file with FERC, Accession No. 20090812-0089) (providing comments on the draft EIS for Ruby Pipeline); Comments by Steven D. Caley, GreenLaw, on Draft Environmental Impact Statement for the Southeast Market Pipelines Project, Including the Sabal (Sinkhole) Trail Pipeline 34 (Oct. 26, 2015) (on file with FERC, Accession No. 20151027-5089) (illustrating the difference over time of organization's comments that ultimately led to the D.C. Circuit's ruling in *Sabal Trail* that FERC's downstream GHG analysis was insufficient).

83. Comment by the Coalition for Responsible Growth & Resource Conservation, Damascus Citizens for Sustainability, and Sierra Club (Mar. 8, 2010) (on file with FERC) (providing scoping comments on the Inergy MARC I project related to unstable soils, Exhibit 1).

84. Comment by Myersville Citizens for a Rural Community on Environmental Assessment 21 (July 30, 2012) (on file with FERC) (referencing Attachments 5 and 6 addressing air quality analysis for a planned compressor station).

85. For example, local communities commissioned their own air quality consultants to challenge the data provided by project sponsors related to the emissions of particular compressor stations. This could lead to additional engineering review by FERC to address the concerns raised and reconcile differences in the offered data. See CLEARVIEW ENERGY PARTNERS, LLC, *A Framework for Year Eight*, *supra* note 75, at 54 Figure 31.

86. CLEARVIEW ENERGY PARTNERS, LLC, *Pipelines & Trend Lines*, *supra* note 35, at 20-21.

87. *Id.* at 3. In an unpublished summary order, the U.S. Court of Appeals for the Second Circuit rejected the environmental coalition's contentions that FERC should have undertaken an environmental impact statement (EIS) to meet its requirements under NEPA, as opposed to the environmental assessment (EA) it did rely on, and rejected the allegation that FERC's cumulative impacts analysis failed to take the necessary "hard look"

judicial challenges to the federal oversight and permitting of natural gas and liquids (e.g., oil, natural gas liquids and refined products) pipelines from 2012 to mid-year 2019.⁸⁸ I started with the MARC I case, because that was the first time institutional investor clients shared their concerns that an adverse court ruling could delay a project's construction schedule if a certificate was suspended.⁸⁹

Between 2012 and July 2019, FERC was a defendant in 30 adjudicated cases (ten more were pending in mid-July) where stakeholders opposed to the project on environmental grounds sought judicial review.⁹⁰ I decomposed these 40 cases into 112 specific allegations of legal error.⁹¹ In the 30 cases adjudicated through our study period ending mid-July, three of the 112 discrete allegations succeeded, 57 failed, 40 were pending, and 12 were not reached by the court (Figure 1).⁹²

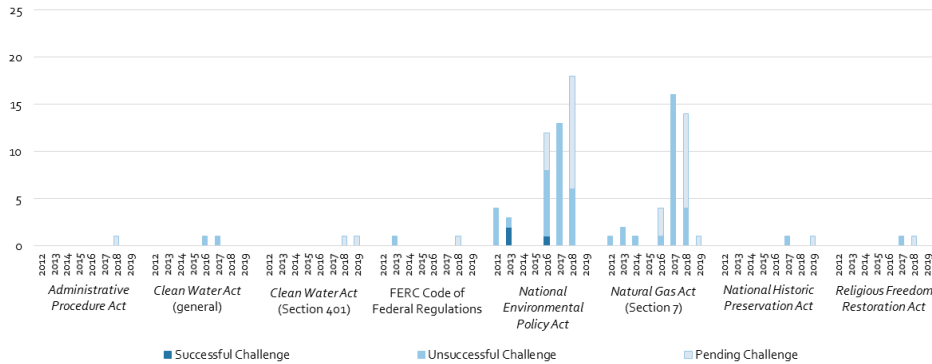


Figure 1. Challenges to FERC Natural Gas Pipeline Certificates by Statute, Year Filed and Outcome.⁹³

In my view, the three successful allegations of error illustrate examples of when FERC's "enabling" approach failed to meet the requirements of NEPA. Two were in *Delaware Riverkeeper, et al. v. FERC (Delaware Riverkeeper)* where the Commission's certificate order for Tennessee Gas' Northeast Upgrade Project was remanded for (1) segmentation during the NEPA review, and (2) an insufficient cumulative impacts analysis.⁹⁴ The third was in *Sierra Club v.*

at project impacts. Summary Order, Coalition for Responsible Growth, et al. v. FERC, No. 12-566 (June 12, 2012).

88. CLEARVIEW ENERGY PARTNERS, LLC, *Pipelines & Trend Lines*, supra note 35, at 1.

89. *Id.* at 3-7. The stock performance of infrastructure companies can fluctuate if delays to planned projects resulted in reductions or shifts in earnings and profits expectations.

90. *Id.* at 11.

91. *Id.*

92. *Id.* at 7.

93. CLEARVIEW ENERGY PARTNERS, LLC, *Pipelines & Trend Lines*, supra note 35, at 7 (showing results based on court data through July 12, 2019).

94. *Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304 (D.C. Cir. 2014).

FERC (Florida Southeast Connection) also frequently referred to as *Sabal Trail*, where FERC was faulted for failing to provide a downstream impacts analysis for greenhouse gases.⁹⁵

1. Tennessee Gas

In June 2014, the D.C. Circuit found that FERC's review failed to meet the requirements of NEPA when the Commission "segmented" (or separated) its environmental review of the Northeast Upgrade Project without considering "three other connected, contemporaneous, closely related, and interdependent Tennessee Gas pipeline projects."⁹⁶ Since these projects were not included, the Commission's review failed to provide a meaningful analysis of the cumulative impacts of these projects and failed to demonstrate that the impacts would be insignificant.⁹⁷ The court found that FERC failed to meet its own existing definitions of "independent utility"⁹⁸ and could not credibly reject commenters' requests to consider the other known and related projects.⁹⁹

The petitioners led by Delaware Riverkeeper did not expressly seek vacatur of FERC's orders, but instead explained that their concerns would be redressed by the court "remanding the challenged orders, to ensure that conditions imposed by FERC on the [Northeast Upgrade Project]'s construction, site restoration, and operation are fully informed by a proper NEPA analysis."¹⁰⁰ When the D.C. Circuit issued its decision remanding the certificate, the project was already in service and experienced no court-related delay.

2. Sabal Trail

In an August 22, 2017 split decision, the D.C. Circuit vacated and remanded the certificates for three related projects that were subject to the appeal in *Sabal Trail*.¹⁰¹ The projects at issue were Florida Southeast Connection (NextEra), Sabal Trail (Spectra, NextEra and Duke) and the Hillabee Expansion (Williams).¹⁰² In its NEPA review, FERC concluded that it did not need to extend its NEPA re-

95. *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017) [hereinafter *Sabal Trail*].

96. *Delaware Riverkeeper*, 753 F.3d at 1309.

97. *Id.* at 1320.

98. *Id.* at 1315, 1317 (noting "In any event, as we explain below, FERC's position fails even on its own terms Not only did Tennessee Gas acknowledge the functional interdependence of the 300 Line Project and the Northeast Project, it made clear that the projects are financially interdependent as well.").

99. *Id.* at 1318 (finding "Tennessee Gas states that it did not know at the time it commenced the 300 Line Project that it was embarking on a series of upgrade projects that would soon transform the entire pipeline. That may be so. But the important question here is whether FERC was justified in rejecting commenters' requests that it analyze the entire pipeline upgrade project once the Northeast Project was under review and once the parties had pointed out the interrelatedness of the sequential pieces of pipeline which were, in fact, creating a complete, new, linear pipeline. Because of the temporal overlap of the projects, the scope and interrelatedness of the work should have been evident to FERC as it reviewed the Northeast Project. Yet FERC wrote and relied upon an EA that failed to consider fully the contemporaneous, connected projects.").

100. Brief of Petitioners at 21, *Delaware Riverkeeper Network v. FERC*, No. 13-1015 (D.C. Cir. Apr. 26, 2013).

101. *Sabal Trail*, 867 F.3d at 1357.

102. *Id.* at 1363.

view to evaluate downstream GHG emissions because the state was responsible for the permitting of the power plants which had contracted for the gas service.¹⁰³

The majority on the D.C. Circuit panel found that since FERC can reject a project for adverse environmental consequences, NEPA required the Commission to at least make a rough quantification of the downstream emissions associated with the combustion of GHGs, or give a specific explanation for why it would be unable to do so.¹⁰⁴

To address the court's remand, FERC posted a draft supplemental Environmental Impact Statement (EIS) to quantify the downstream GHG emissions on September 27, 2017.¹⁰⁵ FERC then undertook a variety of procedural steps at the D.C. Circuit which delayed the issuance of the mandate that would have vacated the certificate and could have interrupted service on completed sections and ongoing construction on others.¹⁰⁶ The Commission completed the supplemental EIS on February 5, 2018,¹⁰⁷ based on a "full-burn analysis"¹⁰⁸ and reissued the project certificates on March 14, 2018.¹⁰⁹

Notwithstanding the Sierra Club-led petitioners' success in securing a ruling that vacated the certificate in April 2017, the FERC's procedural steps at the court to delay the mandate and work quickly to reissue the certificates avoided

103. *Id.* at 1372.

104. *Id.* at 1373-74 (finding "Because FERC could deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment, the agency is a 'legally relevant cause' of the direct and indirect environmental effects of pipelines it approves Public Citizen thus did not excuse FERC from considering these indirect effects. . . . We conclude that the EIS for the Southeast Market Pipelines Project should have either given a quantitative estimate of the downstream greenhouse emissions that will result from burning the natural gas that the pipelines will transport or explained more specifically why it could not have done so." (citations omitted)).

105. Notice, *Florida Southeast Connection, LLC; Transcontinental Gas Pipe Line Company, LLC; Sabal Trail Transmission, LLC; Notice of Availability of the Draft Supplemental Environmental Impact Statement for the Southeast Market Pipelines Project*, 82 Fed. Reg. 46,233 (2017).

106. On October 6, 2017, FERC requested the panel rehear its remedy decision, and the pipeline project sought panel rehearing and en banc review. The court's mandate was stayed while these requests were pending. On January 31, 2018, the court denied the requests for panel rehearing by FERC and the project sponsors, and the project sponsor's request for rehearing en banc. On February 6, the Commission filed a motion requesting the court stay its mandate for 45 days, accompanied by a similar motion from the pipeline seeking a 90-day stay. On March 8, the court issued an order withholding the issuance of the mandate until March 26 (48 days). See *Petition for Panel Rehearing, Sierra Club v. FERC*, Nos. 16-1329, 16-1387 (D.C. Cir. Oct. 6, 2017); Brief of Respondent, *Sierra Club v. FERC*, Nos. 16-1329, 16-1387 (D.C. Cir. Jan. 31, 2017), 2017 WL 461851; Brief of Respondent, *Sierra Club v. FERC*, Nos. 16-1329, 16-1387, 2017 WL 430523 (D.C. Cir. Jan. 31, 2017); Motion of Intervenor-Respondents for 90-Day Stay of Issuance of Mandate, *Sierra Club v. FERC*, Nos. 16-1329, 16-1387 (D.C. Cir. Feb. 6, 2017); Motion to Stay Issuance of Mandate, *Sierra Club v. FERC*, Nos. 16-1329, 16-1387 (D.C. Cir. Feb. 6, 2017); Order, *Sierra Club v. FERC*, Nos. 16-1329, 16-1387 (D.C. Cir. Mar. 7, 2017).

107. Motion of Intervenor-Respondents for 90-Day Stay of Issuance of Mandate at 32, *Sierra Club v. FERC*, Nos. 16-1329, 16-1387 (D.C. Cir. Feb. 6, 2017).

108. *Id.* at 36. The Commission derived potential downstream GHG emissions by assuming all the gas delivered by the pipeline (up to its full capacity) would be combusted in a new, natural gas-fired power plant. FERC then compared these annual emissions rates to the emissions inventories for Florida and the United States in 2015.

109. *Sabal Trail Transmission*, 162 F.E.R.C. ¶ 61,233 (2018).

suspension or interruption of the project's schedule arising from the court's ruling.¹¹⁰ Pipeline opponents have, however, succeeded in other circumstances that have led to material delays of two major natural gas pipelines on the Eastern Seaboard, as I discuss next.

II. PROJECT OPPONENTS TARGET FERC'S SISTER AGENCIES

A. *Two Pipelines See Meaningful Delays When Opponents Begin Challenging FERC's Sister Agencies*

Two major natural gas pipelines received FERC certificates on October 13, 2017 – Atlantic Coast Pipeline (Atlantic Coast)¹¹¹ and Mountain Valley Pipeline (Mountain Valley).¹¹² As of the time of this article, both projects have experienced significant delays to their construction schedules arising from adverse court rulings vacating federal authorizations as I discuss in detail below.

Mountain Valley's certificate application targeted providing service in two stages (the first in December 2017 and the second December 2018).¹¹³ Atlantic Coast had planned to be in service by November 2018.¹¹⁴ As of the end of October, Mountain Valley is targeting an in-service date of late-2020,¹¹⁵ and Atlantic Coast is targeting commissioning in early 2022.¹¹⁶

B. *Interagency Stumble – FERC EIS Fails to Support a Sister Agency's NEPA Needs*

On July 27, 2018, the Fourth Circuit granted consolidated appeals under a petition initiated by the Sierra Club on its own behalf and that of several other environmental organizations in December 2017 against the Right-of-Way (ROW) and Temporary Use Permit issued by Interior's Bureau of Land Management (BLM)¹¹⁷ for Mountain Valley to cross the Jefferson National Forest in *Sierra Club et al. v. United States Forest Service et al.*¹¹⁸ Sierra Club's appeal

110. See CLEARVIEW ENERGY PARTNERS, LLC, *Sabal Trail – Court Gives FERC till March 26* (Mar. 7, 2018), <https://mailchi.mp/cvenergy/research-sabal-trail-court-gives-ferc-until-march-1525229>.

111. *Atlantic Coast Pipeline, LLC*, 161 F.E.R.C. ¶ 61,042 (2017).

112. *Mountain Valley Pipeline, LLC*, 161 F.E.R.C. ¶ 61,043 (2017).

113. See Application from Mountain Valley Pipeline, LLC for Certificate of Public Convenience and Necessity and Related Authorizations 11 (Oct. 23, 2015) (on file with FERC, Accession No. 20151023-5035).

114. See Abbreviated Application from Atlantic Coast Pipeline, LLC for a Certificate of Public Convenience and Necessity and Blanket Certificates 3 (Sept. 18, 2015) (on file FERC Accession No. 20150918-5212).

115. See News Release, MVP Total Project Work 90% Complete by Year-End (Oct. 22, 2019) (on file with Equitrans Midstream).

116. Dominion Energy Inc., Quarterly Report (Form 10-Q) 65 (Nov. 1, 2019).

117. BUREAU OF LAND MGMT., NOS. VA-ES-058143, WV-ES-058142, RIGHT-OF-WAY GRANT/TEMP. USE PERMIT (2017).

118. *Sierra Club, Inc. v. United States Forest Serv.*, 897 F.3d 582 (4th Cir. 2018).

was consolidated with a separate Sierra Club-led appeal of the Forest Service's Rule of Decision (ROD)¹¹⁹ upon which BLM also relied.

I would characterize interagency efforts to streamline federal reviews in a consolidated agency effort as an example of an "enabling" approach to fulfilling *existing* requirements; this case illustrates that there are limits to how much the review can be compressed. The Fourth Circuit explained that consolidated interagency review does not relieve cooperating agencies from ensuring that a combined NEPA document meets each's own statutory and regulatory requirements.¹²⁰ The court agreed with petitioners that the BLM violated its obligations under the MLA in adopting FERC's EIS "because it 'failed to demonstrate that alternatives that would make greater use of existing rights-of-way were impractical.'"¹²¹ The court vacated the BLM's ROD, ROW, and the Temporary Use Permit through the Jefferson National Forest given this shortcoming.¹²²

The Fourth Circuit also agreed with petitioners that the Forest Service failed to ensure that the soil and riparian standard amendments made to the Forest Management Plan to accommodate Mountain Valley complied with the NFMA and the Forest Service's own regulations.¹²³ The court determined that the FERC's EIS included an analysis of erosion and sedimentation effects that did not meet the Forest Service's obligations under the NFMA and that this violated NEPA.¹²⁴ Therefore, the court also vacated and remanded the Forest Service's ROD to remedy this failing.¹²⁵

In this case, the court found that the BLM and the Forest Service both relied on an EIS developed by FERC that was inadequate for meeting each agency's own statutory responsibilities (the MLA and the NFMA, respectively).¹²⁶ I believe this decision illustrates that cooperating agencies (here, BLM and Forest Service) must have their statutory requirements met in the lead agency's NEPA review (for natural gas pipelines, FERC) or an authorization risks vacatur at a time when the project is already under construction, creating the risk of work stoppages on at least certain areas of a project¹²⁷ given the latency associated with judicial review. This was the first time I observed an appeal that specifically challenged whether a combined NEPA review met all the requirements for

119. USDA USFS, RECORD OF DECISION, MOUNTAIN VALLEY PROJECT LAND AND RESOURCE MANAGEMENT PLAN AMENDMENT FOR THE JEFFERSON NATIONAL FOREST, (Dec. 2017), https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd565459.pdf.

120. *Sierra Club*, 897 F.3d at 590 (citing 40 C.F.R. § 1506.3; Hughes River Watershed Conservancy v. Glickman, 81 F.3d 437, 445 & n.6 (4th Cir. 1996)).

121. *Id.* at 604. Separately, the court dismissed the challenges that BLM and the Forest Service violated NEPA solely by relying on the alternatives analysis in the FERC-issued EIS instead of its own. *Id.* at 600.

122. *Id.* at 582.

123. *Id.* at 603.

124. *Sierra Club*, 897 F.3d at 595.

125. *Id.* at 582.

126. *Id.* at 587.

127. See CLEARVIEW ENERGY PARTNERS, LLC, *Fourth Circuit Vacates Two Non-FERC Permits for MVP* (July 27, 2018), <https://mailchi.mp/cvenery/researchfourth-circuit-vacates-two-non-ferc-permits-for-mvp-1627389>.

each cooperating agency and I do not expect it to be the last. It would also prove to be the first of three challenges in rapid succession.

Elections have consequences and agencies change positions. The court's ruling also noted that criticisms raised by the Forest Service of FERC's draft EIS (issued in 2016)¹²⁸ were not addressed in FERC's final EIS (issued in 2017),¹²⁹ and neither FERC nor the Forest Service explained how those shortcomings were resolved in the final NEPA document.¹³⁰ I think that this ruling (and a similar ruling for Atlantic Coast that I address below) may have particular relevance when a project review begins under one administration and is completed under another.

That said, I would not argue that only reviews that span a change in administration might be vulnerable on judicial review. Inconsistencies in conclusions between draft and final NEPA documents can pose problems if not adequately explained. Similarly, if an agency that takes a less rigorous ("enabling") approach to reviews than it did in the past (particularly if other stakeholders criticized this approach as unsupported) such an approval could be vulnerable on appeal. Project opponents could ask the courts to determine whether the new approach is appropriate under the APA.¹³¹

Resolution of Mountain Valley's permits in the Jefferson Forest remains outstanding, and no construction is currently allowed in these areas.¹³² Given that Mountain Valley's ROW and Temporary Use Permit for the Jefferson National Forest were vacated last July, I had expected revised permits to be issued in Spring of 2019. BLM notified FERC on August 24, 2018 that its re-evaluation of alternative routes did not result in a route that would provide more co-location with existing infrastructure and was "practical" given the requirements of the MLA.¹³³ This information supported FERC's rationale when it narrowed the scope¹³⁴ of the August 3, 2018 stop work order¹³⁵ on Mountain Valley to areas within the Jefferson National Forest and across the waterbodies at issue in the vacatur of the project's Nationwide Permit 12, as discussed further below. These permits remain pending. I have attributed that delay in part to a potential complicating factor related to the Appalachian Trail, as I discuss further below in the context of Atlantic Coast's Forest Service right of way litigation arising from an adverse ruling in *Cowpasture River Preservation Association v. Forest Service*.¹³⁶ The legality of Mountain Valley's crossing of the Appalachian Trail was

128. 161 F.E.R.C. ¶ 61,043 at P 81.

129. *Id.*

130. *Sierra Club*, 897 F.3d at 595-96.

131. 5 U.S.C. § 551-96 (2019).

132. Notification of Stop Work Order from FERC to Mountain Valley Pipeline LLC (Aug. 3, 2018) (on file with FERC, Accession No. 20180803-3076).

133. Mineral Leasing Act Section 29(p) Analysis for the Mountain Valley Pipeline (Aug. 24, 2018) (on file with FERC, Accession No. 20180828-0035).

134. Limited Construction Approval for Mountain Valley Pipeline LLC (Aug. 20, 2018) (on file with FERC Accession No. 20180820-3036).

135. Notification of Stop Work Order, *supra* note 132.

136. *Cowpasture River Pres. Ass'n v. Forest Serv.*, 911 F.3d 150 (4th Cir. 2018).

not challenged in *Sierra Club* (897 F.3d 582),¹³⁷ however, I immediately received questions as to whether Mountain Valley's Appalachian Trail crossing could be challenged when reissued. After all, Mountain Valley requested to file an amicus curiae brief supporting the rehearing requests in that case.¹³⁸ The short answer is, yes, and I am watching for such a challenge.

A further delay to the reissuance of a new Jefferson National Forest ROW could also arise from Mountain Valley's June 17 proposal to offer land to the National Park Service in exchange for approvals over the originally proposed right of way.¹³⁹ Such an exchange represents an action subject to notice and comment,¹⁴⁰ and thus far, the agency has yet to post a notice. While this land exchange does not address any of the shortcomings identified in the Fourth Circuit's vacatur and remand of the original ROW and Temporary Use Permit,¹⁴¹ I believe it is being offered to enhance the balance of equities weighed by the federal agencies when considering the appropriateness of the approval of the crossing of the Appalachian Trail generally.¹⁴²

C. Statutory Overreach – The Corps Takes the NWP 12 a Bridge Too Far

1. Litigation Leads to a Waiver and a Failed Work Around

Mountain Valley lost authorization for construction across waterbodies in West Virginia and Virginia when environmental advocates successfully challenged the Corps of Engineers' (Corps) Nationwide Permit 12 for West Virginia in *Sierra Club v. United States Army Corps of Engineers*.¹⁴³

In this situation, efforts to defuse an appeal to a state-issued permit led to a judicial challenge that resulted in the suspension and subsequent vacatur of a federal authorization.¹⁴⁴ In early January 2017, the Corps finalized the five-year regulatory refresh of the nationwide permit program pursuant to the Clean Water Act (CWA).¹⁴⁵ Section 12 of this program (NWP 12) details the permitting regime at the Corps for linear infrastructure, such as pipelines and electric transmission lines across federally administered waterbodies.¹⁴⁶ Each state has the option to set additional criteria, and West Virginia codified its state-specific conditions in an April 2017 action¹⁴⁷ that established, among other things, that a pro-

137. See generally *Sierra Club*, 897 F.3d 582.

138. Brief for Mountain Valley Pipeline, LLC as Amici Curiae Supporting Petition for Rehearing en Banc, *Cowpasture River Pres. Ass'n v. Forest Serv.*, 911 F.3d 150 (4th Cir. Feb. 4, 2019) 2019 WL 495916.

139. EQM Midstream Partners, LP, Current Report (Form 8-K) (June 17, 2019).

140. *Id.*

141. *Id.*

142. See CLEARVIEW ENERGY PARTNERS, LLC, *Digging in to MVP's Proposed Land Exchange* (June 19, 2019), https://gallery.mailchimp.com/0554cc7ed0bda904329a48c93/files/660aad18-0be1-4156-b57a-0cb80ee86fa3/2019_06_19_MVP_Land_Exchange.01.pdf.

143. *Sierra Club v. United States Army Corps of Eng'rs*, 909 F.3d 635, 639 (4th Cir. 2018).

144. *Id.*

145. Final Rule, *Issuance & Reissuance of Nationwide Permits*, 82 Fed. Reg. 1,860 (2017).

146. *Id.* at 1,862.

147. *Sierra Club*, 909 F.3d at 640.

ject must apply for and receive an individual water quality certification under section 401 of the Clean Water Act (CWA section 401) if the pipeline is equal to or greater than 36 inches in diameter, or crosses a river subject to regulation under section 10 of the Rivers and Harbors Act.¹⁴⁸

Mountain Valley applied for a water quality certification for four river crossings in West Virginia (the Gauley, Greenbrier, Elk, and Monongahela Rivers) which the state regulator issued in March 2017.¹⁴⁹ The Sierra Club led a group of like-minded environmental groups in a request for review of the water quality certification issued by West Virginia by the Fourth Circuit.¹⁵⁰ In September 2017, prior to filing its own brief, West Virginia requested voluntary vacatur and remand of its CWA section 401 permit,¹⁵¹ explaining that the state regulator determined that the review of the application could be “further evaluated and possibly enhanced,” including the antidegradation analysis challenged by the Sierra Club.¹⁵² Instead of issuing a revised CWA section 401 permit, West Virginia waived its review altogether on November 1, 2017.¹⁵³ On December 22, the Corps’ Huntington District issued an NWP 12 permit authorizing approximately 600 waterbody crossings through West Virginia, including across the Gauley, Greenbrier, Elk and Monongahela Rivers.¹⁵⁴

The Sierra Club (and its co-litigants) returned to the Fourth Circuit and challenged the Corps’ reissued NWP 12 approval as plainly inconsistent with the clear regulations set by West Virginia in April 2017 and binding under the NWP 12 program.¹⁵⁵ The court granted the requested stay pending judicial review¹⁵⁶ on June 21, 2018.¹⁵⁷ After an administrative suspension of the original permit, the Corps issued a new NWP 12,¹⁵⁸ which was also appealed by Sierra Club¹⁵⁹ and consolidated in the initial action. On October 2, the Fourth Circuit issued an initial order vacating the NWP 12 permit,¹⁶⁰ and the full opinion followed.

In its November 27, 2018 opinion in *Sierra Club* (909 F.3d 635), the Fourth Circuit did not dispute that the dry trench-crossings planned for the four rivers in

148. 33 U.S.C. § 403.

149. See West Virginia Department of Environmental Protection issues Individual 401 Water Quality Certification for Mountain Valley Pipeline (March 24, 2017) (on file with FERC, Accession No. 20170324-5037).

150. *Sierra Club*, 909 F.3d at 641.

151. *Id.*

152. *Id.*

153. Letter from Scott Mandirola, Dir., DEP, to Hon. Kimberly D. Bose, Sec’y, FERC (Nov. 1, 2017) (on file with FERC, Accession No 20171106-0009).

154. Letter from Teresa D. Spagna, Chief, Huntington Dist., Army Corps Eng’rs to Shawn Posey (Dec. 22, 2017) (on file with Mountain Valley Pipeline, LLC) (verifying Nationwide Permit 12).

155. *Sierra Club*, 909 F.3d at 642-43.

156. *Id.* at 642.

157. Order Granting Petitioners’ Second Motion for Stay, *Sierra Club v. United States Army Corps of Eng’rs*, No. 18-1173 (4th Cir. June 21, 2018).

158. *Sierra Club*, 909 F.3d at 640.

159. *Id.* at 642.

160. Order, *Sierra Club v. United States Army Corps of Eng’rs*, No. 18-1173 (4th Cir. Oct. 2, 2018).

FERC's EIS were likely to be more environmentally protective than the wet-trench crossings generally assumed under the NWP 12.¹⁶¹ However, the court unequivocally found that the Corps lacked the statutory authority to substitute its solution via the FERC's EIS to establish a requirement outside of West Virginia's NWP 12 regulations,¹⁶² even if the state regulator supported it.

2. Current Status

Even before the Fourth Circuit ruled on this appeal, West Virginia undertook revisions to its NWP 12 program to specifically include the dry-trench method and the issues related to the RHA section 10 rivers (that the court subsequently directed it to address).¹⁶³ Those were finalized in early April 2019¹⁶⁴ and forwarded to the EPA for review. The EPA endorsed the new regulations on August 15,¹⁶⁵ but the FERC docket does not reflect that a new NWP 12 has been reissued, nor has the Corps or Mountain Valley made an announcement regarding reinstatement. Mountain Valley lacks authorization from the Corps for relevant waterbody construction in Virginia too, given the suspension of the West Virginia segment and voluntary remand of the appeal for this authorization.¹⁶⁶ However, Mountain Valley had been able to continue work in other areas (with the exception of Forest Service areas, which will be addressed below),¹⁶⁷ minimizing schedule delay.

The Sierra Club also sought judicial review of the Huntington District's reissued NWP 12 approval for Atlantic Coast's crossing of the Greenbrier River in

161. *Sierra Club*, 909 F.3d at 641-42.

162. *Id.* at 639, 648 (holding "First, contrary to the Corps' position, the Reinstatement's explicit language applying Special Condition 6 'in lieu of' Special Condition C indicates that it is replacing Special Condition C. ('The phrase 'in lieu of' means 'instead of.'"). By substituting Special Condition 6 for Special Condition C, the Corps effectively and unlawfully 'reject[ed]' a state-imposed condition. Second, the Corps' argument presupposes that the Clean Water Act's requirement regarding the mandatory incorporation of state conditions differs in the context of nationwide permits versus individual permits. Yet no statutory language supports this claim. On the contrary, neither Section 1341(d), nor any other provision in Section 1341, draws any distinction between nationwide and individual permits." (citations omitted); and "Absent any further limiting principles, the Corps' interpretation would radically empower it to unilaterally set aside state certification conditions as well as undermine the system of cooperative federalism upon which the Clean Water Act is premised. Further, the plain language of the Clean Water Act does not authorize the Corps to replace a state condition with a meaningfully different alternative condition, even if the Corps reasonably determines that the alternative condition is more protective of water quality. Accordingly, we vacate the July 3, 2018, Reinstatement as exceeding the Corps' statutory authority." (citing 5 U.S.C. § 706(2)(C)).

163. *Sierra Club*, 909 F.3d. at 648, n.2.

164. Standard Conditions of State 401 Water Quality Certification Applicable to Nationwide Permits (Apr. 24, 2019) (on file with FERC, Accession No. 20170324-503).

165. Letter from Catherine Liebertz, Dir., EPA to Katheryn Emery, DEP (August 6, 2019) (on file with FERC, Accession No. 20190806-5049).

166. Order Granting Motion for Abeyance, *Sierra Club v. United States Army Corps of Eng'rs*, No. 18-1713 (4th Cir. Jan. 9, 2019).

167. Letter from Rich McGuire, Dir., FERC, to Mr. Matthew Eggerding, Couns., Mountain Valley Pipeline (June 25, 2018) (on file with FERC, Accession No 20180625-3001).

July 2018.¹⁶⁸ On October 31, Sierra Club requested a stay of the reissued West Virginia NWP 12 for Atlantic Coast in its new appeal of the reissued Atlantic Coast NWP 12, given the vacatur in Mountain Valley's proceeding.¹⁶⁹ This stay pending judicial review was granted.¹⁷⁰

These appeals for Atlantic Coast were subsequently consolidated, as Mountain Valley's had been.¹⁷¹ In January 2019 the Corps requested vacatur and remand of Atlantic Coast's reissued NWP 12 permit,¹⁷² which the Fourth Circuit granted.¹⁷³ I expect that the Corps is likely to reissue these permits at or close to the time it reissues Mountain Valley's. Atlantic Coast is not presently authorized to work in waterbody areas across its length (as other NWP authorizations issued by other districts outside of West Virginia were also suspended). That said, Atlantic Coast faces bigger hurdles to its schedule, as I explain below.

D. Interagency Stumble – Fish & Wildlife Review Fails to Support FERC Authorization

Agency efforts to fast-track approvals can result in major delays and I think Atlantic Coast's experience illustrates that the ESA may be a particularly substantive hurdle. Project opponents of the Atlantic Coast Pipeline successfully appealed multiple federal approvals that feed into the FERC's certificate review that I view as examples of poorly executed "enabling" efforts slowing a project down instead of accelerating its progress.¹⁷⁴ Atlantic Coast's sponsors are currently targeting an early 2022 in-service date, which is more than two years later than the target eyed when FERC issued the project's certificate in the fall of 2017.¹⁷⁵

Flawed ESA reviews have led to the broadest stop work orders to date. I think this illustrates the "limiting" nature of these statutes, reinforced by the Fourth Circuit's refusal of a request to narrow the scope of its decision, as I explain next.

1. The First Round of Permit Challenges

On January 19, 2018, the Sierra Club and the Virginia Wilderness Committee sought review¹⁷⁶ by the Fourth Circuit of the National Park Service's right of

168. Joint Petition for Review, *Sierra Club v. United States Army Corps of Eng'rs*, No 18-1743 (4th Cir. July 3, 2018).

169. Joint Motion for Stay Pending Appeal, *Sierra Club v. United States Army Corps of Eng'rs*, No 18-2273 (4th Cir. Oct. 31, 2018).

170. Order, *Sierra Club v. United States Army Corps of Eng'rs*, No 18-2273 (4th Cir. Nov. 7, 2018).

171. Order, *Sierra Club v. United States Army Corps of Eng'rs*, No 18-2273 (4th Cir. Nov. 20, 2018).

172. Respondents' Unopposed Motion for Voluntary Remand and Vacatur, *Sierra Club v. U.S. Army Corps of Eng'rs*, No 18-1743 (4th Cir. Jan. 18, 2019).

173. Notice of Judgement, *Sierra Club v. United States Army Corps of Eng'rs*, No 18-1743 (4th Cir. Jan. 25, 2019).

174. CLEARVIEW ENERGY PARTNERS, LLC, *Pipelines and Trend Lines*, *supra* 35, at 20.

175. Dominion Energy Inc., *supra* note 116.

176. *Sierra Club v. United States Dep't of the Interior*, 899 F.3d 260, 267 (4th Cir. 2018).

way¹⁷⁷ authorizing Atlantic Coast to cross the Blue Ridge Parkway. The environmental groups contended that the Park Service lacked authority to issue the right of way under the Blue Ridge Parkway Organic Act.¹⁷⁸ The same day, the Defenders of Wildlife sought review¹⁷⁹ of Fish & Wildlife's Biological Opinion (BiOp) and Incidental Take Statement (ITS)¹⁸⁰ for Atlantic Coast, contending these agency actions failed to set the enforceable limits for impact on protected species as required by the ESA.¹⁸¹ In March 2018, the two appeals were consolidated and set for expedited consideration with Sierra Club as the lead plaintiff.¹⁸²

Oral arguments were held on May 9, 2018, and five days later the court issued an interim order vacating the Fish & Wildlife's ESA reviews.¹⁸³ On August 6, 2018, the Fourth Circuit issued its full opinion explaining its initial order and adding vacatur and remand of the Park Service's right of way for Atlantic Coast to cross the Blue Ridge Parkway.¹⁸⁴ In its ruling, *Sierra Club v. United States Department of the Interior* (*Sierra Club*, 899 F. 3d. 260), the Fourth Circuit found that neither the Park Service's nor Fish & Wildlife's decisions met the existing requirements of the statutes each was charged with administering.¹⁸⁵

In its August 6 ruling, the Fourth Circuit found that Fish & Wildlife failed to satisfy the requirements for establishing a habitat surrogate to function as a substitute for an enforceable numeric limit otherwise required in an ITS.¹⁸⁶ I might paraphrase the ruling as a directive to Fish & Wildlife to either meet the three requirements established for defining habitat surrogates or to set numeric limits for the five species at issue in order to meet the "limiting" criteria set in the statute.

I would also characterize the Blue Ridge Parkway Organic Act as a "limiting" statute, given that the Park Service is barred from conducting management and administration of Park System lands "in derogation of the of the values and purposes" for which Congress established for such lands in the National Park Service Organic Act.¹⁸⁷ The Fourth Circuit did not address Sierra Club's argument that the Park Service lacked authority under the Blue Ridge Parkway Organic Act to issue a pipeline right of way.¹⁸⁸ Instead, the court assumed this au-

177. *Id.* at 281.

178. *Id.*

179. *Id.* at 268.

180. Biological Opinion and Incidental Take Statement for Mountain Valley Pipeline, U.S. Fish & Wildlife Service, No. CP16-10-000 (Nov. 3, 2017) (on file with FERC, Accession No. 20171103-3008).

181. *Sierra Club*, 899 F.3d at 268.

182. *Id.* at 266.

183. Order Vacating Authorizations, *Sierra Club v. United States Dep't of the Interior*, No 18-1082 (4th Cir. May 15, 2018).

184. *Sierra Club*, 899 F.3d at 281.

185. *Id.* at 295.

186. *Id.* at 269.

187. 54 U.S.C. § 100101(b)(2).

188. *Sierra Club*, 899 F.3d at 292 ("However, we need not—and thus do not—decide either of these broader interpretative questions because, even assuming that § 460a-3's general right-of-way authority encom-

thority and then determined that the Park Service acted arbitrarily by failing to explain how the siting of the pipeline's crossing, "visible from at least one key observation point along the Parkway, thus significantly decreasing the park's scenic value," was not inconsistent with parkway purposes as defined under the Blue Ridge Parkway Organic Act.¹⁸⁹

2. Pipeline Opponents Challenge Reissued Permits

Upon the suspension of the BiOp and ITS on May 15, 2018, FERC directed Atlantic Coast to cease construction activity in relevant areas pending revision of the permit.¹⁹⁰ On September 11, 2018, Fish & Wildlife reissued the BiOp and the ITS.¹⁹¹ The Park Service reissued the right of way for the Blue Ridge Parkway on September 14.¹⁹² Atlantic Coast resumed construction. The revised authorizations were released just over a month after the Fourth Circuit issued its full ruling vacating the original versions on August 6. The Defenders of Wildlife and the Sierra Club immediately appealed both actions.¹⁹³ Motions to accelerate both cases were granted, but this time they were not consolidated.

On November 30, Defenders of Wildlife requested a stay of the reissued BiOp and ITS,¹⁹⁴ alleging that Fish & Wildlife rushed both the reissued BiOp and ITS for political reasons and the resulting actions failed to meet the requirements of the ESA. In addition, the Defenders of Wildlife contended that the revised BiOp and ITS compounded the analytical errors of the 2017 version of these authorizations and posed additional risk to the Indiana bat, the clubshell mussel, the Rusty Patch Bumble Bee (RPBB), and the Madison Cave isopod.¹⁹⁵

The Fourth Circuit granted the stay on December 7.¹⁹⁶ Although Atlantic Coast requested the Fourth Circuit limit the applicability of the stay to the areas of the George Washington National Forest and the Monongahela National Forest where these habitats are located,¹⁹⁷ the court declined that request on January 11.¹⁹⁸ Atlantic Coast has been unable to undertake any construction activity,

passes oil and gas pipelines, Petitioners nonetheless prevail because the agency has not fulfilled the requirements needed to exercise any such authority.").

189. *Id.* at 293.

190. Letter from David Swearingen, Chief, FERC, to Matthew Bley, Dir, Dominion Energy (May 16, 2018) (on file with FERC, Accession No 20180516-3074).

191. Memorandum from U.S. Dep't of the Interior to FERC (Sept. 11, 2018) (on file with FERC, Accession No. 20180917-3001).

192. National Park Service Right-of-Way Permit No.: 5-140-1945R (Sept. 14, 2018) (on file with FERC, Accession No. 20180917-5034).

193. *Defenders of Wildlife v. United States Dep't of the Interior*, 931 F.3d 339 (4th Cir. 2019).

194. Motion to Stay for Petitioner, *Defenders of Wildlife v. United States Dep't of the Interior*, No. 18-2090 (4th Cir. Nov. 30, 2018).

195. *Defenders of Wildlife*, 931 F.3d at 342.

196. Order granting Stay for Petitioners, *Defenders of Wildlife v. United States Dep't of the Interior*, No. 18-2090 (4th Cir. Dec. 7, 2018).

197. Intervenor for Respondent, *Defenders of Wildlife v. United States Dep't of the Interior*, No. 18-2090 (4th Cir. Dec. 14, 2018).

198. Order Denying Emergency Motion to Clarify, *Defenders of Wildlife v. United States Dep't of the Interior*, No. 18-2090 (4th Cir. Jan. 11, 2019).

save remediation and stabilization activity since, and it is the lack of these authorizations that has had the most substantive effect on the project's schedule.

Separately, a week after issuing the stay in the Defenders of Wildlife appeal, the Fourth Circuit vacated and remanded the Forest Service's right of way for Atlantic Coast across the George Washington National Forest in *Cowpasture*, a case I turn to in the next section.¹⁹⁹ On January 16, 2019, the Park Service requested voluntary vacatur and remand²⁰⁰ of the September 2018 reissued Blue Ridge Parkway ROW given potential implications of the *Cowpasture* ruling. The Fourth Circuit granted that request on January 23.²⁰¹ The Fish & Wildlife case continued with Defenders of Wildlife as the lead plaintiff.²⁰²

On July 26, 2019, the Fourth Circuit granted the entirety of the Defenders of Wildlife appeal, vacating and remanding Fish & Wildlife's reissued BiOp and ITS.²⁰³ In my view, a key takeaway from this ruling is that good execution on substance is a necessary prerequisite for an "enabling" agency's action surviving judicial review. In other words, accelerating action to "enable" a project with a quickly issued but flawed authorization risks stalling it instead of propelling it forward if the review does not meet statutory requirements.

I think that the errors the court identified in Fish & Wildlife's jeopardy and take analysis for the RPBB may prove particularly challenging on remand.²⁰⁴ The agency failed to undertake surveys appropriate for a recently listed species and relied on nest density analyses for significantly more common bees than the RPBB.²⁰⁵ The court's criticism of Fish & Wildlife's conclusion that "the killing of more bees [38 overwintering queens and potentially 1,000 worker bees associated with each] than have been found in most locations in the past two decades would not jeopardize the continued survival or recovery of the RPBB" appears to me to be hard to defend unless new data and facts are available that support the original conclusion.²⁰⁶

The clubshell analysis also looks problematic given the court's conclusion that Fish & Wildlife's approach is "unsupported by legal authority."²⁰⁷ I did not read this to be a solicitation by the court for appropriate statutory references, but

199. *Cowpasture*, 911 F.3d 150.

200. Motion for Voluntary Remand for Respondent, *Sierra Club v. United States Dep't of the Interior*, No. 18-2095 (4th Cir. Jan. 16, 2019).

201. Judgment, *Sierra Club v. United States Dep't of the Interior*, No. 18-2095 (4th Cir. Jan. 23, 2019).

202. *Defenders of Wildlife*, 931 F.3d at 339.

203. *Id.*

204. See CLEARVIEW ENERGY PARTNERS, LLC, *ACP's Vacated Permits May Prove Tough to Fix* (July 29, 2019), https://gallery.mailchimp.com/0554cc7ed0bda904329a48c93/files/81e99515-0c25-4cd1-a5a7-1a913caaf2d3/2019_07_29_ACP_BiOp_Fail_Part_2.02.pdf.

205. *Defenders of Wildlife*, 931 F.3d at 349.

206. *Id.* at 352. The court noted in footnote 2 of its decision: "As noted earlier, 95% of the 103 remaining populations of RPBB (or 98 populations) have been observed with 5 or fewer bees. One of the other five populations was documented by 30 bees—the maximum number observed in any of the remaining populations. Thus, assuming that the other four populations were documented with at most 29 bees each, the total number of observed RPBBs worldwide would be at most 636." *Defenders of Wildlife*, 931 F.3d at 342 n.2.

207. *Defenders of Wildlife*, 931 F.3d at 357.

a verdict that Fish & Wildlife's approach was plainly inconsistent with the requirements of the ESA (and, according to the court, the agency's own regulations).²⁰⁸

The court found that Fish & Wildlife's approach to identifying take limits on the Madison Cave isopod failed to resolve the errors found in the August 2018 ruling.²⁰⁹ Fish & Wildlife narrowed the habitat surrogate to 11.2 acres (from the 896.7 acres in the 2017 ITS), while failing to reconcile it with its parallel finding that "ground disturbing activities will cause the horizontal crumbling of the karst terrain hundreds of acres away" in a manner that could potentially kill the isopod in neighboring areas.²¹⁰ Yet, Fish & Wildlife argued that it was justified in limiting the potential habitat surrogate to the immediate construction area.²¹¹ The court found this rationale insufficient.²¹²

Perhaps when it comes to the Indiana bat analysis, Fish & Wildlife may have an easier task ahead. On this issue, the court calls on Fish & Wildlife to explain why it abandoned the original conclusions of the field office that supervises this area in 2017 in favor of practices observed by "other unnamed field offices of the agency."²¹³ Perhaps Fish & Wildlife can make a case that the local office is some sort of outlier and that the 2017 analysis was in error, assuming it has the evidence to support it.

The court noted that the revised 2018 BiOp and ITS were issued "a mere 19 days" after FERC resumed formal consultation with Fish & Wildlife, and chided the agency for losing sight of its statutory mandate.²¹⁴ However, it appears to me that the court found the 2018 BiOp and ITS so inconsistent with the plain requirements of the ESA²¹⁵ that if Fish & Wildlife took more time to issue the same decisions, the court's ruling may not have been any different.

3. Current Status

The Fourth Circuit's July 26 vacatur of the reissued BiOp and ITS deprived Atlantic Coast of a necessary approval required by its certificate for construction.²¹⁶ Atlantic Coast indicated publicly that it and Fish & Wildlife began tak-

208. *Id.* at 358.

209. *Id.* at 363.

210. *Id.* at 365.

211. *Id.*

212. *Defenders of Wildlife*, 931 F.3d at 365.

213. *Id.* at 362.

214. *Id.* at 365. "In fast-tracking its decisions, the agency appears to have lost sight of its mandate under the [Endangered Species Act]: "to protect and conserve endangered and threatened species and their habitats." *Nat'l Ass'n of Home Builders v. Defs. Of Wildlife*, 551 U.S. 644, 651 (2007). This mandate has "priority over the 'primary missions' of federal agencies." *TVA v. Hill*, 437 U.S. 153, 185 (1978). "We hope that, upon remand, [Fish & Wildlife] will consider any further action it takes with this mandate in mind." *Defenders of Wildlife*, 931 F.3d at 366.

215. *Defenders of Wildlife*, 931 F.3d at 365.

216. "Commission staff has submitted a Biological Assessment to the U.S. Fish and Wildlife Service that includes a detailed assessment regarding the effects of the projects on federally listed species, initiating formal consultation with the U.S. Fish and Wildlife Service regarding species that will likely be adversely affected by

ing steps after oral argument in May to prepare for the contingency of vacatur.²¹⁷ But I think it is unlikely that the agency could have known the full extent of the actions it might need to take to address and correct the errors the court would not fully identify until it ruled on July 26.

If Atlantic Coast's planned early 2022 in-service target assumed a significant delay (up to 12 months from last summer's vacatur) in the resumption of construction in the event the court made the adverse ruling that materialized on July 26, then that schedule may well hold.

However, I do not think that Atlantic Coast's current planned in-service date would accommodate a decision from the Fish & Wildlife Service that results in a change to the route. Similarly, the current target does not seem sufficient to accommodate a future stay of a reissued BiOp and ITS pending appeal, or a third vacatur and remand. I do expect the environmental groups to challenge the reissued BiOp and ITS when released given their recent actions.

The Defenders of Wildlife and its co-litigants wrote Fish & Wildlife on October 1 articulating their concerns regarding the ongoing revisions to Atlantic Coast's BiOp and ITS.²¹⁸ I view the October 1 letter as an early and concrete indication of the issues the environmental groups could be planning to rely on to challenge in the upcoming third version of the BiOp and ITS.²¹⁹ First, Defenders contends that the structure of the BiOp is inadequate.²²⁰ Second, they argue that Fish & Wildlife must revisit their earlier analysis of the candydarter and the Roanoke log perch.²²¹ Neither species featured in the earlier litigation of the BiOp, but both are the subject of a reinitiation of ESA consultation for the Mountain Valley project that began in August.²²²

The October 1 letter then continues to detail the environmental advocates' views that the Indiana bat analysis must include updated information,²²³ and the

either the [Atlantic Coast Pipeline] or Supply Header project. Environmental Condition 54 in the appendix to this order stipulates that construction cannot begin until after staff completes the process of complying with the Endangered Species Act." 161 F.E.R.C. ¶ 61,042 at P 255.

217. Oral remarks by Dominion CEO Tom Farrell on July 31, 2019 quarterly earnings conference call: "We are disappointed that last week, the Fourth Circuit vacated the project's biological opinion. Over recent months, we have been taking steps to bolster the official record of the case in the event the court ruled negatively. These steps include the additional surveying of the rusty patched bumble bee along the Project corridor, which has been underway since mid-June. There's nothing in the court's opinion on the poor species that we expect would prevent the biological opinion from being reissued in time to recommence construction by year-end and complete critical path tree filling during the November through March window." Audio: Dominion Energy, Inc. Q2 2019 Earnings Call (July 31, 2019) (on file with Seeking Alpha).

218. Letter from Patrick Hunter, Couns., Southern Environmental Law Center to Paul Phifer, Assistant Regional Director, US FWS (Oct. 1, 2019) (on file with FERC, Accession No. 20191018-5045).

219. See CLEARVIEW ENERGY PARTNERS, LLC, LLC, *ACP – Green Groups Eye Challenge to Next BiOp/ITS*, 1 (Oct. 21, 2019), https://gallery.mailchimp.com/0554cc7ed0bda904329a48c93/files/8a8d68a7-2c06-421b-b38a-b9f7f375b4f1/2019_10_21_Greens_Eye_ACP_Revised_BiOp.pdf.

220. Letter from Hunter, *supra* note 218, at 2.

221. *Id.* at 3, 5.

222. See Letter from James Martin, Chief, FERC to Cindy Shulz, Field Supervisor, USFWS (Aug. 28, 2019) (on file with FERC, Accession No. 20190828-3057).

223. Letter from Hunter, *supra* note 218, at 14.

shortcomings in the prior analysis for the Madison Cave isopod.²²⁴ Finally, the groups assert that the project *should* avoid the clubshell habitat at Hackers Creek²²⁵ and *must* avoid the RPBB habitat altogether given the species' precarious position on the "brink of extinction"²²⁶ (emphasis supplied).

Although I am not a biologist qualified to assess the environmental groups' concerns, I do think the RPBB review may be a particular challenge to the project remaining on its current schedule. I base this opinion on the possibility that (1) Fish & Wildlife could direct a reroute; (2) a stay could be granted pending judicial review; and/or (3) the Fourth Circuit could make a future ruling that the project must avoid this species and its habitat leading to a reroute.

If the project route requires more than a ¼-mile variance, then Atlantic Coast would need to amend its FERC-issued certificate and construction of a re-located segment (not to mention its in-service timeline) would become dependent on the timing of that review. How long it might take FERC to review a certificate amendment would depend on the scope of any such change and the extent of continued opposition to the project. At this juncture, I think it would be reasonable to expect FERC to work expeditiously on a potential re-route, but certificate amendments can take a year or more for review, depending on scope, from the date the modification is sought. It does not appear to me that there is room in an early 2022 in-service timeline to accommodate a route modification and a related certificate amendment.

E. A Dual Failure – Cowpasture Reveals an Interagency Stumble and Statutory Overreach

Shortly after the Sierra Club initiated its appeals of the Fish & Wildlife and Park Service approvals for Atlantic Coast, the Cowpasture River Preservation Association initiated a separate appeal challenging the Forest Service's ROD of Atlantic Coast's right of way through the George Washington and Monongahela National Forests.²²⁷ Although the Interior Department, on its own behalf and that of the Agriculture Department, sought consolidation of this case with the Sierra Club appeal of the first BiOp/ITS and the Forest Service approvals discussed above²²⁸ the Fourth Circuit declined.²²⁹ This case moved on a different, partially accelerated timetable.

224. *Id.* at 16.

225. *Id.*

226. *Id.* at 19.

227. *See generally Cowpasture* 911 F.3d 150.

228. Joint Motion to Consolidate Petitions and Expedite Oral Argument, *Cowpasture River Pres. Ass'n v. Forest Serv.*, No.18-1144, (4th Cir. Feb. 15, 2018).

229. Order on Motions, *Cowpasture River Pres. Ass'n v. Forest Serv.*, No.18-1144, (4th Cir. Mar. 15, 2018).

1. Another Problematic Forest Service Review

On September 18, 2018, Cowpasture sought a stay²³⁰ of the Forest Service right of way pending the outcome of the appeal. Petitioners pointed to FERC's September 17, 2018 decision to lift the stop work order that had been in place in the wake of the vacatur of the Fish & Wildlife BiOp and ITS in May 2018 given the reissuance of both authorizations in September as the catalyst for their request.²³¹ The Fourth Circuit granted the stay on September 24, prohibiting work on the Forest Service land rights of way at issue in this appeal.²³² The court heard oral argument as scheduled on September 28, 2018.²³³ This construction prohibition is more limited in geographic scope than that associated with the Bi-Op and ITS that followed as it only addresses the Forest Service lands.

The Fourth Circuit found FERC's EIS failed to meet the Forest Service's needs,²³⁴ agreeing with petitioners that the Forest Service's amendments to the George Washington National Forest's and Monongahela National Forest's management plans violated the National Forest Management Act.²³⁵ In addition, the court agreed that the Forest Service violated NEPA for failing to ensure that FERC's EIS would consider alternatives consistent with the Forest Service's responsibilities under the National Forest Management Act.²³⁶ The court also found that the EIS improperly rejected an alternative route that would have avoided the George Washington National Forest altogether.²³⁷ Petitioners also argued that the NEPA review failed to take the required "hard look" at the risk of landslides and failed to require necessary mitigation, prevailing on this point as well.²³⁸ Petitioners also alleged that the erosion mitigation plan approval was not supported by the record and never addressed the concerns initially raised by the Forest Service. The court agreed.²³⁹

On the NEPA/EIS issues generally, the court found that the Forest Service "changed course" insofar that it had raised concerns in 2015 and 2016 that were not resolved in either the FERC's final EIS or in the Forest Service's Rule of Decision.²⁴⁰ I think this provides another example of a failure to effectively execute an "enabling" review robust enough to survive judicial review when political sentiments change.

230. Petitioners' Motion for Stay, Cowpasture River Pres. Ass'n v. Forest Serv., No.18-1144, (4th Cir. Sept. 18, 2018).

231. Letter from Terry L. Turpin, Dir., Office of Energy Projects, to Matthew R. Bley, Dir., Gas Transmission Certificates, Dominion Energy Transmission, Inc. (on file with FERC, Accession No. 20180917-3025).

232. Order on Petitioners' Motion for Stay, Cowpasture River Pres. Ass'n v. Forest Serv., No.18-1144, (4th Cir. Sept. 24, 2018).

233. *Cowpasture*, 911 F.3d 150.

234. *Id.* at 173.

235. *Id.* at 161.

236. *Id.* at 168.

237. *Id.* at 169.

238. *Cowpasture*, 911 F.3d at 170.

239. *Id.* at 173.

240. *Id.* at 158.

The Fourth Circuit found the Forest Service violated NEPA by failing to ensure that the FERC-led review and its own Rule of Decision (ROD) analyzed whether the amendments it was proposing to accommodate Atlantic Coast were consistent with the Forest Service's 2012 Planning Rule.²⁴¹ Therefore, the Fourth Circuit concluded that this action was arbitrary and capricious.²⁴²

The court also found that the Forest Service's position that the amendments made to the management plans to accommodate the project would not cause a substantial adverse effect on a national forest to be "strained and implausible" in light of substantial record evidence to the contrary.²⁴³ The court further wrote, "[t]he lengths to which the Forest Service apparently went to avoid applying the substantive protections of the 2012 Planning Rule . . . are striking, and inexplicable" and therefore supported the panel's finding that the agency's actions were arbitrary and capricious, too.²⁴⁴

On the route alternatives challenges, the court agreed with the Cowpasture litigants that the Forest Service failed in its duties under NEPA in accepting FERC's EIS.²⁴⁵ In *Cowpasture*, the court explained that while the EIS may have met FERC's requirements vis-à-vis alternatives, the Forest Service has other standards under NEPA review that are dictated by the National Forest Management Act.²⁴⁶ The court went on to explain that this was the same failing it found when it vacated the Bureau of Land Management's right of way for Mountain Valley earlier that year in *Sierra Club* (897 F.3d 582).²⁴⁷ Since the Forest Service's ROD did not address this issue properly, the court found the ROW approval inconsistent with NEPA.²⁴⁸

On the "hard look" challenges, the court noted that the Forest Service raised concerns that were never addressed in the final EIS or its own ROD, and ultimately "relied on the very mitigation measures it previously found unreliable," thereby violating NEPA and the National Forest Management Act.²⁴⁹ In issuing its December 13 vacatur in this case, the Fourth Circuit wrote: "We trust the United States Forest Service to 'speak for the trees, for the trees have no tongues.' A thorough review of the record leads to the necessary conclusion that the Forest Service abdicated its responsibility to preserve national forest resources."²⁵⁰

241. *Id.* at 173.

242. *Id.*

243. *Cowpasture*, 911 F.3d at 166.

244. *Id.*

245. *Id.* at 172-74.

246. *Id.* at 170.

247. *Id.* at 172-173.

248. *Cowpasture*, 911 F.3d at 179.

249. *Id.* at 174.

250. *Id.* at 183 (quoting DR. SEUSS, *THE LORAX* (1971)).

2. The Appalachian Trail Right-of-Way Problem and Statutory Conflicts

Embedded in the challenge to the route analysis, the Cowpasture-led litigants alleged that the Forest Service's authority under the MLA did not empower it to approve a right of way for Atlantic Coast to cross the Appalachian Trail.²⁵¹ Petitioners contended the Forest Service violated the National Trails System Act by relying on MLA authority to authorize the crossing.²⁵² In the context of the alternatives analysis, the court noted that avoidance of a Congressional approval to cross the Appalachian Trail (as necessary under the National Park System Organic Act)²⁵³ was a "significant factor" in determining the preferred route evaluated by FERC in the draft EIS and selected in the final EIS.²⁵⁴ As noted above, the court found the lack of off-forest alternatives to be inconsistent with the Forest Service's NEPA obligations under the National Forest Management Act.²⁵⁵

The Fourth Circuit found that the Appalachian Trail is a "unit" of the National Park Service and therefore the MLA authorities relied on by the Forest Service do not apply.²⁵⁶ The court explained that the Forest Service "misreads" both the MLA and the National Trails System Act in a manner that "defies logic."²⁵⁷ Specifically, the court found the MLA does not provide any agency with authority to site a pipeline over National Park System land; since the Appalachian Trail is a unit of the National Park System, the Forest Service has no authority to rely on the MLA.²⁵⁸ The court wrote: "the applicable administrator is the Secretary of the Interior, not the Secretary of Agriculture [of which Forest Service is part], and the applicable laws are those of the National Park System."²⁵⁹

3. Current Status

On June 25, the Solicitor General of the U.S. Department of Justice filed a petition for writ of certiorari²⁶⁰ on behalf of the Forest Service seeking review of *Cowpasture*. That petition, and a similar petition²⁶¹ filed by Atlantic Coast the same day, asked the Supreme Court to review the Fourth Circuit's ruling on right of way for the Appalachian Trail only.²⁶²

251. *Id.* at 179-80.

252. *Id.* at 169.

253. 54 U.S.C. § 100101.

254. *Cowpasture*, 911 F.3d at 156-57.

255. *Id.* at 172-73.

256. *Id.* at 179-80.

257. *Id.* at 180.

258. *Id.* at 181.

259. *Cowpasture*, 911 F.3d at 181.

260. *Cowpasture River Pres. Ass'n v. Forest Serv.*, 911 F.3d 150 (4th Cir. 2018), *petition for cert. filed*, 2019 WL 2635899 (U.S. June 25, 2019) (No. 18-1584).

261. *Id.* at I; *Atlantic Coast Pipeline v. Cowpasture River Pre. Ass'n*, 911 F.3d 150 (4th Cir. 2018), *petition for cert. filed*, 2019 WL 4889930 (U.S. Oct. 4, 2019) (No. 18-1587).

262. "Although the government disagrees with these further rulings by the court of appeals, they, unlike the court's ruling concerning the Mineral Leasing Act, can be resolved by the Forest Service on remand. The government therefore does not seek review of them here." *Petition for Writ of Cert., United States Forest Serv.*, 2019 WL 2635899, at 13.

Both June petitions argued that the Fourth Circuit misread the National Trail System Act as designating the right of way associated with the Appalachian Trail a component of the National Park System, thereby displacing any authority under the MLA held by a relevant federal agency (here, the Forest Service).²⁶³ The Forest Service also offered an argument it had not raised in its principal case – that there was no conflict with the National Trail System Act because the Trail is a surface footpath.²⁶⁴

The Cowpasture-led litigants challenged this argument and countered in their response brief that the Forest Service had never issued a green field permit under the authority of the MLA across the Trail for an oil or gas pipeline until those for Atlantic Coast and Mountain Valley.²⁶⁵ In other words, this approach was a new (“enabling”) one taken to enable approval of both projects over a greenfield route that obviated the need for the National Park Service to seek Congressional authorizations. I note that the record indicates that the approach of siting the Appalachian Trail crossing over Forest Service land under consideration in 2016, before the Trump Administration took office.²⁶⁶ To back up its assertion that the practice was not as longstanding as the Forest Service argued, the Cowpasture-led litigants recounted that not one of the 55 existing pipelines that cross the Trail at 34 locations to date were sited by the Forest Service relying on its authority under the MLA.²⁶⁷

The Supreme Court granted cert on October 4.²⁶⁸ If the Supreme Court upholds the Fourth Circuit, Atlantic Coast may have to amend its route to cross the Trail on land not managed solely by the Forest Service or find a way to secure National Park Service authorization (such as through Congressional approval) for the existing route. If the Supreme Court overturns the Fourth Circuit and the crossing can be reinstated, construction would remain barred in these areas unless and until the BiOp and ITS are also reissued and in effect.

F. *A Defenders’ Encore? Mountain Valley Draws BiOp/ITS Challenge*

A coalition of environmental groups led by Wild Virginia wrote Fish & Wildlife on May 1 asking the agency to voluntarily reopen its ESA consultation with FERC on the Mountain Valley project.²⁶⁹ The groups argued that the analy-

263. Petition for Writ of Cert., *Atl. Coast Pipeline*, 2019 WL 2711441, at 5; Petition for Writ of Cert., *United States Forest Serv.*, 2019 WL 2635899, at 13.

264. Petition for Writ of Cert., *United States Forest Serv.*, 2019 WL 2635899, at 9.

265. Brief in Opposition for Respondents at 14, *United States Forest Serv. v. Cowpasture River Pres. Ass’n*, 2019 WL 2635899 (U.S. June 25, 2019) (No. 18-1584).

266. Notice of availability, *Atlantic Coast Pipeline Project and Supply Header Project Draft Environmental Impact Statement and the Forest Service Draft of Associated Land and Resource Management Plan Amendments*, 82 Fed. Reg. 1,685 (2017).

267. Brief in Opposition for Respondents at 14-15, *United States Forest Serv. v. Cowpasture River Pres. Ass’n*, 2019 WL 2635899 (U.S. June 25, 2019) (No. 18-1584).

268. *Cowpasture River Pres. Ass’n, v. United States Forest Serv.*, 911 F.3d 150 (4th Cir. 2018), cert. granted, (Oct. 4, 2019) (No. 18-1584).

269. Letter from Elly Benson, Sierra Club, to Kyla Hastie, Acting Assistant Reg’l Dir., Ecological Serv., U.S. Fish and Wildlife Serv. (May 1, 2019) (on file with FERC, Accession No. 20190501-5307).

sis of Mountain Valley's impacts on the Roanoke log perch (a fish) was inadequate. The groups also contended that the plain language of the statute requires the federal agencies to reopen their consultation based on the new information the groups offered from a state geological employee prepared in April 2019 based on observed conditions in construction areas.²⁷⁰ Neither Fish & Wildlife nor FERC appeared to publicly acknowledge the May 1 request until after the request for stay was filed.²⁷¹

Wild Virginia turned to the Fourth Circuit on August 12, 2019, seeking review of the November 2017 BiOp and ITS.²⁷² These petitioners argued that the federal agencies must reopen ESA consultation based on the new information the groups offered from a state geological employee prepared in April 2019 and observed conditions in construction areas.²⁷³

Wild Virginia requested a stay pending review on August 21.²⁷⁴ In its response opposing this motion, Fish & Wildlife explained that it had reinitiated consultation with FERC, and no stay was required because this was the objective the petitioners sought.²⁷⁵ Fish & Wildlife also asked that the court place the case in abeyance given that the reinitiation of consultation could conclude by January 11, 2020. The Fourth Circuit granted both motions on October 21, staying the 2017 BiOp and ITS, placing the case in abeyance, and directing status reports in the interim.²⁷⁶ As I told ClearView's clients to expect,²⁷⁷ the stay led to a broad construction stand down – similar to that in place on Atlantic Coast – and forced at least a six-month delay for the project's planned in-service date.²⁷⁸

III. CONCLUSIONS AND LOOKING AHEAD

Figure 2 illustrates that the judicial appeals of non-FERC federal agency and state-delegated authorizations number half of what the Commission faced over my study period. State agencies appear to share FERC's generally strong record on appeal. However, FERC's sister agencies have not been as successful in fending off court review.

270. *Id.*

271. Letter from James Martin, Chief, FERC to Cindy Shulz, Field Supervisor, US FWS (Aug. 28, 2019) (on file with FERC, Accession No. 20190828-3057).

272. Petition for Review, *Wild Va. v. United States Dep't of the Interior*, No. 19-1866 (4th Cir. Aug. 12, 2019).

273. *Id.*

274. Petitioners' Motion for Stay, *Wild Va. v. United States Dep't of the Interior*, No. 19-1866 (4th Cir. Aug. 21, 2019).

275. Respondents' Opposition to Motion and Motion for Abeyance, *Wild Va. v. United States Dep't of the Interior*, No. 19-1866 (4th Cir. Aug. 29, 2019).

276. Order on Motions, *Wild Va. v. United States Dep't of the Interior*, No. 19-1866 (4th Cir. Oct. 11, 2019).

277. See CLEARVIEW ENERGY PARTNERS, LLC, *4th Circuit Stays MVP BiOp/ITS, Construction Stop Ahead* (Oct. 11, 2019), <https://mailchi.mp/cvenery/research-4th-circuit-stays-mvp-biopits-construction-stop-ahead-1631333>.

278. News Release, MVP Total Project Work 90% Complete by Year-End, *supra* note 115.

Of the 168 individual allegations of legal error evaluated in this study (from +80 appeals of agency actions on natural gas pipelines between 2012 and mid-October 2019), 29 have succeeded, 79 have not, 45 are pending, 14 were not reached by the court, and four were withdrawn.

Of the 55 non-FERC challenges tabulated, 26 have been successful, 18 have failed, six are pending, and two were not reached by the court. Three of the six pending allegations are under consideration in the Wild Virginia appeal, where the stay has adversely impacted Mountain Valley's schedule (as discussed above).

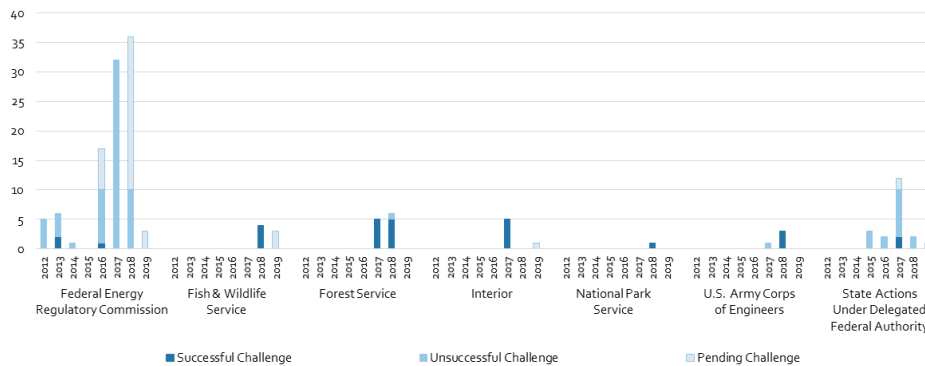


Figure 2. Challenges to Natural Gas Projects by Agency, Year Filed and Outcome.²⁷⁹

In closing, it appears to me that the recent successes pipeline opponents have had in challenging agency actions other than FERC's certificate review are likely inspire more appeals. In my view, the duty of federal agencies to meet existing statutory requirements remains clear, even before the Trump Administration embarks on implementing a more "enabling" approach through various regulatory reform initiatives.

Most energy-relevant regulators tend to be either "limiting" or "enabling" because of their statutory underpinnings, and they develop enabling or limiting cultures over time. Political appointees can push enabling agencies into limiting policy decisions, or vice versa, but when they go too far, they tend to run afoul of the courts, agency culture or both.

In order to prevail against such challenges, FERC's sister agencies – the Corps, the Forest Service, and Fish & Wildlife – may need to take longer to complete their reviews than they have in the recent past, as they face the challenge of rebutting criticisms from pipeline opponents during their review process and building records that survive judicial review. The scope and duration of construction interruptions may vary, but even small incomplete areas can prove a hurdle to several billion dollars of infrastructure entering service on time.

279. CLEARVIEW ENERGY PARTNERS, LLC, based on court data through October 15, 2019.