Applicability of NEPA to Federal Energy Market Restructuring

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ENERGY MARKET RESTRUCTURING

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Abstract: In furtherance of its goal of creating a more competitive electricity market, the Federal Energy Regulatory Commission (FERC) has proposed the creation of a Standard Market Design. While the proposal has been hotly debated, the focus has largely been on the economics rather than on environmental issues. FERC should fully study potential environmental impacts resulting from the implementation of such a proposal. Specifically, FERC should conduct a full environmental impact statement rather than rely on an environmental assessment and previous environmental impact statements prepared for earlier orders. This Note discusses when an environmental impact statement is required and argues that the Standard Market Design proposal is the type of agency action requiring such a study.

Introduction

The National Environmental Policy Act (NEPA) reflected a new national sensitivity to the effect of human activity on the environment and the responsibility of the federal government to protect the environment. NEPA directs that federal agencies assess the environmental impact of agency actions that could have a significant effect on

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The Congress, recognizing the profound impact of man’s activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures . . . in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

Id. § 4331(a).
the environment before those actions take effect.\(^2\) If an agency action will have a significant effect on the environment, the agency must prepare an Environmental Impact Statement (EIS) that addresses why the action is necessary, describes the affected environment, and lists a comparison of alternatives.\(^3\) Preparation of an EIS is a burdensome process and agencies frequently rely on the less formal Environmental Assessment (EA) process to determine whether a proposed action will have a significant impact.\(^4\)

Currently, the Federal Energy Regulatory Commission (FERC) is actively seeking to restructure the electric energy markets in the United States.\(^5\) A cornerstone of FERC’s emerging regulatory policy is the implementation of a proposed Standard Market Design (SMD).\(^6\) FERC hopes to avoid preparation of an EIS in connection with this policy initiative,\(^7\) but the nature and scope of the SMD policy initiative should qualify as a “major Federal action” having a significant effect on the environment and, as such, it meets NEPA’s criteria requiring a full EIS.\(^8\) FERC should, therefore, be required to conduct a complete EIS prior to implementing its SMD proposal.

FERC believes that regulatory action is necessary to address concerns that “just and reasonable prices” cannot be reliably achieved without short-term, wholesale markets consisting of transparent prices and market structures.\(^9\) FERC seeks to create a competitive energy market while preventing potential market disasters such as those that

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\(^2\) See id. § 4332.
\(^3\) See id.
\(^8\) See discussion infra Part IV.
\(^9\) FERC, supra note 5, at 1.
have occurred in California. Problems stemming from “poorly designed markets and inadequate generation, transmission and demand response,” which sent the California electricity market spiraling out of control, are the conditions that FERC now seeks to prevent. FERC recognizes that wholesale markets do not naturally facilitate and support a level playing field for all participants, mitigate the influence of market power, or establish fair rules to govern market behavior. In addition, absent regulation, existing markets do not prevent unlawful prices, nor do they tend automatically to remedy problems when the system fails. For example, those wishing to enter the electricity market may be blocked by existing transmission operators who favor their own supplies of energy. This favoritism applies both to the ability to interconnect new generation resources to the grid and to the allocation of the costs associated with those interconnections. According to FERC, this results in higher costs to the customer. FERC concluded that to address and resolve these problems on a case-by-case basis would be time-consuming for both the Commission and market participants.

The Commission believes that solving these problems is a key element in restoring the public’s faith in competitive power markets. It also believes that a competitive power market will save consumers billions of dollars annually. FERC’s goals are to create “reliable, reasonably priced electric service for all customers; sufficient electric infrastructure; transparent markets with fair rules for all market participants; stability and regulatory certainty for customers, the electric power industry, and investors; technological innovation; and efficient use of the nation’s resources.” FERC has fashioned the SMD and

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10 FERC, Standard Market Design 1, at http://www.ferc.gov/industries/electric/indus-act/smd/nopr/101.pdf (last visited Feb. 18, 2005) (“The U.S. Federal Energy Regulatory Commission’s proposal to standardize the structure and operation of competitive wholesale power markets nationally represents the agency’s commitment to markets and its determination to assure that severe market dysfunctions such as California’s never happen again.”).
11 FERC, supra note 5, at 3.
12 Id. at 1.
13 Id.
14 Id. at 3.
15 Id.
16 Id.
17 FERC, supra note 5, at 3.
18 FERC, supra note 10, at 1.
19 See id.
20 FERC, supra note 5, at 1.
proposed new implementing regulations to meet these goals and to remedy the problems facing wholesale markets.\textsuperscript{21}

The SMD would complete a trinity of FERC initiatives that began in 1996 to foster competitive wholesale markets.\textsuperscript{22} In that year, based on a mandate imposed by Congress as part of the 1992 Energy Policy Act, FERC finalized rules to open the transmission grid to those providing wholesale power.\textsuperscript{23} These rules tackled the issue of vertically integrated utilities that were using control of transmission lines for the benefit of their own generation output, thereby frustrating the development of a competitive market.\textsuperscript{24} FERC found that non-discriminatory access to transmission services was critical in establishing a competitive market.\textsuperscript{25} Orders 888 and 889 required investor-owned utilities to allow competing power providers access to their transmission systems and imposed rules of conduct to prevent discrimination and create transparency.\textsuperscript{26}

The second part of the trinity was FERC Order 2000.\textsuperscript{27} This order continued FERC’s goals of establishing functioning “competitive wholesale power markets and eliminating the residual undue discrimination in interstate transmission services.”\textsuperscript{28} Order 2000 was designed to encourage transmission-owning utilities to shift, on a voluntary basis, operational control of high-voltage power lines owned and operated by them to Regional Transmission Organizations (RTOs).\textsuperscript{29} Under Order 2000, control would be shifted to RTOs while the participating trans-

\begin{footnotesize}
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\item[22] Id. at 55,454.
\item[24] See id. at 21,541; FERC, supra note 10, at 1.
\item[26] FERC, supra note 10, at 1–2.
\item[28] Id.
\item[29] FERC, supra note 10, at 2.
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mission-owning utilities would continue to maintain ownership of their “power-grid” assets and would continue to collect revenue from the use of those assets. The idea was to create a system whereby utilities would no longer be able to use their operational control of transmission systems to gain a competitive advantage.

Yet, even after the passage of Orders 888, 889, and 2000, FERC concluded that the wholesale electricity market continued to be plagued by discriminatory practices. Transmission owners and operators still inhibited competition in both wholesale and retail power markets through the use of their interstate transmission facilities, and transmission owners still favored their own generation. Also, inconsistent rules governing transmission limited some transactions and the differences between adjacent transmission systems created seams which raised the costs of inter-regional power flows. Finally, when reliability issues arose, vertically integrated utilities were found to interrupt competitors’ transactions and to permit transactions by their affiliated generation to continue. FERC concluded that these problems created electricity rates that were both unjust and unreasonable.

Through the use of the SMD, FERC wants to reduce barriers to transmission access and inconsistent administration of short-term markets, reductions that would create a more level playing field for market participants. Ideally, new generators would be able to enter the market and operate more efficiently. FERC believes that the SMD would provide the framework to solve the remaining problems of discriminating transmission services.

Given that the driving force behind the SMD is economic, it is no surprise that FERC’s major focus has been its potential economic im-

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30 Id.
32 See FERC, supra note 10, at 2 (“In the Standard Market Design proposal, FERC notes that ‘the absence of standardization with respect to market rules and practices within and between regional markets’ allows discrimination to continue and hinders establishment of an efficient competitive wholesale marketplace.”).
34 FERC, supra note 10, at 2.
35 See id.
36 See id.
37 See id.
39 See id.
40 See id. at 1.
pact. Nevertheless, NEPA mandates that the environmental implications of this proposal be taken into consideration prior to enactment.\textsuperscript{41} Under NEPA, governmental agencies are required to look at the potential environmental impacts of their major actions; FERC is no exception.\textsuperscript{42}

I. FERC’s Actions to Date Regarding Environmental Impacts of the Standard Market Design

FERC, in compliance with NEPA and its regulations, initiated an EA on the SMD proposal in the summer of 2002.\textsuperscript{43} If FERC concludes as a result of the EA that the SMD will have no significant impact on the environment, it can avoid conducting a costly and time-consuming EIS.\textsuperscript{44} To determine the scope of the EA, FERC solicited comments from the public.\textsuperscript{45} FERC may use the comments in the preparation of the EA.\textsuperscript{46} The public initially had approximately forty-five days to submit comments to the Commission.\textsuperscript{47} In addition, FERC held a scoping meeting on August 12, 2002, at which oral comments were presented regarding environmental concerns.\textsuperscript{48}

While the attendance at the scoping hearing was smaller in scale than hearings for non-environmental issues, three presenters did raise several concerns regarding potential environmental impacts.\textsuperscript{49} In determining how it would like to proceed with the EA, FERC looked to how it addressed the environmental issues in Orders 888, 889, and 2000.\textsuperscript{50} The Commission would prefer to avoid conducting a complete study of all electric competition, which would likely be required by an EIS.\textsuperscript{51} FERC staff reasons that it has already done this twice and a third complete study is not necessary.\textsuperscript{52} Charles S. Whitmore, referring to the EIS and EA conducted in connection with Orders 888 and 2000, stated “We have already, in effect, done the study twice.”\textsuperscript{53}

\textsuperscript{42} See id.
\textsuperscript{44} NEPA and Agency Planning, 40 C.F.R. § 1501.4 (2003). If the agency determines through the EA that there will be no significant impact, then it must publish a Finding of No Significant Impact (FONSI). \textit{Id.} § 1501.4(e).
\textsuperscript{46} See id.
\textsuperscript{47} See id. at 49,915.
\textsuperscript{48} Scoping Meeting, \textit{supra} note 7; Proposed Rulemaking, 67 Fed. Reg. at 49,915.
\textsuperscript{49} See Scoping Meeting, \textit{supra} note 7, at 4 (statement of Charles S. Whitmore, FERC).
\textsuperscript{50} Id.
\textsuperscript{51} See id. at 10–11.
\textsuperscript{52} See id.
\textsuperscript{53} Id. at 10.
such, FERC wants to address only those things that have changed since the EISs and EAs of Orders 888, 889, and 2000.\textsuperscript{54} In addition, FERC plans to look at factors that it either did not know about or did not consider at the time of the previous orders.\textsuperscript{55}

Beth Nagusky, on behalf of the Independent Energy Producers of Maine and the New England Renewable Power Producers Association, discussed the effect of the SMD on renewable power producers in New England.\textsuperscript{56} Specifically, she found that the use of Locational Marginal Pricing (LMP), which results in energy prices determined by local supply conditions, negatively affected renewable energy sources.\textsuperscript{57} Many renewable energy sources are in a unique situation compared to other energy resources, given their locational constraints.\textsuperscript{58} Unlike other power generation facilities, such as coal, natural gas, or nuclear, which can be located remotely from the location where fuel is produced, renewable energy sources must remain in close proximity to their fuel resource.\textsuperscript{59} For example, as Ms. Nagusky put it, “You are not going to locate a hydro unit in downtown Boston because we’re not going to be building hydro dams on the Charles River.”\textsuperscript{60}

Whether a site is suitable for a renewable power generator will vary depending on the type of generator.\textsuperscript{61} For example, hydropower generators need to be located near free flowing rivers, while wind generators need to be either offshore or near ridgelines, and biomass facilities need to be in wooded areas.\textsuperscript{62} Regardless of the type of generator, these areas are usually far from load pockets.\textsuperscript{63} The concern, however, is that when transmission is constrained, these sources of energy will be backed down, resulting in a loss of revenue compared to other non-renewable generators.\textsuperscript{64} LMP also could deter investment in new renewable gen-

\textsuperscript{55} Id. at 10 (statement of Charles S. Whitmore, FERC).
\textsuperscript{56} Id. at 12 (statement of Beth Nagusky, Independent Energy Producers of Maine and New England Renewable Power Producers Association).
\textsuperscript{57} Id. at 13.
\textsuperscript{58} Id. at 14; \textit{See} Int'l Council for Local Envtl. Initiative, FAQs About Wind Power, [hereinafter ICLEI] at http://www.greenpowergovs.org/wind/FAQs.html (last visited Feb. 18, 2005).
\textsuperscript{60} Id.
\textsuperscript{61} \textit{See}, \textit{e.g.}, ICLEI, \textit{supra} note 58.
\textsuperscript{62} Id.
\textsuperscript{64} \textit{See} id. at 15.
erators and make non-renewable generators a more appealing option for investment. Either result has adverse environmental consequences. When renewable energy generators are backed down, generators relying on non-environmentally friendly fossil fuels, such as coal, will have to run in their place. Similarly, a reduction in the number of zero-emission generators will increase the operations of pollutant-emitting generators, which will have an adverse effect on air quality.

New England renewable energy advocates were not the only ones concerned about the impact an SMD may have on the environment. Terry Black, representing the Project for Sustainable FERC Energy Policy (the Project), also expressed concern about the proposed SMD. The Project had previously participated in the environmental evaluations for both Orders 888 and 2000. The Project’s SMD concerns sprang from the environmental studies it conducted in connection with the previous two orders. The Project’s concerns center on coal-generators and the emissions potential of both new generators, a likely result under the SMD, and existing generators. Specifically, the Project asserted that the EIS conducted in connection with Order 888 had underestimated the potential increase in air pollution resulting from that regulatory initiative. The projections made in the Order 888 EIS were substantially lower than the actual results for both the base cases and the competition scenarios. In fact, FERC’s generation growth prediction for the EIS was 4.6% lower than the actual growth realized. The lifespan for coal plants was also underestimated in the EIS prepared in connection with Order 888.

Concerns regarding the impact on land usage have also been raised, specifically land usage associated with transmission grid expan-

65 See id.
66 See id.
67 See id. at 14.
68 Scoping Meeting, supra note 7, at 19–25 (statement of Terry Black, Director, Project for Sustainable FERC Energy Policy).
69 Id. at 19.
70 See id. at 19–25.
71 See id. at 19–20.
72 Id. at 20–21.
74 Id. at 6.
75 See id. at 5.
sion.\textsuperscript{76} James Loewen of the California Public Utility Commission (CPUC) argued that the SMD, with its push for system expansion and planning, will have a significant impact on land usage.\textsuperscript{77}

In the CPUC’s opinion, the previous environmental studies failed to address this problem.\textsuperscript{78} It found that these land use impacts could negatively affect communities, economic uses, and wildlife.\textsuperscript{79} The CPUC saw three reasons why the SMD would increase transmission grid expansion.\textsuperscript{80} First, the SMD promotes new system usages.\textsuperscript{81} Second, additional transmission capacity will be needed to remedy the problems with market power.\textsuperscript{82} Finally, there will be a certain amount of overbuilding of the transmission grid to deal with uncertainty surrounding generation plan additions.\textsuperscript{83}

The issues raised by the Project, the Independent Energy Producers of Maine, and the New England Renewable Power Producers Association address important concerns regarding the environmental implications of the proposed SMD and FERC’s responsibility to assess those and other potential environmental impacts.

II. STATUTORY AND REGULATORY FRAMEWORK

A. Environmental Impact Statements and Their Applicability to Federal Regulations

In 1970, Congress enacted NEPA, one of the earliest modern environmental laws.\textsuperscript{84} Although NEPA is not the most detailed piece of legislation, it has had a large impact on government agencies.\textsuperscript{85} To begin, Title II of NEPA established the Council for Environmental Quality (CEQ).\textsuperscript{86} Some of the CEQ’s purposes were to assist and advise the President on agency progress in implementing NEPA, to

\textsuperscript{76} Scoping Meeting, supra note 7, at 25 (statement of James Loewen, California Public Utility Commission).
\textsuperscript{77} Id.
\textsuperscript{78} Id. at 25.
\textsuperscript{79} See id. at 30.
\textsuperscript{80} Id. at 25.
\textsuperscript{81} Id. at 25–27.
\textsuperscript{82} Scoping Meeting, supra note 7, at 27–29 (statement of James Loewen, California Public Utility Commission).
\textsuperscript{83} Id. at 25, 29.
\textsuperscript{86} See 42 U.S.C. §§ 4341–4347.
promote environmental policies, and to provide guidance during the preparation of the annual environmental quality report. In 1970, President Nixon expanded the CEQ’s role by requiring it to issue guidelines for federal agencies regarding NEPA’s requirements. These guidelines were designed to assist federal agencies in determining when and how to prepare an EIS.

NEPA and the CEQ regulations require an EIS to be “included in every recommendation or report on proposals for legislation and other ‘major Federal actions’ significantly affecting the quality of human environment.” Federal agencies do not have to prepare an EIS if the proposal fails to meet any condition of section 1502.3. Provided, however, that the agency action meets all the conditions, an EIS must be conducted.

An EIS is not necessary until an agency proposes an action, a point in time defined as the stage in which an agency has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated. Preparation of an environmental impact statement on a proposal should be timed (§ 1502.5) so that the final statement may be completed in time for the statement to be included in any recommendation or report on the proposal. A proposal may exist in fact as well as by agency declaration that one exists.

1. Major Federal Actions

The first step in determining whether an agency is required to conduct an EIS is determining whether the proposal is a “major Federal action[].” Actions subject to federal control and responsibility, whose effects may be major, will be considered “major Federal ac-

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89 *Id.*; Spensley, *supra* note 87, at 310.
91 See 42 U.S.C. § 4332 (2000); *Ferrey, supra* note 85, at 75.
92 42 C.F.R. § 1502.3. In addition, there are several categorical exclusions which will release an agency from the duty of having to prepare an impact statement. NEPA and Agency Planning, 40 C.F.R. § 1501.4(a) (2).
93 Terminology and Index, 40 C.F.R. § 1508.23 (2003).
These include “new or revised agency rules, regulations, plans, policies, or procedures . . . .” Actions can be either new or continuing and often fall within one of four categories. The first of these categories deals with the adoption of official policies. Rules and regulations fall under this category. The second category is the adoption of formal plans. The third category deals with the adoption of programs, such as groups of actions designed to implement a policy. The fourth and final category is the approval of specific projects. This category includes construction or management activities, such as projects requiring federal permits. While all categories contain actions which can be considered “major,” it is the specific project category which receives the most focus.

Determining when a federal action is “major” is not quite as easy as defining a “Federal action,” and has often been the subject of NEPA litigation. Courts take into account various aspects of the program to determine if an action will be considered “major.” Factors such as “the cost of a project, the amount of planning that has gone into the project, and the time needed to complete it” are all possible considerations in determining whether an action is “major.”

2. Significant Impact

In determining whether an action has a significant impact, both the context and intensity of the action are reviewed. “Contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality” must be taken into consideration when determining whether an action will have a significant impact.

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95 40 C.F.R. § 1508.18.
96 Id. § 1508.18(a).
97 Id.
98 Id. § 1508.18(b).
100 Id. § 1508.18(b)(2).
101 Id. § 1508.18.
102 Id. § 1508.18(b)(3).
103 Id. § 1508.18(b)(4).
104 Id.
105 Moore, supra note 94, at 14.
106 Ferrey, supra note 85, at 77.
107 Hanly v. Mitchell, 460 F.2d 640, 644 (2d Cir. 1972); Ferrey, supra note 85, at 77.
108 Ferrey, supra note 85, at 77.
109 Terminology and Index, 40 C.F.R. § 1508.27 (2003); Ferrey, supra note 85, at 77.
110 40 C.F.R. § 1508.27(a).
The context requirement essentially looks at the specific circumstances of an action.\textsuperscript{111}

The intensity portion deals with the severity of the impact.\textsuperscript{112} Under NEPA requirements, there are ten factors that should be taken into account when determining the intensity of an action: (1) beneficial and adverse impacts; (2) effects on public health or safety; (3) aspects of the geographical area; (4) the level of controversy surrounding the effects on the environment; (5) whether the effects on the environment are largely uncertain or unknown; (6) whether the action could impact future actions by establishing a precedent; (7) whether the action, when taken together with additional related actions, would have a significant impact; (8) the effect the action may have on existing infrastructure and cultural or scientific resources; (9) the action’s impact on threatened or endangered species; and (10) the relation between the action and federal, state, and local environmental laws or regulations.\textsuperscript{113}

A federal action can have both direct and indirect effects.\textsuperscript{114} Direct effects result from the action and occur from the moment of implementation.\textsuperscript{115} Indirect effects, while reasonably foreseeable, occur at a later point in time.\textsuperscript{116} They can include things such as industry growth or ecosystem development.\textsuperscript{117} It is important to note that the terms “effects” and “impacts” can be used interchangeably throughout the regulations and include “ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health” effects.\textsuperscript{118}

3. Human Environment

The human environment includes both the natural and physical environment and the relationship of people with the environment.\textsuperscript{119} As with effects, the human environment includes ecological, aesthetic, historic, cultural, and health matters.\textsuperscript{120} While social and economic

\textsuperscript{111} Ferrey, supra note 85, at 79.
\textsuperscript{112} 40 C.F.R. § 1508.27(b).
\textsuperscript{113} Id. § 1508.27(b)(1)–(10).
\textsuperscript{114} Id. § 1508.8(a)–(b).
\textsuperscript{115} Terminology and Index, 40 C.F.R. § 1508.8(a) (2003).
\textsuperscript{116} Id. § 1508.8(b).
\textsuperscript{117} Id. § 1508.8(b); Ferrey, supra note 85, at 77.
\textsuperscript{118} 40 C.F.R. § 1508.8.
\textsuperscript{119} Id. § 1508.14.
\textsuperscript{120} Id. § 1508.8.
effects do not require an EIS by themselves, when the two are intertwined with the natural or physical environment, they must be taken into account and the EIS must address their effects on the human environment.\textsuperscript{121}

\textbf{B. Environmental Assessments}

If it is unclear whether an EIS is required, an agency will prepare an EA.\textsuperscript{122} An EA is conducted over a much shorter time period, often several weeks to a few months, and has three major differences from an EIS: (1) no notices, scoping meetings, or public meetings are mandated; (2) data used in the assessments are existing data rather than new information; and (3) the agency is not required to publish information regarding the availability of the draft EA.\textsuperscript{123} An EA serves three functions: (1) it briefly provides enough evidence and analysis to determine whether an EIS is necessary; (2) when an EIS is not required, an EA aids the agency in complying with the NEPA; and (3) when an EIS is required, an EA facilitates the preparation of the EIS.\textsuperscript{124} Upon the completion of the EA, the agency will do one of two things: it will conclude that there is a possibility of significant impacts, calling for an EIS, or it will conclude that there are no significant impacts and issue a Finding of No Significant Impact (FONSI).\textsuperscript{125}

An EA is appealing to agencies because a full EIS can be time-consuming and expensive.\textsuperscript{126} The court in \textit{Cronin v. U.S. Department of Agriculture} described an EA as “a rough-cut, low-budget environmental impact statement designed to show whether a full-fledged environmental impact statement . . . is necessary.”\textsuperscript{127} The time and expense of preparing a full EIS can be “the kiss of death to many a federal project.”\textsuperscript{128} Concerns with cost and time are reflected in FERC’s decision to conduct an EA.\textsuperscript{129} While cost and time play a role in an agency’s desire to avoid an EIS, the EA’s lower standard of scrutiny is also likely

\begin{thebibliography}{999}
\bibitem{121} Id. Terminology and Index, 40 C.F.R. § 1508.14 (2003).
\bibitem{122} Spensley, \textit{supra} note 87, at 320.
\bibitem{123} \textsc{Jacob I. Bregman}, \textit{Environmental Impact Statements} 24 (2d ed. 1999).
\bibitem{124} 40 C.F.R. § 1508.9(a) (1)–(3).
\bibitem{125} Bregman, \textit{supra} note 123, at 24.
\bibitem{126} \textit{See Cronin v. U.S. Dep’t of Agric.}, 919 F.2d 439, 443 (7th Cir. 1990).
\bibitem{127} Id.
\bibitem{128} Id.
\bibitem{129} \textit{See Scoping Hearing, supra} note 7, at 10 (statement of Charles S. Whitmore, FERC).
\end{thebibliography}
to play a role. An EA allows agencies to avoid researching new data and conducting studies of specific scenarios.\textsuperscript{130}

III. FERC’s Agency Policies Regarding the Assessment of Environmental Impacts

In addition to the requirements set forth by NEPA, the Council for Environmental Quality (CEQ) requires each federal agency to implement its own supplemental procedures.\textsuperscript{131} While each agency is required to establish these supplemental procedures, they are allowed great flexibility in how to structure them, thus creating a scheme where procedures vary from agency to agency.\textsuperscript{132} FERC’s Statement of General Policy to Implement Procedures for Compliance with the National Environmental Policy Act of 1969 states:

(a) It will be the general policy of [FERC] to adopt and to adhere to the objectives and aims of [NEPA] in its regulations promulgated for statutes under [FERC’s] jurisdiction . . . .

(b) Therefore, in compliance with [NEPA], [FERC] staff will make a detailed environmental statement when the regulatory action taken by [FERC] . . . will have a significant environmental impact.\textsuperscript{133}

Under FERC regulations, an EA must be prepared for any regulation or proposed legislation that has not been previously excluded under section 380.4(a).\textsuperscript{134} That section lists thirty-six different types of actions for which FERC is exempted from having to prepare either an EA or an EIS.\textsuperscript{135} These actions range from internal administrative functions to construction on existing off-shore platforms.\textsuperscript{136} Section 380.4(a)(2) sets forth the exclusions for certain types of rules and regulations.\textsuperscript{137} Under this section, rules or legislation not initiated by the Commission and proposed rules and legislation that are merely “clarifying, corrective, or procedural” in nature or “that do not substantially change the

\textsuperscript{130} Bregman, supra note 123, at 24.
\textsuperscript{131} Agency Compliance, 40 C.F.R. § 1507.3(b)–(c) (2003); Daniel R. Mandelker, NEPA Law and Litigation § 2:11 (2d ed. 2001).
\textsuperscript{132} Mandelker, supra note 131, at § 2:11.
\textsuperscript{133} General Policy and Interpretations, 18 C.F.R. § 2.80 (2004).
\textsuperscript{134} FERC Regulations Implementing NEPA, 18 C.F.R. § 380.5(b) (12) (2004).
\textsuperscript{135} Id. § 380.4(a).
\textsuperscript{136} Id.
\textsuperscript{137} Id. § 380.4(a)(2).
effect of legislation or regulations being amended” are exempt from having to prepare an EA or EIS.\textsuperscript{138}

Certain FERC actions require an EIS from the outset.\textsuperscript{139} Proposed regulations, however, are not referenced in section 380.6, which lists the actions requiring an EIS.\textsuperscript{140} The section instead focuses on particular tangible actions which fall under the specific projects category of NEPA.\textsuperscript{141} These include actions such as the granting of licenses to new hydropower plants or the approval to develop underground natural gas storage facilities.\textsuperscript{142} All other FERC actions, while not subject to a mandatory initial EIS, remain subject to the CEQ regulations.\textsuperscript{143} As such, FERC is required to prepare an EIS for its “major Federal actions significantly affecting the quality of the human environment.”\textsuperscript{144}

IV. GIV\textsc{EN THE NATURE AND GOALS OF THE SMD, FERC SHOULD BE REQUIRED TO CONDUCT AN EIS}

Given the national application of an SMD and the potential impacts on the environment, FERC should be required to conduct an EIS. NEPA and FERC regulations call for an EIS whenever there is a “major Federal action” that would have a significant impact on the environment.\textsuperscript{145} FERC’s proposed SMD meets these conditions and, while an EA may assist in the preparation of an EIS, an EA cannot replace an EIS.

A. The SMD Is a Major Federal Action

The proposed SMD is a “major Federal action.” A proposed regulation, unless specifically excluded, is considered a federal action.\textsuperscript{146} Federal actions are not limited to physical actions such as the construction of a structure.\textsuperscript{147} For example, the proposed SMD could be considered under three of the federal action categories: (1) an adoption of official policy; (2) an adoption of formal plans; or (3) an

\textsuperscript{138} Id.
\textsuperscript{139} FERC Regulations Implementing NEPA, 18 C.F.R. § 380.6 (2004).
\textsuperscript{140} Id. § 380.6.
\textsuperscript{141} Id. § 380.6; Terminology and Index, 40 C.F.R. § 1508.18(b)(4) (2003).
\textsuperscript{142} 18 C.F.R. § 380.6.
\textsuperscript{143} 18 C.F.R. §§ 380.1, 380.4, 380.6.
\textsuperscript{144} 42 U.S.C. § 4332(2)(C) (2000).
\textsuperscript{145} See General Policy and Interpretations, 18 C.F.R. § 2.80 (2004).
\textsuperscript{146} See Terminology and Index, 40 C.F.R. § 1508.18(a) (2003) (“Actions include . . . new or revised agency rules, regulations . . . .”).
\textsuperscript{147} Id.
adoption of programs.\textsuperscript{148} A plan restructuring the utility industry, which fits into several of the categories in NEPA’s definition of “federal actions,” must be considered a “major Federal action.”\textsuperscript{149}

The essential question is whether the federal action is “major.” The scope and goals of the project indicate that FERC’s SMD is Major. The purpose of the SMD is to restructure the entire utility industry.\textsuperscript{150} As such, the SMD has a nationwide application.\textsuperscript{151} The SMD is integrally related to a series of regulatory initiatives begun more than eight years ago, which have been the subject of over a dozen hearings and conferences.\textsuperscript{152} Lastly, FERC has received over 1,500 comments on the matter.\textsuperscript{153}

Further strengthening the argument that the adoption of the SMD would be a “major Federal action” was FERC’s decision to conduct an EIS for Order 888.\textsuperscript{154} In preparing Order 888, FERC conducted an EIS, thus concluding that an order allowing competing power providers access to their transmission systems was a “major Federal action.”\textsuperscript{155}

Similarly, the SMD seeks to remove remaining barriers to competition, with the stated goal of allowing more generators to enter the market through easier access to transmission.\textsuperscript{156} Based on the definitions found in NEPA, the context and scope of the proposed regulation, and

\textsuperscript{148} See id. § 1508.18(b) (1)–(3).

\textsuperscript{149} See id.


\textsuperscript{151} See FERC, Commission Proposes New Foundation, supra note 150, at 1–2; FERC, Commission Issues White Paper, supra note 150, at 2.


\textsuperscript{154} See FERC, OPEN ACCESS RULE FINAL ENVIRONMENTAL IMPACT STATEMENT, 1-5, 1-6 (1996).

\textsuperscript{155} See 42 U.S.C. § 4332(2)(C) (2000); FERC, supra note 154, at 1-5, 1-6.

FERC’s decision to conduct an EIS for Order 888, FERC’s SMD is a “major Federal action,” fulfilling the first segment of the EIS trigger.\(^{157}\)

**B. The SMD Will Have Significant Impacts on the Environment**

Since FERC’s proposed SMD is a “major Federal action,” FERC’s decision to conduct an EA rather than a full EIS must stem from doubts as to whether the SMD could have significant environmental impacts. Creating a utility market designed to foster increased competition will create environmental impacts.\(^{158}\) An increase in generators, especially coal-generation facilities, will result in increased emissions.\(^{159}\)

1. Increased Emissions from Coal-Generation Facilities

Although capital-intensive coal-generation facilities feature relatively low variable energy costs, coal is far from the cleanest energy source.\(^{160}\) For example, it is acknowledged that coal-generation facilities produce more NO\(_x\) emissions than other types of facilities.\(^{161}\) In the EIS for Order 888, using a base of “maintaining the status quo,” FERC concluded that, in a market favoring coal over natural gas, NO\(_x\) emissions would increase by “two percent in 2000, three percent in 2005, and five percent in 2010.”\(^{162}\)

FERC staff have expressed their desire to use the EIS from Order 888 and address only concerns that either were not addressed in 1996 or were not known at the time.\(^{163}\) The problem, however, as pointed out by Terry Black at the August 12, 2002 scoping meeting, is that the

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\(^{158}\) See discussion supra Part I.

\(^{159}\) See Woolf et al., supra note 73, at 6.


\(^{161}\) See FERC, supra note 154, at 6-18, 6-19

\(^{162}\) FERC, supra note 154, at 6-18

\(^{163}\) Scoping Meeting, supra note 7, at 10–11 (statement of Charles S. Whitmore, FERC).
previous models were wrong.\textsuperscript{164} FERC’s Final Environmental Impact Statement (FEIS) emission predictions for NO\textsubscript{x} and CO\textsubscript{2} were significantly lower than actual 2000 figures.\textsuperscript{165} The increase in emissions for the year 2000 was not the two percent predicted.\textsuperscript{166} The errors were not limited to emission predictions of coal-generation facilities in the base case, but were found in the competition model as well.\textsuperscript{167} FERC’s predictions for NO\textsubscript{x} emissions were “5.4 percent lower than actual for the base case (favoring coal).”\textsuperscript{168} FERC’s predictions for “Competition-Favors-Coal” were 4.3\% lower than actual numbers.\textsuperscript{169} For CO\textsubscript{2} emissions, FERC’s predictions were 8.5\% lower in the base case than actual and 7.9\% lower in Competition-Favors-Coal.\textsuperscript{170} It is likely, given that FERC underestimated coal generation generally, that predictions for mercury emissions were also lower than the actual 2000 figures.\textsuperscript{171}

FERC also underestimated the lifespan of coal-generation facilities, which skewed its prediction of emissions released over a period of years.\textsuperscript{172} While, as of 2000, this error had no impact, the effects will appear over a longer period of time.\textsuperscript{173} Longer life expectancy for coal-generation facilities, coupled with low fuel costs, will continue to make this type of generation facility an attractive source of energy, resulting in a significant long-term emissions impact.\textsuperscript{174}

Increases in emissions will have a significant impact on the environment. FERC should be required to conduct a full EIS for two main reasons. First, the model used in the prior EIS has been shown to be inaccurate in predicting the amount of increased emissions.\textsuperscript{175} Second, the proposed SMD is a separate action, and agencies should not

\textsuperscript{164} Id. at 20 (statement of Terry Black, Director, Project for Sustainable FERC Energy Policy); Woolf et al., supra note 73, at 6.
\textsuperscript{165} Scoping Meeting, supra note 7, at 20 (statement of Terry Black, Director, Project for Sustainable FERC Energy Policy).
\textsuperscript{166} Woolf et al., supra note 73, at 7.
\textsuperscript{167} Scoping Meeting, supra note 7, at 20 (statement of Terry Black, Director, Project for Sustainable FERC Energy Policy); Woolf et al., supra note 73, at 7.
\textsuperscript{168} Woolf et al., supra note 73, at 7.
\textsuperscript{169} Id.
\textsuperscript{170} Id.
\textsuperscript{171} Id.
\textsuperscript{172} See Scoping Meeting, supra note 7, at 21 (statement of Terry Black, Director, Project for Sustainable FERC Energy Policy); Woolf et al., supra note 73, at 5.
\textsuperscript{173} See Scoping Meeting, supra note 7, at 21 (statement of Terry Black, Director, Project for Sustainable FERC Energy Policy).
\textsuperscript{174} See id.
\textsuperscript{175} See Woolf et al., supra note 73, at 1–6.
be allowed to rely on past compliances with NEPA to avoid current

In Anacostia Watershed Society v. Babbitt, the National Park Service argued that since the organization receiving jurisdiction over park land had complied with NEPA in the past, the National Park Service should be relieved of its duties under the Act.\footnote{Anacostia Watershed Soc’y, 871 F. Supp. at 478.} The case centered on the transfer of portions of Anacostia Park from the National Park Service to the District of Columbia.\footnote{See id. at 478.} The National Park Service asked the National Capital Planning Commission (NCPC), the federal planning agency for the federal government in D.C., to consider whether the National Park Service should make this transfer.\footnote{Id. at 478–79.} The NCPC then conducted its own EA and issued a FONSI, after which the National Park Service transferred jurisdiction.\footnote{Id. at 483.} The National Park Service argued that the EA and FONSI issued by the NCPC in 1992 relieved it of NEPA obligations.\footnote{Id. at 483.} The court held that the National Park Service remained bound to comply with NEPA and it could not adopt “the NCPC’s environmental assessment or FONSI.”\footnote{Anacostia Watershed Soc’y, 871 F. Supp. at 487.} The court further stated that to allow the Park Service to adopt another agency’s findings “would amount to a post hoc rationalization of the National Park Service’s previous decision.”\footnote{Id. at 487.}

Although FERC staff had indicated a desire to dispose of concerns over increased emission levels by relying on a prior EIS and EA which it has prepared, as opposed to a separate agency, the underlying principle of Anacostia applies: the SMD should be viewed as a separate and distinct action which requires a separate EIS. The purpose of NEPA is to ensure:

that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision. . . .
NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast.\textsuperscript{184}

Potential increases in emissions from coal-generation plants was one reason the Court of Appeals for the Eighth Circuit vacated an FEIS prepared by the Surface Transportation Board.\textsuperscript{185} In \textit{Mid States Coalition for Progress v. Surface Transportation Board}, the Surface Transportation Board, after releasing its FEIS, issued a final approval to the Dakota, Minnesota & Eastern Railroad Corporation to construct roughly 280 miles of new rail and to upgrade 600 miles of existing rail.\textsuperscript{186} The Sierra Club, petitioning with Mid States Coalition for Progress, argued that the Board failed in its FEIS to consider whether an increase in coal supplied to power generators would affect air quality.\textsuperscript{187} The Sierra Club contended that increased access to coal would increase coal consumption relative to other fuels, which would increase emissions.\textsuperscript{188} The Sierra Club argued that this would be a significant impact and, while certain emissions would be subject to national caps, others, such as nitrous oxide, carbon dioxide, and mercury, would not.\textsuperscript{189} The court found that “when the nature of the effect is reasonably foreseeable but its extent is not, . . . the agency may not simply ignore the effect.”\textsuperscript{190} The court found it “irresponsible” for the Surface Transportation Board to approve the project absent an examination of the effects resulting from increased coal consumption.\textsuperscript{191}

By seeking to increase competition in the energy market, FERC expects construction of new generation facilities around high-load areas; otherwise, there would be no need to suggest using the Order 888 EIS to avoid a complete EIS for the SMD proposal.\textsuperscript{192} Similar to the permit at issue in \textit{Mid State Coalition for Progress}, the SMD is an agency action that removes existing barriers, but which could also have a significant impact on air quality.\textsuperscript{193} The Court of Appeals for

\textsuperscript{184} Robertson v. Methow Valley Citizens Counsel, 490 U.S. 332, 349 (1989).
\textsuperscript{186} Id. at 532.
\textsuperscript{187} Id. at 548.
\textsuperscript{188} Id.
\textsuperscript{189} Id.
\textsuperscript{190} Id. at 549.
\textsuperscript{191} Mid States Coalition for Progress, 345 F.3d at 550.
\textsuperscript{193} See \textit{Mid State Coalition for Progress}, 345 F.3d at 548; FERC, \textit{supra} note 38, at 3.
the Eighth Circuit concluded that an FEIS was arbitrary and capricious for failing to address increased emission from coal-generation facilities, which indicates that increased generation is a factor significant enough to warrant an EIS.\footnote{See \textit{Mid States Coalition for Progress}, 345 F.3d at 550.} FERC’s decision to conduct an EIS at the time of Order 888, the failure of the EIS to predict emission increases, FERC’s desire to use the EIS rather than conduct a new study, and the previously discussed cases demonstrate that increased emissions from additional generation facilities, which are likely to be constructed in an SMD environment, constitute a significant effect on the environment.\footnote{See \textit{id.}; Proposed Rulemaking, 67 Fed. Reg. at 49,914; \textit{Scoping Meeting}, supra note 7, at 10 (statement of Charles S. Whitmore, FERC).} The inaccuracy of FERC’s Order 888 EIS has cast uncertainty on the true impact of increased competition in the utility market.\footnote{See \textit{id.}; Proposed Rulemaking, 67 Fed. Reg. at 49,914; \textit{Scoping Meeting}, supra note 7, at 10 (statement of Charles S. Whitmore, FERC).} When there is doubt as to the environmental effects, federal agencies are usually required to prepare an EIS; the proposed SMD should not be an exception to this rule.\footnote{Pub. Citizen v. Dep’t. of Transp., 316 F.3d 1002, 1024 (9th Cir. 2003). “Preparation of an EIS is mandated where uncertainty may be resolved by further collection of data, or where the collection of such data may prevent ‘speculation on potential . . . effects.’” \textit{Id.} (quoting Nat’l Parks and Conservation Ass’n v. Babbitt, 241 F.3d at 732, 732 (9th Cir. 2001) (omission in original)).}

2. Effects of the SMD on the Renewable Energy Sources

Since the SMD is intended to price energy on a locational basis and the highest energy prices may be expected in load-heavy areas, renewable energy sources could be placed at a severe disadvantage.\footnote{See \textit{Scoping Meeting}, supra note 7, at 13 (statement of Beth Nagusky, Independent Energy Producers of Maine and New England Renewable Power Producers Association).} Renewable energy sources are generally located in more remote locations.\footnote{See \textit{ICLEI}, supra note 58; Int’l Council for Local Envtl. Initiative, Wind Resource Map, \textit{at} http://www.greenpowergovs.org/wind/wind%20resources%20map.html (last visited Feb. 18, 2005).} For example, high-wind areas most likely will not be located adjacent to major loads.\footnote{See \textit{Scoping Meeting}, supra note 7, at 14 (statement of Beth Nagusky, Independent Energy Producers of Maine and New England Renewable Power Producers Association); \textit{ICLEI}, supra note 58.} When choosing between an offshore wind-generation facility and a coal facility, it is likely that new market par-
Participants will choose the non-renewable source, which provides more freedom to locate.201

FERC has already underestimated the increase of pollution from coal facilities, a figure which can only increase if regulations are adopted encouraging higher-polluting facilities over zero-emission ones.202 Renewable energy sources have a significant impact on our environment by reducing emissions and increasing air quality.203 As it is, “utilities are responsible for 27% of nitrogen oxide emissions, two-thirds of sulfur dioxide emissions, and over a third of carbon emissions,” figures that could be greatly reduced through the use of renewable energy.204

A federal program that discourages actions which would have a positive effect on the environment will result in a significant negative impact on the environment. A reduction in zero-emission renewable-generation facilities will certainly have a negative impact on the environment. Therefore, FERC should address the ways in which an SMD would discourage the construction of new low- or zero-emission facilities.

Another problem the proposed SMD presents to renewable energy facilities is increasing the cost of operation. The proposed SMD is structured to increase competition in load-heavy areas through the establishment of a pricing system in which the distance from the load will increase cost.205 This pricing scheme could reduce the likelihood of a new market participant choosing to construct facilities fueled by a renewable energy source and could also potentially force current renewable energy facilities to scale back generation.206 In the worst-case scenario, current renewable-energy facilities would be forced out of the market by competition. While these possible results are arguably beyond FERC’s control, FERC should be required to study these possible effects and implement mitigating measures, or explain why mitigation is inappropriate. Although these mitigating measures may be

202 See Scoping Meeting, supra note 7, at 20 (statement of Terry Black, Director, Project for Sustainable FERC Energy Policy); WOOLF ET AL., supra note 73, at 5–6.
204 Id.
as simple as providing exemptions or credits to renewables, a study of the potential effects should be conducted to determine how best to approach the situation.\textsuperscript{207}

3. Environmental Justice

The SMD could also have an impact on environmental justice. FERC should address fully where these new generation facilities are likely to be located and what agency measures could be taken to ensure that environmental justice is served.\textsuperscript{208} It is highly likely that additional power plants will be located in poorer areas. For the same reasons that power companies would likely choose to construct more cost effective new generation facilities, they will be enticed to locate in areas where land costs are lower.\textsuperscript{209} While an SMD opponent may not be able to challenge an EA on an environmental justice claim alone, potential environmental justice issues can play a role in determining whether the action is significant.\textsuperscript{210}

V. CHALLENGING A FINDING OF NO SIGNIFICANT IMPACT

Should FERC make a FONSI, opponents will have to show that its decision was arbitrary and capricious.\textsuperscript{211} Forcing FERC to conduct an EIS at this stage can become difficult since courts prefer to defer to agency decisions.\textsuperscript{212} “[A]s long as the agency’s decision is ‘fully informed’ and ‘well-considered,’ it is entitled to judicial deference and a reviewing court should not substitute its own policy judgment.”\textsuperscript{213}

The difficulty in succeeding on these grounds is that agencies are given an extremely long leash. In \textit{Transmission Access Policy Study Group}

\footnotesize
\textsuperscript{207} See id. at 16–18 (suggesting several mitigating measures to assist renewable generators).

\textsuperscript{208} See Exec. Order No. 12,898, 59 Fed. Reg. 7629, 7629 (1994) ("To the greatest extent practicable and permitted by law, . . . each Federal agency shall make achieving environmental justice part of its mission . . . .").

\textsuperscript{209} See discussion supra Part IV.B.1.

\textsuperscript{210} See Terminology and Index, 40 C.F.R. § 1508.8 (2003); Sur Contra La Contaminación v. EPA, 202 F.3d 443, 549 (1st Cir. 2000) (holding that Executive Order 12,898 is intended for internal management purposes only and does not create a right to judicial review).

\textsuperscript{211} See NRDC v. Hodel, 865 F.2d 288, 294 (D.C. Cir. 1988).

\textsuperscript{212} See id.; see also Friends of Fiery Gizzard v. Farmers Home Admin., 61 F.3d 501, 506 (6th Cir. 1995).

\textsuperscript{213} See NRDC, 865 F.2d at 294 (quoting N. Slope Borough v. Andrus, 642 F.2d 589, 599 (D.C. Cir. 1980).
v. FERC, the EIS for Order 888 was contested. The petitioners in the case argued that “FERC acted arbitrarily and capriciously by failing to adopt measures to mitigate the expected harmful environmental effects of Order 888.” The court concluded that, since FERC found only “small increases” in emissions, it was reasonable for FERC to decide not to adopt mitigating measures. Furthermore, the court held that FERC’s decision that any increased emissions from Order 888 would best be handled by EPA and individual states was not arbitrary or capricious. That one agency can “pass the buck” to another and that this decision will be upheld by courts is discouraging for potential challengers.

Should FERC, however, issue a FONSI, opponents can likely show FERC’s decision would be arbitrary and capricious because FERC failed to take a “hard look” at the environmental effects of an SMD. The Court of Appeals for the Ninth Circuit found that the United States Forest Service failed to take a hard look at the environmental impacts of a decision to sell timber. In Idaho Sporting Congress v. Thomas, the Forest Service chose to conduct an EA rather than an EIS to evaluate the environmental effects resulting from a sale of timber. Idaho Sporting Congress (ISC) argued that the decision not to conduct an EIS was arbitrary and capricious because substantial questions remained as to the effect timber sales would have on the environment. Specifically, ISC argued that the EA had no factual and scientific analysis, relying instead on the opinion of a Forest Service hydrologist.

In reaching the conclusion that the Forest Service violated its NEPA duties, the Court of Appeals for the Ninth Circuit examined the Forest Service’s decision to use a 1985 report to show that its past management practices had not resulted in an adverse impact on water quality. While the district court had agreed with the Forest Service that the 1985 report sufficiently supplemented the 1990 report, the appeals court concluded that using the 1985 report was inadequate “for two main reasons: (1) the scope of the 1985 report differs from that of the 1990 report; (2) there are factual differences between the

215 See id. at 736.
216 See id. at 737.
217 See id.
218 See Idaho Sporting Cong. v. Thomas, 137 F.3d 1146, 1149 (9th Cir. 1998).
219 Id. at 1154.
220 Id. at 1148–49.
221 Id. at 1150.
222 Id.
logging done in 1985 and the proposed logging under the Miners Creek timber sale . . . .”223 The 1985 report was limited to the Miners Creek watershed and it failed to state where in the logging process the monitoring and analysis was conducted.224 In addition, both the 1985 report and the 1990 report were “premised on riparian buffers of 100 feet,” while the proposed project allowed for buffers of twenty to seventy-five feet.225 Taking these factors into account, the Court of Appeals for the Ninth Circuit concluded that a full EIS was necessary.226

Applying the rationale in Idaho Sporting Congress to FERC’s proposed SMD, FERC’s desire to use the Order 888 EIS to avoid conducting a full EIS is a failure to take a “hard look” at potential environmental impacts and, thus, is arbitrary and capricious.227 Just as the scopes for the two projects in Idaho Sporting Congress were different, so too are the scopes for Order 888 and the proposed SMD.228 While the goal—increased competition—of Order 888 and the proposed SMD may be similar, the methods of reaching these goals are different.229 For example, Order 888’s opening of the transmission grid does not impact renewable-energy generators nearly as much as the newly proposed SMD.230 FERC staff contend that an EA should be sufficient to examine factors unknown at the time of the Order 888 EIS and any changes since that EIS, but that response does not account for the differences between the projected emission increases in the Order 888 EIS and the actual emission increases.231

VI. POTENTIAL ARGUMENTS THAT THERE WILL NOT BE A SIGNIFICANT IMPACT ON THE ENVIRONMENT AND WHY THESE ARGUMENTS FALL SHORT

FERC may argue that whatever environmental impacts result from the SMD, they do not rise to the level that would impose a duty to conduct a full EIS. An agency would likely prefer this approach since it would remove the burden of having to conduct the studies

223 Idaho Sporting Congress, 137 F.3d at 1150.
224 Id.
225 Id. at 1151.
226 Id.
228 See Idaho Sporting Congress, 137 F.3d at 1150; discussion supra Introduction.
229 See discussion supra Introduction.
230 See discussion supra Part I.
231 Proposed Rulemaking, 67 Fed. Reg. at 49,914; Scoping Meeting, supra note 7, at 10 (statement of Charles S. Whitmore, FERC); Woolf et al., supra note 73, at 5–6.
themselves. One of the arguments would be that, while the SMD would allow new generators to enter the market, this does not grant them free access to set up shop where and when they choose.\textsuperscript{232} Any new generation facility would still require approval at the state level.\textsuperscript{233} This approval would require compliance with state regulations on zoning and permits, which often take into account environmental concerns.\textsuperscript{234} In addition, while the federal laws such as the Clean Air Act would still apply to generators, there are no national caps for some emissions such as nitrous oxide, carbon dioxide, and mercury.\textsuperscript{235}

While there may be state regulations on the establishment of new generation facilities, this should be viewed as a second line of defense. The main problem with using only a state permitting process is the very thing that makes it desirable: it works on a facility-by-facility basis. A study of an individual plant would look at the environmental impacts of a single generation facility for the area in which it would be located.\textsuperscript{236} It is unlikely that the overall effect of additional generation facilities across the nation will be taken into account in these types of studies.\textsuperscript{237} Cumulative environmental impacts, such as the air pollution concerns raised by the Project for Sustainable FERC Energy Policy, would not be fully addressed through the use of a facility-by-facility EIS.\textsuperscript{238}

Additionally, absent an EIS at this stage of the process, there would likely not be enough weight given to the types of new facilities being constructed. Given the goals of an SMD, new generation can be expected to locate near load centers in transmission-constrained areas and it is unlikely that these areas will be suitable for zero-emissions or environment-friendly generators.\textsuperscript{239} Consideration of individual power generation facilities does not mitigate these concerns.

\textsuperscript{232} See, \textit{e.g.}, \textsc{cal. pub. util. code} § 1001 (2004) (requiring that, prior to construction, electrical corporations must first obtain a certificate of public convenience and necessity); 66 \textsc{pa. cons. stat.} § 1101 (2003) (requiring public utilities to obtain a certificate of public convenience prior to delivering services to the public); \textsc{va. code ann.} § 56-256.2(B) (2004) (requiring that consideration be given to the effects on the environment in issuing a certificate of convenience required for all new public utilities).

\textsuperscript{233} See, \textit{e.g.}, \textsc{cal. pub. util. code} § 1001; 66 \textsc{pa. cons. stat.} § 1101; \textsc{va. code ann.} § 56-256.2(B).

\textsuperscript{234} See, \textit{e.g.}, \textsc{cal. pub. util. code} § 1001; 66 \textsc{pa. cons. stat.} § 1101; \textsc{va. code ann.} § 56-256.2(B).

\textsuperscript{235} See \textsc{mid states coalition for progress v. surface transp. bd.}, 345 F.3d 520, 548 (8th Cir. 2003).

\textsuperscript{236} See, \textit{e.g.}, \textsc{va. code ann.} § 56-256.2(B).

\textsuperscript{237} See \textit{scoping hearing, supra} note 7, at 20–21 (statement of Terry Black, Director, Project for Sustainable FERC Energy Policy).

\textsuperscript{238} \textsc{woolf et al., supra} note 73, at 5–6 (2001).

\textsuperscript{239} \textit{scoping hearing, supra} note 7, at 14 (statement of Beth Nagusky, Independent Energy Producers of Maine and New England Renewable Power Producers Association).
plant emission at the construction permitting stage will not correct for failure to consider environmental shortcomings in the design of the wholesale power market. Those entering the market will likely wish to do so cheaply, quickly, and with a high payoff rate, which currently favors higher-emission facilities. The fact that individual states will be required to cope with environmental considerations on a permit-by-permit basis, resulting in a major FERC regulatory initiative, does not constitute a statutorily permissible substitute for FERC’s duties under NEPA.

Finally, supporters may argue that FERC could make a FONSI, while adopting mitigating measures. A similar situation occurred in Spilker v. White, where the Court of Appeals for the Fifth Circuit did not object to a FONSI predicated on adoption of mitigating measures. Other circuits have followed similar reasoning; however, this practice leaves a haunting question: how can an agency adopt appropriate mitigating measures without first studying the effects of the proposed action? This practice essentially places the cart before the horse, as noted by the Court of Appeals for the Ninth Circuit in Idaho Sporting Congress. That court concluded that, “[w]ithout analytical data to support the proposed mitigation measures, we are not persuaded that they amount to anything more than a ‘mere listing’ of good management practices.” On balance, the Court of Appeals for the Ninth Circuit’s reasoning is the most logical and should control in situations such as this.

**Conclusion**

By looking at the purpose and the language of NEPA and comparing it with FERC’s actions to date, it would seem that a complete EIS is necessary. All that is required by NEPA to trigger the requirement for a full EIS is for a proposed “major Federal action” to have a significant effect on the human environment. It has been demonstrated that there are several potentially significant environmental impacts associated with the FERC SMD initiative. The increase in emission levels from low energy cost coal-fueled generation facilities, the impact the SMD

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240 See discussion supra Part IV.B.1.
242 See 352 F.3d 235, 241 (5th Cir. 2003).
243 See id.
244 See Idaho Sporting Congress, 137 F.3d at 1151.
245 See id.
246 See discussion supra Parts I–II.
will have on renewable-energy facilities, and the influence of locational marginal pricing on power plant siting are examples of significant impacts on the environment. While FERC and agencies in similar situations should have conducted an EIS from the outset, it is not too late for FERC to correct its course. FERC should, in its current EA, reach the conclusion that an EIS is required in connection with its proposed SMD. Should FERC issue a FONSI, there is reason to conclude that such a finding amounts to an arbitrary and capricious agency action. The use of an EA should be reserved for situations in which there is real doubt as to whether there will be adverse environmental impacts. Where, as in the case with the SMD, it is readily apparent that there are significant environmental impacts, FERC should shoulder the burden imposed by NEPA and perform an EIS.

248 See discussion supra Part I.

249 See discussion supra Part V.