Eighth Annual Energy and Sustainability Moot Court Competition
West Virginia University College of Law

March 2018

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

C.A. No. 17-02345
ORDER

Planet Protection Group,

Petitioner,

-v.-

United States Department of Energy, FE Docket No. 14-161-LNG

Respondent,

Mammoth Cove Point LNG, L.P.,

Intervenor.

Planet Protection Group,

Appellant,

-v.-

United States Department of Energy; State of Franklin, Department of Natural Resources, D.C. No. 16-01985

Appellees,

Mammoth Cove Point LNG, L.P.,

Intervenor.

This case involves an appeal to the United States Court of Appeals for the District of Columbia Circuit from orders in two separate proceedings:

1. An order by the United States Department of Energy (DOE) denying rehearing in FE Docket No. 14-161-LNG. Appellant Planet Protection Group (PPG) takes issue with the decision of DOE denying rehearing of the DOE's Order Conditionally Granting Long-Term Multi-Contract Authorization to Export Liquefied Natural Gas by Vessel from the Mammoth Cove Point LNG Terminal (Mammoth Terminal) in Mammoth, Franklin to Non-Free Trade Agreement Nations.

Grayed-out text denotes a change from the original Problem in response to the Official Competition Q&A period.

2. An order by the Federal District Court for the Eastern District of Franklin denying PPG's request for injunctive relief against Mammoth Cove Point LNG, L.P. (Mammoth Cove), the State of Franklin, Department of Natural Resources (DNR), and DOE.

PPG appealed the DOE order to this circuit, and appealed the District Court's rulings to the 12th Circuit Court of Appeals. Because both actions involve common parties (PPG, DOE and Mammoth Cove), the development of the same LNG project (the Mammoth Terminal), and common evidentiary issues (e.g., consideration of the impact of greenhouse gas (GHG) emissions in connection with approval of a liquefied natural gas (LNG) project), PPG, Mammoth Cove and DOE jointly filed a motion in both circuit courts to have the actions consolidated for decision by this court.[1] On December 1, 2017, the 12th Circuit granted the motion, and this court similarly granted the motion and accepted jurisdiction over the appeal of D.C. No. 16-01985 on December 8, 2017.

It is hereby ordered that PPG and Mammoth Cove[2] brief the following issues:[3]

1) Whether DOE's failure to consider the downstream impacts of GHG emissions attributable to the Mammoth Terminal in its Environmental Impact Statement (EIS) for the project violated the National Environmental Policy Act (NEPA).
2) Whether DOE's approval of the Mammoth Terminal would violate the Due Process Clause of the Fifth Amendment to the U.S. Constitution inasmuch as the GHG emissions from the Mammoth Terminal would contribute to a rise in atmospheric carbon dioxide (CO_2) levels that dangerously interfere with a stable climate system required alike by PPG as well as citizens of the United States.
3) Whether the issues raised by PPG in its Due Process challenge to the Mammoth Terminal in Federal District Court for the Eastern District of Franklin involve nonjusticiable political questions.
4) Whether Mammoth Cove's participation in the Property Exchange Agreement violates the rights of PPG and other citizens of Franklin under the public trust doctrine inasmuch as the Vandalia River and its riverbeds cannot be subjected to private ownership.

SO ORDERED

Entered this 29th Day of December, 2017

[1] The State of Franklin did not object to the motion in the 12th Circuit Court of Appeals to transfer the case to the D.C. Circuit Court of Appeals for consolidation with the related appeal.
[2] Neither the U.S. DOE nor the State of Franklin will be represented in this case for the purposes of the briefs and oral argument. Participants will represent PPG and Mammoth Cove.
[3] The parties have stipulated that PPG has standing for purposes of this appeal, and thus parties need not brief or argue about injury in fact, causation, and redressability. Similarly, parties need not brief any procedural issues regarding the D.C. Circuit Court of Appeal's jurisdiction over issues 2, 3, and 4

Factual Background

A. The LNG Export Industry in the U.S.

Only one LNG export terminal is currently operating in the United States—Cheniere Energy's Sabine Pass facility, which has been operating since early 2016. That facility has a capacity of about 2 billion cubic feet (Bcf)/day, with plans to expand to 3.5 Bcf/day. There are five additional LNG projects under construction with a total capacity of about 7.5 Bcf/day that will come online in 2018 and 2019, making total U.S. LNG export capacity about 10 or 11 Bcf/day within just a few years. Four more projects with a capacity of almost 7 Bcf/day are approved but not yet under construction. These terminals will make the United States one of the top three LNG exporters in the world; the other two major exporters are Australia and Qatar.

Between 2016 and 2020, the United States is expected to account for about half of the 20 Bcf/day of new LNG export capacity worldwide. (Worldwide LNG demand is now around 37 billion cubic feet per day.) The Energy Information Administration (EIA) expects that U.S. LNG exports will exceed 3 Bcf/day in 2018 and over 12 Bcf/day by 2035.

B. Proposed Mammoth Cove Point LNG Terminal

Pluto Energy Company, a U.S.-based international natural gas development company, formed a limited partnership, Mammoth Cove Point LNG, L.P to build the Mammoth Cove LNG Terminal near Mammoth, in the state of Franklin. The project will enable Mammoth Cove to transport natural gas from its existing pipeline interconnects to the Mammoth Terminal for the export of up to 1 billion cubic feet per day of LNG. The gas would come from the Maximus and Unita shale plays, two of the most prolific natural gas basins in North America, both of which are located within a portion of the mid-Atlantic region of the United States that covers five states, including the state of Franklin. Mammoth Cove proposes to complete construction of the liquefaction project so that facilities may start service in June 2020.

Natural gas-fired turbines at the facility will drive the main refrigerant compressors. The facility also will generate additional power on site to meet the power demands of the liquefaction plant. The liquefaction facilities will connect with the existing facility and share common facilities such as the LNG tanks, pumps, piping and pier in order to support the exporting of LNG.

The Mammoth Terminal will be located on 575 acres of land—including one-half mile of riverfront—along the west bank of the Vandalia River (Vandalia Riverfront Property), about 3 miles upstream from where the Vandalia River empties into Vandalia Bay. Vandalia Bay, in turn, feeds into the Atlantic Ocean about 35 miles downstream; the Vandalia River is thus an estuary. Given the depth of the Vandalia River at the proposed Terminal location, LNG tankers will be able to easily access the Terminal upon construction of the planned pier infrastructure adjacent to the Terminal.

Mammoth Cove has executed terminal service agreements (TSAs) with two customers, each of which will contract for 50 percent of the available capacity. The two customers are The Deutsch Group LLC, a German corporation, and UK Partners LLC, a London-based entity. Combined, these customers have contracted for firm capacity to liquefy natural gas and load LNG onto ships in the average annual amount of 375 million dekatherms (Dth), which is equivalent to about 1.00 Bcf/day of natural gas. In addition, the TSAs provide each of the customers with access as "overrun" services to any LNG production capability that may exist in excess of this firm capacity. Both The Deutsch Group and UK Partners contracted for a primary term of 20 years, with certain potential extension rights at the end of that term. The Deutsch Group has executed gas supply agreements within Germany to take delivery of the natural gas once it is delivered to the Deutsch Group's LNG import facility. UK Partners has a similar arrangement to offload natural gas to buyers within the United Kingdom.

C. The Vandalia Riverfront Property

The Vandalia Riverfront Property has been owned by the State of Franklin since the formation of the state in 1803,[4] and since 1967 has been managed by the Franklin DNR. Although the property has not formally been recognized as a public park in the Franklin Directory of State Parks, as a practical matter it has been considered by its users as public property. Over time, several trails have been formed on the property through frequent use by hikers, runners, and bicyclists, and the beach along the Vandalia River is used for launching kayaks and rowboats, many of which are left by their owners at the site, padlocked to nearby trees.

In 1975, DNR erected a chain link fence on the westerly portion of the property, and attached "NO TRESPASSING" signs at several locations along the fence. Gates through the fence at the southern and northern boundaries of the property allow DNR employees to occasionally access the site. The fences are not consistently monitored or maintained, however, and the gates are rarely locked. Nor has DNR followed a consistent enforcement policy to limit access to the property, and in fact has allowed three picnic tables to be placed near the edge of the sandy beach at the northernmost end of the property, closest to the town of Mammoth.

In late 2013, Franklin Governor Manny Carbon announced that the State of Franklin would work closely with Pluto Energy Company to procure a location suitable for the Mammoth Terminal, in an effort to attract the capital investment, property tax revenue, commerce and jobs associated with the proposed LNG facility. Under his direction, DNR entered into an agreement (Property Transfer Agreement) with Mammoth Cove to whereby Mammoth Cove would acquire the Vandalia Riverfront Property in exchange for a 1250-acre parcel of property owned by Pluto Energy Company in nearby Saturn Township.[4a] The Property Transfer Agreement was executed as of January 1, 2014, but its effectiveness was

[4] The Vandalia River at the proposed site for the Mammoth Terminal was navigable at the time of Franklin's statehood in 1803. (Franklin was not one of the original 13 states.)

[4a] The Franklin legislature did not take any action with respect to the transfer; DNR was the party to the Property Transfer Agreement, acting pursuant to its general statutory grant of authority.

expressly made contingent on Mammoth Terminal receiving the necessary regulatory approvals from DOE and FERC to export LNG from the facility.

D. Planet Protection Group

The Planet Protection Group (PPG) is a national environmental and public interest organization based in Washington, D.C. PPG has members located throughout the state of Franklin. Its chapter in the town of Mammoth includes several citizens who allege they will be directly affected by construction and operation of the proposed Mammoth Terminal. For example, one member lives approximately 0.5 miles from the proposed Mammoth Terminal facility, and she alleges that the additional noise made during construction and operation of the facility would hinder her enjoyment of her home. Several PPG members regularly take advantage of the trails and beach on the Vandalia Riverfront Property. In addition, PPG has identified many members between the ages of 18 and 30 who assert that they will be adversely affected by future sea level rise associated with increased GHG concentrations in the atmosphere, including localized impacts on Vandalia Bay and the tide-affected portions of the Vandalia River. Finally, another member of PPG claims that decreased snowpack attributable to increased GHG concentrations in the atmosphere—and the resulting climate change—impair his ability to downhill and cross-country ski during the winter.

Legal Background

A. The Natural Gas Act

Section 3(a) of the Natural Gas Act (NGA), 15 U.S.C. §717b(a), governs the export of natural gas from LNG facilities. It bars exportation of any natural gas from the United States to a foreign country without "first having secured an order . . . . authorizing it to do so." Section 7 of the NGA, 15 U.S.C. §717f(c)(1)(A) authorizes the Federal Energy Regulatory Commission (FERC) to issue certificates of public convenience and necessity for LNG facilities engaged in interstate natural gas transportation by pipeline. DOE has delegated to FERC the authority to "[a]pprove or disapprove the construction and operation of particular [export] facilities, the site at which such facilities shall be located, and with respect to natural gas that involves the construction of new domestic facilities, the place of . . . exit for [natural gas] exports. *DOE Delegation Order No. 00-004.00A, § 121.A (May 16, 2006).* As a result, if an operator of a natural gas terminal wants to export natural gas and has to construct or modify facilities to do so, it must obtain authorization from both DOE (to export) and FERC (to construct and to operate the necessary facilities).

Under Section 3(a) of the Natural Gas Act (15 U.S.C. § 717b(a)), the Department of Energy (DOE) is authorized to issue licenses to export LNG after it has determined that the proposed exports are consistent with the public interest. Exports of LNG to countries with which the U.S. has a free trade agreement (FTA) are deemed to be consistent with the public interest and approved as a matter of course (see Section 3(c) of the Natural Gas Act (15 U.S.C. § 717b(c))). By contrast, for exports to countries with which the U.S. does not have an FTA, the DOE, in making its public interest determination considers several factors including the

impact these exports would have on US energy needs and prices. As a result, applications for these exports take longer to conclude.

DOE's "public interest" analysis of export applications generally turns on whether the exports will unduly reduce domestic supplies of natural gas, causing adverse economic consequences in the U.S. Some energy intensive domestic industries, for example, argue that LNG exports will drive up their costs and should therefore be slowed. DOE has commissioned multiple studies on LNG exports, and they generally have found that LNG exports benefit the U.S. economy.[5]

B. The National Environmental Policy Act

The National Environmental Policy Act (NEPA) establishes a national policy to "encourage productive and enjoyable harmony between man and his environment," and was intended to promote "the understanding of the ecological systems and natural resources important to the" United States. *42 U.S.C. § 4321*. It requires a federal agency, "to the fullest extent possible," to prepare a detailed environmental impact statement ("EIS") regarding the environmental impact of "major Federal actions significantly affecting the quality of the human environment." *42 U.S.C. § 4332(2)(C)(i)*. A "major Federal action" is defined as including "actions with effects that may be major and which are potentially subject to Federal control and responsibility" and includes approval of specific projects, such as actions approved by permit or other regulatory decision. *40 C.F.R. § 1508.18.* The EIS must contain:

a) the environmental impact of the proposed action,
b) any adverse environmental effects which cannot be avoided should the proposal be implemented,
c) alternatives to the proposed action,
d) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
e) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

42 U.S.C. § 4332(2)(C)(i)–(v).

The federal agency must establish the scope of the project's EIS, which consists of the "range of actions, alternatives, and impacts to be considered" in the EIS, including connected, cumulative, and similar actions and direct, indirect, and cumulative impacts. *40 C.F.R. § 1508.25.* A cumulative impact is the impact on the environment resulting from the action's impact "when added to other past, present, and reasonably foreseeable future actions regardless of what agency or person undertakes such other actions." *40 C.F.R. § 1508.7.* The

[5] In 2012, for example, the Energy Information Administration (EIA) examined how LNG exports in amounts equivalent to 6 and 12 Bcf/day might impact domestic energy markets over a 25-year period. EIA projected that increased LNG exports would lead to increased natural gas prices within the U.S. and that the U.S. market would respond by increasing gas production. A second study by NERA Economic Consulting, also published in 2012, concluded that in all scenarios analyzed, "the U.S. would experience net economic benefits from increased LNG exports."

contents of the EIS must show that the reviewing agency has contemplated the full range of potential environmental impacts resulting from the proposed action and documented the evidence to support that analysis.

Authorizations to export natural gas require an environmental review under NEPA. The Natural Gas Act designates FERC as the "lead agency for purposes of coordinating all applicable Federal authorizations and for the purposes of complying with the National Environmental Policy Act." *15 U.S.C. § 717n(b)(1)*. As a result, DOE participates in the NEPA process only as a "cooperating agency" *40 C.F.R. § 1501.6(b),* while FERC is ultimately responsible for "supervis[ing] the preparation of [the] environmental impact statement." *Id*. *§ 1501.5.* That arrangement makes it possible for DOE to adopt FERC's analysis as its own for purposes of any additional NEPA review required by an export-authorization request. But DOE must independently review FERC's work and conclude that DOE's own "comments and suggestions have been satisfied." *Id*. *§ 1506.3.* DOE is ultimately responsible for reviewing the indirect effects of exports because it has final say over the authorization of exports.

C. Environmental Impact Statement for the Mammoth Cove LNG Terminal

In 2014, Mammoth Cove sought authorization from FERC to construct gas liquefaction facilities to facilitate LNG export operations. As required by NEPA, FERC undertook an extensive review of the Mammoth Terminal project, and prepared an Environmental Impact Statement (EIS). DOE, the Environmental Protection Agency, the Department of Transportation, the U.S. Army Corps of Engineers, and the National Oceanic and Atmospheric Administration all participated in that review as "cooperating agencies." In April 2017, FERC issued its final EIS, which found that the Mammoth Terminal project "would result in some adverse environmental impacts," but that those impacts would be "mostly temporary and short-term" as long as Mammoth Cove implemented mitigation procedures proposed by FERC. The EIS disclosed and analyzed direct, indirect, and cumulative impacts from the construction and operation of the proposed liquefaction and export facilities. The EIS did not, however, evaluate the indirect effects pertaining to the authorization of exports. In May 2017, FERC conditionally authorized the Mammoth Terminal project, determining that if Mammoth Cove complied with specified environmental conditions, the project would not be inconsistent with the public interest.

In June 2017, DOE adopted FERC's EIS in full, and supplemented it with two reports: (1) an Addendum to the EIS to examine certain indirect effects of LNG exports, focusing primarily on the impacts of export-induced natural gas production in the U.S. and, of more relevance to this appeal, (2) a report prepared by the National Energy Technology Laboratory (NETL) that addressed potential indirect effects of LNG exports on global GHG emissions. *Life Cycle Greenhouse Gas Perspective on Exporting Liquefied Natural Gas from the United States, DOE/NETL-2014/1649 (May 29, 2014) (*LIFE CYCLE REPORT*)*. The LIFE CYCLE REPORT concluded that exporting LNG from the U.S. to produce power in Europe and Asia would not increase GHG emissions compared to regional coal power.

On September 21, 2017, DOE issued its Order Conditionally Granting Long-Term Multi-Contract Authorization to Export Liquefied Natural Gas by Vessel from the Mammoth Cove Point LNG Terminal to Non-Free Trade Agreement Nations. In that Order, DOE explained its reasoning for adopting FERC's EIS in full and granting Mammoth Cove's application under Section 3(a) of the Natural Gas Act, finding the proposed exports are in the "public interest." PPG shortly thereafter petitioned for rehearing, and challenged DOE's examination of the potential GHG emissions resulting from the indirect effects of exports. PPG asserted that the LIFE CYCLE REPORT was insufficient in its analysis of downstream emissions, given that the REPORT compared the GHG emissions from generating electricity using imported LNG only to power generation from regional coal. (For example, Scenario 1 in the REPORT compared the GHG emissions associated with natural gas extracted from the Marcellus Shale and transported via LNG tanker to Rotterdam, thereby reflecting the displacement of "regional coal" in the European market.)[6] PPG claimed that DOE should also have considered the potential for LNG to compete with renewables, which it argued are "prevalent in certain import markets." PPG asserted that such an analysis would show that displacement of renewables by LNG-sourced natural gas plants would result in an increase in GHG emissions, which is a "reasonably foreseeable" environmental impact associated with authorizing LNG exports from the Mammoth terminal.

While PPG's Petition for Rehearing was pending before DOE, the D.C. Circuit Court of Appeals issued its decision in *Sierra Club v. DOE*, 867 F.3d 189 (August 15, 2017). In that decision, the Court upheld DOE's rejection of similar arguments by Sierra Club with respect to the analysis of downstream GHG emissions in DOE's decision to authorize the Freeport LNG terminals in Texas. *867 F.3d at 202*. Using the same reasoning that the D.C. Circuit affirmed in the Freeport case, DOE shortly thereafter denied PPG's petition for rehearing, and this appeal followed on November 1, 2017.

Procedural Background

A. Basis for Appeals of the Planet Protection Group

1. Appeal of DOE Decision

On September 21, 2017, DOE issued its Order Conditionally Granting Long-Term Multi-Contract Authorization to Export Liquefied Natural Gas by Vessel from the Mammoth Cove Point LNG Terminal to Non-Free Trade Agreement Nations. Upon DOE's denial of PPG's subsequent request for rehearing on October 2, 2017, PPG appealed DOE's decision to the District of Columbia Circuit Court of Appeals on November 1, 2017. PPG argues that DOE's decision to grant the authorization was arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence, or otherwise not in accordance with law.

In this appeal, PPG challenges DOE's examination of the potential GHG emissions resulting from the indirect effects of exports. PPG asserts that the LIFE CYCLE REPORT relied

[6] Life Cycle Report, p. 2.

upon by DOE in granting the export authorization for the Mammoth Terminal was insufficient in its analysis of downstream emissions, given that the REPORT compared the GHG emissions from generating electricity using imported LNG only to power generation from "regional coal." PPG argues that the D.C. Circuit's August 2017 decision in the Freeport case (*Sierra Club v. DOE*, 867 F.3d 189) is distinguishable. First, PPG submits that in the case of the Mammoth Terminal, the destination of the LNG is known—50 percent to the United Kingdom, and 50 percent to Germany—and the energy profiles of these countries do not fit the "regional coal" scenario modeled in the LIFE CYCLE REPORT. Citing a recent report by the International Energy Agency, PPG claims that renewable energy represents a more prominent resource in the electricity generating portfolios in the U.K. and Germany, respectively, than reflected in the "regional coal" scenario, and thus LNG imports into these nations are more likely to displace zero-carbon resources (e.g., wind and solar) than coal-fired generation. According to PPG, wind power is growing in importance in the UK, and wind generation now produces more electricity than coal plants. Germany, for its part, is moving forward aggressively with solar energy, and its renewable energy output has increased more than eightfold since 1990.

Second, PPG cites the D.C. Circuit's decision in *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Circuit, August 22, 2017)—issued one week after the D.C. Circuit's August 15, 2017 decision in the Freeport case—and claims that NEPA requires a rigorous analysis of downstream impacts of GHG emissions from natural gas facilities. In *Sierra Club v. FERC*, the court rejected FERC's argument that downstream GHG impacts associated with its approval of a natural gas pipeline were not reasonably foreseeable. According to that decision, FERC did not "provide[] a satisfactory explanation" for its failure to quantify the GHG emissions that are an indirect effect of its actions. *867 F.3d at 1374*. The court observed that "some educated assumptions are inevitable in the NEPA process" (*Id.*), and PPG submits that the circumstances of the Mammoth Terminal in this case provide DOE with sufficient information to make an informed analysis about the GHG emissions associated with the export of LNG to the United Kingdom and Germany rather than relying on the "regional coal" model in the LIFE CYCLE REPORT.

2. District Court Proceedings

On July 1, 2017, PPG filed its complaint in the U.S. District Court for the Eastern District of Franklin seeking injunctive relief against Mammoth Cove, DOE and the State of Franklin. PPG's claims were based on two separate but related theories. First, PPG alleged that the Vandalia Riverfront Property on which Mammoth Cove proposes to build its Terminal is protected by the public trust doctrine, and thus the State of Franklin lacked the legal authority to enter into the Property Transfer Agreement purporting to convey the Vandalia River Property to Mammoth Cove.[7] According to PPG, the public trust doctrine places upon the fifty states a duty to safeguard the rights of their citizens, both current and

[7] According to PPG's complaint, federal courts have subject matter jurisdiction over the issue of navigability for title under 28 U.S.C. § 1331. No party contested the jurisdiction of the Federal District Court for Eastern Franklin to consider the issue of Franklin's ownership of navigable waters.

future, to certain resources contained therein, including their navigable waters and the lands thereunder. PPG cites *Shively v. Bowlby*, 152 U.S. 1, 49-50 (1894) as an early case articulating the basis for the public trust doctrine in the U.S. ("[T]he navigable waters and the soils under them . . . shall not be disposed of piecemeal to individuals, as private property, but shall be held for the purpose of being ultimately administered and dealt with for the public benefit by the state.") While the state of Franklin has no case precedent directly addressing the applicability of the public trust doctrine, PPG submits that the concept dates back to the Institutes of Justinian ("the following things are by natural law common to all—the air, running water, the sea, and consequently the seashore"),[8] and the doctrine made its way to the United States through the English common law.[9] Consistent with *Illinois Central Railroad Company v. Illinois*, 146 U.S. 387, 453 (1892) ("The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them . . . than it can abdicate its police powers in the administration of government and the preservation of the peace"), PPG asserts that any agreement purporting to convey the Vandalia Riverfront Property to Mammoth Cove is invalid.

Second, PPG claims that the proposed construction and operation of the Mammoth Terminal would violate the Due Process Clause of the Fifth Amendment to the U.S. Constitution inasmuch as the GHG emissions from the Mammoth Terminal would contribute to a rise in atmospheric carbon dioxide (CO_2) levels that dangerously interfere with a stable climate system required alike by PPG members as well as citizens of the United States. According to PPG, the right to a climate system capable of sustaining human life is a "fundamental right" which triggers a "strict scrutiny" standard of review under the Due Process Clause. *Juliana v. U.S.*, 217 F.Supp.3d 1224, 1248 (D.Or. 2016) PPG asserts that DOE's actions in authorizing LNG export facilities—including granting the requested authorization of the proposed Mammoth Terminal—represent a pattern of historic and continued authorization of the extraction, production, transportation, and utilization of fossil fuels, the result of which has been to cause dangerous interference with the earth's atmosphere and climate system.[10] PPG's cause of action includes the following elements:

- PPG alleges that a stable climate system is a necessary condition to exercising other rights to life, liberty, and property.
- Unlike the plaintiffs in *Juliana*, PPG is not seeking to impose an affirmative obligation on DOE to develop a plan to reduce CO_2 emissions; rather PPG's request for injunctive relief is limited to restraining DOE from issuing the necessary authorizations that would allow the Mammoth Terminal to operate.

[8] Timothy G. Kearley, *Justice Fred Blume and the Translation of Justinian's Code*, 99 Law Libr. J. 525, ¶ 1 (2007).
[9] *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 284 (1997) ("American law adopted as its own much of the English law respecting navigable waters, including the principle that submerged lands are held for a public purpose".)
[10] Unlike PPG's appeal of DOE's decision to the D.C. Circuit Court of Appeals—which is an appeal of an administrative action pursuant to the Natural Gas Act—its challenge in the District Court is based on a claimed violation of a constitutional right.

- This case involves a "natural resources" trust, which operates according to basic trust principles that impose upon the government, as trustee, a fiduciary duty to protect the trust property (atmosphere, water, seas, seashores, and wildlife) against damage or destruction, for the benefit of current and future generations. This public trust doctrine applies to the federal government. *Juliana*, 217 F.Supp 3d at 1259.
- Because the Due Process Clause safeguards fundamental rights that are "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition,"[11] PPG's public trust claims are properly categorized as substantive due process claims. *Juliana*, 217 F.Supp 3d at 1261. In other words, the right to a stable climate system, implicit in due process, is a constitutionally protected right, a consequence of the government's dominion over trust resources like submerged lands and oceans.

On October 2, 2017, Judge Laura Mars of the U.S. District Court for the Eastern District of Franklin issued her opinion denying the injunctive relief requested by PPG. She granted Franklin's Motion to Dismiss PPG's challenge to the Property Transfer Agreement, ruling as a matter of law that Franklin had the authority to convey the Vandalia Riverfront Property to Mammoth Cove. In her ruling, Judge Mars relied on Franklin's Marketable Title Act, which provides that any "person . . . who, alone or together with his predecessors in title, shall have been vested with any estate in real property of record for 30 years or more, shall have a marketable record title." With respect to PPG's claims that the Vandalia Riverfront Property is a "trust property" protected under the common law public trust doctrine, Judge Mars noted that "while the text of Franklin's Marketable Title Act contains a fulsome list of exceptions, none makes mention of public trust rights." Thus, even accepting the statements in PPG's complaint at true, Judge Mars ruled that PPG had failed to demonstrate that Franklin lacked the legal authority to execute the Property Transfer Agreement and convey the Vandalia Riverfront Property to Mammoth Cove.

With respect to PPG's constitutional claims, Judge Mars granted the Motions to Dismiss filed by DOE and Mammoth Cove, ruling that the court lacked jurisdiction because the complaint raised nonjusticiable political questions. Applying the criteria set forth in *Baker v. Carr*, 369 U.S. 186, 210 (1962), Judge Mars expressed the view that the dispute "calls for decisionmaking beyond a court's competence." According to Judge Mars's opinion, resolving this dispute would "implicitly require a yet-unmade policy determination regarding the impact of downstream GHG emissions—including policy determinations about how to weigh competing economic and environmental concerns—which is a task properly charged to a political branch."

PPG promptly filed its appeal of the District Court's decision with the 12th Circuit Court of Appeals, which subsequently transferred the action to the D.C. Circuit Court of Appeals for consolidation with the appeal of DOE's decision in FE Docket No. 14-161-LNG.

[11] *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, (2010).

[NOTE: No decisions or documents dated after December 29, 2017 may be cited either in briefs or in oral arguments.]