

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA
CIRCUIT

**Sierra Club and Galveston Baykeeper v. Federal Energy Regulatory
Commission**

423 U.S. App. D.C. 394 (D.C. Cir. 2016) · No. 14-1275 · Decided June 28, 2016

SUMMARY

The U.S. Court of Appeals for the District of Columbia Circuit upheld the Federal Energy Regulatory Commission’s authorization of Freeport LNG’s terminal modifications for export operations. The court held that Sierra Club and Galveston Baykeeper had standing and that their NEPA claims were not moot, but concluded that FERC’s analysis of the projects’ indirect and cumulative environmental effects was not arbitrary or capricious. The court distinguished environmental effects attributable to the export authorization, which were to be challenged in a separate proceeding concerning the Department of Energy.

CASE DETAILS

COURT	United States Court of Appeals for the District of Columbia Circuit
WRITING FOR THE COURT	Millett, Circuit Judge; Rogers, Circuit Judge; Griffith, Circuit Judge
JURISDICTION	Federal
DECIDED	June 28, 2016
DOCKET	14-1275
DISPOSITION	other
PROCEDURAL POSTURE	Petition for review of orders of the Federal Energy Regulatory Commission authorizing Freeport LNG Development, L.P. to modify and expand its Texas liquefied natural gas terminal to support export operations.
STANDARD OF REVIEW	The court reviewed FERC's NEPA analysis to determine whether the agency adequately considered and disclosed environmental impacts and whether its decision was arbitrary or capricious. The court applied deferential review and declined to flyspeck the analysis for minor deficiencies. Objections not raised before FERC on rehearing were jurisdictionally barred under 15 U.S.C. § 717r(b).
PRECEDENTIAL VALUE	published precedential opinion

PARTIES

Sierra Club, Galveston Baykeeper v. Federal Energy Regulatory Commission

TOPICS

environmental impact review

administrative law

judicial review of agency action

appellate jurisdiction

preservation of error

PRACTICE AREAS

environmental law

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appellate procedure

QUESTIONS PRESENTED

1. Whether Sierra Club and Galveston Baykeeper had associational standing to challenge FERC's NEPA review and authorization of the Freeport Projects.
2. Whether the petition for review was moot because the Department of Energy later conducted additional environmental analyses in connection with its separate export authorization.
3. Whether FERC's NEPA analysis adequately addressed reasonably foreseeable indirect environmental effects, including effects associated with induced domestic natural gas production and increased coal use.
4. Whether FERC adequately analyzed the cumulative environmental effects of the Freeport Projects together with other LNG export projects nationwide.
5. Whether the court had jurisdiction to consider petitioners' argument that FERC should have quantified emissions in tons per year rather than pounds per megawatt-hour when that objection was not presented to FERC on rehearing.

HOLDINGS

1. The Associations had standing because at least one Sierra Club member alleged a concrete aesthetic and recreational injury from noise and construction near the Freeport facility, the injury was connected to FERC's challenged authorization and NEPA review, and the remaining associational-standing requirements were satisfied.
2. The petition was not moot merely because the Department of Energy later conducted additional environmental analyses.
3. FERC did not act arbitrarily or capriciously by declining to analyze asserted increases in domestic natural gas production, higher domestic gas prices, increased coal use, and related emissions as indirect effects of the Freeport Projects.
4. FERC did not act arbitrarily or capriciously by limiting its cumulative-impact analysis to Brazoria County rather than conducting a nationwide analysis of other LNG export projects.
5. The court lacked jurisdiction to consider petitioners' argument that FERC should have quantified emissions in tons per year rather than pounds per megawatt-hour because petitioners did not raise that

objection before FERC on rehearing.

KEY QUOTATIONS

“We hold that the Associations have standing to press their challenges to the Commission’s orders and that their case is not moot, but we deny the petition for review on the merits.” (at 2-3)

“As we have held before, we hold again: it is sufficient for standing purposes that the “aesthetic injury follows from an inadequate [Environmental Impact Statement] whether or not the inadequacy concerns the same environmental issue that causes their injury.”” (at 10-11)

“Our job is “simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious.”” (at 15-16)

“Because the “tons per year vs. pounds per megawatt-hour” argument was not raised before the Commission, it cannot be considered here.” (at 24)

FACTUAL BACKGROUND

Freeport LNG operated a liquefied natural gas terminal on Quintana Island in Brazoria County, Texas, initially authorized for importing natural gas. After market conditions shifted, Freeport sought FERC authorization to modify the terminal and construct additional liquefaction facilities to support exports. FERC prepared a consolidated environmental impact statement under NEPA and concluded that the projects' adverse environmental effects would be mostly temporary and short-term if mitigation conditions were followed. Petitioners challenged FERC's treatment of induced domestic gas production, nationwide cumulative effects, and emissions calculations.

PROCEDURAL HISTORY

FERC issued a Final Environmental Impact Statement and conditionally authorized the Freeport Projects after conducting environmental review under NEPA. Sierra Club and Galveston Baykeeper intervened, sought rehearing, and challenged FERC's denial of rehearing in the D.C. Circuit. The Department of Energy separately issued an order authorizing exports, and the petitioners separately challenged that order. The court held that petitioners had standing and that the FERC challenge was not moot, but denied the petition on the merits and dismissed one unpreserved argument for lack of jurisdiction.

DISPOSITION

other

CASES CITED

- Brotherhood of Locomotive Engineers and Trainmen v. Surface Transportation Board, 457 F.3d 24, 27 (D.C. Cir. 2006)
- Sierra Club v. EPA, 292 F.3d 895, 898 (D.C. Cir. 2002)
- WildEarth Guardians v. Jewell, 738 F.3d 298, 305, 307 (D.C. Cir. 2013)

- Florida Audubon Society v. Bentsen, 94 F.3d 658, 665, 668 (D.C. Cir. 1996) (en banc)
- Massachusetts v. EPA, 549 U.S. 497, 518 (2007)
- Americans for Safe Access v. DEA, 706 F.3d 438, 443 (D.C. Cir. 2013)
- Communities Against Runway Expansion, Inc. v. FAA, 355 F.3d 678, 684-685 (D.C. Cir. 2004)
- DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 353 (2006)
- National Committee for the New River, Inc. v. FERC, 433 F.3d 830, 832 (D.C. Cir. 2005)
- Lemon v. Geren, 514 F.3d 1312, 1315 (D.C. Cir. 2008)
- Delaware Riverkeeper Network v. FERC, 753 F.3d 1304, 1313-1314 (D.C. Cir. 2014)
- Natural Resources Defense Council, Inc. v. Hodel, 865 F.2d 288, 294, 297 (D.C. Cir. 1988)
- Theodore Roosevelt Conservation Partnership v. Salazar, 661 F.3d 66, 75 (D.C. Cir. 2011)
- Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 97-98 (1983)
- Department of Transportation v. Public Citizen, 541 U.S. 752, 764, 767, 769, 771 (2004)
- Village of Bensenville v. FAA, 457 F.3d 52, 65 (D.C. Cir. 2006)
- City of Shoreacres v. Waterworth, 420 F.3d 440, 453 (5th Cir. 2005)
- Sierra Club v. Marsh, 976 F.2d 763, 767 (1st Cir. 1992)
- Mid States Coalition for Progress v. Surface Transportation Board, 345 F.3d 520, 532, 549 (8th Cir. 2003)
- SEC v. Chenery Corp., 318 U.S. 80, 87 (1943)
- Shea v. Director, Office of Workers' Compensation Programs, United States Department of Labor, 929 F.2d 736, 739 n.4 (D.C. Cir. 1991)
- Chae-Sik Lee v. Kennedy, 294 F.2d 231, 234 (D.C. Cir. 1961), cert. denied sub nom. Lee v. Kennedy, 368 U.S. 926 (1961)
- Canonsburg General Hospital v. Burwell, 807 F.3d 295, 304 (D.C. Cir. 2015)
- New York New York, LLC v. NLRB, 313 F.3d 585, 590 (D.C. Cir. 2002)
- Grand Canyon Trust v. FAA, 290 F.3d 339, 342, 345 (D.C. Cir. 2002)
- TOMAC, Taxpayers of Michigan Against Casinos v. Norton, 433 F.3d 852, 864 (D.C. Cir. 2006)
- Kleppe v. Sierra Club, 427 U.S. 390, 410, 412, 414 (1976)
- Minisink Residents for Environmental Preservation and Safety v. FERC, 762 F.3d 97, 113 (D.C. Cir. 2014)
- Moreau v. FERC, 982 F.2d 556, 562-563 (D.C. Cir. 1993)
- Public Service Commission v. Federal Power Commission, 543 F.2d 757, 774 n.116 (D.C. Cir. 1974)
- NO Gas Pipeline v. FERC, 756 F.3d 764, 768-769 (D.C. Cir. 2014)