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***Vecinos para el Bienestar de la Comunidad Costera v. FERC*, 6 F.4th
1321 (D.C. Cir. 2021)**

Malcolm M. Gilbert*

I. INTRODUCTION

In 2019, the Federal Energy Regulatory Commission (“FERC”) issued Certificate Orders approving project proposals for three liquefied natural gas (“LNG”) export terminals and two natural gas pipelines to supply one terminal (collectively, “Projects”).¹ If constructed, all of the terminals would be situated along a shipping channel near Brownsville, TX, where the median income is roughly half the national average, and 93-percent of the population identifies as Hispanic or Latinx.² The two parallel pipelines would bisect four Texas counties over their 135-mile course before reaching Brownsville.³ In *Vecinos para el Bienestar de la Comunidad Costera* (“*Vecinos*”) *Vecinos para el Bienestar de la Comunidad* (“Petitioners”) challenged the Orders, arguing ozone pollution from the Projects would disproportionately affect lower-income, minority individuals in Brownsville-area environmental justice communities.⁴ Further, Petitioners argued the approval orders did not adequately rationalize the exclusion of a social cost of carbon tool from FERC’s environmental impact statements (“EISs”), especially considering their projection that the construction, operations, and export activity from the

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1. *Order Granting Authorization Under Section 3 of the Natural Gas Act*, 169 FERC ¶ 61, 130 (2019); *Order Granting Authorizations Under Sections 3 and 7 of the Natural Gas Act*, 169 FERC ¶ 61, 131 (2019); *Order Granting Authorization Under Section 3 of the Natural Gas Act*, 169 FERC ¶ 61, 132 (2019) (Hereinafter “FERC Orders”) (Certificate applications for the export terminals were submitted by Rio Grande LNG, LLC (“Rio Grande”); Texas LNG, LLC (“Texas LNG”); and Annova, LLC (“Annova”). Applications for the two natural gas pipelines were submitted by a Rio Grande subsidiary, Rio Bravo Co. (“Rio Bravo”). Before oral arguments, intervenor Annova notified FERC they were abandoning their terminal project, and the Court granted permission to withdraw from court proceedings); *see also*, 15 U.S.C. § 717(f)(c) (2018) (requiring any natural gas developer to obtain a Certificate of Public Convenience or Necessity (“Certificate Order”) from FERC prior to development in order to demonstrate why the project is in the “public interest”).

2. U.S. Census Bureau, *Brownsville City, Texas*, QUICKFACTS, <https://perma.cc/BY87-NFPY> (last updated July 1, 2019).

3. Sierra Club Lone Star Chapter, *Rio Bravo Pipeline*, LOWER RIO GRANDE VALLEY GROUP, <https://perma.cc/V2VL-8HGP> (last visited Sept. 10, 2021).

4. 6 F.4th 1321, 1327 (D.C. Cir. 2021).

Projects would emit a significant amount of greenhouse gases and contribute to anthropogenic climate change.⁵

This case note will explore the role that environmental justice and climate change play in Federal agency decision-making processes, analyze the legal framework for the *Vecinos* decision, and discuss how the outcome of this litigation could affect similar project proposals in future Federal Energy Regulatory Commission decisions.

II. PROCEDURAL HISTORY

Petitioners are residents of Laguna Heights, TX, who are concerned that increased shipping traffic in the Brownsville Shipping Channel will have disruptive economic effects and negative health impacts on area residents.⁶ The local economy depends on tourism and commercial fishing, which residents fear will be disrupted by gas tankers.⁷ By contrast, the Projects' developers contend they will bring thousands of direct and indirect jobs to the area, where the unemployment rate is higher than the national average, at 6.5-percent.⁸ Texas LNG and RioGrande LNG ("Developers") anticipate processing roughly five billion cubic feet of LNG per day.⁹ Over the course of a year, production at their facilities would amount to approximately 0.7-percent of the 700 billion cubic feet of LNG the U.S. exported to the global market in 2020.¹⁰

In November 2019, Petitioners filed two separate rehearing requests to address deficiencies with the Orders under the National Environmental Policy Act ("NEPA").¹¹ They alleged the Projects are not

5. Br. Resp't FERC 34, *Vecinos para el Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321 (D.C. Cir. 2021) (Nos. 20-1093–94 (consolidated)); *see also*, Christina Swanson, Amanda Levin, *Sailing to Nowhere: Liquefied Natural Gas Is Not An Effective Climate Strategy*, Natural Resources Defense Council (December 2020), <https://perma.cc/5NYG-J2VZ> (explaining that greenhouse gas emissions from the extraction, transport, liquefaction, and re-gasification of LNG can be almost equal to the emissions produced from the actual burning of the gas, effectively doubling the climate impact of each unit of energy created from gas transported overseas).

6. Texas RioGrande Legal Aid, *Local Residents Sue Federal Energy Regulatory Commission for Approving Fracked Gas Facility* (Feb. 20, 2020), <https://perma.cc/UE6L-RVD3>.

7. *Id.*

8. Miranda Wilson, *Gas Projects Reveal FERC's Environmental Justice Conundrum*, E&E NEWS ENERGYWIRE (Aug. 3, 2021), <https://perma.cc/5C6D-BX8C>.

9. NEXTDECADE, *Community Opportunity: Rio Grande LNG*, <https://perma.cc/72GY-B9LU> (last visited Oct. 8, 2021); *see also* Texas LNG, *Project Overview*, <https://perma.cc/ALC5-GME3> (last visited Oct. 8, 2021).

10. Department of Energy, *Liquefied Natural Gas*, OFFICE OF FOSSIL ENERGY AND CARBON MANAGEMENT, <https://perma.cc/E637-ESK6> (last visited Oct. 8, 2021).

11. FERC, *Process for Natural Gas Certificates*, <https://perma.cc/JQJ3-EQPW> (last visited Sept. 10, 2021) (FERC issues a Certificate

in the public interest because FERC’s EISs failed to take NEPA’s requisite “hard look” at disparate impacts on EJCs, and because they did not adequately explain why FERC rejected using a social cost of carbon (“SCC”) tool to assess climate impacts.¹² In early 2020, FERC denied Petitioners’ rehearing requests, arguing its EISs sufficiently addressed Petitioners’ concerns.¹³ Petitioners then filed a petition for judicial review in the D.C. Circuit.¹⁴

III. POLITICAL BACKGROUND

The political background of environmental justice and climate change issues are central to understanding how DOE and FERC integrate the issues into decision-making processes and provides an essential backdrop to the Court’s decision. This section will detail the political history and modern standing of each issue to provide appropriate context for the Court’s legal framework.

A. Growing Strength in Environmental Justice

Historically, pollution from oil, gas, and coal emissions has disproportionately affected low-income African American communities in the United States.¹⁵ More generally, industrial pollution has affected all lower-income demographic groups more than middle and upper-class groups.¹⁶ Climate change is expected to exacerbate the negative health impacts of pollution and industrial development on lower-income communities.¹⁷

Environmental justice advocates mobilized around racial inequities in industrial siting and pollution during the Civil Rights Era of

Order as the final step in a sequence of events surrounding a project’s initial application and subsequent public comment and environmental impact analyses).

12. Vecinos para el Bienestar de la Comunidad Costera v. FERC, 6 F.4th 1321, 1327 (D.C. Cir. 2021).

13. *Id.*

14. *Id.*

15. Ihab Mikati, Adam F. Benson, Jennifer Richmond-Bryant, *Disparities in Distribution of Particulate Matter Emission Sources by Race and Poverty Status*, AMERICAN JOURNAL OF PUBLIC HEALTH, Apr. 2018, at 480–485; see also, Robert D. Bullard, *Blacks and the Environment*, HUMBOLDT JOURNAL OF SOCIAL RELATIONS, 1987, at 165–84 (“[D]isadvantaged people are largely victims of middle- and upper-class pollution because they usually live closest to the sources of pollution—power plants, industrial installations, and in central cities where vehicle traffic is heaviest . . .”).

16. Bullard, *supra* note 17, at 165–84.

17. Maxine Burkett, *Just Solutions to Climate Change: A Climate Justice Proposal for a Domestic Clean Development Mechanism*, 56 BUFFALO L. REV. 169, 179 (2008) (citing reports that negative health impacts like pollution-related respiratory illnesses will unevenly affect lower income and minority communities, especially in areas with ozone levels that exceed National Ambient Air Quality Standards).

the 1960s.¹⁸ In the 1980s and early 1990s, localized efforts to protect lower-income communities and start rectifying environmental injustice grew into policymaking at the federal level.¹⁹ In 1994, President Clinton ordered that “each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations.”²⁰ The Order did not create a private right of judicial review, thus it does not have the force of law.²¹

The Order did, however, direct the Clinton Administration to establish an Interagency Working Group on Environmental Justice.²² In consultation with the Environmental Protection Agency (“EPA”) and other agencies, the Council on Environmental Quality issued guidance in 1997 for agencies to follow in addressing environmental justice in the NEPA process.²³ The guidance recommends that to comply with NEPA, agencies should assess the impact and consequences of their decisions on environmental justice communities (“EJCs”).²⁴ Further, agencies are required by NEPA to take a “hard look” at “ecological . . . economic, social, [and] health” impacts of agency decisions.²⁵

Critics argue Executive Order 12,898 has not adequately addressed environmental justice issues because the Council on Environmental Quality guidance lacks legal authority. Gridlock in Congress continues to stymie efforts to incorporate environmental justice guidance into law, so the executive branch controls progress on achieving

18. EPA, *Environmental Justice Timeline*, <https://perma.cc/FPS6-DYB8> (last visited Sept. 23, 2021).

19. *Id.*

20. FEDERAL ACTIONS TO ADDRESS ENVIRONMENTAL JUSTICE IN MINORITY POPULATIONS AND LOW-INCOME POPULATIONS, Exec. Order No. 12,898, § 1-101, 59 Fed. Reg. 7,629 (Feb. 11, 1994); *see also* EPA, *Environmental Justice*, <https://perma.cc/54LS-KHBS> (last visited Oct. 9, 2021) (defining environmental justice as the “fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies”).

21. *Id.* § 6-609.

22. *Id.* § 1-102.

23. Executive Office of the President, *Environmental Justice: Guidance Under the National Environmental Policy Act*, COUNCIL ON ENVTL. QUALITY (Dec. 10, 1997), <https://perma.cc/7MJ4-9GF8>.

24. EPA, *Federal Interagency Working Group on Environmental Justice (EJ IWG)*, ENVIRONMENTAL JUSTICE, <https://perma.cc/SM2J-UW8W> (last updated Aug., 2021) (defining EJCs broadly as minority and low-income populations that are susceptible to disproportionately high and adverse human health or environmental effects of EPA programs); *see also* EPA, *Climate Change and Social Vulnerability in the United States: A Focus on Six Impacts*, OFFICE OF ATMOSPHERIC PROGRAMS (Sept. 21, 2021), <https://perma.cc/HSC3-QJ37> (defining “low income” individuals as those living in households with income that is 200-percent of the poverty level or lower).

25. 40 C.F.R. § 1508.8 (2002).

environmental justice.²⁶ Administration changes often reverse agency priorities and undermine that progress.²⁷ In January 2021, President Biden re-prioritized the aims of Executive Order 12,898 by rescinding Trump Era rulemakings, policies, and executive orders that sought to deregulate industry at the cost of environmental justice and progressive climate policy.²⁸ President Biden's Executive Order 14,008 catalogs ambitious climate goals that re-prioritize the environmental justice and climate issues under Council on Environmental Quality guidance.²⁹

B. Vacillating Federal Climate Priorities

Improvements in environmental justice are inextricably bound to the existential threat of climate change.³⁰ Climate disasters—drought, hurricanes, floods, and wildfires—disproportionately impact communities who have less mobility than middle- and upper-income communities do to adapt to or recover from them.³¹ Greenhouse gas emissions are the principal cause of anthropogenic climate change. Behind China, the United States is the second largest greenhouse gas emitter in the world.³²

Legislative efforts to curb greenhouse gas emissions in the U.S. and combat anthropogenic climate change have been railroaded by gridlock in Congress, much like environmental justice legislation.³³ Notwithstanding its failures to pass climate legislation, the Obama Administration Council on Environmental Quality and Interagency

26. *Environmental Justice: The Social and Demographic Impact of Environmental Choice*, 4 TREATISE ON ENVIRONMENTAL LAW § 9.1, 4(D)(iii) (Matthew and Bender Co., 2021) (hereinafter "*Environmental Justice*").

27. *See, e.g.*, Brie D. Sherwin, *The Upside Down: A New Reality for Science at the EPA and its Impact on Environmental Justice*, 27 N.Y.U. ENVTL. L.J. 57, 74 (2019) (describing the change in regulatory priorities between the Obama and Trump Administrations); *see also* Uma Outka, Elizabeth K. Warner, *Reversing Course on Environmental Justice Under the Trump Administration*, 54 Wake Forest L. Rev. 393, 413–14 (2019) (describing how the Trump Administration reversed environmental justice priorities in ways that negatively impacted diverse communities, such as the Standing Rock Sioux Tribe in relation to the Dakota Access Pipeline).

28. ENSURING THE FUTURE IS MADE IN ALL OF AMERICA BY ALL OF AMERICA'S WORKERS, Exec. Order No. 14,005, 86 Fed. Reg. 17,7475 (Jan. 28, 2021).

29. TACKLING THE CLIMATE CRISIS AT HOME AND ABROAD, Exec. Order No. 14,008, 86 Fed. Reg. 19,7619 (Feb. 1, 2021); *see* Ellen M. Gilmer, *Biden Bolsters DOJ Focus on Environmental Justice, Climate*, BLOOMBERG LAW (Jan. 27, 2021), <https://perma.cc/UM6Z-MGQ2> (detailing the Biden Administration's climate goals).

30. *Climate Change and Social Vulnerability in the United States: A Focus on Six Impacts*, EPA, 430-R-21-003, 6 (Sept. 21, 2021), <https://perma.cc/4BVM-6CKH> (key findings indicate that because Hispanic and Latinx communities have high participation in weather-exposed industries, they are particularly vulnerable to the effects of climate change).

31. *Id.* at 9.

32. Ian Tiseo, *Global CO2 Emissions by Country 2009-2019*, STATISTA (Jan. 4, 2021), <https://perma.cc/M7JC-HCS2>.

33. *Environmental Justice*, *supra* note 28, at 4(D)(iii).

Working Group on SCC published technical guidance for agencies to better assess the costs and benefits of regulations in the context of greenhouse gas emissions and climate change.³⁴ The Council on Environmental Quality guidance provides specific recommendations for agencies to incorporate carbon pricing and discount rates into decision-making processes.

Notably, the *Vecinos* proceedings began during the Trump Administration.³⁵ President Trump disbanded the Interagency Working Group on SCC in March 2017, and his Office of Management and Budget lowered Obama-era discount rates.³⁶ Along with environmental justice issues, President Biden reprioritized SCC policies and restored Obama-era Council on Environmental Quality guidance under Executive Order 13,990.³⁷ Biden's Office of Management and Budget reset discount rates to Obama-era standards, and the Interagency Working Group on SCC has reconvened (it is now called the Interagency Working Group on Social Cost of Greenhouse Gases) to develop guidance that better reflects a fast-evolving understanding of climate change.³⁸

IV. LEGAL FRAMEWORK

To lay out the legal framework for the *Vecinos* decision, the D.C. Circuit Court outlined the regulatory decision-making authority of the Department of Energy ("DOE") and FERC regarding environmental justice and climate issues.

A. *The Natural Gas Act of 1938*

FERC and DOE share responsibility for regulating the domestic transport and export of natural gas.³⁹ DOE regulates the export of LNG, and the Natural Gas Act requires FERC's approval for the construction and operation of gas pipelines.⁴⁰ DOE delegated siting, construction, and operations authority to FERC, meaning FERC is responsible for decision-

34. Interagency Working Group on Social Cost of Carbon, *Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866*, 3, (Feb., 2010), <https://perma.cc/3XLF-FZZS>.

35. FERC Orders, *supra* note 1.

36. PROMOTING ENERGY INDEPENDENCE AND ECONOMIC GROWTH, Exec. Order No. 13,653, 82 Fed. Reg. 16093, 16093-16097 (Mar. 31, 2017); *see also* Dana Nuccitelli, *The Trump EPA is Vastly Underestimating the Cost of Carbon Dioxide Pollution to Society, New Research Finds*, YALE CLIMATE CONNECTIONS (July 30, 2020), <https://perma.cc/Q6K6-5FFE>.

37. Interagency Working Group on Social Cost of Greenhouse Gases, *Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide: Interim Estimates under Executive Order 13990*, 5 (Feb. 2021), <https://perma.cc/NR7H-6PG3>.

38. *Id.*

39. 42 U.S.C. § 7151(b) (2018); 15 U.S.C. § 717f(c) et seq.; *see also* Pub. L. No. 95-91, 91 Stat. 565 (1977).

40. 15 U.S.C. § 717f (c)(1)(A).

making surrounding the location and construction of pipelines and export terminals.⁴¹

The Projects implicate FERC’s authority under the Natural Gas Act.⁴² FERC *must* authorize the construction and operation of a proposed LNG facility unless it determines that the facility will not be consistent with the public interest.⁴³ Conversely, FERC *may not* authorize the construction and operation of a proposed interstate LNG pipeline unless it determines the pipeline is or will be required by the present or future public convenience and necessity.⁴⁴

To discern whether a project is in the “public convenience and necessity,” FERC is required to consider conservation and environmental issues, as well as impacts on gas consumers and the development of gas supplies.⁴⁵ FERC’s “Certificate Policy Statement” further clarifies the public convenience and necessity standard, providing that FERC will issue a certificate if a project’s public benefits outweigh its adverse effects (i.e. meeting unserved market demand versus deleterious environmental impacts on surrounding communities).⁴⁶ The certificate gives FERC legal authority to exercise eminent domain in land acquisitions necessary for the pipelines’ construction.⁴⁷

B. NEPA

NEPA is the Nation’s “basic national charter for protection of the environment,”⁴⁸ and it requires that an EIS must be prepared if a decision constitutes a major federal action that will significantly affect the quality of the human environment.⁴⁹ Under NEPA, a federal agency must take a “hard look” at the potential impacts of its decision.⁵⁰ A “hard look” requires considerations of alternatives, environmental impacts, and any adverse environmental effects that cannot be avoided should the proposed

41. *Delegation Order No. 00-004.00A*, § 1.21.A, (Dept. Energy May 16, 2006), <https://perma.cc/K8KG-F226> (May 16, 2006) (renewing delegation to FERC over the construction and operation of LNG facilities); *see also* *Vecinos para el Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321, 1325 (D.C. Cir. 2021).

42. 15 U.S.C. § 717b; 15 U.S.C. § 717f.

43. 15 U.S.C. § 717b(a).

44. *Id.*; *see also* Valerie L. Chartier-Hogancamp, *Fairness and Justice: Discrepancies in Eminent Domain for Oil and Natural Gas Pipelines*, 49 *TEX. ENVTL. L.J.* 67, 74 (2019).

45. *Minisink Residents for Env'tl. Pres. & Safety v. FERC*, 762 F.3d 97, 101 (D.C. Cir. 2014); *see also* *Sierra Club v. FERC*, 867 F.3d 1357, 1373 (D.C. Cir. 2017).

46. *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61, 227 (1999); *clarified*, 90 FERC ¶ 61, 128 (2000); *further clarified*, 92 FERC ¶ 61, 094 (2000); *see also* *City of Oberlin, Ohio v. FERC*, 937 F.3d 599, 602 (D.C. Cir. 2019).

47. 15 U.S.C. § 717f(h).

48. *Ctr. For Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1185 (9th Cir. 2008) (citing 40 C.F.R. § 1500.1(a)).

49. 42 U.S.C. § 4332(2)(C) (2018).

50. *Ctr. For Biological Diversity*, 538 F.3d at 1194.

action take effect.⁵¹ Agencies must also consider foreseeable indirect effects, connected actions, similar actions, and account for the cumulative effects of any incremental impacts, added to other past, present, and reasonably foreseeable future actions.⁵²

C. *The Administrative Procedures Act (“APA”)*

Courts review NEPA decisions against the APA “arbitrary or capricious” standard.⁵³ In reviewing an agency decision, the Court “will not ‘flyspeck’ an agency’s environmental analysis, looking for any deficiency no matter how minor.”⁵⁴ Instead, the Court looks to determine whether an agency gave the matter the requisite “hard look” under NEPA, ensuring the agency adequately considered the environmental impacts of its actions and its decision is not arbitrary or capricious.⁵⁵ The Court gives deference to the agency when evaluating data within the agency’s technical expertise.⁵⁶

V. DISTRICT OF COLUMBIA CIRCUIT COURT RULING

The Court remanded FERC’s approval orders for three reasons. First, the EJCs FERC identified did not adequately encompass the region that would be impacted by ozone emissions.⁵⁷ Second, FERC failed to respond to Petitioners’ complaint that FERC was required to use an SCC tool but refused to.⁵⁸ Finally, the Court found that FERC erroneously awarded Rio Bravo a Certificate of Public Convenience and Necessity because of its failure to satisfy NEPA, ruling that a “hard look” is necessary to reasonably balance a project’s economic benefits with its negative impacts and establish public interest.⁵⁹

The Court remanded without vacatur because it expected FERC could remedy deficiencies in its EIS on remand without causing inequitable delay to the project development.

A. *Did Census Blocks Adequately Represent Potentially Affected EJCs?*

FERC projected the impact of the Projects on EJCs by quantifying the amount of air pollution that would affect individuals within two-mile

51. *Id.*

52. 40 C.F.R. § 1508.8(b); *see also* Delaware Riverkeeper Network v. FERC, 753 F.3d 1304, 1309 (D.C. Cir. 2014) (citing 40 C.F.R. § 1508.25).

53. 5 U.S.C. § 706(2)(A) (2018).

54. Nevada v. U.S. Dep’t of Energy, 457 F.3d 78, 93 (D.C. Cir. 2006).

55. Nat’l Comm. for the New River v. FERC, 373 F.3d 1323, 1327 (D.C. Cir. 2004).

56. *Id.*

57. Vecinos para el Bienestar de la Comunidad Costera v. FERC, 6 F.4th 1321, 1330 (D.C. Cir. 2021).

58. *Id.* at 1329.

59. *Id.* at 1331.

radius census blocks surrounding the project area.⁶⁰ The Court held that FERC's EIS did not adequately explain why a two-mile range adequately represented potential EJC health impacts when the EISs acknowledged air pollution had the potential to reach a distance as far as thirty-one miles away.⁶¹ FERC was required under NEPA to provide a reasonable and adequate explanation for its decision to delineate the area potentially affected by the project by making a “rational connection between the facts found and the decision made.”⁶² The Court stipulated that on remand, FERC must provide that explanation and further explain whether its conclusions still comport with its position that the projects would not disproportionately and adversely affect minority and low-income residents.⁶³

B. Should Climate Impacts have been Analyzed?

FERC estimated the amount of greenhouse gas emissions associated with the construction and operation of the Projects.⁶⁴ However, it concluded it could not determine the significance of the Projects' impact on climate change because there is not a universally accepted method for doing so.⁶⁵ The Court ruled that if FERC cannot obtain information relevant to reasonably foreseeable significant adverse impacts, like impacts surrounding climate change, under 40 C.F.R. § 1502.21(c) it must include an evaluation of the impacts based upon theoretical approaches or methods generally accepted in the science community.⁶⁶ Petitioners alleged FERC did not include any such evaluation within its EISs. The Court held that, regardless of FERC's statutory obligation to analyze the climate impacts of the Projects, under 40 C.F.R. § 1502.21(c), it was incumbent on FERC to respond to a central statutory question raised by Petitioners.⁶⁷ The Court held that because FERC raised the issue of climate change in its EIS, but failed to respond to Petitioners' complaints, its EIS was deficient.⁶⁸ The Court ordered that on remand, FERC must explain whether the statute calls for it to apply an SCC tool or some other generally accepted protocol, and if not, to provide a reasonable explanation for its decision.⁶⁹

C. Is the Rio Bravo Pipeline in the Public Interest?

60. Br. Resp't FERC 41.
 61. *Vecinos*, 6 F.4th at 1330 (D.C. Cir. 2021).
 62. *Id.* (citing *Cmtys. Against Runway Expansion, Inc. v. F.A.A.*, 355 F.3d at 689 (D.C. Cir. 2004)). Don't abbrev FAA
 63. *Id.* at 20.
 64. Br. Resp't FERC 69.
 65. *Vecinos*, 6 F.4th at 1328.
 66. 40 C.F.R. § 1502.21(c) (2012).
 67. *Vecinos*, 6 F.4th at 1329.
 68. *Id.*
 69. *Id.* at 1330.

The Court held that FERC's failure to adequately explain its use of two-mile radius census blocks indicates its Natural Gas Act public interest analysis was deficient.⁷⁰ During "exceedance events," ambient air quality impact might reach 76.5 parts per billion ("ppb"), exceeding the 70 ppb National Ambient Air Quality Standard ("NAAQS").⁷¹ Further, ozone pollution has the potential to reach a distance as far as thirty-one miles away.⁷² FERC's public interest analysis was not grounded in a "rational connection between the facts found and the decision made."⁷³ If pollution has the potential to impact individuals thirty-one miles away, FERC had an obligation to adequately explain why two-mile radius census blocks are an appropriate representation of impacted EJCs.⁷⁴ The Court ordered that on remand, FERC must address whether its conclusion that the projects are in the public interest still holds, or otherwise reasonably explain why it is not obligated to consider them.⁷⁵

VI. ANALYSIS

Although the *Vecinos* Court ruled only on procedural NEPA violations, the substantive disagreements between FERC and Petitioners highlight the transformation that took place during the Trump Era in relation to environmental justice and climate policy. Further, the arguments offer insight into policy issues that are likely to be addressed under the Biden Administration, which has already demonstrated its commitment to doing.

A. FERC's Flexible Rules for Determining Impacts on EJCs

During NEPA review, environmental justice guidelines recommend that agencies take a "hard look" at the impacts its projects have on low-income and minority communities.⁷⁶ Practically, the agencies may choose to use land areas of any size to define EJCs nearby a project if it provides a reasonable explanation for doing so.

FERC argued the Projects would not disproportionately affect EJCs on three bases. First, FERC maintained that because the EJC it identified in two-mile radius census blocks has a similar composition to the rest of South Texas, the census blocks represented the entire region that could be affected by air quality pollution.⁷⁷ Second, it suggested its air quality analysis projects a worst-case scenario, therefore normal

70. *Id.*

71. Br. Resp't FERC 61.

72. *Vecinos*, 6 F.4th at 1330.

73. *Id.*

74. *Id.*

75. *Id.* at 1331.

76. Executive Office of the President, *Environmental Justice: Guidance Under the National Environmental Policy Act*, COUNCIL ON ENVTL. QUALITY (Dec. 10, 1997), <https://perma.cc/7MJ4-9GF8>.

77. Br. Resp't FERC 56.

operations would not have disparate effects on the health of the EJC's it identified in the project area.⁷⁸ Finally, it argued that the local economic benefits outweigh potential negative impacts on the local tourism, fishing economies, and property values.⁷⁹

FERC determined the projects would not disproportionately affect EJC's because its air quality projections were conservative and reflected the worst-case scenario.⁸⁰ During “exceedance events,” ambient air quality impact might reach 76.5 parts per billion (“ppb”), exceeding the 70 ppb National Ambient Air Quality Standard (“NAAQS”). The exceedance event calculations assumed operation of the facilities at full capacity.⁸¹ FERC argued the facilities would ordinarily operate at a low enough capacity such that ambient air quality would not surpass the Standard,⁸² and thus concluded that the NAAQS was a “reasonable proxy for the potential health impacts, including the environmental justice community.”⁸³

FERC also looked at whether the demographic features of different communities surrounding the projects make them particularly susceptible to respiratory disease.⁸⁴ However, Petitioners noted that FERC only addressed the question of whether certain races or ethnic groups would be more susceptible than others, neglecting to consider factors such as age and lack of healthcare access. FERC failed to explain why the NAAQS are the appropriate metric for determining impacts on EJC's *without* consideration of those additional factors.⁸⁵ Further, FERC did not adequately explain options to mitigate the negative health effects from air emissions, such as measures that might reduce air emissions from shipping vessels responsible for liquid natural gas exports.⁸⁶

Finally, Petitioners argued that FERC did not adequately explain potential non-greenhouse gas effects in its conclusion that positive effects on the labor market outweighed negative impacts on property values, the fishing industry, and the tourism economy. In its EISs, FERC found the “cumulative impacts on property values by the three Brownsville projects were not reasonably foreseeable and therefore appropriately omitted from the environmental review,” and the projects would “not be expected to affect regional tourism patterns or the overall level of visitation to the region.”⁸⁷ FERC did not indicate how it reached that conclusion, nor the methods it used to conduct its cost-benefit analysis.⁸⁸

78. Br. Resp't FERC 35-36.

79. Br. Resp't FERC 43.

80. Br. Resp't FERC 35.

81. Br. Resp't FERC 61.

82. Br. Resp't FERC 61.

83. Br. Resp't FERC 61.

84. Br. Resp't FERC 64.

85. Pet'r's Final J. Reply Br. at 23, *Vecinos para el Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321 (D.C. Cir. 2021) (Nos. 20-1093-94 (consolidated)).

86. Pet'r's Final J. Reply Br. 29.

87. Br. Resp't FERC 46.

88. Pet'r's Final J. Reply Br. 51.

Notwithstanding the substantive disagreements surrounding impacts to EJC's, the Court ruled only on the narrow scope of FERC's use of census blocks to describe the Projects' potential impacts on EJC's. The geographic scope of environmental justice analyses is often a sticking point during NEPA review. Agencies may manipulate the scale of land areas used to describe EJC's if they provide a reasonable explanation for doing so.

The juxtaposition between *Vecinos* and a similar decision from this Court demonstrates exactly how agencies can manipulate their analyses to favor particular outcomes.⁸⁹ In *Sierra Club*, the petitioners claimed that proposed natural gas pipeline projects would disproportionately affect low-income and minority groups in Alabama, Georgia, and Florida.⁹⁰ The Court found FERC had done its due diligence by analyzing similar potential health impacts on surrounding communities.⁹¹ Further, FERC had reasonably compared alternate routes with its preferred route and concluded any alternative would pose similar impacts on lower-income and minority communities.⁹²

Notably, FERC used census *tracts* to describe EJC's in *Sierra Club*, rather than their smaller subunit, the census *block*.⁹³ In *Sierra Club*, describing EJC's with census tracts was more suitable for advancing the Sabal Trail Pipeline because the census tracts encompassed distant, more affluent neighborhoods. The census tracts effectively buried pocket minority communities in a broader dataset, even though those groups tend to live much closer to compressors and other harmful gas infrastructure.⁹⁴ By contrast, in *Vecinos*, FERC used much smaller, two-mile census blocks to describe EJC's even though their own data showed a potential for broader regional health impacts. Census blocks were better suited to Developers' goals because they improved the Projects' optics by diminishing the public perception of harm.

As FERC indicated, the demographic composition throughout the rest of South Texas is much like Brownsville.⁹⁵ If FERC broadens the scope of its environmental justice analysis on remand, it will likely find representative census tracts have a similar composition as the two-mile radius census blocks.⁹⁶ Denial of permit vacatur is essentially an invitation from the Court to provide the few changes necessary to satisfy the

89. *Sierra Club v. FERC*, 867 F.3d 1357, 1369 (D.C. Cir. 2017).

90. *Id.*

91. *Id.*

92. *Id.*

93. *Sierra Club*, 867 F.3d at 1370.

94. Sean Sullivan, 'Environmental Justice' at Center of Suit Against FERC's Sabal Trail Approval, S&P GLOBAL MARKET INTELLIGENCE (Apr. 20, 2017), <https://perma.cc/39Y9-TVYG>.

95. Br. Resp't FERC 56.

96. *Id.*

“arbitrary and capricious” standard and advance the projects, much like the outcome of *Sierra Club*.⁹⁷

President Clinton’s Executive Order 12,898 did not create a private right to judicial review.⁹⁸ Further, NEPA does not require that agencies provide more than a “reasonable explanation” for permitting projects with a potentially disproportionate impact on EJs.⁹⁹ The interplay of NEPA and the APA only requires an agency to provide an explanation that is neither arbitrary nor capricious.¹⁰⁰ The outcome of the *Vecinos* decision likely rings hollow with critics of Executive Order 12,898 because it does not provide a new footing for EJC challenges, and instead demonstrates how an agency can manipulate environmental justice analyses to better suit the interests of developers.

B. Trouble with Monetizing Carbon

The courts have consistently recognized that NEPA does not require the use of an SCC tool, nor does it require a cost-benefit analysis that incorporates greenhouse gas emissions.¹⁰¹ In *Vecinos*, FERC argued NEPA does not provide a substantive requirement to monetize the projects’ social costs of carbon, and for policy reasons, it chose not to do so.¹⁰² FERC offered three primary points to support its argument that monetizing the SCC would not “meaningfully inform its project-level NEPA review”:

- (1) EPA states that 'no consensus exists on the appropriate [discount] rate to use for analyses spanning multiple generations' and, consequently, significant variation in output can result';
- (2) 'the tool does not measure the actual incremental impacts of a project on the environment'; and
- (3) 'there are no established criteria identifying the monetized values that are to be considered significant for NEPA reviews.'¹⁰³

97. Gavin Bade, *FERC issues Final Sabal Trail EIS, Potentially Avoiding Hold on Project*, UTILITY DIVE (Feb. 6, 2018), <https://perma.cc/manage/create?folder=135257>; see also Maya Weber, *Sabal Trail, Hillabee projects get two more years from US FERC to complete work*, S & P GLOBAL (Jun. 16, 2021), <https://perma.cc/EEC7-HM7T>.

98. FEDERAL ACTIONS TO ADDRESS ENVIRONMENTAL JUSTICE IN MINORITY POPULATIONS AND LOW-INCOME POPULATIONS, Exec. Order No. 12,898 § 6-609, 59 Fed. Reg. 7,629 (Feb. 11, 1994).

99. *Ctr. For Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1194 (9th Cir. 2008) (citing C.F.R. § 1500.1(a)).

100. *Nat’l Comm. for the New River v. FERC*, 373 F.3d 1323, 1327 (D.C. Cir. 2004).

101. *Citizens for a Healthy Cmty. v. U.S. Bureau of Land Mgmt.*, 377 F. Supp. 3d 1223, 1241 (D. Colo. 2019).

102. Br. Resp’t FERC 60.

103. Br. Resp’t FERC 60.

FERC additionally argued that the SCC tool “no longer represents government policy” because the tool was “withdrawn as no longer representative of governmental policy” by President Trump with Executive Order 13,783 in 2017.¹⁰⁴

FERC circumnavigated an adequate and reasonable explanation for the carbon costs of the project with a strawman, arguing that if it had monetized the costs of greenhouse gases, then it would have had to monetize the social benefits of the proposed project to appropriately balance the SCC tool’s projected costs.¹⁰⁵ Petitioners note that FERC *did* monetize many of those costs, at least to the extent needed to write them off. For example, FERC explained the shipping from the projects would not have a significant impact on local tourism and commercial fishing economies.¹⁰⁶

FERC premised its SCC argument on the assertion that there is no consensus surrounding an appropriate discount to be applied.¹⁰⁷ FERC was correct that 40 C.F.R. § 1502.23 establishes the merits and drawbacks of proposed projects do not need to be reflected monetarily when there are important qualitative considerations to consider.¹⁰⁸ Although there is neither a statutory obligation nor a consensus as to the appropriate method for monetizing carbon, the use of either a 3-percent rate or below is generally accepted in the scientific community.¹⁰⁹ Petitioners’ rehearing request pointed out that where an agency finds guidance lacking around a particular impact, “agencies must use generally accepted methods to analyze impacts even where those methods are imperfect or cannot provide the exact information the agency would prefer.”¹¹⁰ Further, they indicated that FERC previously found the use of an SCC tool is generally accepted within the regulatory community.¹¹¹ Because FERC estimated the greenhouse gases associated with the projects but did not adequately explain why they excluded an SCC analysis, it was incumbent on them to address the Petitioners’ challenge under 40 C.F.R. § 1502.21(c).¹¹²

Petitioners did not persuade the Court on the merits of their substantive climate claims. Rather, they persuaded the Court because of procedural deficiencies in FERC’s briefing and rehearing denials. FERC neglected to adhere to its statutory obligation to respond to Petitioners’

104. Br. Resp’t FERC 75.

105. Br. Resp’t FERC 59-60.

106. Br. Resp’t FERC 43.

107. Br. Resp’t FERC 73.

108. Br. Resp’t FERC 64.

109. *See, e.g.*, Interagency Working Group on Social Cost of Greenhouse Gases, *Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide: Interim Estimates under Executive Order 13990*, 20 (Feb. 2021), <https://perma.cc/3LJD-FXHU> (survey of over 200 experts found three-quarters agreed the median risk-free social discount rate of 2 percent was acceptable) (citation omitted).

110. Pet’r’s Final J. Reply Br. 37.

111. Pet’r’s Final J. Reply Br. 44.

112. *Vecinos para el Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321, 1329 (D.C. Cir. 2021).

claims under 40 C.F.R. § 1502.21(c), and the Court provided it with the opportunity to fix that error on remand.¹¹³ The Court's order only requires FERC to address deficiencies in the EISs at a project-level. Therefore, FERC may either apply an appropriate discount rate, or provide a more thorough explanation for why a generally accepted method is unworkable, which may well be the case given other, less predictable externalities like global market trends.

The Brownsville Projects are among dozens of other large-scale natural gas developments proposed, or in development, across the country.¹¹⁴ FERC approved ten other natural gas projects within nine months of approving the Projects here.¹¹⁵ Recently, the EPA urged FERC to adopt an SCC tool in response to the surge of gas approvals flooding the wake of retired coal-fired power plants and new gaps in the energy marketplace.¹¹⁶ For example, Columbia Gulf Transmission has proposed facilities in Louisiana that the EPA says would cause over \$205 million dollars in climate damages per year.¹¹⁷ Similarly, an Iroquois Gas Transmission project could do more than \$144 million in annual damage.¹¹⁸

Disagreement surrounding the efficacy of traditional SCC tools to combat climate change is multi-faceted. Some environmental advocates have criticized the Interagency Working Group's estimations for being too conservative, despite generally acknowledging they are a step in the right direction.¹¹⁹ On the other hand, other critics argue that the models reflect values and political judgments at the cost of statistical relevance and accuracy, because they fail to account for externalities other than greenhouse gas emissions.¹²⁰

FERC has not indicated precisely how it will respond to EPAs recommendations regarding an SCC tool in those projects, nor whether the

113. *Id.*

114. FERC, *Major Pipeline Projects Pending*, NATURAL GAS, <https://perma.cc/VG8H-AG9T> (last updated July 2021).

115. Miranda Wilson, *Gas Projects Reveal FERC's Environmental Justice Conundrum*, E&E NEWS ENERGYWIRE (Aug. 3, 2021), <https://perma.cc/5C6D-BX8C>.

116. East Lateral Xpress Project, 86 Fed. Reg. 35288, 35288 (July 2, 2021); Enhancement by Compression Project, 86 Fed. Reg. 33705, 33705 (June 25, 2021); *see also More U.S. Coal-Fired Power Plants are Decommissioning as Retirements Continue*, U.S. ENERGY INFO ADMIN. (July 26, 2019), <https://perma.cc/848D-JA4C>.

117. East Lateral Xpress Project, 86 Fed. Reg. 35288, 35288 (July 2, 2021).

118. Enhancement by Compression Project, 86 Fed. Reg. 33705, 33705 (June 25, 2021).

119. *See, e.g.,* Melissa J. Luttrell, *The Social Cost of Inertia: How Cost-Benefit Incoherence Threatens to Derail U.S. Climate Policy*, 25 DUKE ENVTL. L. & POL'Y F. 131, 170–82 (2014); *see also Over 120,000 Stand Up for a Social Cost of Carbon*, ENVTL. DEF. FUND (Feb. 26, 2014), <https://perma.cc/Q5Y5-J98T>.

120. Robert Pindyck, THE USE AND MISUSE OF MODELS FOR CLIMATE POLICY (Nat'l Bureau of Econ. Research, Working Paper 21097, 2015), <https://perma.cc/2NBY-DD66>.

recommendations will inform decision-making generally. In a March 18, 2021, decision, FERC considered the significance of a proposed natural gas pipeline project's greenhouse gas emissions and their contribution to climate change for the first time.¹²¹ That decision indicates FERC is beginning to approach climate change challenges head-on—at least providing an explanation for conclusions surrounding emissions, whether it changes the course of the decision or not.

D. A Strategy Change under New Leadership?

Public interest balancing tends to weigh in favor of substantial economic benefits, but FERC's approach to factoring environmental justice and climate issues into its cost-benefit analyses may be evolving.

FERC manipulated the land area used to describe EJs in both *Sierra Club* and *Vecinos*. Although the legal outcomes were different, the strategy was consistent with the Trump Administration's emphasis on narrowing the scope of significant and cumulative effects analyses during NEPA review.¹²² So, too, was FERC's decision not to use an SCC tool for lack of consensus and changes in administrative priorities.¹²³ President Trump was a staunch advocate for rolling-back, or "streamlining," NEPA review to expedite economic development.¹²⁴

When FERC approved the Projects, Richard Glick was the sole Democrat and dissenting opinion against the approval orders.¹²⁵ Glick identified the same deficiencies with the projects as Petitioners: the environmental justice, greenhouse gas emissions, and public interest analyses were either inadequate or too narrow in scope to satisfy NEPA and the Natural Gas Act.¹²⁶ Glick is now the agency head at FERC, and has prioritized incorporating the risks of environmental harm due to climate change in agency decision making. The Biden Administration and Chairman Glick's renewed emphasis on environmental justice and climate is yet to transform project-level siting and decision making around LNG infrastructure. Nevertheless, Chairman Glick recently indicated FERC is committed to reviewing environmental justice and climate issues on a case-by-case basis.¹²⁷ Further, he emphasized his priority at FERC is to mitigate the legal risk to developers and the federal government, couching

121. *Northern Natural Gas Company Order Issuing Certificate and Approving Abandonment*, 174 FERC ¶ 61, 189 (2021).

122. Jonathan Hahn, *Trump's NEPA Rollback Favors More Pollution and Less Community Input*, SIERRA CLUB (Jul. 17, 2020), <https://perma.cc/HY5K-SQML>.

123. Br. Resp't FERC 75.

124. *Id.*

125. *Commissioner Richard Glick Dissent Regarding the Rio Grande LNG Terminal and Rio Bravo Pipeline Projects*, FERC, Docket Nos. CP16-454-001, CP16-454-001 (Jan 23, 2020).

126. *Id.*

127. Chairman Richard Glick, *Letter from Chairman Richard Glick to Senator John Barrasso, M.D.*, FERC (Apr. 12, 2021), <https://perma.cc/2L6D-Z6BB>.

“risk” as the upstream and downstream economic and environmental impacts of climate change.¹²⁸

VII. CONCLUSION

The *Vecinos* decision is unlikely to fundamentally change the course of environmental justice and SCC jurisprudence under NEPA. The Court did not rule on the merits of Petitioners’ substantive claims, recognizing its role in determining the outcome of NEPA claims is merely to establish whether FERC’s EISs were procedurally sufficient.

As the Court discussed, FERC will likely address deficiencies in its EISs to the extent required by NEPA. To vacate FERC’s Orders could have spelled delay and inequitable harm to Intervenors. If FERC cannot remedy deficiencies in its EISs, Petitioners may again look to NEPA to show the Projects pose glaring environmental justice and climate issues that cannot be explained away by taking a “harder look.” Even then, advocates have had only marginal success enjoining agency decisions on environmental justice claims before.¹²⁹ They have had even less success enforcing implementation of SCC tools through Court orders.¹³⁰

The proceedings have not delayed the development of the Brownsville Projects, thus it is even less likely that any future decisions will stop them. Similar litigation surrounding natural gas development, like *Sierra Club*, has played out in favor of economic development, not environmental justice or climate issues. Along with other project proposals on FERC’s docket, *Vecinos* has helped to raise the profile of environmental justice and climate issues before agency heads and policymakers.¹³¹ FERC is not bound to the policies of other administrative agencies. However, prodding from the EPA and recent FERC decisions suggest changes to climate policies at FERC may continue to unfold as part of President Biden’s promised climate agenda.

128. *Id.*

129. *See* *S. Camden Citizens in Action v. N.J. Dep’t of Env’tl. Prot.*, 145 F. Supp. 2d 446 (D.N.J. 2001) (Where a New Jersey District Court granted a preliminary injunction against the EPA and New Jersey Department of Environmental Protection for permitting an industrial facility that would disproportionately impact the health and environmental effect of minority groups in Camden, N.J. Plaintiffs demonstrated that majority-black neighborhoods in Camden exhibited disproportionately high rates of asthma and respiratory illness. The proposed cement grinding facility would have emitted ozone at higher levels than the National Ambient Air Quality Standard and disproportionately impact the same neighborhoods. The distinction with *Vecinos* is that in *S. Camden*, the claims were brought under § 1983, Title VI of the Civil Rights Act of 1964 rather than NEPA. Only a week after the *S. Camden* decision, in *Alexander v. Sandoval*, the Supreme Court foreclosed § 1983 as an avenue to access judicial review for environmental justice claims. 532 U.S. 275, 279-81 (2001). The Courts have not granted injunctive relief in environmental justice NEPA claims).

130. *Citizens for a Healthy Cmty. v. U.S. Bureau of Land Mgmt.*, 377 F. Supp. 3d 1223, 1241 (D. Colo. 2019).

131. *Id.*

LNG production is unlikely to decrease in the foreseeable future because it is widely viewed as carbon neutral.¹³² As such, LNG helps countries satisfy energy demand and meet clean energy goals as they divest from traditional fossil fuels.¹³³ Shortages across the globe further indicate a substantial market opportunity for the United States.¹³⁴ No matter how progressive an Administration's views on environmental justice and climate, public interest balancing weighs the overall economic benefits of a project. The Developers will likely provide jobs and stimulate the local economy, *and* they will likely negatively impact nearby EJs. Notwithstanding local impacts, the global market envisions LNG helping to achieve carbon emissions goals by divesting from traditional, dirtier fuel sources like coal. The demand for LNG is growing rapidly both domestically and abroad, and the United States has the potential to capitalize on gaps in the market.

Tension at the Federal level between economic development and a need to curb carbon emissions indicates that industrial development (i.e., in LNG markets) is likely to continue disproportionately impacting lower-income and minority communities at an appreciable scale.¹³⁵ Like the agency policies in place as this proceeding began, agency rules are only as strong as the statutes behind them. While Congress delays on passing climate legislation surrounding environmental justice and the SCC, decision-making at FERC and other agencies remains subject to the political priorities.

132. U.S. Energy Info. Admin., *Natural Gas Explained: Liquefied Natural Gas*, <https://perma.cc/LM8K-YWS6> (last updated July 20, 2021) (explaining the role that LNG is expanding into in the global energy market).

133. *Id.*

134. Mike Lee, *Surging U.S. LNG Puts Biden in Climate Bind*, E&E NEWS ENERGY WIRE (July 8, 2021), <https://perma.cc/853V-QWZK>.

135. EPA, *Climate Change and Social Vulnerability in the United States: A Focus on Six Impacts*, OFFICE OF ATMOSPHERIC PROGRAMS (Sept. 21, 2021), <https://perma.cc/SP3L-HZRE>; *see also* Mike Lee, *supra* note 138.