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## Legal Update Clean Air Act Developments

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AAPCA Spring Meeting  
March 25-27, 2019  
Baton Rouge, Louisiana

March 26, 2019

# Overview

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- Recent EPA Policy Changes
- Clean Air Litigation
- Climate Change Regulatory Developments & Litigation
- Judicial Scrutiny of Deference to Agencies

# Status of Recent EPA Reforms

Name of Action	Status of Action	Has action been challenged in court?	Is court challenge still pending or has it been resolved?
12/7/17 EPA Memo on Actual to Projected Actual Test – Major Modification Applicability	EPA memo	No	N/A
3/13/18 EPA Memo on Project Emissions Accounting	EPA memo but rulemaking in process	Yes - EPA memo challenged in court	Still pending – in abeyance pending rulemaking
11/15/18 Action on Project Aggregation (83 FR 57324)	Final action	Yes	Still pending; final briefs due Dec. 2019
4/30/18 EPA Letter re Common Control	Letter	No	N/A
10/16/18 EPA Letter re Common Control	Letter	No	N/A
9/4/18 EPA Draft Memo on Adjacency	Draft memo subject to comment	No	N/A
2017 Denial of Petition to Object to Title V – PacifiCorp Energy (NSR oversight)	Denial of Title V petition	Yes	Still pending; oral argument set for May 2019
1/25/18 EPA guidance withdrawing Once In Always In	Guidance but rulemaking in process	Yes – Guidance challenged in court	Still pending; oral argument set for April 2019
Nov. 2018 Draft EPA Policy on Ambient Air	Draft policy subject to comment	No	N/A
8/31/18 Proposed Affordable Clean Energy Rule (83 FR 44746)	Proposed rule; final rule is forthcoming	No	N/A

# New Source Review Reform

- **12/7/17 EPA Memo: Enforceability & Use of Actual to Projected Actual Applicability Test in Determining Major Modification Applicability**
  - So long as company complies with procedural requirements governing preconstruction analysis, EPA will not second-guess that analysis
  - Where company projects an insignificant emissions increase, EPA will not pursue enforcement **unless post-project actual emissions data** indicates significant emissions increase or significant net emissions increase did in fact occur
- No petition for review filed in court



# New Source Review Reform

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## 3/13/18 EPA Memo: Project Emissions Accounting

- Clarifies that **emissions decreases** (as well as increases) are to be considered when calculating at Step 1 whether the proposed project will result in a significant emissions increase
  - “Project emissions accounting” is what happens at Step 1
  - Decrease need not be creditable or enforceable in order to be considered at Step 1

## Memo challenged in court (*Env. Defense Fund v. EPA*, 18-1149, D.C. Cir.)

- In July 2018, Petitioner environmental groups moved to hold the litigation in abeyance on ground that EPA is preparing a formal rulemaking that would affect issues in case (petitioners indicated their challenge was based on argument that EPA issued memo without undergoing formal rulemaking)
- D.C. Circuit granted that motion for abeyance on 7/13/18

# New Source Review Reform



- **11/15/18: EPA published final action on project aggregation (83 FR 57324)**
  - “Project Aggregation” considers whether multiple projects should be characterized as a single project for NSR applicability purposes
  - Revives Bush-era EPA interpretation that projects should be aggregated when “substantially related” (*i.e.*, technically or economically dependent)
  - Rebuttable presumption that projects occurring more than 3 years apart not “substantially related”
- **Challenged in court (*NRDC v. EPA*, 19-1007, D.C. Cir.); briefing schedule set, with final briefs due 12/13/19**
  - NRDC’s statement of issues indicates it will argue: EPA violated CAA by narrowing its “longstanding interpretation” of 42 USC 7411(a)(4) (defining “modification”)); change was arbitrary; and made without proper procedure



# New Source Review Litigation

*United States v. Luminant Generation Co.*, 905 F.3d 874 (5th Cir. Oct. 1, 2018).

- Joined other circuits in holding action to recover **civil penalties** for violation of NSR permitting requirements must be brought within 5 years of alleged construction period.
  - Violation occurs on first day of unpermitted construction and does not extend into operation.



# New Source Review Litigation

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- *United States v. Luminant Generation Co.*, 905 F.3d 874 (5th Cir. Oct. 1, 2018).
  - But, the case further held that the statute of limitations, by itself, did not bar government's claims for **injunctive** relief (government, as sovereign, is exempt from concurrent-remedies doctrine, which bars concurrent equitable claim if the expiration of statute of limitations bars a legal claim).
  - The 5th Circuit did not “prejudge” whether equitable relief was actually available – instead, it remanded to district court for consideration whether “any equitable relief is appropriate and proper under the legal and factual circumstances of this case in which the legal relief has been time barred.”
  - In Nov. 2018, defendant/appellee Luminant Generation filed petition for rehearing *en banc* on the injunctive relief issue; petition is still pending.



# NSR/Title V Source Aggregation

## Criteria: Common Control

- **4/30/18 Letter from William Wehrum, EPA Asst. Administrator, Re: Meadowbrook Energy**
  - Narrowed meaning of “control.”
  - Assessment of “control” must focus on power of one entity to dictate decisions of the other that could affect the applicability of, or compliance with, relevant air pollution regulatory requirements.
  - Dependency relationships should not be presumed to result in common control.
  - No petition for review filed in court
- The EPA assessed whether a biogas facility owned by Meadowbrook should be aggregated with an existing landfill owned by Keystone Sanitary Landfill.



# NSR/Title V Source Aggregation

## Criteria: Common Control

10/16/18 Letter from Anna Wood, EPA Air Quality Policy Division Director, to Wisconsin DNR (reviewing whether a landfill and collocated energy company should be aggregated)



- Fact that one entity has some control over an activity that another entity also has some control over does not necessarily mean first entity “controls” the second entity; will be a case-by-case evaluation.
  - **Where overlap of control is limited to small portion of each entity’s otherwise separate operations, entities are not “persons under common control.”**
- “Persons under common control” suggests entities are controlled from “central, unified position” such as through parent-subsidary relationship
- Permitting authorities should ensure each activity is ultimately allocated to single source.
- No petition for review filed in court

# Source Aggregation Criteria: Adjacency

- **9/4/18 EPA Draft Memo “Interpreting ‘Adjacent’ for New Source Review and Title V Source Determinations in All Industries Other Than Oil and Gas”**
  - Proposes that adjacency should be determined exclusively by physical proximity.
    - But does not provide a “bright line” rule or fixed distance.
  - Functional interrelatedness not relevant to adjacency determination.
  - Comment period for draft memo closed on 10/5/18.



# Whether Title V Review Includes NSR Oversight

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In 2017, in **PacifiCorp Energy** matter, EPA's denial of petition to object to Title V permit declared: "title V permitting process is not the appropriate forum to review preconstruction permitting decisions."

- State agency did not err by incorporating terms of previous preconstruction permits into Title V permit without further review of whether those terms were properly derived or whether different type of permit was required for the construction.
- EPA's decision being challenged in D.C. Cir. (18-1038, *Sierra Club v. EPA*)
  - Briefing is complete; oral arguments scheduled for 5/1/19.
  - The State of Utah and PacifiCorp intervened in the matter.
- Sierra Club also filed an action to preserve its rights in the 10<sup>th</sup> Circuit: *Sierra Club v. EPA*, Case No. 18-9507 (10th Cir.).

# Whether Title V Review Includes NSR Oversight

- Sierra Club argues:



- EPA's decision was a legislative rule because it changed the definition and longstanding interpretation of "applicable requirements" under Title V permitting. This required formal rulemaking.
- The order was in contravention of CAA because it does not allow a full review of CAA requirements for a Title V permit.

- EPA argues:



- Decision is a non-binding adjudicative order without national applicability, which makes the DC Cir. an improper venue, and formal rulemaking unnecessary. Any challenge should be brought in the 10<sup>th</sup> Circuit.
  - Decision is a reasonable interpretation of an ambiguous part of the CAA.
- In January 2019, Sierra Club challenged a similar EPA decision in the 5<sup>th</sup> Circuit. EPA declined to review the prior state permit requirements which were incorporated into Exxon's Title V CAA permit for a Texas olefins plant. *Environmental Integrity Project v. EPA*, 18-6084 (5th Cir.)

# Once In Always In Withdrawal

**1/25/18: EPA issued guidance withdrawing “once in always in” (OIAI) policy (83 FR 5543 (2/8/18))**

- Under OIAI (outlined in 1995 memo), once a facility qualified as a major source under CAA Section 112, it had to continue meeting MACT standards for HAPs, even if its emissions later fell below major source thresholds.
- New policy allows major source to become area source when it takes an enforceable limit on its potential to emit HAPs below major source thresholds; area sources typically subject to less stringent standards.

**New policy being challenged in D.C. Cir. (*Cal. Comm. Against Toxics v. EPA*, 18-1085); final briefs filed 2/22/19; oral argument set for 4/1/19**

- Environmental group petitioners assert guidance is: a legislative rule required to undergo notice and comment rulemaking; contrary to text, structure, and context of Section 112; and arbitrary because it fails to consider impact on Section 112 regulatory regime and on emissions.

**EPA in process of codifying change in regulation**

- On 2/25/19, EPA sent draft proposed rule to Office of Management & Budget for review.



# Revised Ambient Air Policy

- In Nov. 2018, EPA released draft revised policy on exclusions from “ambient air.”
  - “Ambient air” defined at 40 CFR 50.1(e) to mean “that portion of atmosphere, external to buildings, to which the general public has access.”
- EPA’s longstanding policy had been that general public should not be deemed to have access when land: (1) is owned or controlled by owner/operator of stationary source and (2) is surrounded by fence or other physical barrier precluding general public access.



# Revised Ambient Air Policy

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- In Nov. 2018, EPA released draft revised policy on exclusions from “ambient air.”
  - New Nov. 2018 draft policy proposes to replace fence/physical barrier requirement with more general requirement of measures, which may include physical barriers, effective in deterring or precluding general public access (like video surveillance and monitoring, drones, routine security patrols, and “other potential future technologies”).
  - EPA expects change will provide greater flexibility in determining where to place modeling receptors for air quality analyses.
- EPA accepted comment on draft policy through 1/11/19.

# EPA's Revised Consistency Regulations Upheld

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- In August 2016, during Obama administration, EPA revised its regional consistency regulations (adopted under § 7601 of CAA addressing administration) to provide that *only* the decisions of the *U.S. Supreme Court and the D.C. Circuit* that arise from challenges to “nationally applicable” regulations or final action shall “apply *uniformly*” (40 CFR 56.3(d))
- Industry groups, including American Petroleum Institute, filed petitions for review, arguing CAA § 7601 requires EPA to implement CAA uniformly nationwide
- In June 2018, D.C. Circuit denied the petitions and upheld the regulations (*Natl Env'tl Devel. Assn's Clean Air Project v. EPA*, 891 F.3d 1041 (D.C. Cir. 2018) (*NEDACAP II*))

# EPA's Revised Consistency Regulations Upheld

*NEDACAP II*: D.C. Circuit concluded Section 7601's uniformity obligations do not address court-created inconsistencies and EPA reasonably interpreted those obligations to allow intercircuit nonacquiescence



- CAA “contemplates ... splits in the regional circuits”
- “There is nothing in the statute to indicate that EPA is bound to change its rules nationwide each time a regional circuit issues a decision that is at odds with an EPA rule.”

# Court Orders CSB to Issue Chemical Release Reporting Requirements

- 1990 CAA Amendments established Chemical Safety Board (CSB) and provided that it shall establish requirements for reporting accidental releases into ambient air (42 USC 7412(r)(6))
- After Hurricane Harvey, Air Alliance Houston and Louisiana Bucket Brigade and others filed lawsuit in district court for District of Columbia, alleging CSB's failure to issue regulations violated prohibition in APA against agency action unreasonably delayed (*Air Alliance Houston v. CSB*, 17-02608, D.D.C)
  - On 2/4/19, the judge concluded that CSB's nearly 28-year delay in issuing regulations constituted an "egregious abdication of a statutory obligation"
  - Judge ordered CSB to promulgate final accidental chemical release reporting regulations within 12 months



# Greenhouse Gas Regulation Developments

## Clean Power Plan Litigation

- Litigation in D.C. Cir. (15-1363) challenging Clean Power Plan (CPP) still in abeyance pending rulemaking



- In 2015, pursuant to CAA Section 111(d), EPA issued CPP to address CO<sub>2</sub> emissions from existing fossil fuel-fired power plants (U.S. Supreme Court stayed CPP in 2016 before it went into effect)
  - CPP's Best System of Emission Reduction (BSER) employed generation shifting measures that departed from traditional source-specific approach to regulation. For instance, it called for:
  - Substituting increased generation from new zero-emitting renewable energy generating capacity for decreased generation from affected fossil-fired generating units.



# Greenhouse Gas Regulation Developments

## Clean Power Plan Litigation

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- Industry and many states challenged CPP in D.C. Cir (15-1363); matter was briefed, and oral argument held in September 2016
  - Petitioners argued *inter alia* that CPP was contrary to Section 111(d) (Section 111(d) forbids EPA from requiring owners/operators of existing sources to subsidize lower emitting generation, including generation outside of Section 111's reach; EPA cannot require states to adopt standards of performance that can only be met through non-performance by regulated sources through generation shifting)
- Following change in presidential administration, EPA announced in March 2017 it would review CPP, and in April 2017, D.C. Circuit ordered litigation to be held in abeyance pending EPA's review and directed EPA to file status reports at 30-day intervals
- EPA continues to file status reports to date
- While in abeyance, several petitioner states (North Carolina, Michigan, and Colorado) have withdrawn from the litigation.

# Greenhouse Gas Regulation Developments

## Proposed Affordable Clean Energy Rule

- On 10/16/17, EPA issued a proposed rule repealing the CPP (82 FR 48,035)
  - On 8/31/18, EPA published a proposed rule – the Affordable Clean Energy (ACE) Rule (83 FR 44,746) – to replace the Clean Power Plan
    - Proposes that heat rate improvement measures are BSER for existing coal-fired existing generating units (reads BSER in Section 111 to be limited to measures that can be applied at an individual source)
    - Revises NSR program to incentivize efficiency improvements at existing power plants (only projects that increase hourly rate of pollutant emissions would need to undergo full NSR analysis)
    - Comment period closed 10/31/18; EPA currently reviewing comments
  - EPA intends to issue a final rulemaking in second quarter of 2019 (according to status report it filed in Clean Power Plan litigation)



# Increased Focus on Climate Change

## Competing Approaches in Congress



3/15/19 U.S. Youth Climate Strike: students skipped school to protest climate inaction

Part of larger Global Climate Strike, inspired by teen activist Greta Thunberg in Sweden



Green New Deal  
(Nonbinding  
Resolution)



Competing Carbon  
Tax Proposals



# Green New Deal

- Nonbinding Resolution
  - Introduced by Rep. Ocasio-Cortez (D-NY) and Sen. Markey (D-Mass.) in February 2019
  - Seeks a 10-year national mobilization of investment to achieve net-zero greenhouse gas emissions
  - Foresees the federal government spearheading projects to
    - build climate resilience; upgrade infrastructure; meet 100 percent of power demand through “clean, renewable, and zero-emission energy sources;” overhaul transportation system to remove pollution and greenhouse gas emissions as much as technologically feasible; remove pollution and greenhouse gas emissions from manufacturing and industry as much as technologically feasible
  - Includes a broad social justice platform (seeks to guarantee a job “with a family-sustaining wage” to all Americans)

# Competing Carbon Tax Proposals

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- Competing Carbon Tax Proposals
  - Both would entail less federal involvement than Green New Deal and employ a free-market approach to reduce emissions; tax revenue would be returned to American households
    - Proposal introduced by Rep. Deutch (D.-Fla.) and 2 Republican members of bipartisan climate caucus entails a more sharply increasing tax on carbon-based fuels, and it would keep in place other measures to curb greenhouse gases
    - The other approach was designed by Republican Secretaries of State James Baker and George Shultz and is supported by the Climate Leadership Council (a coalition of corporations and environmentalists); would eliminate other regulations on greenhouse gases and set limits on climate lawsuits

# Climate Change Litigation

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# *Juliana v. U.S.*, 18-36082 (9th Cir.) (Kids' Climate Change Suit)

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## Plaintiffs

- Plaintiffs argue that the US government is violating the due process clause of the Fifth Amendment and the Public Trust Doctrine by authorizing and subsidizing the production and use of fossil fuels.
- Plaintiffs allege that knowing governmental action is damaging the climate system, and this will cause death and property damage.



# *Juliana v. U.S.*, 18-36082 (9th Cir.) (Kids' Climate Change Suit)

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## Government

- The government argues that plaintiffs do not have standing because they cannot show specific injury.
- The government urges that the APA is the proper vehicle to challenge administrative action.

# *Juliana v. U.S.*, 18-36082 (9th Cir.) (Kids' Climate Change Suit)

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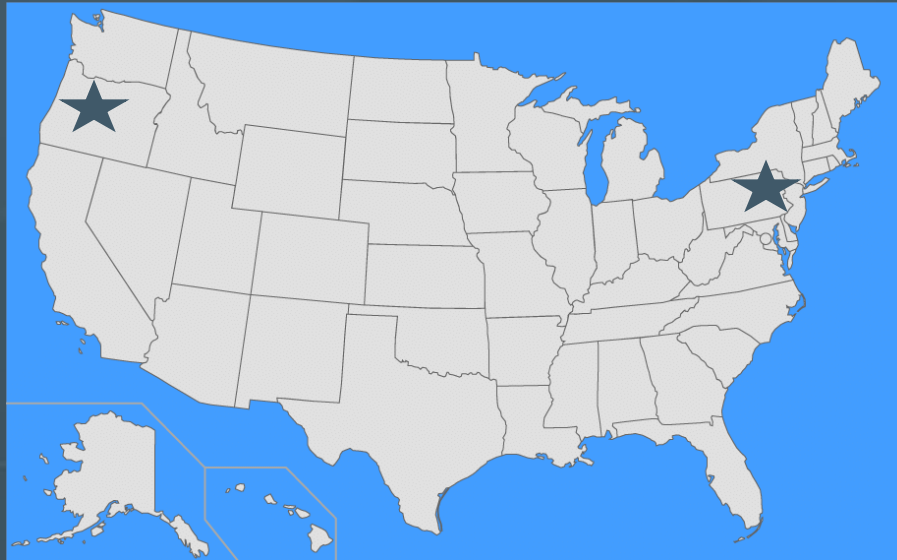
## Developments in 2018 & 2019 include:

- October 2018:
  - The District Court denied the government's motion for summary judgment and refused to certify the issue for appeal.
  - Trial was originally scheduled for October 2018.
- November 2018:
  - After the government filed petitions for mandamus in the Supreme Court and the Ninth Circuit, the district court stayed the case and certified the government's motions for appeal.
  - The appeal is currently pending before the Ninth Circuit.
- February 2019:
  - Plaintiffs filed for an injunction against the government to prevent it from authorizing (i) coal mining on federal public lands; (ii) offshore oil and gas projects on the Outer Continental Shelf; and (iii) development of new fossil fuel infrastructure.
- March 2019:
  - The 9th Circuit ordered that the motion for injunction would be decided following oral arguments (which have not yet been scheduled).

# *Clean Air Council v. U.S.*, No. 17-4977 (E.D. Pa. Feb. 19, 2019)

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- A Pennsylvania federal district court dismissed a similar case, and noted that the Oregon district court “contravened or ignored longstanding authority” by letting the Kids’ Climate Change Suit continue.
- Sets up a potential split in the circuits.



# *The City of New York v. BP, 18-2188* (2d Cir.)

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- NYC sued several oil companies, seeking to recover costs for climate change-related infrastructure and public health expenses, such as building a seawall.





# *The City of New York v. BP, 18-2188* (2d Cir.)

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- The District Court dismissed the action because it was preempted under the Clean Air Act and the constitution.
- NYC appealed, arguing that its suit is narrowly focused on New York and is not otherwise preempted.
- In February 2019, Defendants responded that the district court correctly dismissed the case. It argues that NYC is attempting to have the court improperly determine climate change policy.
  - In March 2019, the US Government filed an amicus brief also arguing that the Clean Air Act and the Constitution's foreign commerce clause and foreign affairs powers preempt NYC's suit.
- Oral arguments have not been set yet.



# *City of Oakland v. B.P.*, 18-16663 (9th Cir.)

- Oakland and San Francisco sued several oil and gas companies under a public nuisance theory for contributing to climate change.
- The case was originally brought in state court, but defendants removed it to federal court.

United States District Court For the Northern District of California	9		
	10	CITY OF OAKLAND, a Municipal Corporation, and	
	11	THE PEOPLE OF THE STATE OF CALIFORNIA,	
	12	acting by and through Oakland City Attorney	
	13	BARBARA J. PARKER,	No. C 17-06011 WHA
	14	Plaintiffs,	and
	15	v.	No. C 17-06012 WHA
	16	BP P.L.C., a public limited company of England and	
	17	Wales, CHEVRON CORPORATION, a Delaware	
	18	corporation, CONOCOPHILLIPS, a Delaware	
	19	corporation, EXXON MOBIL CORPORATION, a	
	20	New Jersey corporation, ROYAL DUTCH SHELL	
	21	PLC, a public limited company of England and	
	22	Wales, and DOES 1 through 10,	

Defendants	
_____	/
AND RELATED CASE.	
_____	/

# *City of Oakland v. B.P.*, 18-16663 (9th Cir.)

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- The District Court dismissed the case, finding that the claims were preempted because they would have an extraterritorial reach and interfere with foreign policy and that California lacked personal jurisdiction over several defendants.
- On March 13, 2019, Oakland and San Francisco appealed to the 9th Circuit, arguing:
  - The federal court did not have jurisdiction over its state law nuisance claim,
  - Such a nuisance claim is not preempted by federal law, and
  - California can exercise personal jurisdiction over all defendants.

# *Appalachian Voices v. FERC, 17-1271 (DC Cir. Feb. 19, 2019)*

Environmental groups argued that FERC did not adequately consider climate change impacts when it issued a construction certificate for a pipeline. The groups argued that FERC should use a “social cost of carbon” tool to measure the GHG impacts.

In 2017, in *Sierra Club v. FERC*, the DC Circuit held that FERC was required to consider the downstream greenhouse gas emissions impacts of pipeline projects.



## *Appalachian Voices v. FERC*, 17-1271 (DC Cir. Feb. 19, 2019)

The DC Circuit held that FERC's consideration of climate change impacts was adequate.

- “FERC provided an estimate of the upper bound of emissions resulting from end-use combustion, and it gave several reasons why it believed petitioners’ preferred metric, the Social Cost of Carbon tool, is not an appropriate measure of project-level climate change impacts and their significance under NEPA or the Natural Gas Act. That is all that is required for NEPA purposes.”

## *WildEarth Guardians v. Zinke*, 16-1724 (D.D.C. Mar. 19, 2019)

- The court held that the Bureau of Land Management “failed to take a ‘hard look’ at GHG emissions from the Wyoming [oil and gas] Lease Sales, and therefore the EAs and FONSIIs issued for those sales did not comply with NEPA.”
- The court determined that the BLM was required to analyze the cumulative effect of GHG emissions with the leases, including drilling and downstream use and state and national implications. It did not require BLM to apply the social cost of carbon or global carbon budget protocols to quantify the climate change impact of GHG emissions.



# Calcasieu Pass Terminal and TransCameron Pipeline

On Feb. 22, 2019, three days after the DC Circuit decision, FERC approved a Louisiana LNG terminal and pipeline. FERC's analysis relied on direct GHG emissions.

The swing vote commissioner noted that while she would like to see the social costs of carbon included in the analysis, she believes the GHG emissions data FERC provided is what the law requires.

One commissioner dissented from the order, noting that including GHG emissions data was insufficient to adequately review the impacts of climate change.



# Judicial Scrutiny of Deference to Agencies

- *Chevron* Deference: Doctrine that requires federal courts to defer to an agency's interpretation of a statute if the statute is ambiguous and the agency interpretation is reasonable.
  - In recent years, several members of the U.S. Supreme Court have questioned *Chevron's* foundation. *E.g.*, Justice Kennedy recently stated it is "necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron*" (*Pereira v. Sessions*, 138 S.Ct. 2105 (June 21, 2018) (concurring opinion in immigration matter))
- In *Kisor v. Wilkie* (No. 18-15), U.S. Supreme Court is considering whether to overrule *Auer v. Robbins*, 519 U.S. 452 (1997), and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), which direct courts to defer to a federal agency's reasonable interpretation of its own ambiguous regulation.
  - Arises from a veteran's claim to alter the effective date of his veteran disability benefits, a claim that U.S. Dept. of Veterans Affairs denied in part under its own regulations.
  - The Federal Circuit deferred to the agency's definition pursuant to *Auer*.
  - In Supreme Court brief, the veteran argues *inter alia* that *Auer* deference undermines notice and comment procedures that Congress established in APA; allows agency to engage in subregulatory interpretation that binds public without APA's procedural safeguards.
  - Set for oral argument 3/27/19.



# Thank you

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FOR YOUR TIME AND CONSIDERATION

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