
South Coast Air Quality Management District v. Federal Energy Regulatory Commission: Ninth Circuit Holds Reliance on Problematic State Agency Standard Satisfies NEPA

INTRODUCTION

South Coast Air Quality Management District v. Federal Energy Regulatory Commission held that the Federal Energy Regulatory Commission could use a problematic state natural gas quality standard to satisfy environmental review under the National Environmental Policy Act.¹ *South Coast* involved the Ninth Circuit review of a Federal Energy Regulatory Commission order approving the expansion of an interstate natural gas pipeline.² The expansion would enable the consumption of foreign-sourced liquefied natural gas in California's South Coast Air Basin,³ which would likely increase nitrogen oxide emissions in the South Coast Air Basin.⁴ The court held that the Federal Energy Regulatory Commission's reliance on the natural gas quality standards set forth by the California Public Utilities Commission was reasonable, as the California Public Utilities Commission has jurisdiction over the final intrastate pipeline segment that ultimately would introduce the foreign-sourced liquefied natural gas into the South Coast Air Basin.⁵ This rigid jurisdictional argument directly frustrates an enumerated purpose of the National Environmental Policy Act: to produce relevant environmental analysis "before decisions are made and before actions are taken."⁶

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1. *S. Coast Air Quality Mgmt. Dist. v. Fed. Energy Regulatory Comm'n (S. Coast)*, 621 F.3d 1085, 1096 (9th Cir. 2010).

2. *Id.* at 1089.

3. *Id.*

4. STEVEN WEISSMAN, ALJ, RULEMAKING NO. 04-01-025, PROPOSED DECISION RE POLICIES AND RULES TO ENSURE RELIABLE, LONG-TERM SUPPLIES OF NATURAL GAS 113–15 (2006).

5. *See S. Coast*, 621 F.3d at 1091, 1096.

6. 40 C.F.R. § 1500.1(b) (2010). NEPA outlines a set of procedures that requires agencies to prepare a detailed environmental impact statement for major federal actions that significantly affect the environment. 42 U.S.C. § 4332(C) (2006).

I. BACKGROUND

A. *The Setting in California*

California has an air-pollution problem related to its consumption of natural gas.⁷ The combustion of any natural gas releases several pollutants, including nitrogen oxide (NO_x),⁸ a chemical precursor of ozone and particulate matter, two federally regulated air pollutants.⁹ But not all natural gas is created equal. Natural gas varies based on hydrocarbon composition, resulting in different levels of NO_x emissions upon combustion.¹⁰ The changing gas-supply profile, due in part to increasing liquefied natural gas (LNG) imports, prompted the industry to define “interchangeability” indices for natural gas compositions.¹¹ An industry group recommended the Wobbe Index (WI) as the most robust.¹²

The WI was relevant in *South Coast Air Quality Management District v. Federal Energy Regulatory Commission (South Coast)* because NO_x emissions and WI values are closely related: NO_x emissions tend to rise as the WI value of a given quantity of natural gas increases.¹³ The five-year historical average WI value of natural gas burned in the South Coast Air Basin (Basin) is 1332.¹⁴ The WI values of foreign-sourced LNG are generally higher,¹⁵ with the WI values of some supplies in excess of 1400.¹⁶ The California Public Utilities Commission’s (CPUC) WI maximum allowable value of 1385 would provide regulatory certainty to LNG developers looking to introduce LNG into the

7. See, e.g., NAT’L RESEARCH COUNCIL, AIR QUALITY MANAGEMENT IN THE UNITED STATES 40 (2004). The Basin struggles to a greater degree than other urban areas to meet federal standards for several pollutants, including ozone and particulate matter. S. COAST AIR QUALITY MGMT. DIST., FINAL 2007 AIR QUALITY MANAGEMENT PLAN 2-4 (2007).

8. See generally Paulina Jaramillo et al., *Comparative Life-Cycle Air Emissions of Coal, Domestic Natural Gas, LNG, and SNG for Electricity Generation*, 41 ENVTL. SCI. & TECH. 6290 (2007) (listing the greenhouse gas, SO_x, and NO_x life-cycle emissions of electricity generated by the combustion of various fuels).

9. *S. Coast*, 621 F.3d at 1089.

10. NATURAL GAS COUNCIL (NGC) INTERCHANGEABILITY WORK GROUP, WHITE PAPER ON NATURAL GAS INTERCHANGEABILITY AND NON-COMBUSTION END USE 4–5, 12 (2005) [hereinafter NGC WHITE PAPER].

11. *Id.* at 2–3. “Interchangeability” is defined as “the ability to substitute one gaseous fuel for another in a combustion application without materially changing operational safety, efficiency, performance, or materially increasing air pollutant emissions.” *Id.* at 2 (emphasis added).

12. *Id.* at 18.

13. *S. Coast*, 621 F.3d at 1089.

14. *Id.*

15. *Id.*

16. NAT’L ASS’N OF STATE REGULATORY COMM’RS, LIQUEFIED NATURAL GAS: AN OVERVIEW OF THE ISSUES FOR STATE PUBLIC UTILITY COMMISSIONS 14 (2005).

Basin.¹⁷ However, this regulatory certainty would likely lead to increased NO_x emissions.¹⁸

B. *The Statutes*

South Coast involved issues related to the National Environmental Policy Act (NEPA),¹⁹ the Natural Gas Act,²⁰ and the Clean Air Act.²¹ However, the dispute in *South Coast* primarily centered on the obligations of the Federal Energy Regulatory Commission (FERC) under NEPA. NEPA itself does not mandate particular results, but simply outlines a set of “action-forcing”²² procedures that require agencies to take a “hard look” at environmental consequences of a proposed action.²³ One of NEPA’s purposes is to ensure that the federal agency has detailed information concerning environmental impacts of the proposed action.²⁴ It requires the agency to prepare a detailed environmental impact statement (EIS) for “major federal actions significantly affecting the quality of the human environment.”²⁵ The action-forcing mechanism, the EIS, is where the rubber meets the road by ensuring “public officials make decisions that are based on [an] understanding of environmental consequences.”²⁶

C. *The Pipeline*

South Coast concerned North Baja Pipeline, LLC’s (North Baja) application to modify its pipeline, as submitted to FERC.²⁷ North Baja operates a nearly eighty-mile interstate natural gas pipeline that extends from Arizona, through southeastern California, to a point on the international border between Arizona and Mexico.²⁸ The pipeline supplies natural gas from the United States to Mexico, where it connects with a Sempra Energy pipeline.²⁹

17. Re Policies and Rules to Ensure Reliable, Long-Term Supplies of Natural Gas, 252 Pub. Util. Rep. 4th (PUR) 1, at 72 (Cal. Pub. Utils. Comm’n, Sept. 21, 2006) (final order) [hereinafter CPUC Final Order].

18. *See id.* at 49–61.

19. *See* 42 U.S.C. § 4321 (2006).

20. *See* 15 U.S.C. § 717 (2006).

21. *See* 42 U.S.C. § 7401 (2006).

22. 40 C.F.R. § 1502.1 (2010).

23. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *see also* James J. Hoecker, *The NEPA Mandate and Federal Regulation of the Natural Gas Industry*, 13 ENERGY L.J. 265, 265 (1992) (“NEPA is more procedural than prophylactic.”).

24. *S. Coast*, 621 F.3d 1085, 1092 (9th Cir. 2010).

25. 42 U.S.C. § 4332(C) (2006).

26. 40 C.F.R. § 1500.1(c) (2010). The EIS provides a discussion of significant environmental impacts and reasonable alternatives that minimize adverse impacts or enhance the quality of the human environment. 40 C.F.R. § 1502.1 (2010).

27. *S. Coast*, 621 F.3d at 1089.

28. *Id.*

29. *Id.*; *North Baja Pipeline*, 121 FERC ¶ 61,010, 61,032 (2007).

In February 2006, North Baja filed an application with FERC to expand the pipeline in order to allow the importation of LNG from Mexico into the United States.³⁰ As part of the expansion, an interconnection was proposed from the pipeline to an existing Southern California Gas Company (SoCalGas) compressor station located in Riverside County, California.³¹ The SoCalGas interconnection would enable consumption of foreign-sourced LNG in the Basin.³²

In June 2007, FERC and other agencies issued a final EIS for the project.³³ The final EIS did not analyze any air-quality impacts resulting from the consumption of foreign-sourced LNG supplied by the pipeline.³⁴ Instead, FERC points to the fact that any LNG introduced into California by the pipeline would necessarily meet CPUC's natural gas quality standard.³⁵ The South Coast Air Quality Management District (the District)³⁶ intervened in November 2006 on grounds related to the purported inadequacy of the final EIS.³⁷ In October 2007, FERC authorized the expansion as requested by North Baja.³⁸

II. ANALYSIS

A. South Coast Held Reliance on CPUC's WI Maximum Value to Satisfy NEPA Was Reasonable

The District contended that, because of the purported nexus between FERC approval of the pipeline and consumption of foreign-sourced LNG in the Basin,³⁹ FERC should have analyzed the air-quality impact resulting from consumption of foreign-sourced LNG supplied by the pipeline.⁴⁰ The District argued that FERC's reliance on the fact that CPUC's WI maximum value of

30. *North Baja Pipeline*, 121 FERC ¶ 61,010, 61,032.

31. *Id.* ¶¶ 61,034–35 n.9.

32. *Id.* ¶ 61,045 n.75. However, not all natural gas delivered to the SoCalGas interconnection would necessarily flow to the Basin. *See id.*

33. *See* Notice of Availability, 72 Fed. Reg. 33,221 (June 15, 2007).

34. *North Baja Pipeline*, 121 FERC ¶ 61,010, 61,038.

35. *Id.* ¶ 61,039.

36. The District is the California state governmental body charged with regulating air pollution in the South Coast Air Basin, which includes Orange County and the non-desert portions of Los Angeles, Riverside, and San Bernardino Counties. *See* CAL. HEALTH & SAFETY CODE § 40402 (West 2010).

37. *North Baja Pipeline*, 121 FERC ¶ 61,010, 61,035.

38. *Id.* ¶ 61,010.

39. *Id.* ¶ 61,044.

40. *S. Coast*, 621 F.3d 1085, 1093 (9th Cir. 2010). The court apparently believed that “[FERC] had considered [the emissions impact of the consumption of foreign-sourced LNG supplied by the Pipeline] in its 250-page EIS.” *Id.* However, FERC admitted it did not consider this particular impact in its EIS, instead relying on the fact that the CPUC's WI maximum value of 1385 necessarily would apply. *North Baja Pipeline*, 121 FERC ¶ 61,073, 61,613.

1385 would be the upper limit could not substitute for FERC's own emissions analysis.⁴¹ The District alleged that this analytical limitation violated NEPA.⁴²

The *South Coast* court rejected the District's arguments and upheld the EIS.⁴³ The court framed its opinion around the creation of FERC's jurisdiction,⁴⁴ interpreted narrowly to extend only to those areas outside of state regulatory reach.⁴⁵ Notably, the Hinshaw Amendment⁴⁶ to the Natural Gas Act explicitly removes intrastate pipelines, such as the SoCalGas interconnection, from the purview of FERC.⁴⁷ Therefore, the court found that state agencies should regulate "all aspects related to the direct consumption of gas"—here, the state agency is the CPUC.⁴⁸

In consideration of these historic limits on FERC's authority, the court held that NEPA cannot compel FERC to analyze anything outside of its jurisdictional limits.⁴⁹ Generally, nor can NEPA be used to indirectly expand the limits on FERC's authority.⁵⁰ Given the CPUC's authority over quality standards related to the direct consumption of natural gas, the court found FERC's reliance on the CPUC's standard reasonable "even if CPUC's conclusions were somehow incorrect."⁵¹

B. South Coast in Light of the Underlying CPUC Proceeding

The CPUC proceeding investigated, among other things, the revision of California natural gas quality standards.⁵² The CPUC adopted the revision without environmental impact review and based on a thin evidentiary record. The administrative law judge (ALJ) who oversaw the CPUC proceeding found that the California Environmental Quality Act,⁵³ the state-level counterpart of

41. Reply Brief for Petitioner at 2, *S. Coast*, 621 F.3d 1085, No. 08-72265 (9th Cir. Jan. 21, 2009) (opining that FERC cannot "outsource its legal obligation to prepare a complete environmental analysis").

42. *S. Coast*, 621 F.3d at 1089–90. The District also alleged violations of Natural Gas Act and Clean Air Act. *Id.*

43. *Id.* at 1101.

44. *See id.* at 1091.

45. *Mich. Consol. Gas Co. v. Panhandle E. Pipe Line Co.*, 887 F.2d 1295, 1299 (6th Cir. 1989).

46. The Hinshaw Amendment exempts pipelines that receive natural gas from facilities that are within or at the boundary of a state, if all gas is ultimately consumed within the state and subject to that state's regulatory commission. Monica Berry, *Liquefied Natural Gas Import Terminals: Jurisdiction Over Siting, Construction, and Operation in the Context of Commerce Clause Jurisprudence*, 26 ENERGY L.J. 135, 139 (2005) (citing 15 U.S.C. § 717(c) (2000)).

47. *S. Coast*, 621 F.3d at 1091 (citing *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 284 n.3 (1997)). FERC can consider a matter beyond its jurisdiction if there would otherwise be a regulatory gap, but not if Congress reserved jurisdiction within another agency. *Altamont Gas Transmission Co. v. Fed. Energy Regulatory Comm'n*, 92 F.3d 1239, 1248 (D.C. Cir. 1996).

48. *S. Coast*, 621 F.3d at 1092.

49. *Id.*

50. *See Natural Res. Def. Council v. EPA*, 822 F.3d 104, 129 (D.C. Cir. 1987).

51. *S. Coast*, 621 F.3d at 1096 (emphasis added).

52. CPUC Final Order, *supra* note 17, at 4.

53. CAL. PUB. RES. CODE § 21000 (West 2010).

NEPA,⁵⁴ compelled environmental review of the revision.⁵⁵ The five politically appointed commissioners of the CPUC overruled the ALJ and ordered that environmental review of the revision was not needed.⁵⁶ The District's judicial challenge to this order was unsuccessful.⁵⁷

Instead of relying on environmental review, the CPUC relied on the interim recommendations from a white paper by members of the Natural Gas Council (NGC), an industry trade group,⁵⁸ to establish the WI maximum value of 1385.⁵⁹ The NGC white paper made no effort to conceal a litany of largely unaddressed concerns related to increasing the WI maximum value, including non-compliance with emission requirements.⁶⁰ Even an industry respondent in the CPUC proceeding conceded "the record [was] notable for its lack of the solid empirical data."⁶¹

The details surrounding the paper's creation further calls into question whether the CPUC should have relied on the recommendations outlined in a single industry white paper. A self-selected group of industry participants drafted the NGC white paper, and did not state which participants endorsed the interim recommendations.⁶²

Some of the same industry participants who authored the NGC white paper had much at stake in the FERC and CPUC proceedings. SoCalGas was a respondent in the CPUC proceeding⁶³ and was the real party in interest to the proposed interconnection with the pipeline.⁶⁴ Sempra Energy was the real party interest to a pipeline in Mexico that connects with the pipeline.⁶⁵ And, Sempra Energy owns SoCalGas.⁶⁶ That the same industry participants were authors of

54. *S. Coast*, 621 F.3d 1085, 1094 (9th Cir. 2010).

55. WEISSMAN, *supra* note 4, at 194–95.

56. Reply Brief for Petitioner at 13 n.1, *S. Coast*, 621 F.3d 1085, No. 08-72265 (9th Cir. Jan. 21, 2009); *see* CPUC Final Order, *supra* note 17, at 75. In response, the California attorney general submitted an amicus curiae brief urging the CPUC to reconsider its decision and conduct an environmental review. Brief for California Attorney General Bill Lockyer as Amicus Curiae Supporting Rehearing Requestor, Re Policies and Rules to Ensure Reliable, Long-term Supplies of Natural Gas, Rulemaking No. 04-01-025 (Cal. Pub. Utils. Comm'n Oct. 27, 2006).

57. *See S. Coast Air Quality Mgmt. Dist. v. Cal. Pub. Utils. Comm'n*, No. S151156, 2008 Cal. LEXIS 8866 (Cal. July 16, 2008).

58. The NGC is "an organization made up of the representatives of the trade associations of the different sectors of the natural gas industry." Provisions Governing Natural Gas Quality and Interchangeability in Interstate Natural Gas Pipeline Company Tariffs, 115 FERC ¶ 61,325, 62,158 n.17 (June 15, 2006) (statement of policy).

59. CPUC Final Order, *supra* note 17, at 74.

60. NGC WHITE PAPER, *supra* note 10, at 19. Other unaddressed concerns outlined in the NGC white paper include increased soot formation, damage to end-use equipment, and data limitations related to end-use equipment and natural gas supplies. *Id.* at 18–20.

61. WEISSMAN, *supra* note 4, at 128–29 (emphasis added).

62. *See* NGC WHITE PAPER, *supra* note 10, at 31–32.

63. Re Policies and Rules to Ensure Reliable, Long-Term Supplies of Natural Gas, 230 Pub. Util. Rep. 4th (PUR) 1, at 3 (Cal. Pub. Utils. Comm'n, Jan. 22, 2004).

64. *See S. Coast*, 621 F.3d 1085, 1089 (9th Cir. 2010).

65. *See* North Baja Pipeline, L.L.C., 121 FERC ¶ 61,010, 61,032 (2007).

66. SEMPRA ENERGY, ANNUAL REPORT 3 (2009).

the NGC white paper and stakeholders to the CPUC and FERC proceedings suggest a captured regulatory process.

C. Reconciling South Coast with the Policies and Purposes of NEPA

The holding in *South Coast* is unsettling given that the policy motivations supporting further environmental review are consistent and clear. NEPA is “our basic national charter for protection of the environment,”⁶⁷ and expresses a determination by Congress that “procrastination on environmental concerns is no longer acceptable.”⁶⁸ NEPA itself requires that environmental review occur sooner rather than later, and before “any irreversible and irretrievable commitments of resources.”⁶⁹ Federal agency decisions “to act now and deal with the environmental consequences later . . . [are] plainly inconsistent with the broad mandate of NEPA.”⁷⁰ Therefore, it is difficult to reconcile the holding in *South Coast* with the spirit of NEPA.

CONCLUSION

By not requiring further examination under NEPA, *South Coast* highlighted a squandered opportunity to analyze previously unaddressed environmental concerns, such as poorly understood end-use emissions from foreign-sourced LNG. The court’s holding on jurisdictional grounds is inconsistent with NEPA’s unambiguous language and clear congressional intent to encourage environmental review as early as possible.

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67. 40 C.F.R. § 1500.1(a) (2010).

68. *Found. for N. Am. Wild Sheep v. U.S. Dep’t of Agric.*, 681 F.2d 1172, 1181 (9th Cir. 1982). In the CPUC proceeding, the District argued that the approval of the revision without environmental review would be to proceed in this procrastinating fashion. WEISSMAN, *supra* note 4, at 124–25 (“The District argues that in essence, the . . . proposal is to act now and respond to the consequences later. For example, the testimony indicated that SoCalGas would follow a ‘rollout’ approach that would largely rely on responding to difficulties encountered by sources after the introduction of [foreign-sourced LNG with high WI values].”).

69. *See* 42 U.S.C. § 4332(C)(v) (2010); 40 C.F.R. § 1500.1(b).

70. *Found. for N. Am. Wild Sheep.*, 681 F.2d at 1181.

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