

The Narrow Reinterpretation: The Oil and Gas Industry’s Retreat from the Broad Permitting Authority It Long Embraced

By Max Sarinsky¹

America’s oil and gas industry relies heavily on federal permits, which are prerequisites for extraction, transport, and export. For instance, producing oil or gas on either federal land or water managed by the Department of the Interior (Interior) requires leasing and authorization.² Constructing interstate gas pipelines requires a permit from the Federal Energy Regulatory Commission (FERC)³ while exporting gas to foreign countries requires similar approval from the Department of Energy (DOE).⁴

Due to their crucial permitting role, these agencies have emerged as focal points in recent debates on climate and energy policy. Many key players—from the White House⁵ to the U.N. Secretariat⁶ to the International Energy Agency⁷—have joined advocates in opposing continued oil and gas development. Heeding these calls, numerous federal agencies have recently reconsidered their approaches to oil and gas permitting to varying degrees.⁸

¹ Sarinsky substantially completed his work on this article before beginning his position in the federal government.

² This is conducted under various statutes. In federal waters, oil and gas management is conducted under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq.* On federal land, oil and gas management is conducted under the Mineral Leasing Act, 30 U.S.C. § 181 *et seq.*

³ 15 U.S.C. § 717f(c) (requiring “certificate of public convenience and necessity”).

⁴ 15 U.S.C. § 717b(a). Exports are “deemed to be consistent with the public interest” when directed to a country with which the United States has a free trade agreement. Currently, 22% of exports are to free trade association countries—meaning that the majority (78%) of exports require a “public interest” determination. U.S. Dep’t of Energy, LNG Monthly 4 tbl.1e (June 2023), <https://perma.cc/5UZU-WR2P>.

⁵ Lisa Friedman, *Biden Sets in Motion Plan to Ban New Oil and Gas Leases on Federal Land*, N.Y. TIMES (Jan. 25, 2021).

⁶ Lisa Friedman, *U.N. Chief Warns of ‘Catastrophe’ With Continued Use of Fossil Fuels*, N.Y. TIMES (Mar. 21, 2022).

⁷ Int’l Energy Agency, *Net Zero by 2050: A Roadmap for the Global Energy Sector 20* (2021) (calling for an immediate end to approving new oil and gas production).

⁸ This essay focuses only on permitting fossil fuel production, transport, and export projects. The Biden administration has also taken considerable legislative and regulatory action to reduce greenhouse gas emissions and invest in renewable energy technology and uptake.

Under the Biden administration, Interior has substantially scaled back oil and gas leasing,⁹ prompting legal battles and congressional fights.¹⁰ FERC issued new guidance to reform gas-pipeline permitting in response to climate concerns before quickly backtracking in response to industry and congressional opposition.¹¹ And while DOE has not significantly reformed its assessment of gas exportation, it has begun hinting at a new approach¹² and, in January 2024, paused new export authorizations to reconsider its underlying climate and economic analyses.¹³

Although these permitting developments span different agencies and statutes, the oil and gas industry and its proponents have opposed them using a similar legal argument: climate considerations fall outside the agency’s purview. Under this argument, the permitting agency can consider the economic benefits and local impacts of oil and gas extraction, transport, and export. But the agency cannot assess broader environmental effects or weigh the benefits and drawbacks of competing energy sources.¹⁴ The argument would thus prohibit permitting agencies from

⁹ Onshore, fiscal year 2022 shattered Bureau of Land Management (BLM) records for the lowest number of new leases and acreage issued since the agency began compiling statistics in 2012—the second consecutive year in which both records were broken. Bureau of Land Mgmt., Summary of Onshore Oil & Gas Statistics (last updated Oct. 1, 2022), <https://www.blm.gov/programs-energy-and-minerals-oil-and-gas-oil-and-gas-statistics> (download .zip file for Fiscal Year 2022 statistics). Offshore, the Bureau of Ocean Energy Management (BOEM) held only one lease sale during the first 22 months of the Biden administration. Bureau of Ocean Energy Management, Lease Sales, <https://www.boem.gov/oil-gas-energy/lease-sales>. Over the prior decade, BOEM had normally held 2–3 lease sales per year. Bureau of Ocean Energy Management, All Lease Offerings, <https://perma.cc/UWD7-CSSL>.

¹⁰ See, e.g., What More Gulf of Mexico Oil and Gas Leasing Means for Achieving U.S. Climate Targets: Hearing Before H. Nat. Res. Subcomm. On Energy & Mineral Res., 117th Cong. (2022) (evincing interparty Congressional dispute over scale of leasing); *Louisiana v. Biden*, 543 F. Supp. 3d 388 (W.D. La. 2021) (enjoining Department of the Interior moratorium on federal oil and gas leasing), vacated and remanded sub nom, *Louisiana v. Biden*, 45 F.4th 841 (5th Cir. 2022).

¹¹ Certification of New Interstate Natural Gas Facilities, 178 FERC ¶ 61,107 (2022); Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews, 178 FERC ¶ 61,108 (2022). The Commission issued both of these policy statements in February 2022. In March 2022, it published an order designating the two policy statements as drafts and accepting further comments. Order on Draft Policy Statements, 178 FERC ¶ 61,197 (2022). As of November 2023, the Commission has not finalized either policy statement.

¹² See, e.g., Dep’t of Energy, Order Denying petition for Rulemaking on Exports of Liquefied Natural Gas (July 18, 2023) (recognizing that the Natural Gas Act’s public interest standard gives the agency “broad discretion” and “flexibility to adapt to changing economic and environmental circumstances,” including climate change).

¹³ See The White House, Fact Sheet: Biden-Harris Administration Announces Temporary Pause on Pending Approvals of Liquefied Natural Gas Exports (Jan. 26, 2024), <https://perma.cc/YE3Y-H4SU>.

¹⁴ See *infra* notes 27–30 (BOEM offshore oil and gas leasing), 62–64 (FERC interstate gas pipelines), and 81–83 (DOE gas exports) and accompanying text.

broadly considering the climate effects of oil and gas, tilting the balance in favor of their permitting.

But historical context—which courts are increasingly looking toward when engaging in statutory interpretation¹⁵—undermines this ascendant argument. While the oil and gas industry now calls for a narrow review that places a thumb on the scale in its favor, permitting agencies have long considered broader environmental and energy policy questions when determining whether to greenlight oil and gas (often consistent with Congress’s express wishes). Ironically, proponents of oil and gas—including sometimes the industry itself—were once the most vocal advocates for this broad weighing of environmental questions. Not so long ago, these proponents pointed to the relative environmental advantages of oil and gas over potential substitutes such as coal—the dominant energy source in the United States until its rapid decline in the 2010s.¹⁶

What changed? Not the governing statutes, at least not in pertinent part. But the energy sector has: cleaner renewable sources have quickly replaced coal as the primary competitors to oil and gas.¹⁷ In other words, oil and gas have shifted largely from the cleaner alternative to the dirtier alternative.¹⁸ Consequently, whereas broad consideration of environmental concerns may have once supported these sources relative to available alternatives, such concerns now cut the other way. Given this shifting landscape, oil and gas proponents now assert that permitting agencies lack the broad authority those proponents once championed.

¹⁵ See Richard L. Revesz & Max Sarinsky, *Regulatory Antecedents and the Major Questions Doctrine*, 36 *Geo. Env’t L. Rev.* (forthcoming 2024) (manuscript at 3–11), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4291030.

¹⁶ Energy Info. Admin., *Electric Power Sector Energy Consumption* (last updated Nov. 2023), <https://perma.cc/DVP9-G5U4>.

¹⁷ *Id.*

¹⁸ See Michaja Pehl et al., *Understanding Future Emissions from Low-Carbon Power Systems by Integrating of Life-Cycle Assessment and Integrated Energy Modeling*, 2 *Nature Energy* 939, 940 fig.1 (2017).

Analysis

What function do energy permitting agencies serve? Congress created many of them to promote energy security and conservation and to prevent abusive corporate power over critical resources.¹⁹ Increasingly, however, oil and gas proponents argue that the agencies' functions are relatively narrow. In this new story, the agencies exist mainly to promote oil and gas development, subject to relatively confined limitations like ensuring fair returns, promoting market competition, and mitigating local environmental harms. Because these general arguments offer a novel and narrow view of the authority of permitting agencies, this Essay sometimes refers to them in shorthand as the "Narrow Reinterpretation."

This reinterpretation notably overlooks whether society should promote oil and gas development at all. Under the Narrow Reinterpretation, the applicable statutory provisions do not allow permitting agencies to assess whether facilitating the continued, long-term use of oil and gas constitutes sound energy or environmental policy. Rather, under the Narrow Reinterpretation, accounting for the environmental and climate impacts of oil and gas versus alternative energy sources contradicts statutory purpose and falls beyond the agency's purview.

This Essay explores the Narrow Interpretation in three case studies: 1) the Bureau of Ocean Energy Management's leasing of offshore waters for oil and gas development; 2) FERC's permitting of interstate gas pipelines; and 3) DOE's permitting of gas export applications. Although not the only federal statutes delegating oil-and-gas permitting authority,²⁰ these are three

¹⁹ See, e.g., Alison Gocke, *Pipelines and Politics*, 47 HARV. ENV'T L. REV. 207, 214 (2023) (explaining that Congress created the Federal Power Commission—the predecessor to FERC—"as a means for controlling certain kinds of businesses, particularly those seen as natural monopolies").

²⁰ Another key example is the Bureau of Land Management's permitting of oil and gas leasing and extraction on federal lands under the Mineral Leasing Act, 30 U.S.C. § 181 *et seq.*, and Federal Land Policy and Management Act, 43 U.S.C. § 1701 *et seq.* This article does not omit this case study for any particular reason, besides the author's relative lack of familiarity with it.

of the most significant and contentious of those statutes. They therefore offer a useful window to observe trends and draw generalizations.

In each of these three case studies, proponents of oil and gas development have recently and prominently invoked the Narrow Interpretation. These arguments generally require creative textual analysis, as each of these three relevant statutes, on its face, grants broad discretion to the permitting agency to consider the public interest²¹—a legal standard long understood to reflect changing societal needs.²²

But that’s not the focus of this Essay. Instead, this Essay explains how the Narrow Reinterpretation is also, under these three statutes, at odds with longstanding practice and, at times, expressed Congressional intent. In applying all three statutes, the permitting agencies have historically considered broad questions of energy and environmental policy, exploring whether the public interest calls for facilitating oil and gas versus another energy source. And for at least two of them, legislative history indicates Congress’s goal of delegating broadly to the agency to consider energy and environmental goals in response to changing technologies and social needs.

What’s more, as detailed below, that analysis has traditionally favored the oil and gas industry—namely because oil and gas are cleaner-burning than what was, until recently, their primary competitor: coal.²³ This particular historical irony reveals the Narrow Reinterpretation to not only lack precedent, but also be an opportunistic legal response to the shifting energy landscape.

²¹ See *supra* notes 3–4 and accompanying text (quoting relevant statutes).

²² *E.g.* *Atl. Ref. Co. v. Pub. Serv. Comm’n of State of N.Y.*, 360 U.S. 378, 391 (1959) (recognizing that the government should “evaluate all factors bearing on the public interest” in permitting gas pipelines); *State of Cal. By & Through Brown v. Watt*, 668 F.2d 1290, 1317 (D.C. Cir. 1981) (recognizing that the statute governing offshore leasing “vests the [Interior] Secretary with discretion to weigh the elements so as to best meet national energy needs,” and “[t]he weight of these elements may well shift with changes in technology, in environment, and in the nation's energy needs” (internal quotation marks omitted)).

²³ Pehl et al., *supra* note 18, at 940 fig.1.

Though not perfect parallels, the historical precedents discussed in this Essay are highly relevant to assessing agency authority to consider climate impacts. While these historical precedents often concern local pollutants rather than greenhouse gases, that distinction is not material. As noted further below, if permitting agencies may consider the relative environmental impacts of competing energy sources, there is no reason for this authority to extend to only some pollutants.²⁴ Moreover, while these precedents typically support permitting approvals, rather than denials, that too is immaterial: the operative statutes grant agencies broad authority to approve or deny permits as the public interest dictates, operating as a double-edged sword rather than a one-way ratchet. If an agency may consider an energy source's relative environmental advantages to support permit issuance, it can also consider its relative environmental disadvantages to support permit denial.

This Essay discusses each of the three cases studies in turn, starting with offshore oil and gas leasing from the Department of the Interior.

Offshore Oil and Gas Leasing

The Bureau of Ocean Energy Management (BOEM), a subagency within the Department of the Interior, manages oil and gas leasing on the outer continental shelf (i.e., the nation's offshore waters). The Outer Continental Shelf Lands Act (OCSLA) authorizes BOEM to determine "the size, timing, and location of leasing activity" to "best meet national energy needs."²⁵ As part of that determination, BOEM must "consider[]" economic, social, and environmental values"

²⁴ *Cf.* *Massachusetts v. Env't Prot. Agency*, 549 U.S. 497, 512, 528–29 (2007) (finding that greenhouse gases constitute an "air pollutant" under the Clean Air Act that may be regulated under the same provisions as "local air pollutants" that defendant agency argued were different in kind).

²⁵ 43 U.S.C. § 1344(a).

including “the potential impact of oil and gas exploration on other resource values of the outer Continental Shelf and the marine, coastal, and human environments.”²⁶

Although the statutory standard uses broad and general terms, proponents of the Narrow Reinterpretation have argued that, in practice, it limits BOEM’s consideration of environmental impacts to localized effects that the statute emphasizes.²⁷ In a brief filed last year in the U.S. Court of Appeals for the D.C. Circuit, the American Petroleum Institute (API, the industry’s trade association) argued that OCSLA “instruct[s] Interior to consider only local environmental harms” and thus takes “global considerations” like climate change “off the table entirely.”²⁸ In essence, API argued that BOEM may consider only localized environmental effects resulting from energy extraction itself, and cannot consider downstream environmental effects resulting from energy combustion. (To be sure, this argument has some judicial support: The D.C. Circuit once stated in dicta that OCSLA requires BOEM to “limit” its environmental analysis to effects from offshore

²⁶ *Id.* § 1344(a)(1).

²⁷ For instance, 43 U.S.C. § 1344(a)(2)—which prescribes factors that BOEM must consider when assessing the “[t]iming and location of exploration, development, and production” of oil and gas—focuses predominantly on localized factors. But other key textual provisions permit a broader analysis. Most significantly, § 1344 also provides that “the size” of leasing activity shall be based on “national energy needs”—a far more expansive term that clearly includes consideration of non-local factors. *See id.* § 1344(a). And in determining what degree of leasing will “best meet national energy needs,” BOEM’s analysis must be “consistent with” the principles listed later in the provision that include localized environmental factors—indicating those principles are not an exhaustive list of all relevant factors. *See id.* For a fuller textual argument supporting BOEM’s authority to consider non-local environmental impacts, see Amicus Brief of the Inst. for Pol’y Integrity at N.Y. Univ. School of Law at 6–14, *Friends of the Earth v. Haaland*, No. 22-5036 (D.C. Cir. filed Dec. 14, 2022); Laura A. Figueroa et al., Inst. for Pol’y Integrity, *Interior’s Authority to Consider Downstream Emissions from Offshore Leasing* 5–7 (2022), <https://perma.cc/M6LA-TV22>.

²⁸ Brief for Am. Petroleum Inst. at 32, *Friends of the Earth v. Haaland*, No. 22-5036 (D.C. Cir. filed June 6, 2022). The D.C. Circuit ultimately dismissed this case as moot without reaching the merits. *Friends of the Earth v. Haaland*, No. 22-5036, 2023 WL 3144203 (D.C. Cir. Apr. 28, 2023).

“production activities” and thus not consider downstream impacts.²⁹ However, that statement conflicts with other D.C. Circuit precedent.³⁰)

OCSLA’s legislative and regulatory history is not consistent with API’s argument. Last year, I co-authored an amicus brief and policy brief with two Institute for Policy Integrity colleagues responding to API’s narrow interpretation of OCSLA.³¹ After analyzing OCSLA’s text, legislative and regulatory histories, and caselaw, we concluded that the statute permits Interior to weigh the need for oil and gas against the environmental and climate impacts of those fuels relative to substitutes. Rather than repeat all those arguments here, I highlight some key pieces of the legislative and regulatory history.³²

OCSLA’s legislative history is particularly instructive. Congress enacted OCSLA in 1953 and granted Interior “carte blanche delegation of authority” over the nation’s OCS leasing program.³³ But legislative concerns over that open-ended discretion mounted after President Nixon called on Interior to triple offshore energy leasing in response to the 1970s oil embargo.³⁴ In particular, Congress worried that the “law’s grant of total discretion to the [Interior] Secretary led to a situation where the petroleum industry had a too dominant voice.”³⁵ In particular, Congress worried the statute “provide[d] too many advantages for industry at the possible expense of the taxpayer.”³⁶ In 1978, Congress amended OCSLA—the only major amendment to that statute to

²⁹ *Ctr. for Biological Diversity v. U.S. Dep’t of Interior*, 563 F.3d 466, 485 (D.C. Cir. 2009). The court’s holding was narrower: “[W]e *hold* that OCSLA does not *require* Interior to consider the global environmental impact of oil and gas consumption[.]” *Id.* at 484 (emphasis added).

³⁰ *Ctr. for Sustainable Econ. v. Jewell*, 779 F.3d 588, 605 (D.C. Cir. 2015) (rejecting petitioner’s argument that “environmental effects that do not occur in any [Outer Continental Shelf] area should be treated as irrelevant to Interior’s environmental calculus under OCSLA”).

³¹ Amicus Brief of the Inst. for Pol’y Integrity at N.Y. Univ. School of Law, Friends of the Earth v. Haaland, No. 22-5036 (D.C. Cir. filed Dec. 14, 2022); Laura A. Figueroa et al., Inst. for Pol’y Integrity, *Interior’s Authority to Consider Downstream Emissions from Offshore Leasing* (2022), <https://perma.cc/M6LA-TV22>.

³² For an analysis of text and caselaw, see the amicus brief and policy brief at *supra* note 31.

³³ See S. Rep. No. 95-284, at 43.

³⁴ Richard Nixon, Special Message to the Congress on Energy Policy (Apr. 18, 1973).

³⁵ H. Rep. No. 94-1084, at 76 (1976).

³⁶ *Id.* at 78.

date. This amendment requires periodic five-year leasing schedules and sets out principles for offshore development “subject to environmental safeguards” and “in a manner . . . consistent with . . . national needs.”³⁷

The legislative history of those 1978 amendments demonstrates that Congress was particularly concerned about environmental impacts and preferred oil and gas in the short term largely because it was cleaner than other energy sources available at the time.³⁸ For instance, the bill’s final Senate report recognized that despite “justified concern of many people over the potential damage to the environment” from offshore oil and gas development, offshore development was expected to “supply [energy] with substantially less harm to the environment than most other sources” then available.³⁹ Congress’s finding that offshore extraction was more environmentally acceptable than then-available alternatives related not only to upstream effects from extraction but also downstream effects on air, water, and local use from combustion.⁴⁰ In particular, Congress recognized that offshore oil and gas was a cleaner energy source than coal.⁴¹

At the same time, Congress expected Interior to reconsider the scope of the offshore program as cleaner energy sources became available. The final House report anticipated that “[d]evelopment of our OCS resources will afford us needed time—as much as a generation—within which to develop alternative sources of energy . . . [and] provide time to bring on-line, and improve energy technologies dealing with, solar, geothermal . . . and other energy forms.”⁴² Accordingly, Congress required OCSLA to “consider[] the Nation’s long-range energy needs”⁴³

³⁷ 43 U.S.C. § 1332(3).

³⁸ See Amicus Brief of the Inst. for Pol’y Integrity, *supra* note 31, at 16–21.

³⁹ S. Rep. No. 95-284, at 42 (1977).

⁴⁰ Figueroa et al., *supra* note 31, at 8–9 (discussing legislative history).

⁴¹ See *id.*

⁴² H. Rep. No. 95-590, at 53 (1977).

⁴³ 43 U.S.C. § 1801(14).

and administer the leasing program to “best meet” those needs.⁴⁴ As part of this analysis, a Senate report indicated that Interior should consider “alternatives to large scale expansion of leasing” when determining the size of the offshore program.⁴⁵

Interior’s five-year schedules demonstrate that it has crafted its offshore leasing program to further the national goals of ensuring sufficient energy supply while minimizing environmental burden. In Interior’s view, starting in the 1980s, those goals favored oil and gas because those fuels are cleaner-burning than coal (oil and gas’s primary competition during those decades). In fact, various five-year offshore leasing plans from that era recognized gas as “clean burning,”⁴⁶ the “cleanest form of fossil fuel,”⁴⁷ and a “clean burning, environmentally preferred source of energy for electricity generation.”⁴⁸

Several of these five-year plans directly tied offshore oil and gas production to the nation’s energy and environmental goals. For instance, Interior’s 1992 five-year plan included a guiding principle to “promote the expeditious development of natural gas as an environmentally preferable energy source.”⁴⁹ This emphasis carried over to Interior’s 1997 plan, which asserted that “[e]xpanded use of natural gas, including that produced on the [Outer Continental Shelf], has substantial environmental benefits over other fossil fuels.”⁵⁰ In that plan, Interior determined that

⁴⁴ *Id.* § 1344(a).

⁴⁵ S. Rep. No. 94-284 (1975), at 17–18 (highlighting General Accounting Office policy report).

⁴⁶ *See* Minerals Mgmt. Serv., 5-Year Leasing Program Mid-1987 to Mid-1992 at 76 (1987); Minerals Mgmt. Serv., Proposed Final Program Outer Continental Shelf Oil and Gas Leasing Program 2007–2012 at 74 (2007); 2012 Plan at 113.

⁴⁷ Minerals Mgmt. Serv., Proposed Final Outer Continental Shelf Oil & Gas Leasing Program 1997–2002, at 69 (1996) (1997 Plan).

⁴⁸ Minerals Mgmt. Serv., Proposed Final Outer Continental Shelf Oil & Gas Leasing Program 2002–2007, at 71 (2002).

⁴⁹ Minerals Mgmt. Serv., Outer Continental Shelf Natural Gas and Oil Resource Management Comprehensive Program 1992–1997, at 13 (1992).

⁵⁰ 1997 Plan, *supra* note 47, at 4.

extensive offshore oil and gas development would help “reduce the adverse environmental impacts associated with energy production, delivery, and use.”⁵¹

Of course, in both OCSLA’s legislative history and these historical examples, the referenced environmental impacts were more localized pollution, not greenhouse gas emissions, from burning energy. But for the Narrow Reinterpretation, the key distinction is the consideration of downstream combustion emissions, not the specific pollutant. In its aforementioned brief, for instance, API argued that BOEM can “consider only local environmental harms” in the offshore region—that is, environmental impacts from the production itself (and not combustion).⁵² As this section demonstrates, history is not consistent with that argument. And given that BOEM has long considered the relative downstream impacts of different energy sources, there is no principled basis to draw the line at downstream climate pollution (nor does API try).

As the history above illustrates, Congress expected Interior to manage offshore oil and gas leasing with an eye toward minimizing environmental impacts—including impacts from energy combustion—by considering alternative energy sources. And Interior has frequently done so over the past four decades. This history rebuts the Narrow Reinterpretation of Interior’s authority.

Interstate Gas Transport

FERC is responsible for determining whether proposals to transport gas in interstate commerce serve the public interest.⁵³ Under Section 7 of the Natural Gas Act (NGA), FERC may authorize interstate transportation pipelines and related facilities like compressor stations only if they serve the “public convenience and necessity.”⁵⁴ Although the NGA does not define “public

⁵¹ *Id.* at 3.

⁵² Brief for Am. Petroleum Inst., *supra* note 28, at 32 (emphasis omitted).

⁵³ 15 U.S.C. § 717f.

⁵⁴ *Id.* § 717f(c)(1)(A).

convenience and necessity,” the Supreme Court has recognized that it “requires the Commission to evaluate all factors bearing on the public interest.”⁵⁵

FERC’s obligation to assess the public interest has been put to the test due to increasing calls for reform due to climate change. Today (though not historically⁵⁶), FERC approves virtually all Section 7 applications it receives.⁵⁷ These approvals have produced extensive litigation from opponents arguing, sometimes successfully, that FERC insufficiently considered the impacts of continued natural gas build-out on climate change.⁵⁸ In response, FERC proposed two policy statements in 2022 that emphasize the importance of assessing climate change impacts from pipeline certification.⁵⁹ Those statements confirmed that the Commission would “balance . . . all of the benefits of a proposal together with all of the adverse impacts, including the economic and environmental impacts.”⁶⁰ As part of that balancing, FERC specified that it would consider climate impacts resulting from pipeline build-out when “reasonably foreseeable.”⁶¹

Opposition to this proposed reform from gas proponents was strong and swift. In separate dissents, FERC Commissioners Mark Christie and James Danly invoked the Narrow

⁵⁵ *Atl. Ref. Co. v. Pub. Serv. Comm’n of State of N.Y.*, 360 U.S. 378, 391 (1959). Federal courts continue to rely on this statement of FERC’s broad authority. *E.g.* *City of Oberlin, Ohio v. FERC*, 39 F.4th 719, 726 (D.C. Cir. 2022).

⁵⁶ Gocke, *supra* note 19, at 225.

⁵⁷ *Id.* at 236.

⁵⁸ Several recent D.C. Circuit decisions have ruled that the Commission did not sufficiently consider the greenhouse gas emissions resulting from the combustion of the natural gas that the pipeline will facilitate. *Sierra Club v. Fed. Energy Regul. Comm’n (Sabal Trail)*, 867 F.3d 1357 (D.C. Cir. 2017); *Food & Water Watch v. Fed. Energy Regul. Comm’n*, 28 F.4th 277 (D.C. Cir. 2022). In another case, the D.C. Circuit expressed “misgivings” about the Commission’s assessment of climate impacts, but found that the issue was not preserved. *Birckhead v. Fed. Energy Regul. Comm’n*, 925 F.3d 510 (D.C. Cir. 2019). In at least one recent case, the D.C. Circuit found that the Commission’s review of climate impacts in a Section 7 proceeding was sufficient. *Delaware Riverkeeper Network v. FERC*, 45 F.4th 104, 109–12 (D.C. Cir. 2022).

⁵⁹ *Certification of New Interstate Natural Gas Facilities*, 178 FERC ¶ 61,107 (2022) [hereinafter Updated Certificate Policy Statement]; *Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews*, 178 FERC ¶ 61,108 (2022) [hereinafter GHG Policy Statement]. The Commission issued both of these policy statements in February 2022. In March 2022, it published an order designating the two policy statements as drafts and accepting further comments. *Order on Draft Policy Statements*, 178 FERC ¶ 61,197 (2022). As of November 2023, the Commission has not finalized either policy statement.

⁶⁰ Updated Certificate Policy Statement, *supra* note 59, at P 94.

⁶¹ GHG Policy Statement, *supra* note 59, at P 31.

Reinterpretation to argue that the climate impacts of pipeline development generally fall beyond the agency’s purview. Commissioner Christie called FERC’s authority “to reject a project based solely on [greenhouse gas] emissions . . . specious and ahistorical.”⁶² Commissioner Danly similarly claimed that “environmental effects resulting from the upstream production and downstream use of gas are not factors bearing on the public convenience and necessity.”⁶³ Many in the gas industry opposed the proposed policy statements on similar grounds.⁶⁴

But as several scholars have documented, Section 7’s legislative and regulatory history strongly supports considering gas’s environmental impacts relative to the energy sources it would displace. Regarding legislative history, Alison Gocke explained that Congress originally enacted and later amended Section 7 to grant FERC (and its predecessor, the Federal Power Commission or FPC⁶⁵) broad discretion to balance a wide range of policy considerations.⁶⁶ The history she recounts does not support the Narrow Reinterpretation. Rather, as Gocke explains, early amendments to the Natural Gas Act expressly “authorized the Commission to consider the long-term social and economic costs of pipeline development” and “to take into account the national interest (as opposed to parochial state interests) in the buildout of natural gas infrastructure.”⁶⁷

The regulatory history is perhaps even starker, as regulators and the gas industry have both historically invoked the air-pollution benefits of gas relative to coal as a factor supporting Section

⁶² *Id.* at P 12 (Christie, dissenting).

⁶³ *Id.* at P 31 (Danly, dissenting).

⁶⁴ *E.g.* U.S. Chamber of Commerce, Comments on Certification of New Interstate Natural Gas Facilities and Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews, Docket Nos. PL18-1-001 & PL21-3-001, at 10–16 (Apr. 25, 2022); Enbridge Gas Pipelines, Comments on Certification of New Interstate Natural Gas Facilities and Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews, Docket Nos. PL18-1-001 & PL21-3-001, at 14–40 (Apr. 25, 2022). Interstate Natural Gas Association of America, Comments on Certification of New Interstate Natural Gas Facilities and Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews, Docket Nos. PL18-1-001 & PL21-3-001, at 12–21 (Apr. 25, 2022).

⁶⁵ The Federal Power Commission was renamed the Federal Energy Regulatory Commission in 1977. Department of Energy Organization Act, Pub. L. No. 95-51, 91 Stat. 565 (1977).

⁶⁶ Gocke, *supra* note 19, at 214–28.

⁶⁷ *Id.* at 214.

7 certification. Analyzing 1960s and 1970s certifications, Gocke explained that “the Commission weighed the possible air pollution benefits of natural gas as compared to coal to determine whether the construction of a pipeline would be in the public interest.”⁶⁸ Romany Webb similarly cataloged how “decisions issued in the 1950s and 1960s routinely discussed how natural gas transported via a proposed pipeline project would be used and assessed the air quality impacts of that use,” including whether the gas “would improve local air quality.”⁶⁹

Three historical examples merit particular mention. First, in a 1961 Supreme Court case challenging the FPC’s denial of a Section 7 certificate on other grounds, the petitioning gas company argued that the FPC gave insufficient weight to the air-pollution benefits of gas over coal.⁷⁰ The Supreme Court agreed that those environmental benefits were “entitled to great weight” in the analysis, but it ultimately let the denial stand.⁷¹ Second, in a 1966 decision, the FPC recognized that gas’s ability to “reduce air pollution” merits “the most serious attention” in Section 7 proceedings.⁷² And third, in the 1999 policy statement that remains effective, FERC explained that the “types of public benefits that might be shown” in a Section 7 proceeding include “advancing clean air objectives” based upon “the environmental advantages of gas over other fuels.”⁷³ In a later clarification, FERC specified that the environmental benefits it “will continue to take into account” under Section 7 include “the overall benefits to the environment of natural gas consumption.”⁷⁴

⁶⁸ *Id.* at at 225.

⁶⁹ Romany M. Webb, *Climate Change, FERC, and Natural Gas Pipelines: The Legal Basis for Considering Greenhouse Gas Emissions Under Section 7 of the Natural Gas Act*, 28 N.Y.U. ENV’T L.J. 179, 224 (2020).

⁷⁰ Fed. Power Comm’n v. Transcon. Gas Pipe Line Corp., 365 U.S. 1, 30–31 (1961).

⁷¹ *Id.* at 31; *see also* Gocke, *supra* note 19, at 226–27 (providing further discussion).

⁷² Transwestern Pipeline Co., 36 F.P.C. 176, 190 (1966).

⁷³ Statement of Policy, Certification of New Interstate Pipeline Facilities, 88 FERC ¶ 61,227, ¶¶ 61,744. 61,748 (1999).

⁷⁴ Order Clarifying Statement of Policy, Certification of New Interstate Pipeline Facilities, 90 FERC ¶ 61,128, ¶ 61,398 (2000).

Though these examples all concern FERC’s approval of gas infrastructure, FERC’s authority to consider the “public convenience and necessity” neither requires the agency to consider all relevant factors whether they support or oppose certification.⁷⁵ As my colleagues explained in a letter filed with FERC: “[N]othing in the statute says the Commission may consider only indirect benefits of a pipeline. And absent an express prohibition on being evenhanded, there is no reason to assume Congress would have intended a lopsided analysis.”⁷⁶

This history demonstrates that regulators have long weighed the air-quality impacts of gas relative to competing fuels under Section 7. Now that gas is the dirtier alternative, proponents of the Narrow Reinterpretation want to ignore this extensive history.

Gas Exports

Under Section 3 of the NGA, DOE must review applications to export gas, including liquefied gas.⁷⁷ This section appears to provide DOE broad discretion for most applications⁷⁸ since it directs the agency to grant an application if “the proposed exportation” is “consistent with the public interest.”⁷⁹ (DOE had the same broad authority over gas import applications until 1992,

⁷⁵ See *Atl. Ref. Co.*, 360 U.S. at 391 (requiring consideration of “all factors bearing on the public interest”).

⁷⁶ Supplemental Comments of the Institute for Policy Integrity at New York University School of Law 10, Certification of New Interstate Natural Gas Facilities (Docket No. PL18-1-000) & Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews (Docket No. PL21-3-000) (Oct. 20, 2022), <https://perma.cc/EC85-Z3MW>.

⁷⁷ 15 U.S.C. § 717b.

⁷⁸ The Natural Gas Act provides that applications to export natural gas to a nation with “which there is in effect a free trade agreement requiring national treatment for trade in natural gas . . . shall be granted without modification or delay.” *Id.* § 717b(c). Exports to free-trade-agreement nations currently constitute less than 25% of the nation’s LNG exports. U.S. DEP’T OF ENERGY, LNG MONTHLY 4 (Aug. 2023).

⁷⁹ 15 U.S.C. § 717b(a). More precisely, this provision provides that DOE “shall issue” export authorization “unless, after opportunity for hearing, it finds that the proposed exportation . . . will not be consistent with the public interest.” *Id.*

when that year’s Energy Policy Act deemed all imports to be “consistent with the public interest.”⁸⁰)

Despite this broad statutory language, proponents of increased gas exports have sometimes invoked the Narrow Reinterpretation in response to calls for reforming the gas export program to address climate change. In a rare example of the federal government endorsing the Narrow Reinterpretation, DOE adopted this position under the Trump Administration. In a 2020 rule providing for limited and expedited environmental review of export applications (known as a “categorical exclusion”), the agency stated that environmental impacts occurring both before and after the export itself—including the production and combustion of the exported gas—fall outside the scope of the agency’s consideration.⁸¹ And although DOE has not invoked this Narrow Reinterpretation since 2020, others have. In a brief filed in the D.C. Circuit in April 2023, a gas-export applicant⁸² argued that DOE’s regulatory authority is limited and excludes consideration of “environmental considerations” downstream and upstream “when determining what would not be consistent with the public interest.”⁸³

But DOE’s practice contradicts that argument. On numerous occasions dating back at least fifty years, DOE (and the FPC, which had authority over exports and imports before 1977) has broadly evaluated the environmental impacts of gas production and combustion in determining

⁸⁰ Energy Policy Act of 1992, Pub. L. No. 102-486, § 201, 106 Stat. 2776, 2866 (1992) (codified at 15 U.S.C. § 717b(c)) (applying to import and exports to countries with a free trade agreement with the United States requiring national treatment for trade in natural gas).

⁸¹ National Environmental Policy Act Implementing Procedures, 85 Fed. Reg. 78,197, 78,198 (Dec. 4, 2020).

⁸² The lead attorney on the respondent-intervenor’s brief was Jonathan D. Brightbill, now a partner at Winston & Strawn who served during the Trump administration as the acting assistant attorney general for the Environment & Natural Resources Division of the Department of Justice. *See* Jonathan D. Brightbill, WINSTON & STRAWN (last visited Apr. 28, 2024), <https://perma.cc/EM47-5KZ5>.

⁸³ Brief of Intervenor-Respondent Golden Pass LNG Terminal LLC at 20, *Sierra Club v. U.S. Dep’t of Energy*, No. 22-1217 (D.C. Cir. filed Apr. 27, 2023).

whether the proposed import or export serves the public interest.⁸⁴ In those instances, like with gas transport, regulators examined whether gas's environmental impacts supported approval because it was less environmentally harmful than other energy sources that it would displace in the destination country.

One particularly prominent example is a DOE determination from 1972 approving the import of liquefied gas from Algeria for twenty years.⁸⁵ In summarizing its approval in the decision's first paragraph, the FPC pointed to "the environmental and other benefits to be derived from the increased availability of natural gas made possible by this project."⁸⁶ The United States faced a gas shortage and, without additional imports, "would be forced to obtain new energy supplies either from alternative supplies of natural gas, supplies of other fossil fuels, or supplies of substitute or synthetic gas."⁸⁷ And as the FPC noted, those other fuels' environmental impacts are similar or worse than imported gas. For example, the FPC found that coal could "adversely affect[] [downstream] air quality" and degrade local environments where the coal is mined.⁸⁸ The FPC also considered coal gasification but concluded that its "environmental implications . . . far exceed those involved in the instant proposal" since it would require harmful mining and pipelines.⁸⁹

Regulators relied on similar rationales for approving other import projects in the 1970s. In another 1972 determination, the FPC concluded that the import would "assist in meeting reasonable ambient air quality standards" compared to using alternative energy sources.⁹⁰

⁸⁴ As noted above, export determinations were reviewed under Section 3's public interest standard until 1992. *See supra* note 80 and accompanying text.

⁸⁵ *Distrigas Corp.*, 47 F.P.C. 752 (1972).

⁸⁶ *Id.* at 752.

⁸⁷ *Id.* at 771.

⁸⁸ *Id.* at 773.

⁸⁹ *Id.* at 775.

⁹⁰ *Columbia LNG Corporation*, 47 F.P.C. 1624, 1646 (1972) (vacated and remanded on other grounds *S. Natural Gas Co. v. F.P.C.*, 491 F.2d 651 (5th Cir. 1974)).

Focusing particularly on gas combustion, the agency affirmed its hearing examiner’s finding that “the environmental impact as a whole will be minimal in comparison to the benefits, both to the environment and the productivity of the area involved, to be derived from the increased availability of clean-burning natural gas.”⁹¹ Similarly, in a 1977 approval, regulators concluded that the imported gas would “provide a long-term, relatively pollution-free source of energy to a significant part of our population” compared to available substitutes.⁹² As these examples show, the environmental benefits of gas relative to likely substitutes provided key support for approving various import applications in the late 20th century.

In the 21st century, as the United States became a net exporter of gas,⁹³ DOE provided similar rationales for permitting additional exports. With the primary environmental concern shifting from local degradation to climate change, DOE has continued to assert that the proposed project would improve or at least not worsen outcomes compared to likely substitutes. In particular, DOE published reports in 2014 and 2019 comparing the lifecycle greenhouse gas emissions of exported gas to emissions from other fossil fuels⁹⁴ (but not renewables, which opponents criticized⁹⁵). DOE has since highlighted its findings to justify its public interest determinations, explaining in various approvals that U.S. exports “may reduce [greenhouse gas]

⁹¹ *Id.* at 1662.

⁹² *El Paso E. Co., et al.*, 1 FERC ¶ 63,021, 65,151 (1977). This proceeding was before FERC, which is within DOE.

⁹³ Energy Info. Admin, *EIA Expects U.S. Petroleum Trade to Shift Toward Net Imports During 2022* (Feb. 18, 2022), <https://perma.cc/AE23-8HJR>.

⁹⁴ Nat’l Energy Tech. Lab’y, DOE/NETL-2014/1649, *Life Cycle Greenhouse Gas Perspective on Exporting Liquefied Natural Gas from the United States* (2014); Selina Roman White et al., Nat’l Energy Tech. Lab’y, DOE/NETL-2019/2041, *Life Cycle Greenhouse Gas Perspective on Exporting Liquefied Natural Gas from the United States: 2019 Update* (2019). *See also* U.S. Dep’t of Energy, *Addendum to Environmental Review Documents Concerning Exports of Natural Gas From the United States* (2014) (summarizing findings by noting that “[t]o the extent that unconventional natural gas production replaces the use of other carbon-based energy sources, there may be a net positive impact in terms of climate change”).

⁹⁵ *See, e.g., Sierra Club v. United States Dep’t of Energy*, 867 F.3d 189, 201–02 (D.C. Cir. 2017) (rejecting challenge arguing that failure to compare emissions of exported natural gas to emissions from renewables violated the National Environmental Policy Act).

emissions”⁹⁶ because, “to the extent U.S. LNG exports are preferred over coal in LNG-importing nations, U.S. LNG exports are likely to reduce global [greenhouse gas] emissions.”⁹⁷ Only in the 2020 categorical-exclusion rulemaking mentioned above,⁹⁸ and not before or since, has DOE alleged that these climate impacts are irrelevant to the public interest determination.

Viewed in this historical light, that and other recent invocations of the Narrow Reinterpretation are inconsistent with decades of agency practice. Those pushing the Narrow Reinterpretation argue that DOE is required to ignore an effect—gas’s environmental impact relative to likely substitutes—that the agency has traditionally considered. Only now that DOE’s broad authority to weigh gas’s relative environmental impacts undermines rather than supports additional exports are proponents of such exports claiming that the NGA forbids such consideration.

Conclusion

Federal agencies have traditionally approached oil and gas permitting decisions from a broad perspective that considered the environmental impacts of gas relative to likely energy substitutes. This history should dispel invocations of the Narrow Reinterpretation in a range of contexts, revealing it to be both unprecedented and opportunistic. While some proponents of oil and gas development now invoke the Narrow Reinterpretation, they have traditionally benefited from (and themselves sometimes invoked) a broad interpretation of the relevant statutes.

⁹⁶ Alaska LNG, Order No. 3643-A, Docket No. 14-96-LNG, Final Opinion and Order Granting Long-Term Authorization to Export Liquefied Natural Gas to Non-Free Trade Agreement Nations 34 (Aug. 20, 2020).

⁹⁷ Jordan Cove Energy Project L.P., Order No. 3413-A, Docket No. 12-32-LNG, Final Opinion and Order Granting Long-Term Authorization to Export Liquefied Natural Gas to Non-Free Trade Agreement Nations 109 (July 6, 2020).

⁹⁸ See *supra* note 81 and accompanying text.

This history is particularly powerful as courts increasingly rely on history to analyze the breadth of agency power. Though this Essay has taken pains to avoid discussing the major questions doctrine, some proponents of the Narrow Reinterpretation have invoked the doctrine to argue that the climate impacts of oil and gas permitting are an issue of vast economic and political significance.⁹⁹ Yet agency action must be “unheralded” or “unprecedented” for the major questions doctrine to apply.¹⁰⁰ As the history described in this Essay demonstrates, there is nothing unprecedented about agencies considering the environmental impacts of regulated fuels relative to energy substitutes. Rather, ignoring those impacts would be historically anomalous.

⁹⁹ *E.g.*, GHG Policy Statement, *supra* note 59, at PP 3, 22–29 (Christie, dissenting); Brief of Intervenor-Respondent Golden Pass LNG Terminal LLC, *supra* note 83, at 22.

¹⁰⁰ *West Virginia v. EPA*, 142 S. Ct. 2587, 2610 (2022) (“unheralded”) (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)); *Biden v. Nebraska*, 143 S. Ct. 2355, 2374 (2023) (“unprecedented”). *See also* Natasha Brunstein & Donald L. R. Goodson, *Unheralded and Transformative: The Test for Major Questions After West Virginia*, 47 WM. & MARY ENV’T L. & POL’Y REV. 47 (2022) (describing focus on regulatory novelty in Supreme Court’s major questions analysis).