ORAL ARGUMENT NOT YET SCHEDULED

No. 23-1064
(Consolidated with 23-1074, 23-1077, 23-1129, 23-1130, 23-1137)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NEW JERSEY CONSERVATION FOUNDATION, et al.,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

TRANSCONTINENTAL GAS PIPELINE COMPANY, LLC,
Intervenor for Respondent.

On Petition for Review of Orders of the
Federal Energy Regulatory Commission

PROOF OPENING BRIEF OF PETITIONERS

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CERTIFICATE AS TO PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES

I. Parties

A. Petitioners

Petitioners in Nos. 23-1064, 23-1074, and 23-1137 are New Jersey Conservation Foundation, New Jersey League of Conservation Voters, Aquashicola Pohopoco Watershed Association, and Catherine Folio.

New Jersey Conservation Foundation ("NJCF") is a 501(c)(3) not-for-profit organization founded in New Jersey for the purpose of preserving land and natural resources throughout New Jersey. NJCF has no parent companies, and there are no publicly owned corporations that have a ten percent or greater ownership interest in NJCF.

New Jersey League of Conservation Voters Education Fund is a 501(c)(3) not-for-profit organization founded in New Jersey for the purpose of environmental advocacy and conservation. It is part of a family of organizations, including New Jersey League of Conservation Voters, Inc., which is a 501(c)(4); New Jersey League of Conservation Voters Political Action Committee, which is a political action committee; and New Jersey League of Conservation Voters Victory Fund, which is a super political action committee. New Jersey League of Conservation

Voters has no parent companies, and there are no publicly held corporations that have a ten percent or greater ownership interest in New Jersey League of Conservation Voters.

Aquashicola Pohopoco Watershed Conservancy is a 501(c)(3) not-for-profit organization founded in Pennsylvania for the purpose of environmental advocacy and conservation. Aquashicola Pohopoco Watershed Conservancy has no parent companies, and there are no publicly held corporations that have a ten percent or greater ownership interest in Aquashicola Pohopoco Watershed Conservancy.

Petitioners in Nos. 23-1077 and 23-1130 are the Delaware Riverkeeper Network and Maya van Rossum, the Delaware Riverkeeper.

The Delaware Riverkeeper Network is a nonprofit 501(c)(3) membership organization that advocates for the protection of the Delaware River, its tributaries, and the communities of its watershed. Delaware Riverkeeper Network does not have any parent corporation, nor does it issue stock.

Petitioners in No. 23-1129 are Sierra Club and Food & Water Watch.

Sierra Club, a corporation organized and existing under the laws of the State of California, is a national nonprofit organization dedicated to the protection and enjoyment of the environment. Sierra Club is a non-governmental corporate party with no parent corporation, and there are no publicly held corporations that have a ten percent or greater ownership in Sierra Club.

Food & Water Watch is a 501(c)(3) not-for-profit organization founded in 2005 to ensure access to clean drinking water, safe and sustainable food, and a livable climate. Food & Water Watch has no parent companies, and there are no publicly held corporations that have a ten percent or greater ownership interest in Food & Water Watch.

B. Respondent

The Respondent in this case is the Federal Energy Regulatory Commission.

C. Intervenors

Intervenor for Petitioners is New Jersey Rate Counsel.

Intervenors for Respondent are Transcontinental Gas Pipe Line Company, LLC and Exelon Corporation.

D. Amici

No individuals or entities have yet sought leave to participate as *amicus curiae*.

II. Rulings Under Review

Petitioners challenge the following orders of the Federal Energy Regulatory Commission:

1. Order Issuing Certificate and Approving Abandonment, *Transcontinental Gas Pipe Line Co.,* 182 FERC ¶ 61,006 (2023).
2. Notice of Denial of Rehearing by Operation of Law and Providing for Further Consideration, *Transcontinental Gas Pipe Line Co.,* 182 FERC ¶ 62,146 (Mar. 13, 2023).
3. Order on Rehearing, Granting Clarification, Denying Stay, and Dismissing Waiver, *Transcontinental Gas Pipe Line Co.,* 182 FERC ¶ 61,148 (2023).
4. Notice to Proceed with Construction – Tree Felling, *Transcontinental Gas Pipe Line Co.,* FERC Docket No. CP21-94, Accession No. 20230316-3044 (Mar. 16, 2023).
5. Notice to Proceed with Construction and Approval of Mount Effort Contractor Yard, *Transcontinental Gas Pipe Line Co.*, FERC

Docket No. CP21-94, Accession No. 20230323-3094 (Mar. 23, 2023).

6. Notice of Denial of Rehearing by Operation of Law and Providing for Further Consideration, *Transcontinental Gas Pipe Line Co.*, 183 FERC ¶ 62,054 (2023).

7. Order on Rehearing and Stay Requests, *Transcontinental Gas Pipe Line Co.*, 183 FERC ¶ 61,071 (2023).

III. Related Cases

This case has not previously been before this Court or any other court.

/s/ Moneen Nasmith
Moneen Nasmith

Counsel for Petitioners Sierra Club and Food & Water Watch

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GLOSSARY

Board Order	Order, *In re Exploration of Gas Capacity and Related Issues*, New Jersey Board of Public Utilities Docket Nos. GO19070846 & GO20010033 (Jun. 29, 2022)
Certificate Order	Order Issuing Certificate and Approving Abandonment, *Transcontinental Gas Pipe Line Co.*, 182 FERC ¶ 61,006 (2023).
Dth/d	Dekatherms per day
EIS	Environmental Impact Statement
FERC	Federal Energy Regulatory Commission
GHG	Greenhouse Gas(es)
NEPA	National Environmental Policy Act
New Jersey Agencies	New Jersey Board of Public Utilities and New Jersey Division of Rate Counsel
NJ Agencies Study	London Econ. Int'l, *Final Report: Analysis of Natural Gas Capacity to Serve New Jersey Firm Customers* (Nov. 5, 2021), filed as an attachment to New Jersey Parties' Mot. to Intervene & Lodge, *Transcontinental Gas Pipe Line Co.*, FERC Docket No. CP21-94, Accession No. 20220711-5186 (July 11, 2022)
NJCF	New Jersey Conservation Foundation

Skipping Stone Study	Skipping Stone, *Capacity Sufficiency Study for Proposed Regional Energy Access Expansion Project* (Sept. 8, 2022), filed as Exhibit A to Comments on Behalf of NJCF et al. Lodging Expert Report Regarding Capacity Sufficiency, *Transcontinental Gas Pipe Line Co.*, FERC Docket No. CP21-94, Accession No. 20220909-5000 (Sept. 9, 2022)
Transco	Transcontinental Gas Pipe Line Company, LLC
Transco Study	Levitan & Assocs., *Regional Access Energy Expansion* (Apr. 20, 2022), filed as Attachment 1D to Transco Submission of Supplemental Information, *Transcontinental Gas Pipe Line Co.*, FERC Docket No. CP21-94, Accession No. 20220422-5150 (Apr. 22, 2022)

JURISDICTIONAL STATEMENT

This Court has jurisdiction over these petitions for review of final orders of the Federal Energy Regulatory Commission ("FERC" or the "Commission"). 15 U.S.C § 717r(b).

On January 11, 2023, FERC issued an order granting Petitioners' intervention and issuing a certificate of public convenience and necessity allowing construction of a gas pipeline under the Natural Gas Act, 15 U.S.C. § 717f(c). Order Issuing Certificate and Approving Abandonment ¶ 4, *Transcontinental Gas Pipe Line Co.,* 182 FERC ¶ 61,006, JA____ ("Certificate Order"). Petitioners timely moved for rehearing, which was denied by operation of law on March 13, 2023. Notice of Denial of Rehearing by Operation of Law and Providing for Further Consideration, *Transcontinental Gas Pipe Line Co.*, 182 FERC ¶ 62,146, JA____. FERC issued an order on rehearing addressing the merits on March 17, 2023. Order on Rehearing, Granting Clarification, Denying Stay, and Dismissing Waiver, *Transcontinental Gas Pipe Line Co.,* 182 FERC ¶ 61,148, JA____. Petitions for review were timely filed on March 13 (23-1064), March 20 (23-1074 & 23-1077), and May 12, 2023 (23-1129).

FERC issued notices to proceed with construction on March 16 and 23, 2023 (Notice to Proceed with Construction – Tree Felling, *Transcontinental Gas Pipe Line Co.*, FERC Docket No. CP21-94, Accession No. 20230316-3044, JA____, and Notice to Proceed with Construction and Approval of Mount Effort Contractor Yard, *Transcontinental Gas Pipe Line Co.*, FERC Docket No. CP21-94, Accession No. 20230323-3094, JA____), and denied Petitioners' motions for rehearing and stay on May 1, 2023. Order on Rehearing and Stay Requests, *Transcontinental Gas Pipe Line Co.*, 183 FERC ¶ 61,071, JA____.

Timely petitions for review were filed on May 12 and May 25, 2023 (23-1130 & 23-1137).

STATEMENT OF ISSUES

In approving the Regional Energy Access Expansion Project:

1. Did FERC violate Section 7 of the Natural Gas Act, 15 U.S.C. §§ 717r and 717f, and the Administrative Procedure Act, 5 U.S.C. § 706, by determining that the Project would provide sufficient public benefits where the record does not support the finding of need for the Project, including:

   a. where the relevant agencies in New Jersey, the state where most of the Project's gas will go, demonstrated that it does not need additional gas capacity;

   b. where the record demonstrates that New Jersey has more than a sufficient gas supply to meet future demand, even in the case of a potential extreme weather event and where the record demonstrates that the Project will harm New Jersey's consumers;

   c. where the record does not support the finding that the Project is needed for reliability purposes;

d. where the record demonstrates the for-profit private motives for suppliers to enter into contracts for supply on the Project; and

e. where approval of the Project ignored New Jersey's state energy laws and goals?

2. Did FERC violate the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332 *et seq.,* and the Administrative Procedure Act, 5 U.S.C. § 706, by:

a. failing to evaluate reasonable alternatives and defining the Project's purpose and need unlawfully narrowly;

b. failing to consider the Project's foreseeable upstream emissions;

c. failing to discuss and evaluate the significance of the Project's greenhouse gas and climate change impacts; and

d. failing to adequately evaluate the Project's downstream emissions of criteria pollution?

3. Did FERC violate Section 7 of the Natural Gas Act, 15 U.S.C. §§ 717r and 717f, and the Administrative Procedure Act, 5 U.S.C. § 706, by determining that the Project's public benefits

outweighed public harms based on a record that did not establish adequate public benefits and discounted or ignored substantial harms?

STATUTES AND REGULATIONS

Relevant statutes and regulations appear in an addendum.

STATEMENT OF THE CASE

I. Introduction.

Petitioners challenge FERC's approval of the Regional Energy Access Expansion Project (the "Project"), which would consist of building approximately 22.3 miles of 30-inch-diameter lateral gas pipeline and 13.8 miles of 42-inch-diameter loop pipeline in Pennsylvania; one new gas-fired compressor station in New Jersey; modifications to five existing compressor stations in Pennsylvania and New Jersey; and the modification and addition of other ancillary facilities. Certificate Order P 4, JA___.

Despite having a record before it that is replete with evidence that the Project's additional capacity in New Jersey, where a majority of the gas will be delivered, is unneeded, FERC nevertheless concluded that the Project's capacity is needed by the public. FERC's Orders authorizing the Project are rife with reversible errors, including misstatements about the data and analyses in the independent expert studies submitted to the record—one of which was a state-commissioned independent gas capacity study. Those studies demonstrated that there is no need for the Project and that the Project

would, in fact, harm New Jersey consumers. Despite significant evidence that undermined any claims of Project "need," and the unrebutted evidence demonstrating the predominantly profit-driven motive for the Project, the Commission nevertheless approved the Project. FERC also based its approval of the Project on an inadequate and flawed review of the Project's environmental harms under the National Environmental Policy Act ("NEPA"). As a result, FERC's conclusion that the Project's public benefits outweigh its harms and thereby fulfills the Natural Gas Act's requirement that it is required by the public convenience and necessity, is arbitrary and capricious, contrary to law, and must be reversed and remanded.

II. Legal Framework

A. Natural Gas Act

The Natural Gas Act was enacted by Congress in 1938 after a finding that "the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation . . . is necessary in the public interest." 15 U.S.C. § 717(a). Section 7(c) requires applicants seeking to construct, operate, or acquire facilities for transporting or selling natural gas to

obtain a certificate of public convenience and necessity. *Id.* at § 717f(c)(1)(A). Section 7(e) provides that a certificate shall be issued only if the action proposed by the natural gas company "is or will be required by the present or future public convenience and necessity." *Id.* at § 717f(e). FERC is also authorized to condition the certificate as reasonably required by the public convenience and necessity. *Id.*

In 1999, FERC promulgated its Statement of Policy explaining the process by which it would "determin[e] whether there is a need for a specific project and whether, on balance, the project will serve the public interest." Certification of New Interstate Natural Gas Pipeline Facilities, 88 FERC ¶ 61,227, 61,737 (1999), *clarified* 90 FERC ¶ 61,128 (2000), *further clarified* 92 FERC ¶ 61,094 (2000). In February 2022, FERC published an Updated Policy Statement on Certification of New Interstate Natural Gas Facilities, noting the importance of "regional projections for both gas supply and market growth, as well as pipeline-specific studies in these areas," and finding that "comments from state utility or public service commissions as to how a proposed project may impact existing pipelines [are] particularly useful." *See* Updated Policy Statement on Certification of New Interstate Natural Gas Facilities,

178 FERC ¶ 61,107, PP 55–58, 70 (2022). FERC also published a companion Interim Policy Statement concerning the consideration of greenhouse gas ("GHG") emissions in natural gas infrastructure project reviews. Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews, 178 FERC ¶ 61,108 (2022). One month later, FERC issued an order designating both policies as "draft" only. *See* Order on Draft Policy Statements, 178 FERC ¶ 61,197 (2022).

B. National Environmental Policy Act

NEPA was enacted to "declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality." 42 U.S.C. § 4321. The Council on Environmental Quality has promulgated regulations implementing NEPA. *See* 40 C.F.R. Parts 1500–1508. NEPA requires all Federal agencies, including FERC, to prepare a "detailed statement" on "reasonably foreseeable environmental effects" of any proposed "major

Federal action[],” including adverse effects of the proposal and alternatives to the proposal including a “no action” alternative. *See* 42 U.S.C. § 4332(2)(C). This Court has found that, when preparing an environmental impact statement (“EIS”), the Commission must “detail[] the action’s environmental impacts, potential mitigation methods . . . and reasonable alternatives to the action, including a no-action alternative.” *Sierra Club v. FERC*, 38 F.4th 220, 226 (D.C. Cir. 2022) (citing 40 C.F.R. §§ 1502.14, 1502.16, 1501.3(a)(3)). In addition, “[t]he primary purpose of an environmental impact statement prepared pursuant to section 102(2)(C) of NEPA is to ensure agencies consider the environmental impacts of their actions in decision making.” 40 C.F.R. § 1502.1. NEPA demands that agencies “take a hard look at the environmental consequences before taking a major action.” *Ctr. for Biological Diversity v. FERC*, 67 F.4th 1176, 1181 (D.C. Cir. 2023) (quoting *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983)). A thorough discussion of an action’s environmental consequences “forms the scientific and analytic basis for the comparisons” in the analysis of alternatives, including the no action alternative. 40 C.F.R. § 1502.16(a).

III. Factual Background.

A. New Jersey Agencies Determined Existing Gas Capacity into the State Is Sufficient, and Additional Pipeline Infrastructure Is Not Needed.

The majority of the Project's gas capacity is destined for delivery in New Jersey. *See* Certificate Order PP 7–8, JA__–__. In February 2019, the New Jersey Board of Public Utilities—the entity charged with "general supervision and regulation of and jurisdiction and control over all public utilities" and protecting New Jersey utilities customers from "unjust, unreasonable, insufficient or unjustly discriminatory or preferential" rates, N.J.S.A. §§ 48:2-13(a), 48:2-21(b)(1)—opened a docket to determine if the state had sufficient gas capacity to meet future New Jersey customer needs, prospectively. *In re Exploration of Gas Capacity and Related Issues*, New Jersey Board of Public Utilities Docket Nos. GO19070846 & GO20010033, 1 (Jun. 29, 2022) ("Board Order"), JA___.[1] As part of this process, the New Jersey Board of Public Utilities engaged an independent expert who determined, after

[1] The Board Order was attached to New Jersey Parties' Mot. to Intervene and Lodge, *Transcontinental Gas Pipe Line Co.*, FERC Docket No. CP21-94, Accession No. 20220711-5186 (July 11, 2022).

reviewing existing supply into the state and projected future demand in extreme winter conditions, that New Jersey has sufficient gas capacity, and that there was no need for any additional capacity for the state's gas utilities through 2030. London Econ. Int'l, *Final Report: Analysis of Natural Gas Capacity to Serve New Jersey Firm Customers* (Nov. 5, 2021) ("NJ Agencies Study"), JA ___–__.[2] The New Jersey Board of Public Utilities formally adopted this finding of no need for additional gas capacity in New Jersey in a June 2022 order. Board Order at 11, JA___. The Board Order also found support "against the need for additional interstate pipeline capacity," noting that "under most demand scenarios, barring a major catastrophic event impacting one or more primary paths on a major interstate pipeline, New Jersey is well positioned with available interstate [natural gas] supply beyond 2030." *Id.*

More specifically, the NJ Agencies Study found that "through 2030, New Jersey's firm gas capacity can meet firm demand under 1) normal winter weather conditions, 2) in cases of colder-than-normal

[2] The NJ Agencies Study was also attached to New Jersey Parties' Motion to Intervene and Lodge.

weather on a scale experienced in the past, and 3) in the case of a design day," *i.e.*, the coldest projected day in a 90-year period. *Id.* "Design day" "reflects the highest gas demand a [gas utility] expects to be obligated to serve on an extremely cold winter day." Certificate Order P 21 n.41, JA___. The method of calculating design day is at the discretion of each gas utility and is not uniform, but generally each utility uses data from historical "peak" demand days—when demand is its highest point during a given winter season—and adjusts those values in various ways to estimate projected future demand growth. *Id.* The independent expert and the Board of Public Utilities thus concluded that New Jersey did not need any additional gas capacity then, now, or in future—even in the case of an extreme weather event.

B. Transco Sought Approval from FERC to Expand Gas Capacity into New Jersey.

While the New Jersey gas capacity proceedings above were pending, in March 2021, Transcontinental Gas Pipe Line Company, LLC, ("Transco") applied to FERC for a certificate of public convenience and necessity under the Natural Gas Act to construct and operate the Project to expand delivery of gas by 829,400 dekatherms per day ("Dth/d"). Certificate Order P 1, JA___. Most of the gas—73.5%—would

be delivered to locations in New Jersey, with the rest going to New York, Delaware, Maryland, and Pennsylvania. *Id.* at P 7, JA___. Construction of the Project would consist of building approximately 22.3 miles of 30-inch-diameter lateral gas pipeline and 13.8 miles of 42-inch-diameter loop pipeline in Pennsylvania; one new gas-fired compressor station in New Jersey; modifications to five existing compressor stations in Pennsylvania and New Jersey; and the modification and addition of other ancillary facilities. *Id.* at P 4, JA___. Petitioners all successfully intervened in the FERC proceeding. *Id.* at P 11, JA___.

C. New Jersey Agencies Opposed the Project.

On July 11, 2022, shortly after the New Jersey Board of Public Utilities issued the Board Order adopting the NJ Agencies Study, the Board and the New Jersey Division of Rate Counsel (collectively, "New Jersey Agencies") intervened in the FERC proceedings in opposition to the Project. New Jersey Parties' Mot. to Intervene & Lodge at 2, *Transcontinental Gas Pipe Line Co.*, FERC Docket No. CP21-94, Accession No. 20220711-5186 (July 11, 2022), JA___ (noting that they had "good cause to intervene in order to represent consumer interests for the State of New Jersey, who do not need to be burdened with

unneeded natural gas capacity"). As the New Jersey Agencies noted to FERC, "Rate Counsel's statutory duties require it to ensure that New Jersey ratepayers are not paying for capacity the State's regulator has determined is unnecessary," and that the Board "has a statutory duty to ensure that New Jersey's ratepayers are paying just and reasonable rates for natural gas." *Id.* at 6, JA___.

The New Jersey Agencies actively participated in building the record before FERC. They submitted the NJ Agencies Study and the Board Order to the Commission. New Jersey Parties' Mot. to Intervene & Lodge 1, JA___. New Jersey Rate Counsel also rebutted gas utilities' claims to FERC that there is limited supply in some places that may impact utilities' ability to respond to "extreme weather events,"[3] and that the Project is necessary to "ensure deliverability of plentiful gas supplies to New Jersey,"[4] by countering that "this is simply not the case." Comments of NJ Div. of Rate Counsel, *Transcontinental Gas Pipe*

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[3] *See* Comments of South Jersey Resources Group, LLC, *Transcontinental Gas Pipe Line Co.*, FERC Docket No. CP21-94, Accession No. 20221109-5084, 1 (Nov. 9, 2022), JA____.

[4] *See* Comments of New Jersey Natural Gas Co., *Transcontinental Gas Pipe Line Co.*, FERC Docket No. CP21-94, Accession No. 20221109-5041, 1 (Nov. 9, 2022), JA____.

Line Co., FERC Docket No. CP21-94, Accession No. 20221121-5157, 1 (Nov. 21, 2022), JA____. Rate Counsel found that the Project would "impose additional unnecessary costs onto New Jersey ratepayers." *Id.* at 2, JA___. Rate Counsel further informed FERC that "New Jersey's current natural gas infrastructure is able to meet peak demand through 2030 even during design day conditions and the demand will only decrease during the course of the next decade." *Id.*, JA__ (citing NJ Agencies Study at 2, 51, JA___, ___).

D. Petitioners Submitted Additional Evidence to FERC That There Is No Need for the Project.

In addition to the submissions made by the New Jersey Agencies, Petitioners submitted expert materials to FERC that also concluded that there is no public need for the Project. Petitioner NJCF filed a findings by expert energy consultants, Skipping Stone, LLC, that calculated that New Jersey's available gas capacity is even greater than what the NJ Agencies Study found. *See* Verified Statement of Gregory Lander of Skipping Stone, 2–4 (Feb. 7, 2022), JA___–___ (noting that the NJ Agencies Study contains analytical errors that result in an understatement of gas capacity available to gas distribution

companies).[5] NJCF also filed a winter reliability study that concluded that, even during extreme weather events, New Jersey gas utilities did not need additional gas capacity. Skipping Stone, *Analysis of Regional Pipeline System's Ability to Deliver Sufficient Quantities of Natural Gas During Prolonged and Extreme Cold Weather (Winter 2017-2018)*, at 3 (Feb. 11, 2018), JA___ ("This analysis shows that [an interstate pipeline] is not needed to meet peak winter demand, not even for a single day, even during extreme weather events.").[6]

Petitioner NJCF[7] moved for an evidentiary hearing on September 6, 2022, to give the Commission and parties the opportunity to conduct discovery and to ask questions to further explore Transco's claims that the project was needed. NJCF et al. Mot. for Evidentiary Hr'g, *Transcontinental Gas Pipe Line Co.*, FERC Docket No. CP21-94, Accession No. 20220906-5099 (Sept. 6, 2022), JA____.

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[5] This statement was filed as Exhibit C of Attachment A to NJCF's Motion to Lodge, *Transcontinental Gas Pipe Line Co.*, FERC Docket No. CP21-94, Accession No. 20220722-5109 (July 22, 2022).
[6] The winter reliability study was filed as Attachment B to NJCF's Motion to Lodge.
[7] Two affected landowners were also on the motion.

Shortly thereafter, Petitioner NJCF submitted an expert report, also prepared by Skipping Stone, which concluded that the Project "is flatly unneeded and uneconomical." Comments on Behalf of NJCF et al. Lodging Expert Report Regarding Capacity Sufficiency, *Transcontinental Gas Pipe Line Co.*, FERC Docket No. CP21-94, Accession No. 20220909-5000, 2 (Sept. 9, 2022), JA____; *see also id.* at Ex. A, Skipping Stone, *Capacity Sufficiency Study for Transco's Proposed Regional Energy Access Expansion Project* (Sept. 8, 2022), JA___ ("Skipping Stone Study"). The Skipping Stone Study examined the Project's additional capacity and found that "N[ew] J[ersey] ratepayers would bear the entire cost of infrastructure not designed to meet or serve their demand, while the [gas utilities'] shareholders would reap the economic rewards of [the gas utilities' sale] and/or release of excess capacity." Skipping Stone Study at 4, JA____.

E. FERC Purported to Review the Project's Environmental Harms.

FERC issued a Draft EIS on March 2, 2022. Draft EIS, *Transcontinental Gas Pipe Line Co.*, FERC Docket No. CP21-94, Accession No. 20220302-3021 (Mar. 2, 2022). Petitioners noted in comments that FERC's environmental analysis of the Project was done

in a manner that is inconsistent with the Council on Environmental Quality's regulations interpreting NEPA and that the Draft EIS did not (1) consider a broad enough project purpose and need or a reasonable range of alternatives; (2) analyze reasonably foreseeable indirect upstream greenhouse gas emissions; (3) assess the significance of greenhouse gas emissions caused by the Project; or (4) adequately address downstream air pollution. *See, e.g.,* NJCF et al. Comments on Draft EIS, *Transcontinental Gas Pipe Line Co.*, FERC Docket No. CP21-94, Accession No. 20220425-5460, 2–7 (Apr. 25, 2022), JA____–____; Delaware Riverkeeper Network Comments on Draft EIS, Accession No. 20220425-5423, 9–18 (Apr. 25, 2022), JA___–___; Food & Water Watch Comments on Draft EIS, Accession No. 20220422-5196, 2–17 (Apr. 22, 2022), JA___–___.

The U.S. Environmental Protection Agency also filed comments noting that FERC had "narrowly limited the purpose and need to natural gas transmission, therefore precluding other reasonable alternatives from consideration," strongly recommending that FERC use estimates of the social cost of greenhouse gases "to assess climate impacts and help weigh their significance," and recommending that

FERC include upstream emissions estimates and more clearly establish the need for the project. Env't Prot. Agency Comments on Draft EIS, Accession No. 20220425-5217, 3, 7, 9 (Apr. 25, 2022), JA___, ___, ___. On July 29, 2022, FERC released its Final EIS, which largely emulated the Draft EIS and did not make many of the changes urged by Petitioners and the Environmental Protection Agency. *See* Final EIS, *Transcontinental Gas Pipe Line Co.*, FERC Docket No. CP21-94, Accession No. 20220729-3005 (Jul. 29, 2022).

F. Over the New Jersey Agencies' and Petitioners' Objections, FERC Approved the Project.

FERC authorized the Project on January 11, 2023. Certificate Order P 1, JA___. The Commission rested its conclusion that the Project was in the public convenience and necessity on the fact that Transco had contracts in place for all of the Project's capacity. *Id.* at P 38, JA____. FERC's Order incorporated the findings of the Final EIS into its conclusion that the Project's public benefits would outweigh its harms. *Id.* at PP 38, 81, JA___, ___.

All Petitioners requested rehearing of FERC's certificate order, and some Petitioners also requested a stay. NJCF et al. Req. for Reh'g and Mot. for Stay, *Transcontinental Gas Pipe Line Co.*, FERC Docket

No. CP21-94, Accession No. 20230210-5215 (Feb. 10, 2023); Delaware Riverkeeper Network Req. for Reh'g, Accession No. 20230210-5211 (Feb. 10, 2023); Food & Water Watch and Sierra Club Req. for Reh'g, Accession No. 20230210-5214 (Feb. 10, 2023). The rehearing requests argued that FERC had arbitrarily and capriciously found that the Project was needed, inappropriately crediting studies and statements submitted by Transco while effectively ignoring the bulk of the evidence in the record, including the New Jersey Agencies and Petitioners' submissions, that demonstrated a lack of need. *See, e.g.*, NJCF Reh'g Req. at 12–32, JA___–___; Delaware Riverkeeper Network Reh'g Req. at 6–11, JA___–___; Food & Water Watch et al. Reh'g Req. at 4–12, JA___–___. New Jersey Rate Counsel filed a comment letter supporting and joining NJCF's Request for Rehearing and Motion for Stay, making two key points:

> First, FERC misconstrued the New Jersey Board of Public Utilities' findings that New Jersey does in fact have sufficient natural gas capacity without [the Project] because it failed to accord the [Board of Public Utilities]-commissioned London Economics [International] capacity study appropriate weight.
> . . .
> Second, . . . FERC failed to recognize that New Jersey has imposed a statutory duty on its natural

> gas utilities to reduce their demand by 1.1.% by 2026, with additional reductions expected in future years.

New Jersey Division of Rate Counsel Letter Joining NJCF's Reh'g Req., Accession No. 20230210-5206, 1–2 (Feb. 10, 2023), JA___–___.

The New Jersey Agencies further filed a Motion for Clarification requesting that FERC acknowledge and adopt the agencies' findings that existing pipeline capacity suffices to meet demand, even without energy efficiency gains or use of non-pipeline alternatives, and that FERC clarify that it recognizes that prudency determinations are left to state jurisdiction. Mot. for Clarification, *Transcontinental Gas Pipe Line Co.*, FERC Docket No. CP21-94, Accession No. 20230210-5235 (Feb. 10, 2023), JA____.

The rehearing requests also argued that FERC's approval violated NEPA and the Natural Gas Act because it was based on a faulty EIS that narrowly defined the purpose and need of the Project, NJCF Reh'g Req. at 39–44, JA___–___; Food & Water Watch et al. Reh'g Req. at 9–12, JA___–___; Delaware Riverkeeper Network Reh'g Req. at 11–15, JA___–___; did not evaluate a reasonable range of alternatives, NJCF Reh'g Req. at 44–47, JA___–___; Food & Water Watch et al. Reh'g Req.

at 12, JA___; Delaware Riverkeeper Network Reh'g Req. at 15–24, JA___–___; neglected to assess the Project's upstream impacts, NJCF Reh'g Req. at 47–49, JA___–___; Food & Water Watch et al. Reh'g Req. at 13–19, JA___–___; Delaware Riverkeeper Network Reh'g Req. at 31–38, JA___–___; refused to discuss the significance of the Project's climate change impacts, NJCF Reh'g Req. at 47–49, JA___–___; Food & Water Watch et al. Reh'g Req. at 21–25, JA___–___; Delaware Riverkeeper Network Reh'g Req. at 38–54, JA___–___; and lacked analysis of downstream air pollution effects (Food & Water Watch Reh'g Req. at 19–21, JA___–___. These cumulative errors under NEPA, Petitioners argued, resulted in a defective record and an impermissibly skewed balancing of the Project's benefits and adverse impacts under the Natural Gas Act. NJCF Reh'g Req. at 33–38, JA___–___; Food & Water Watch et al. Reh'g Req. at 12, 26, JA___, ___; Delaware Riverkeeper Network Reh'g Req. at 54–57, JA___–___.

FERC denied the requests for rehearing by operation of law on March 13, 2023. Notice of Denial of Rehearing by Operation of Law and Providing for Further Consideration, 182 FERC ¶ 62,146 (2023), JA___–__. FERC issued an order on rehearing addressing the merits on March

17, 2023. Order on Reh'g, Granting Clarification, Den. Stay, and Dismissing Waiver, 182 FERC ¶ 61,148 (2023), JA___–__. In the order addressing the merits of the requests for rehearing, FERC also denied the motions to stay and the pending motion for evidentiary hearing. *Id.* at PP 9–16, 18–21, JA__–___.

FERC issued a Notice to Proceed with Construction to Transco later in March. Notice to Proceed, *Transcontinental Gas Pipe Line Co.*, FERC Docket No. CP21-94, Accession No. 20230323-3094 (Mar. 23, 2023), JA____. Six Petitioners requested rehearing of the Notice to Proceed and moved for a stay. NJCF et al. Req. for Reh'g and Mot. for Stay, Accession No. 20230328-5274 (Mar. 28, 2023),; Delaware Riverkeeper Network Req. for Reh'g, Accession No. 20230330-5333 (Mar. 30, 2023). FERC denied them all. Notice of Denial of Reh'g by Operation of Law and Providing for Further Consideration, 183 FERC ¶ 62,054 (2023), JA___–__; Order on Reh'g and Stay Reqs., 183 FERC ¶ 61,071 (2023), JA____–__.

SUMMARY OF ARGUMENT

While FERC is responsible for ensuring that the construction and operation of interstate gas transportation infrastructure is carried out

in an orderly manner and approved only if it is consistent with the public convenience and necessity, FERC here did the very opposite by approving a gas system expansion primarily for the profit-driven interests of private gas companies while harming New Jersey ratepayers, the surrounding community, and the environment. The record before FERC clearly demonstrated that the state of New Jersey does not need and will not benefit from the Project's capacity. The New Jersey Board of Public Utilities and Rate Counsel submitted to FERC the Board's own independent study and Order, which found that no additional gas capacity is needed in New Jersey and that sources of gas capacity that utilities have relied upon for years are more than adequate to meet current and future demands, even in extreme winter scenarios. New Jersey Rate Counsel's submissions further demonstrated that the Project is unneeded and also explained that the Project would harm New Jersey ratepayers, thereby undermining New Jersey Rate Counsel's ability to fulfill its statutory mandate to protect consumers.

Petitioners bolstered the New Jersey Agencies' evidence by submitting their own independent expert reports, which showed that

the gas capacity available to New Jersey utilities was even more plentiful than the state originally calculated and was more than sufficient to meet any future demand. Petitioners' expert also found that using the Project to shore up any alleged reliability concerns would be extremely uneconomic and outrageously expensive for consumers and echoed concerns raised by New Jersey Rate Counsel that the Project is being driven primarily by the private for-profit objectives of Transco and its shippers.

Despite the raft of evidence demonstrating that a substantial proportion of the Project's capacity is not needed for any public purpose, the Commission approved the Project. In doing so, FERC effectively ignored the evidence showing there is no need for the Project's capacity using a series of incorrect or arbitrary justifications to dismiss these findings, including findings by New Jersey state entities. At the same time, the Commission gave substantial weight to any evidence supporting the need for the Project from the applicant and utility subscribers, refusing to probe their unsupported and highly suspect conclusions even while acknowledging the many flaws in the materials.

In addition, by relying on the mere existence of precedent agreements between Transco and its utility customers for authorization, and finding that their existence outweighed all other evidence in the record, FERC once again put its head in the sand to the profit-seeking motives these industry actors have to construct and operate an unneeded pipeline. Transco's gas utility shippers stand to reap significant profits for their shareholders by contracting for capacity unneeded by their customers on the Project, passing the cost of that capacity to their customers, and then reselling gas through that capacity to other entities.

The Commission's attempts to justify its approval of the Project on claims that the Project would provide a "reliability" benefit fare no better. There is no support in the record for these claims and, as more gas will always decrease reliability concerns, blindly invoking this rationale without record evidence of a specific and substantial reliability issue would justify approval of every new gas project. That reality is entirely at odds with FERC's responsibility under the Natural Gas Act to approve only those projects that are truly needed to serve the public.

In addition to finding benefits of the Project that are not supported by the evidence in the record, FERC failed to adequately consider the Project's harms in its NEPA review. The EIS contains several fundamental errors, including the failure to meaningfully assess potential alternatives, the Project's contributions to climate change, and the effects of the Project's contributions to downstream pollution on communities already suffering from poor air quality. Many of these deficiencies run directly counter to the Council on Environmental Quality's clear instructions on how federal agencies should conduct NEPA reviews, and all of them undermine FERC's conclusion that the Project was "environmentally acceptable" and that its benefits outweighed its adverse effects.

As a result of the lack of evidence for the Commission's conclusion that the Project serves a public need and its failure to adequately account for the Project's environmental and community harms, FERC's finding that there is a need for the Project, that the Project's benefits outweigh its costs, and that it is thus required by the public convenience and necessity is arbitrary, capricious, and contrary to the

Natural Gas Act, NEPA, and the Administrative Procedure Act and, therefore, must be reversed and remanded.

STANDING

Petitioners in Case Nos. 23-1064, 23-1074, and 23-1137 are an individual landowner, Catherine Folio, who is directly and adversely impacted by the proposed Project crossing her land, and nonprofit organizations whose organizational missions are germane to this challenge and whose volunteers and board members live, work, and recreate in areas that will be adversely impacted by the construction and ongoing operation of the Project. This Court can redress the harm to Catherine Folio and these organizations by vacating the Certificate Order and remanding to FERC. *Sierra Club v. FERC*, 867 F.3d 1357, 1365–66 (D.C. Cir. 2017) ("*Sabal Trail*").

Petitioners will experience diminished use and enjoyment of impacted land as a result of the construction and operation of the Project. Folio Decl. ¶¶ 3, 7–8; Vogt Decl. ¶¶ 2–4; Jones Decl. ¶¶ 4–9, 13–14; Aquashicola Pohopoco Watershed Conservancy Decl. ¶¶ 3, 5; NJCF Decl. ¶¶ 4–5. Petitioners enjoy birding, fishing, hiking, and golfing on and near the lands the Project will cut across and adversely impact, and

those activities will be negatively impacted by the Project. Vogt Decl. ¶¶ 2–4; Jones Decl. ¶¶ 4–5, 10–12; Aquashicola Pohopoco Watershed Conservancy Decl. ¶¶ 3–5; NJCF Decl. ¶¶ 3–4. The Project will damage land, endanger plant and animal species, and disrupt water supplies and ecosystems, including destroying habitats of birds, fish and other animals and potentially impact water quality, Folio Decl. ¶¶ 4, 6–8; Vogt Decl. ¶¶ 2–4; Jones Decl. ¶¶ 5–9; Aquashicola Pohopoco Watershed Conservancy Decl. ¶¶ 3–5; NJCF Decl. ¶ 4, thereby frustrating the purpose of the organizations whose mission it is to steward and protect natural resources. Folio Decl. ¶¶ 4, 6–8; Vogt Decl. ¶¶ 2–4; Jones Decl. ¶¶ 5–9; Aquashicola Pohopoco Watershed Conservancy Decl. ¶¶ 3–5; NJCF Decl. ¶ 4. The Project will contribute to greenhouse gas emissions and dust, thereby damaging air quality, contributing to climate change, and interfering with recreational activities near the construction activity, further frustrating Petitioners' organizational purposes. Jones Decl. ¶¶ 11–14; New Jersey League of Conservation Voters Education Fund Decl. ¶ 5; NJCF Decl. ¶ 5.

Petitioner organizations in Case Nos. 23-1077, 23-1129, and 23-1130 have standing to bring this case on behalf of their members who

would be harmed by construction and operation of the Project and would otherwise have standing in their own right. *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). This lawsuit is germane to Petitioner organizations' missions. Van Rossum Decl. ¶¶ 3–7, 9. Neither the claims asserted, nor the relief requested, requires participation of individual members in this lawsuit.

Petitioners' members would be harmed by air pollution from the construction and operation of the planned new compressor station located near their homes, which would negatively impact their ability to enjoy outside activities like gardening, walking, and hiking, especially for a member who has asthma. Quinn Decl. ¶¶ 5–11; Simmons Decl. ¶¶ 4–7, 10. They would also be negatively impacted by the congestion and air pollution caused by construction traffic during the compressor station's construction. Quinn Decl. ¶ 12; Simmons Decl. ¶ 11. Petitioners' members' aesthetic interests will also be harmed by degradation to the waterways and habitats that they live and recreate in. van Rossum Decl. ¶¶ 8, 10–15; Jackson Decl. ¶¶ 7–12; Steinberg Decl. ¶¶ 11–12. Petitioners' members will be further harmed by air pollution caused by the Project's direct and indirect emissions, both

through direct inhalation of the air pollution and because of the environmental degradation and hazards caused by the exacerbation of climate change. Van Rossum Decl. ¶¶ 8, 12–15; Steinberg Decl. ¶ 12.

ARGUMENT

I. Standard of Review

This Court reviews FERC's Natural Gas Act decisions and NEPA analyses for whether they are arbitrary and capricious or otherwise contrary to law. *Env't Def. Fund v. FERC,* 2 F.4th 953, 967–68 (D.C. Cir. 2021), *cert. denied sub nom. Spire Missouri Inc. v. Env't Def. Fund*, 142 S. Ct. 1668 (2022) ("*Spire*"). The "overarching question in this case is whether 'the Commission's "decisionmaking was reasoned, principled, and based upon the record."'" *Id.* (citation omitted). The Court will set aside the Commission's decision if it failed to "examine the relevant data" or did not make a "rational connection between the facts found and the choices made." *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted). This Court only accepts FERC's factual findings as conclusive if they are "supported by substantial evidence." 15 U.S.C. § 717r(b).

II. FERC Arbitrarily and Capriciously Authorized an Unneeded Project in Violation of the Natural Gas Act.

The Natural Gas Act requires that FERC protect consumers against corporate abuse and encourage the orderly development of needed gas infrastructure. *See City of Clarksville v. FERC*, 888 F.3d 477, 479 (D.C. Cir. 2018) (citing *NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 669–70 (1976); *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 610 (1944)); *accord Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1307 (D.C. Cir. 2015). Overbuilding unneeded projects is anything but orderly, and finding need on the basis of private contracts that enrich shareholders only enables corporate abuse. *See* Updated Policy Statement on Certification of New Interstate Natural Gas Facilities P 69 ("Ensuring the orderly development of natural gas supplies includes preventing overbuilding."). As Former FERC Chairman Norman Bay warned:

> Pipelines are capital intensive and long-lived assets. It is inefficient to build pipelines that may not be needed over the long term and that become stranded assets. Overbuilding may subject ratepayers to increased costs of shipping gas on legacy systems.

Nat'l Fuel Gas Supply Corp. Empire Pipeline, Inc., 158 FERC ¶ 61,145, at *57 (2017) (Bay, Comm'r, concurring).

FERC's "ostrich-like approach" to approval of the Project—ignoring record evidence demonstrating that this Project is not designed to fulfill unmet demand or provide some other public benefit, but rather to boost corporate profits—is the very definition of arbitrary and capricious decision-making. *See Spire*, 2 F.4th at 975, 968. FERC violated the Natural Gas Act and the Administrative Procedure Act in concluding that the unneeded proposed Project is in the public interest under the Section 7 of the Natural Gas Act, by, *inter alia,* arbitrarily and capriciously: (1) disregarding the State of New Jersey's clear conclusion that it does not need more gas capacity generally, and does not need the specific gas capacity of this Project to fulfill its energy needs, including during peak winter demand; (2) discounting, misconstruing, or ignoring additional evidence in the record showing a lack of need; (3) invoking unsubstantiated and undefined concepts of reliability as purported Project benefits; (4) refusing to properly consider record evidence that the Project will largely serve the private, for-profit interests of the applicant and utilities; and (5) incorrectly

characterizing and dismissing the effect of binding New Jersey state laws requiring utilities to reduce demand for natural gas and emissions of greenhouse gases. These errors independently, collectively, and completely undermine the Commission's conclusion that the Project would serve a public need and thus be in the public convenience and necessity under Section 7 of the Natural Gas Act.

A. FERC Arbitrarily and Capriciously Ignored Clear Findings by New Jersey State Agencies that There Is No Public Need for the Project's Capacity.

The record firmly establishes that the majority of the Project's proposed capacity is destined for New Jersey markets (73.5% to be exact, *see* Order on Reh'g PP 32–33, JA___–___), and that New Jersey does not need the additional gas capacity. It is undisputed that the New Jersey Agencies concluded "that New Jersey 'can easily meet firm demand under 1) normal winter weather conditions, 2) in cases of colder-than-normal weather on a scale experienced in the past, and 3) in the case of a design day' through 2030 using existing pipeline capacity." Board Order at 11, JA___. In short, New Jersey has sufficient gas capacity even under extreme weather conditions. NJ Agencies Study at 2, 25, JA___, ___.

By approving the Project, the Commission effectively ignored the New Jersey Agencies' findings, supplanting its judgment for that of the state agencies responsible for ensuring adequate and reliable gas service as well as consumer protection. FERC overrode the New Jersey Agencies' resource-intensive findings, concluding instead, with little to no factual basis or analysis, that the self-serving Transco-sponsored study was the "more persuasive" representation of gas capacity needs in the area. *See, e.g.,* Certificate Order P 34, JA___; Order on Reh'g P 41, JA___. FERC's authorization is rooted in an arbitrarily skewed view of the record that does not support its determination, in violation of the Natural Gas Act, *see* 15 U.S.C. § 717r(b). FERC's decision is particularly inconsistent with its Natural Gas Act responsibilities because it will burden New Jersey ratepayers with the costs of unnecessary pipeline capacity. *See* New Jersey Rate Counsel Comments at 2, JA___.

FERC has acknowledged that it should accord due weight to state public utility commissions' perspectives in FERC proceedings, noting in its Draft Updated Policy Statement the obvious importance of regional projections as well as project-specific studies, and finding that

"comments from state utility or public service commissions as to how a proposed project may impact existing pipelines [are] particularly useful." Updated Policy Statement on Certification of New Interstate Natural Gas Facilities PP 55–58, 70. Yet here, FERC took the opposite approach. The significance of the explicit finding by the New Jersey Agencies that New Jersey can "easily meet firm demand" even "in the case of a design day" using existing capacity, and of FERC ignoring that finding, cannot be understated. *See* New Jersey Parties' Mot. to Intervene & Lodge 3–4, JA___; New Jersey Rate Counsel Comments at 2, Accession No. 20221121-5157, JA___ ("New Jersey's current natural gas infrastructure is able to meet peak demand through 2030 even during design day conditions and the demand will only decrease during the course of the next decade." (citing NJ Agencies Study at 2, 51, JA___, ___)). As Commissioner Clements noted, "the most glaring omission in the Commission's need analysis is any discussion of the weight the Commission should accord to the finding of the [New Jersey Agencies] that no additional pipeline capacity is needed in New Jersey." Certificate Order, Clements, Comm'r, concurring P 4, JA___. By

approving the Project over New Jersey's clear objections, the Commission effectively gave the state's findings no weight at all.

Moreover, to the extent FERC attempted to justify its rejection of the New Jersey Agencies' conclusions by finding fault with the NJ Agencies Study, the Commission's rationale is not supported by the record. Critically, the NJ Agencies Study concluded that the Project is not needed because significant other sources of gas ("off-system peaking resources") are available during times of highest demand, which in-state gas utilities have used in the past to ensure adequate service. *See* NJ Agencies Study at 99–100, JA___–___ ("This analysis shows that sufficient firm capacity exists to meet firm demand from customers in New Jersey under a Normal Winter Day, a Historical Peak Day, and even on a Winter Design Day."). FERC summarily rejected New Jersey Agencies' projections for the availability of off-system peaking resources as "uncertain," Order on Reh'g P 38, JA___, even though the projections were based on the gas utilities' own outlooks. NJ Agencies Study at 98–99, JA___–___. As Commissioner Clements criticized, "the reasons the Commission gives for [this] uncertainty would have been true during past severe weather events, not just future ones; the Commission offers

no explanation for why the identified uncertainties are relevant only to the future availability of off-system peaking resources." *Id.*, Clements, Comm'r, concurring in part P 3, JA___. In other words, FERC did not explain why the significant off-system gas resources that utilities have made use of in past years would suddenly no longer be available in the future.

In addition, "[t]he only factual basis the Commission cites for its criticism relating to [the allegedly uncertain availability of] off-system peaking resources is that one [New Jersey gas utility] projected its use of off-system peaking resources would decline to zero after 2022." *Id.*, JA___. Although this utility contracted for approximately 200,000 dekatherms per day ("Dth/d") of off-system peaking resources in the past, NJ Agencies Study at 91–92 nn.156, 158, JA___–___, that same utility now suddenly and without explanation projects to use zero. Certificate Order P 29, JA___; *see also* Order on Reh'g P 38 n.120, JA___. Despite the clear inconsistency between the utility's past practices and its future plans, FERC failed to explore the veracity of the utility's self-serving claims and based its rejection of the New Jersey Agencies' findings in large part on this assertion alone.

The Commission also refused to investigate the profit-driven motives the utility had to manufacture a need for the Project, *see* NJCF Reh'g Req. at 25, JA___; *see also infra* at Section II.D. And FERC failed to consider the potential scenario raised by Commissioner Clements that the utility may have chosen not to enter into contracts for off-system peaking resources, not because such resources suddenly no longer exist, but because it does not anticipate needing those additional resources at all. *See* Order on Reh'g, Clements, Comm'r, concurring in part P 3, JA___. This plausible scenario, if true, would significantly undermine claims that the Project is needed to serve unmet demand, and yet the Commission failed to consider it. *Id.* FERC's reliance on unsubstantiated conclusions and bald shipper assertions that are inconsistent with past practice to reject findings that are supported by data and analyses (including from the state most affected) is the very definition of arbitrary and capricious decision-making. *See Spire,* 2 F.4th at 968, 972–76.

FERC also erred in concluding that the NJ Agencies Study could be dismissed on the basis that it did not consider interruptible demand. Interruptible demand is subject to curtailment or "interruption" if

utilities need the supply to serve customers with firm contracts (*i.e.*, contracts that are not subject to "interruption" and take priority). *See* NJ Agencies Study at 10, JA___ (defining interruptible customers in New Jersey). First, in its Certificate Order, FERC suggests that interruptible demand should be considered in utility gas capacity planning, *see* Certificate Order P 31, JA___, even though gas utilities are, in fact, not permitted to consider such demand in their planning processes. FERC seems to acknowledge this reality, but oddly claims that FERC itself "can consider such important [interruptible] sectors of demand, *regardless of whether [gas utilities] may do so in their planning*." Order on Reh'g P 63, JA___ (emphasis added).[8] Second, FERC faults the NJ Agencies Study for "omit[ting] from its analysis interruptible natural gas generator and industrial demand," *Id.*, JA____, and that of utilities, but the NJ Agencies Study *did* explicitly

[8] FERC's own approach to whether interruptible demand should be considered is inconsistent; the same order claimed that the Commission can and should consider such demand while on the other hand asserting that its "analysis focuses on firm capacity for [gas utilities]," Order on Reh'g P 45 n.138, JA___, *i.e.*, that its analysis did not include interruptible demand.

list the portion of demand attributable to interruptible customers as around 3% served by utilities. NJ Agencies Study at 29–30, JA___–___.

FERC is wrong that the New Jersey Agencies were required to consider interruptible demand. Even if interruptible demand were included in projected future demand scenarios, there would *still* be a significant amount of available capacity to meet the state's gas utility needs, plus additional, unused capacity. *See* NJCF Reh'g Req. 23, JA___ (calculating that even if utilities added the 3% of interruptible load to design day planning, there would still be ample available capacity plus additional capacity unused by New Jersey utilities). Therefore, FERC failed to justify its reasoning for discrediting and discounting the study's findings on this basis.

FERC also erroneously chose to ignore New Jersey's projections that overall gas demand in the state must decrease over time, including by making the unsupported assumption that the projected decreases in demand from sources like residential use for heating and cooking will be replaced and even exceeded by interruptible demand from gas-fired electricity generators. *See* Order on Reh'g P 37 n.119, JA___. FERC did not cite any record evidence of future increased demand or any

independent fact-based assessment of New Jersey's future gas use projections to support this point. Instead, FERC cited only itself for alleged increased interruptible electric generation demand. *Id.*, JA___. As FERC has consistently eschewed any role under the Natural Gas Act to engage in regional gas planning, its unsupported conclusions regarding New Jersey's future demand projections are owed no weight. *See*, *e.g.*, Order Issuing Certificates and Granting Abandonment Authority, *Mountain Valley Pipeline LLC*, 161 FERC ¶ 61,043, P 42 (2017) (FERC cannot examine regional market need); *id.* at P 139 ("The Commission is not engaged in regional [gas] planning.").

B. FERC Failed to Properly Consider Additional Evidence Further Demonstrating a Lack of Need.

In addition to the evidence showing the lack of need submitted by the New Jersey Agencies, FERC also had before it an expert report submitted by Skipping Stone, LLC, an independent global energy market consulting and technology services firm.[9] Skipping Stone Study, JA___–___. The Skipping Stone Study analyzed firm sources of gas

[9] *See* Skipping Stone, LLC, *About Us*, https://skippingstone.com/index.php/about-us/ (last visited July 24, 2023).

capacity available to New Jersey utilities and concluded that there is more than enough supply of capacity to serve design day demand now and in the future, obviating the need for the proposed capacity of the Project. The Commission dismissed the results of this study based on two fundamental mischaracterizations: (1) that Skipping Stone did not take the appropriate approach in selecting and using data on future projected demand for gas, *see* Certificate Order P 27, JA___; and (2) that Skipping Stone did not accurately evaluate available supply capacity in times of system constraint, *see* Certificate Order P 33, JA___; Order on Reh'g P 44, JA___. Both critiques are demonstrably false and neither serve to rationally dismiss Skipping Stone's conclusion that there is more than enough gas capacity in New Jersey without the Project.

1. Contrary to FERC's Determination, the Skipping Stone Study Correctly Analyzed and Calculated Future Demand for Gas in New Jersey.

The Commission's critiques of Skipping Stone's approach to calculating future demand for gas in New Jersey are both wrong and illogical.

First, FERC misread the Skipping Stone Study as focusing "only on [utility] demand," not taking into account demand from electric

generators and industrial users. Certificate Order P 27, JA___; *see also id.* at P 33, JA___; Order on Reh'g P 44, JA____. This is simply wrong—the Skipping Stone Study reflects *all* New Jersey demand in its analysis and data. In fact, it explicitly states that it includes consideration of New Jersey deliveries "to all load types (i.e., including Power generators and interruptible loads)." Skipping Stone Study at 16, JA___. The Skipping Stone Study emphasized this point, noting that its analysis represented:

> all load demands in New Jersey, not just Firm [gas utility] demands, which demands are much less than the total of all loads served by pipelines in New Jersey. The demands that are in addition to the firm demands of New Jersey [gas utilities] are comprised of interruptible loads, such as those of most power generators.

Id. at 17 (internal cross-reference omitted), JA____; *see also id.* at 18, JA___. Despite these clear statements, FERC rejected the findings of the Skipping Stone Study based on the incorrect view that the study looked at an overly narrow segment of demand for gas in New Jersey. *See* Certificate Order P 33, JA___.

Second, the Commission wrongly concluded that Skipping Stone "focused exclusively on historical peak demand from [gas utilities]"

rather than future forecasts and "ignored 'design day' planning principles." Certificate Order P 33, JA___. FERC repeated a similar error in its Order on Rehearing, incorrectly finding that the Study relied "on historical peak day demand" and failed "to account for design day criteria." Order on Reh'g P 50, JA___–__. Again, this is patently false. *See, e.g.,* Skipping Stone Study at 19, Chart 2, JA___ (showing sum of gas utility-supplied design day figures). Skipping Stone began with "New Jersey [gas utilities'] currently projected 2024-'25 Design Day figures and escalate[d] such amounts by an annual 1.2% growth rate." *Id.* at 18, JA___. In fact, Skipping Stone used the same design day sources—namely, numbers from the official filings New Jersey utilities make to state officials on their supply needs—as Transco's consultant used in its report. *Compare* Skipping Stone Study at 18 n.10, JA___ (noting that three of the design day figures were from the most recent New Jersey utilities' state filings for 2022, with the remaining figure taken from Transco's own study as not publicly available), *with* Transco

Study[10] at 9 n.8, JA___ (noting that design day demand was based on New Jersey utilities' state filings for 2021). Therefore, FERC's complaint that the Skipping Stone Study did not use the gas utilities' own design day figures is flatly incorrect.

In addition, FERC failed to recognize that Skipping Stone likely overestimated future demand by conservatively escalating the 2024–25 design day figures by an annual growth rate that exceeded the one from the Transco Study by 15%. Skipping Stone Study at 18 nn.10, 11. JA___. Skipping Stone also conservatively excluded the impacts of New Jersey's Board Order requiring gas utilities to reduce demand. *See* Skipping Stone Study at 18–19, JA___–__; *see also* Order Directing the Utilities to Establish Energy Efficiency and Peak Demand Reduction Programs, New Jersey Board of Public Utilities Docket Nos. QO19010040, QO19060748, & QO17091004 (June 10, 2020), available at https://publicaccess.bpu.state.nj.us/DocumentHandler.ashx?

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[10] Levitan & Assocs., *Regional Access Energy Expansion* (Apr. 20, 2022), filed as Attachment 1D to Transco Submission of Supplemental Information, *Transcontinental Gas Pipe Line Co.*, FERC Docket No. CP21-94, Accession No. 20220422-5150 (Apr. 22, 2022) ("Transco Study"), JA__–___.

document_id=1221939.[11] Had Skipping Stone included the mandatory reduction requirements in its study, the future increase in demand it predicted would not materialize. *See* Skipping Stone Study at 18–19, JA___–___.

Moreover, to the extent that Skipping Stone included analysis of historical peak data—*i.e.,* analyses of actual historical demand against existing supply—such analysis does not violate design day principles, as FERC suggests, but rather bolsters the findings from Skipping Stone's design day analysis by supporting it with real-world data. First, it shows that New Jersey has in the past, and will continue to, meet all of its demand without any additional gas capacity, including from the proposed Project. *See* Skipping Stone Study at 16–17, JA___–___. Second, the actual historical demand levels that Skipping Stone

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[11] Petitioners request that the Court take judicial notice of this Board Order and its legal mandates for gas utilities to achieve 0.75% annual demand reductions. *See* Order Directing the Utilities to Establish Energy Efficiency and Peak Demand Reduction Programs, at 2. The facts contained therein "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Courts "must take judicial notice if a party requests it and the court is supplied with the necessary information," Fed. R. Evid. 201(c)(2), and "may take judicial notice at any stage in the proceeding." Fed. R. Evid. 201(d).

examined exceeded the gas utilities' own future projected design day demand levels, and yet were met with existing supply of capacity. *Id.* at 18–19, JA___–___. FERC failed to explain why lower demand levels in the future require the Project's additional supply, when Skipping Stone's examination of historical data showed that higher demand levels in the past were already met without the Project. *See also supra* at Section II.A (discussing FERC's failures to explain wholesale rejection of evidence of adequate capacity supply).

Lastly, the vague wording in FERC's orders is insufficient to convey the nature of any additional objections or provide a rational basis for rejecting Skipping Stone's findings based on an alleged failure to "account for 'design day criteria.'" *See* Order on Reh'g P 50, JA___. Aside from the fact that FERC is wrong that Skipping Stone did not use design data, the Commission failed to provide any meaningful insight on what other "design day" errors Skipping Stone may have committed. As FERC and the Transco Study acknowledge, there is no standard method for defining a "design day." Certificate Order P 21 n.41, JA___ ("Each [gas utility] uses its own criteria to define design day, but [sic] which is generally defined in a similar, but not uniform way."). Indeed,

each of the gas utilities to be served by the Project "uses its own specific criteria to define the design day." Transco Study at 10 & n.9, JA___ (citing *id.*, n. 8, which has "information on each [gas utilities'] design day criteria"). Gas utilities do not even use standard timeframes for design day calculations. *See id.* at 11, JA___. FERC's orders fail to point to any decisions or guidance that would elaborate on what "principles" Skipping Stone allegedly failed to follow—the Order on Rehearing only cites the Certificate Order, which also lacks any details or specifics. *See, e.g.*, Order on Reh'g P 50 nn.153 & 154, JA___ (citing Certificate Order P 33, JA___). In sum, the Commission failed to justify and explain its wholesale rejection of the substantial evidence before it. *See Animal Legal Def. Fund, Inc. v. Perdue*, 872 F.3d 602, 619 (D.C. Cir. 2017) ("[A]n agency's decision is arbitrary and capricious when its 'explanation for its decision runs counter to the evidence before the agency.'" (quoting *State Farm*, 463 U.S. at 43)).

2. FERC Arbitrarily Dismissed Evidence of Adequate Existing Supply Capacity.

FERC's rejection of Skipping Stone's conclusion, that there is more than enough supply of gas capacity available in New Jersey without the Project, is also without merit. Skipping Stone's analysis

highlighted an existing supply of gas capacity available in New Jersey that gas utilities can use, and have used, to meet demand—including over the course of an especially cold winter. Skipping Stone Study at 18–19, JA__–__.[12] For example, in 2018–19, in-state gas demand was above 7,200,000 Dth/d—far exceeding the design day demand in 2032–33 projected by the gas utilities themselves—and was met by *existing* supply. *Id.*, JA__. Even without the Project's proposed gas capacity, gas utilities were able to meet the high demand by using additional existing capacity sources identified in the Skipping Stone Study. NJCF Reh'g Req. at 20, JA___. And the amount of that additional capacity is not small. For example, the record clearly demonstrated that existing capacity that is stranded—*i.e.*, has no possible delivery point downstream of New Jersey, *see* Skipping Stone Study at 6, 12, JA__, __,

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[12] New Jersey's ability to meet its past demand was further supported by Skipping Stone's winter reliability study, which FERC's Orders failed to adequately address. *See* Skipping Stone, *Analysis of Regional Pipeline System's Ability to Deliver Sufficient Quantities of Natural Gas During Prolonged and Extreme Cold Weather (Winter 2017-2018)*, JA___ (Attachment B to NJCF's Motion to Lodge, Accession No. 20220722-5109 (July 22, 2022)). This study provided data and analysis showing why a previously proposed (and since canceled) pipeline with a capacity of 1.1 billion cubic feet per day was not needed to meet peak winter demand, not even for a single day, even during extreme weather events.

and is available to serve New Jersey demand *today* without a single infrastructure upgrade or modification—is more than the entire Project.[13]

A potentially useful analogy for New Jersey's "stranded capacity" here is passengers (the gas) on a bus (a pipeline). Let's say there are three buses traveling from Washington, D.C. to New York, and each bus can carry 30 passengers. In total, there are 90 passengers who want to transfer onto another bus in New York to continue their journey to Boston. However, the bus going from New York to Boston can only accommodate 70 passengers. This means that 20 passengers will not be able to board the bus to Boston and will be left "stranded" in New York. Now, let's say that the seats on the bus from New York to Boston are reserved by shippers, who get to choose which passengers can continue their journey. Even if shippers select different passengers from the group of 90 arriving in New York, it doesn't change the fact that only 70 passengers can board the bus to Boston. Consequently, 20

[13] There is 893,140 Dth/d of net stranded capacity available to New Jersey. Skipping Stone Study at 6, JA__.

passengers will always be left behind, regardless of whom the shippers choose.

The Commission also demonstrated a fundamental misunderstanding with regards to stranded capacity, claiming that "if the downstream firm capacity customers exercise their rights to the capacity, then New Jersey [gas utilities] will not be able to rely on it." Certificate Order P 32, JA__. FERC misses the point, as the fact is that utilities have used stranded capacity in the past. And if downstream shippers did exercise their firm rights[14] for gas capacity, it would be drawn from elsewhere, *see* Skipping Stone Study, at 11–12, tbls. 9 & 10, JA__–___, leaving the stranded capacity untouched and available. Theoretically, if the downstream shippers decided to forgo drawing from their primary capacity, and instead, drew from stranded capacity on a secondary basis, then the downstream shippers' primary capacity would be readily available to New Jersey.

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[14] When an entity or gas utility enters into a contract for "firm" gas capacity on a pipeline, that contract guarantees sufficient capacity will be available when the entity calls for it, and that it gets priority over any "interruptible" service contracts. NJ Agencies Study at 10, JA___.

By way of further example, one of the sources of stranded capacity is the pipelines feeding the Algonquin Gas Transmission system. Together, they have been sold 3.7 million metric Dth/d, on a firm basis capacity to the Algonquin system, but the Algonquin system only has capacity to receive 2.1 million metric Dth/d into its system in New Jersey. *Id.* at 7, JA___. This leaves the remaining gas capacity stranded—just like our ill-fated New York bus passengers above—among the delivering pipelines in New Jersey. *Id.* After factoring out capacity not available to *all* New Jersey gas utilities (as there is some available only to certain regions), there is over 586,919 Dth/d of stranded capacity to the Algonquin system available to all of New Jersey. *Id.*

Similarly, the Texas Eastern Transmission pipeline has contracted a 774,750 Dth/d delivery to the ConEd gas utility system in Manhattan, but ConEd's deliveries *have never exceeded* 465,529 Dth/d (and for the last five years have not exceeded 440,000 Dth/d) leaving at least 309,221 Dth/d unused. *Id.* at 8–9, JA___. The extent of this difference demonstrates that FERC is wrong that extreme weather events, like "Winter Storm Elliot," would cause market demand to

consume all stranded capacity. *See* Order on Reh'g P 55, JA__. There is no evidence in the record to support the finding that gas needs in Manhattan would suddenly jump more than 66% over the highest demand ever recorded since its in-service date. Thus, it is not a question of downstream shippers unpredictably choosing whether or not to use the full contracted capacity, as FERC suggests. *See id.* Downstream shippers either cannot access additional supplies or will never have a need to access those supplies, and so the capacity to deliver those supplies is, and will continue to be, always reliably available to New Jersey utilities.

In total, Skipping Stone found over 6,728,520 Dth/d (approximately 6.7 billion cubic feet per day) of gas capacity that is available to New Jersey, and not subject to downstream firm exercise by utilities, *i.e.*, 'firm' capacity. Skipping Stone Study at 12 tbl.10, JA___. This 6.7 billion cubic feet per day of gas capacity available to New Jersey is far greater (approximately 1.5 billion cubic feet per day greater) than the conservatively estimated 2032–2033 Design Day demand of 5.18 billion cubic feet per day. *See id.* at 19, JA__ (grey line farthest to the left represents peak design day demand for 2032–33

based on gas utilities' filings). FERC's dismissal of this finding is without basis and its failure to adequately consider this data undermines its conclusion that there is a genuine public need for the Project. Moreover, the 7,260 million metric Dth/d (approximately 7.2 billion cubic feet per day) of actual, used capacity from 2018–2019 is more than 2,070,000 Dth/d *greater* than all New Jersey gas utilities' design day need based on their own design day figures,[15] conservatively[16] escalating those current (*i.e.*, 2024–2025) design day figures by a New Jersey Board of Public Utilities' Order governing those utilities, which mandates they reduce demand by 1.10% by 2026. *Id.* at 16, Chart 1 and 19, Chart 2, JA__, __. Nowhere in FERC's Certificate Order does it truly grapple with this evidence or with how authorizing a Project that does nothing more than provide unnecessary redundancy

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[15] Design day figures were taken from New Jersey utilities' Basic Gas Supply Service filings, except for New Jersey Natural Gas, which neglected to publicly file its working paper. New Jersey Natural Gas' design day figures were instead taken from the Transco Study. Skipping Stone Study at 18 n.10, JA__.

[16] Skipping Stone's modeled annual growth rate for demand exceeded the 1.02% annual growth rate used in the Transco Study by 15%. Skipping Stone Study at 18 n.11, JA__.

serves the public interest. This is plain error. *See Spire*, 2 F.4th at 968.[17]

In addition, FERC fails entirely to acknowledge the last bucket of capacity addressed by Skipping Stone that is potentially available to New Jersey utilities and is on top of the 6.7 billion cubic feet per day noted above and well above 2032–2033 Design Day estimates. This capacity is held firmly by "load serving entities" (such as utilities) and travels through New Jersey with available delivery points along the path. Skipping Stone Study at 5, JA__. This last bucket of capacity is the type that is *actually* subject to downstream firm exercise, unlike the above, and what FERC alludes to, *see* Certificate Order P 32, JA__, and adds another more than 3 billion cubic feet per day of available capacity. Skipping Stone Study, at 11, tbl. 9, JA__. For FERC to assert

[17] FERC also incorrectly found that Skipping Stone included interruptible capacity—*i.e.*, capacity that can be stopped by the operator at any time to fulfill the needs of other customers with firm capacity reservations—and "double count[ed] some available firm capacity." *See* Order on Reh'g P 45, JA__. This is another finding that is absolutely false. There is simply no inclusion of any interruptible supply to New Jersey gas utilities in the Skipping Stone Study's cumulative calculation of supply available now to serve New Jersey load. *See* Skipping Stone Study at 12, tbl.10, JA__.

that the full utilization of this in-path capacity to load serving entities (*i.e.*, the capacity of 3,060,033 Dth/d) would impact the other 1.5 billion cubic feet per day of *existing available* capacity in excess of 2032-2033 Design Day is either mistaken or arbitrary, as this last bucket of capacity has nothing to do with the other capacity available, including stranded.

C. FERC's Claims that the Project Will Provide "Reliability" and "Diversity" Benefits Are Arbitrary and Capricious.

FERC wrongly rests its authorization of the Project on generalized assertions that the Project will provide public benefits of "supply diversity," reliability, and extra gas capacity that someone might want for electric generation. *See* Certificate Order P 25, JA__ ("the Commission finds that the construction and operation of the project will provide more reliable service on peak winter days and will increase supply diversity"); *id.* P 31, JA__; Order on Reh'g P 59, JA__. First, in doing so, FERC failed to point to a single piece of record evidence in support of these undefined benefits, let alone anything sufficient to justify authorization of the Project. Duplicating any pipeline network would arguably always provide some sort of reliability or redundancy

benefit, which would mean that FERC would approve virtually any and all pipeline projects that came before it. Here, FERC predicated its approval on vague assertions of "supply diversity," "flexibility," or "reliability" without record evidence showing *how* this project would increase supply diversity and flexibility or improve reliability. In fact, the Commission does not quantify or value such assertions of "supply diversity" or "flexibility;" it merely restates them. Certificate Order P 68, JA__ (indeed the project's purpose is to diversify fuel supply access"). FERC further confirmed this in its Order on Rehearing, noting that "[a]lthough NJCF argues that the Commission should quantify these benefits, the Commission may rely on qualitative benefits, as it does here," *id.* at P 59, JA__. This is plainly an insufficient basis for FERC to authorize a project as it is inconsistent with FERC's own Policy Statement and the more searching inquiry of need required by the Natural Gas Act. 88 FERC ¶ 61,227, 61,748 (providing that "[v]ague assertions of public benefits will not be sufficient" to justify approval under Section 7 of the Natural Gas Act). Finding that FERC ran afoul of its own policy, this Court recently vacated FERC's authorization of a pipeline based on similarly conclusory assertions of benefits other than

meeting new demand. *See Spire*, 2 F.4th at 972–74 (citing 88 FERC ¶ 61,227).

Second, supply diversity can either provide geographic or economic benefits. Here, however, the record contains no data or analysis substantiating the geographic benefits. As for alleged economic benefits, the record contains only vague statements by Project shippers that it is more cost-effective than other options to satisfy peak demand, without any actual proof of need. Certificate Order P 35, JA__ ("shippers note that the project capacity offers a more cost-effective means to satisfy their statutory obligations to provide safe, reliable, affordable and clean natural gas service to heat homes and business than continued reliance on third-party peaking services in the face of growing demand") (citing project shippers' assertions with zero record evidence supporting them); *see also* Certificate Order, Danly, Comm'r, dissenting, P 5, JA__ (reiterating the same unsubstantiated shippers' assertions regarding pricing and reliability as support for the Order's finding that "this project will provide more reliable service to the local distribution companies").

Indeed, the only actual data or analysis on economic benefits in the record showed that the Project is actually a staggeringly costly method to meet any demand level that exceeds existing or projected peak levels. This is because the Project requires paying for year-round pipeline capacity to meet just a few days of hypothetical peak demand in an extreme scenario. *See* Skipping Stone Study at 17, JA__ (presenting analysis demonstrating how to model the per-Dth used cost of capacity, based on conservative assumptions regarding days used, drawn from 2018–19 shape of actual capacity usage figures and determining that the cost would be an exorbitant "$63.49 per Dth, not including gas cost"). This is essentially the equivalent of buying a car because the owner needs to get to the airport a handful of times per year—having a car arguably might be more reliable than taxi services, but if a car costs $15,000 to own all year and the owner only uses it ten times to get to and from the airport, each of those trips essentially costs the driver $1,500 each—an exorbitant cost for a ride by any measure. FERC cannot rest its decision on such flimsy assertions of economic benefits and fails to address concrete claims regarding project costs. Unsubstantiated statements by self-interested New Jersey utilities do

not provide FERC with sufficient evidence by themselves, let alone when rebutted by actual evidence to the contrary.

D. FERC Failed to Consider Record Evidence of the Profit Motive for Building an Unneeded Project.

The Commission's decision to approve the Project is further undermined by its failure to examine evidence that the proponents of the Project have private profit motivations for claiming that the Project is needed. By failing to investigate the evidence of self-dealing in the record or explain its dismissal of such, *see Spire*, 2 F.4th at 964, FERC failed to perform its statutory duty to ensure that consumers are protected. *See also City of Clarksville*, 888 F.3d at 479 (citing *NAACP,* 425 U.S. at 669–70 and *Hope,* 320 U.S. at 610 (a "principal aim" of the Natural Gas Act is "protect[ing] consumers against exploitation at the hands of natural gas companies") (internal quotation marks omitted)).

In particular, FERC ignored evidence that the gas utilities that have contracted for capacity on the Project have a substantial private for-profit incentive to enter into these agreements. New Jersey ratepayers would bear the entire cost of the Project, even if that infrastructure is not designed to meet or serve their demand. And if there is no actual public demand for the Project's gas, "the [gas

utilities'] shareholders would reap the economic rewards of [gas utilities' sale] of and/or release of excess capacity." Skipping Stone Study at 4, JA__. As the Skipping Stone Study highlighted, in light of this reality, FERC should have delved into the "significant questions" of "the interaction between state-level [gas utility] business operations and incentives that may accompany pipeline expansion proposals, which raise red flags [and] undermin[e] the probative value of the [Project's] precedent agreements." *Id.* at 19–20, JA__–__.

The D.C. Circuit has made it very clear that FERC must take a more careful look at the need for the projects it considers under Section 7 of the Natural Gas Act when there is evidence of self-dealing. *Spire*, 2 F.4th at 972–76. While the particular manifestations of self-dealing may vary from case to case, the Commission is obligated to ensure that a project serves a public need and not just the project proponents' private, for-profit, interests. The form of self-dealing seen here is different from that in *Spire*, where the only precedent agreement for capacity on the project was with an entity affiliated with the project proponent, and, thus, the agreement did not constitute evidence that the project would serve new demand or any genuine public need. *See id.*

at 975. But just as in *Spire*, here FERC has been presented with and ignored credible evidence that there is no new, unmet, demand for the Project and that the Project shippers are entering their precedent agreements for purposes of private profit, not public interest.

Although non-affiliates have ostensibly subscribed to 82% of the Project's capacity, Order on Reh'g PP 66–67, JA__–__, FERC completely disregarded record evidence demonstrating that the subscribers have for-profit motives to sign these contracts for capacity they do not actually need. The reason the Commission looks to the existence of capacity agreements with non-affiliated entities as evidence of need is that private corporate entities should not typically enter into such agreements if they or their customers do not, in fact, genuinely need that capacity. However, here, FERC has been presented with credible evidence that there is no new, unmet, demand for additional capacity and that the Project's shippers stand to profit from the additional capacity. NJCF et al.'s Mot. for Evidentiary Hr'g at 3, JA__. A majority of the proposed capacity is contracted under this kind of agreement, where, if put into service, the Project "would serve as mere excess capacity that would only serve to benefit New Jersey [gas utilities] and

hurt N[ew] J[ersey] ratepayers." Skipping Stone Study at 3–4, JA___–___. FERC's Order fails to acknowledge the allegation of utilities profiteering on ratepayers' backs, much less meaningfully engage with it as a reason to question the weight it accords to the precedent agreements between Transco and its shippers. FERC's "ostrich-like approach" to approval of the Project—ignoring record evidence demonstrating that this Project is not designed to fulfill unmet demand or provide some other public benefit, but to boost corporate profits—is the very definition of arbitrary and capricious decision-making. *See Spire*, 2 F.4th at 975 (finding FERC's decision arbitrary and capricious for failing to engage with "plausible evidence of self-dealing…[including] that the proposed pipeline is not being built to serve increasing load demand and that there is no indication the new pipeline will lead to cost savings"); *see also* 88 FERC ¶ 61,227, 61,747 ("Rather than relying only on one test for need, the Commission will consider all relevant factors reflecting on the need for the project. These might include, but would not be limited to, precedent agreements, demand projections, potential cost savings to consumers, or a

comparison of projected demand with the amount of capacity currently serving the market.").

E. FERC's Dismissive and Incorrect Characterization of New Jersey Laws is Arbitrary and Capricious.

New Jersey gas utilities are required to provide safe and reliable service, N.J.S.A. § 48:2-23, and adhere to New Jersey's greenhouse gas reduction requirements. New Jersey Board of Public Utilities' Order Directing the Utilities to Establish Energy Efficiency and Peak Demand Reduction Programs. In addition, under N.J.S.A. § 48:2-23, utilities are required to provide service "in a manner that tends to conserve and preserve the quality of the environment and prevent the pollution of the waters, land and air of this State." FERC, nevertheless, treated these binding obligations as a nullity absent a "prescribed method" of compliance. *See* Order on Reh'g P 70, JA__. Instead, FERC assumed that these reductions would not be achieved—an assumption that easily becomes a self-fulfilling prophecy when FERC refuses to consider how binding GHG reduction requirements factor into the public need for a project. As detailed in Section III.C, *infra*, FERC's authorization of the Project would lock New Jersey's gas utilities into a project that would ultimately increase annual New Jersey GHG emissions by almost 12%.

Certificate Order P 71, JA__. As Commissioner Clements noted, FERC failed to grapple with this reality, "dismiss[ing] the totality of New Jersey's efforts" to reduce reliance on gas. *Id.*, Clements, Comm'r concurring P 6, JA__. The Commission cannot treat New Jersey's legally-binding climate reduction requirements as if they do not exist.

III. FERC Violated NEPA by Failing to Take a Hard Look at the Project's Environmental Impacts.

FERC's decision to approve the Project also is arbitrary, capricious, and contrary to law because it is based on a fundamentally inadequate review of the Project's environmental harms under NEPA. The Commission violated NEPA in numerous ways, including by conducting its review in a manner that directly contravenes the Council on Environmental Quality's regulations on how federal agencies must implement NEPA. FERC defined the Project's purpose and need too narrowly and, therefore, impermissibly eliminated reasonable alternatives. FERC also disregarded the Project's most severe environmental impacts, including how the Project will increase upstream gas drilling, exacerbate climate change, and increase downstream pollution in areas already overburdened by poor air quality. By avoiding consideration of these impacts, FERC avoided a

careful evaluation of less environmentally damaging alternatives to the Project, as well as opportunities to mitigate the harms it would cause. FERC's failure to collect information about and analyze these impacts in the manner required by federal law violated NEPA. Moreover, basing approval of the Project on an unlawfully deficient NEPA analysis also invalidates the Commission's determination under the Natural Gas Act.

A. FERC Violated NEPA and the Natural Gas Act by Defining the Project's Purpose and Need Unduly Narrowly and by Arbitrarily Restricting the Alternatives It Evaluated.

The Final EIS's definition of the Project's purpose and need remains too narrow to comply with NEPA and the Natural Gas Act because it restricts FERC from considering the full range of reasonable alternatives to the Project, including the no action alternative. A "reasonable" purpose and need statement cannot be so narrow that only one alternative will fulfill it. *See Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991). By only reflecting the narrow goal of the Project applicant in the Final EIS, FERC made its approval of the Project—and its rejection of any reasonable alternative—a foregone conclusion in violation of NEPA and the Natural Gas Act.

FERC failed to articulate a sufficiently broad statement of purpose and need that would satisfy NEPA. In contravention of NEPA caselaw and Council on Environmental Quality regulations, FERC accepted Transco's narrow definition of the Project's purpose and need at face value, adopting the extremely specific goal to provide "an incremental 829,400 dekatherms per day (Dth/d) of year-round firm transportation capacity from the Marcellus Shale production area in northeastern Pennsylvania to delivery points in Pennsylvania, New Jersey, and Maryland." *See* Final EIS at 1–2, JA__–__. Although FERC is required to consider Transco's goals, FERC cannot adopt such a narrow statement of purpose and need and "prioritize [the] applicant's goals above or to the exclusion of other relevant factors," which include "effectively carrying out the agency's policies and programs or the public interest." *See National Environmental Policy Act Implementing Regulations Revisions*, 87 Fed. Reg. 23,453, 23,458 (Apr. 20, 2022). Instead, FERC did the exact opposite of what the Council on Environmental Quality's regulations say is required under NEPA and accepted Transco's formulation that narrows the Project's purpose and

need down to the last dekatherm. Doing so "is inconsistent with fully informed decision making and sound environmental analysis." *See id.*

Selecting an overly narrow purpose and need that impermissibly considers only Transco's desired goals enabled FERC to select an arbitrarily narrow range of alternatives and unlawfully dismiss all of those alternatives, including the no action alternative. The Commission cannot use such a narrow statement of purpose and need that only the Project, as proposed, will fulfill it. *See Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 73 (D.C. Cir. 2011); *see also Sierra Club, Inc. v. U.S. Forest Serv.*, 897 F.3d 582, 598–99 (4th Cir. 2018) (holding that a purpose and need statement is unreasonable where "the agency defines it so narrowly as to allow only one alternative from among the environmentally benign ones in the agency's power, such that the EIS becomes essentially a foreordained formality") (quoting *Webster v. U.S. Dep't of Agric.*, 685 F.3d 411, 422 (4th Cir. 2012)). In fact, FERC has a "duty under NEPA to exercise a degree of skepticism in dealing with self-serving statements from a prime beneficiary of the project." *Nat'l Wildlife Refuge Ass'n v. Rural Utils. Serv.*, 580 F. Supp. 3d 588, 613 (W.D. Wis. 2022) (citing *Simmons v. U.S. Army Corps of Eng'rs*, 120

F.3d 664, 669 (7th Cir. 1997)); *see also* 87 Fed. Reg. at 23,459 ("Always tailoring the purpose and need to an applicant's goals . . . could prevent an agency from considering alternatives that do not meet an applicant's stated goals, but better meet the policies and requirements set forth in NEPA and the agency's statutory authority and goals."). FERC's own regulations require it to consider "any alternative to the proposed action that would have a less severe environmental impact or impacts." *See* 18 C.F.R. § 380.7(b). Yet here FERC rejected any non-gas alternatives, including the no-action alternative, and only seriously considered alternatives that were marginally different from the proposed Project, such as favoring either looping or compression, alternate routes for the pipeline, and alternate placement of compressor stations. *See* Final EIS at 3-3–3-32, JA__–__.

By ruling out any alternatives other than those that fulfilled Transco's narrowly stated need—that is, building a gas pipeline project from point A to point B along the proposed route—including all non-gas energy alternatives, FERC declined to take a "hard look" and all but rubber-stamped the Project in violation of NEPA. While the Commission may not have the authority under the Natural Gas Act to

order alternatives that fall outside its jurisdiction, it is nevertheless required under NEPA to consider whether those reasonable alternatives that would cause fewer environmental impacts nevertheless still satisfy the statutory goals of the Natural Gas Act. *See, e.g.*, *Nat. Res. Def. Council v. Morton*, 458 F.2d 827, 834–36 (D.C. Cir. 1972) (holding that the agency's environmental impact statement violated NEPA because it failed to consider alternatives outside of the Department of the Interior's jurisdiction); *Sierra Club v. Lynn*, 502 F.2d 43, 62 (5th Cir. 1974) ("The agency must consider appropriate alternatives which may be outside its jurisdiction or control, and not limit its attention to just those it can provide… ."); *see also* 87 Fed. Reg. at 23,459 (environmental review can and should include "alternatives—other than the no action alternative—that are beyond the goals of the applicant or outside the agency's jurisdiction because the agency concludes that they are useful for the agency decision maker and the public to make an informed decision.").[18] Moreover, given the wealth of

[18] There are even far more economic, existing ways to ensure gas service, even during the worst-case scenario where days of peak demand

evidence showing the lack of need for the Project, a meaningful assessment of the no action alternative should have at least included consideration of the less environmentally-damaging options of satisfying demand using existing capacity, as gas utilities have done in the past. *See supra*, Section II.B.2.

FERC's view that the question of need is determined under the Natural Gas Act, and that it therefore does not have to consider the underlying public need for the Project in its NEPA analysis, confuses the Commission's role under each statute. *See* Order on Reh'g P 80, JA__; Final EIS at 1–2, JA__–__. While the Final EIS may not be the place for a detailed market analysis, the Commission has a well-

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coincide with an emergency reduction in delivered supply from a pipeline outage that FERC worries about. For example, at the cost of a simple reservation charge(s), gas utilities could shore up supply by contracting in advance for additional currently available capacity on pipeline "X" to account for a potential a failure on pipeline "Y" (and vice-versa). Gas utilities also could construct increased vaporization at an on-system LNG facility. If the utility needed to call on that delivery, it would be paying for a few days of peak rather than saddling its ratepayers with the cost of 365-day capacity from the Project. *See* Skipping Stone Study at 17–18, JA__–__ (discussing how the Project's proffered capacity is an entirely uneconomic way to "firm-up" pipeline capacity for the approximate potential 5 days needed during extreme weather-driven demand).

articulated responsibility under NEPA to look critically at Transco's assertions and ensure that it adopts a statement of purpose and need that allows consideration of a reasonable range of alternatives that are consistent with its authority under the Natural Gas Act. That the Natural Gas Act requires that the Commission determine "need" does not change the fact that NEPA prohibits FERC from "restrict[ing] its analysis to those 'alternative means by which a particular applicant can reach his goals.'" *See Simmons,* 120 F.3d at 669 (quoting *Van Abbema v. Fornell*, 807 F.2d 633, 638 (7th Cir. 1986)).

Adopting such a narrow statement of purpose and need is also inconsistent with the Natural Gas Act, which requires that the Commission determine that the Project is required by the public convenience and necessity in order to approve it. *See* 15 U.S.C. § 717f. Whether a project fulfills a public need requires evaluation of its costs and benefits, including its environmental harms, and must include consideration of whether the Commission should exercise its "power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable term and conditions as the public convenience and necessity may require." *See id.* at § 717f(e). FERC's

NEPA review, therefore, informs the Commission's decision-making under the Natural Gas Act, *see* 87 Fed. Reg. at 23,458, critically by providing the Commission with the information needed to determine whether to issue a certificate and to analyze the full range of reasonable alternatives to decide whether to order modifications or mitigations. The Commission's exercise of its statutory power will not be adequately informed if it adopts a statement of purpose and need so narrowly tailored that it amounts to an exact description of the Project as proposed. The Commission's refusal to engage in any critical evaluation of Transco's purpose and need has resulted in a determination that undercuts NEPA's important informational role, turns environmental review into a box-checking exercise, and thus renders the Commission's decision-making under the Natural Gas Act ill-informed and unreasonable.

B. Upstream GHG Emissions Are Reasonably Foreseeable Indirect Effects of the Project's Approval and Should be Calculated in FERC's NEPA Analysis.

FERC declined to calculate upstream GHG emissions in its Final EIS, primarily on the basis that it could not identify the location of the supply source. Final EIS at 4-178, JA___. In the Certificate Order,

FERC narrowed the issue to the lack of information about the specific identity of the gas suppliers, Certificate Order P 68, JA__, and doubled down on its refusal to use available information to estimate the emissions on rehearing. Order on Reh'g P 95, JA___.

The effects or impacts to be discussed in an EIS include "changes to the human environment from the proposed action or alternatives that are reasonably foreseeable," including "indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable," 40 C.F.R. § 1508.1(g). The Council on Environmental Quality recently explained that "[i]ndirect effects generally include reasonably foreseeable emissions related to a proposed action that are upstream or downstream of the activity resulting from the proposed action." *National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change*, 88 Fed. Reg. 1196, 1204 (Jan. 9, 2023). In the case of a pipeline project conveying natural gas, "[i]ndirect emissions are often reasonably foreseeable since quantifiable connections frequently exist between a proposed activity that involves *use or conveyance* of a commodity or resource, and changes relating to the *production* or

consumption of that resource." *Id*. The Council on Environmental Quality uses natural gas pipelines as an example: "natural gas pipeline infrastructure creates the economic conditions for additional natural gas consumption and production, including both domestically and internationally, which produce indirect (both upstream and downstream) GHG emissions that contribute to climate change." *Id.* at n.84.

Beyond direct GHG emissions associated with the construction and operation of the Project facilities themselves, the Project's reasonably foreseeable indirect GHG emissions include upstream and downstream emissions, including emissions from extraction, processing, refining, and end-use of the natural gas. *See* 88 Fed. Reg. at 1204; *see also Sabal Trail*, 867 F.3d at 1372.

Despite NEPA's requirement to analyze indirect impacts in an EIS, FERC refused to estimate reasonably foreseeable upstream emissions of the Project. Petitioners and the U.S. Environmental Protection Agency identified prior instances where the upstream impacts of increased natural gas transportation capacity were estimated based on readily available data points. Delaware Riverkeeper

Network Comments on Draft EIS at 12–14, JA___–___; Delaware Riverkeeper Network Reh'g Req. at 36–37, JA__–__; Env't Prot. Agency Comments on Draft EIS, JA__. at 36–37, JA__–__. However, the Commission still refused to analyze upstream emissions with those data points, claiming that it could not do so without identifying the specific gas producers for the Project—information that FERC did not have. *See* Order on Reh'g PP 93–94, JA__–__. This explanation fails to respond to Petitioners' argument. FERC has, in the past, estimated upstream emissions caused by a specific project, even without the information FERC now claims is required. *See* 178 FERC ¶ 61,108, PP 10–14 (summarizing FERC's prior treatment of indirect effects, including use of these tools); *see also, e.g., Atl. Coast Pipeline*, 161 FERC ¶ 61,042, P 293 (2017) (estimating upstream greenhouse gas emissions associated with an individual pipeline); and *Nat'l Fuel Gas Supply Corp.*, 158 FERC ¶ 61,145 PP 185, 189 (2017) (same).

The Commission can, and is statutorily required to, estimate the reasonably foreseeable upstream indirect impacts of issuing a certificate, even without specific identified natural gas producers. Contrary to the Commission's assertion, the record contained sufficient

information "available to permit meaningful consideration" of the Project's indirect upstream impacts. *Cf. N. Plains Res. Council Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1078 (quoting *Env't Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1014 (9th Cir. 2006)). The Commission erred by not using this information to "reasonably forecast" the upstream effects of approving the Project. *See N. Plains Res. Council,* 668 F.3d at 1079 (quoting *Selkirk Conservation Alliance v. Forsgren*, 336 F3d 944, 962 (9th Cir. 2003)).

Regardless of what additional information FERC believes it needs, analysis of the Project's upstream impacts is required under NEPA. The Council on Environmental Quality's regulations explicitly acknowledge that information gaps may exist when evaluating reasonably foreseeable significant adverse effects such as climate change. 40 C.F.R. § 1502.21. If information "cannot be obtained because the overall costs of obtaining it are unreasonable or the means to obtain it are not known, the agency shall include within the environmental impact statement" a statement of the relevance of the missing information, as well as a summary of existing relevant evidence and an evaluation of impacts based on methods generally accepted in the scientific

community. *Id.* at § 15.02.21(c). Thus, the Commission should have acknowledged that the particular location and identity of upstream producers has low relevance to estimating GHG emissions and used "reliable existing data and resources" as required by Council on Environmental Quality regulations, *id.* at § 1502.23, to discuss and analyze the Project's upstream GHG impacts.

"[R]easonably foreseeable" means "sufficiently likely to occur such that a person of ordinary prudence would take it into account in reaching a decision." *Id.* at § 1508.1(aa). Neither the identity nor the location of specific gas producers and suppliers affects the likelihood that the gas will be produced, supplied, transported, and, during this process, ultimately emitted or combusted due to FERC's approval of the Project. Especially regarding climate change effects, which the Commission recognizes in its EIS has "fundamentally global impacts" that occur regardless of a project's location, supplier and producer information is irrelevant. *Contra* Final EIS at 4-173, JA___. In light of the global nature of these impacts, the Commission fails to explain why the location of gas wells or the identity of producers is necessary to evaluate upstream GHG emissions.

C. FERC's Failure to Discuss and Evaluate the Significance of Climate Impacts Violates NEPA.

FERC did not determine the significance of the Project's climate impacts, even though NEPA requires an agency to determine which effects are significant. FERC claimed that it did not do so despite having enough data to make that determination because it is "conducting a generic proceeding to determine whether and how the Commission will conduct significance determinations going forward." *Id.* at 4-175, JA___; Certificate Order P 73, JA__; Order on Reh'g P 106, JA__.

Simply because FERC is evaluating different methods by which it intends to comply with NEPA as a matter of policy does not excuse compliance with NEPA in individual cases pending that policy's formation. Each time NEPA is triggered, it must be followed. *See* 42 U.S.C. § 4332(2)(C) (requiring a "detailed statement" for every major Federal action). FERC provides no explanation as to why it is prohibited from evaluating the significance of the Project's contribution to climate change in the absence of a broadly applicable proceeding. Indeed, agencies are "not precluded from announcing new principles in an adjudicative proceeding." *ITServe All., Inc. v. U.S. Dep't of Homeland*

Sec., 71 F.4th 1028, 1035 (D.C. Cir. 2023) (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974)).

Existing law requires FERC to evaluate the significance of the Project's GHG emissions and methods to avoid those impacts. An EIS must "provide full and fair discussion of significant environmental impacts" and "inform decision makers and the public of reasonable alternatives that would avoid or minimize adverse impacts or enhance the quality of the human environment." 40 C.F.R. § 1502.1. An EIS must also discuss the environmental consequences of a proposed action, including the "environmental impacts of the proposed action and reasonable alternatives to the proposed action *and the significance of those impacts*." *Id.* at § 1502.16(a)(1) (emphasis added). The Commission also previously concluded that it has the ability to "assess the significance of a project's GHG emissions and those emissions' contribution to climate change." *N. Nat. Gas Co.*, 174 FERC ¶ 61,189 P 29 (2021). For the Project, FERC estimated the volume of direct emissions and a portion of indirect emissions associated with the Project, Final EIS at 4-175, JA___, *id.* at App. C, JA__, and compared those emissions to current state and nationwide emissions, *id.* at 4-176,

JA___, and to future emissions reduction goals. *Id.* at 4-176–77, JA___–___. The Commission even used the social cost of greenhouse gases tool to determine that the Project would result in a social cost between $4 billion and $46 billion. *Id.* at 4-179–80, JA__–__. FERC, therefore, lacks any rational basis for failing to determine the significance of the Project's GHG emissions. Because the Commission is able to determine significance, and because doing so is required by law, the Commission erred by failing to do so for this Project.

This error is especially egregious in light of the Council on Environmental Quality's recent guidance document, published two days prior to the issuance of the Certificate Order. 88 Fed. Reg. at 1204. The purpose of Council on Environmental Quality's GHG guidance is to "assist Federal agencies in their consideration of the effects of [GHG] emissions and climate change" and to "facilitate compliance with existing NEPA requirements." *Id.* at 1197. The guidance "applies longstanding NEPA principles to the analysis of climate change effects, which are a well-recognized category of effects on the human environment *requiring* consideration under NEPA." *Id.* at 1198 (emphasis added). While FERC was already required to make a finding

of the significance of the Project's GHG emissions, the recent Council on Environmental Quality guidance specifically highlighted that requirement and demonstrated even more clearly that FERC's claim that it does not know how to evaluate the significance of this Project's GHG emissions is irrational. Even though FERC did not have the benefit of the Council on Environmental Quality's guidance at the time it drafted the Final EIS, it was arbitrary and capricious for the Commission to issue the Certificate Order without conducting a supplemental EIS labeling the GHG impacts as either significant or not significant given longstanding NEPA regulations and the newly available Council on Environmental Quality guidance. This Court should not "automatically defer to the agency's express reliance on an interest in finality without carefully reviewing the record and satisfying [itself] that the agency has made a reasoned decision based on its evaluation of the significance—or lack of significance—of the new information." *Marsh v. Oregon Nat. Res. Council,* 490 U.S. 360, 378 (1989).

Assessing the Project's significance is not a meaningless designation. Although it is true that NEPA is an information-forcing

statute, NEPA is also clear on how that information is to be presented. An EIS goes beyond mere acknowledgment of environmental impacts, and in fact uses the information generated about those impacts to evaluate alternatives and mitigation measures, and to discuss an action's impacts over time. The so-called "disclosure" of GHG emissions and social cost calculations, by itself, is insufficient because it "places the burden of analyzing the data on the public" without explaining how that data factors into FERC's decision-making process. 40 C.F.R. §§ 1501.9(e)(2), 1502.14(e).

In the Certificate Order, the Commission abstains from "characterizing [the Project's GHG] emissions as significant or insignificant," and accordingly accepts that "Transco has *not indicated any mitigation* for GHG emissions." Certificate Order PP 73–74, JA__–__ (emphasis added). NEPA requires agencies to include in an EIS "a detailed discussion of possible mitigation measures." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351–52 (1989) (citing 42 U.S.C. § 4332(C)(ii)). "[O]mission of a reasonably complete discussion of possible mitigation measures would undermine the 'action-forcing' function of NEPA" and prevents the Commission and the public from

"properly evaluat[ing] the severity of the adverse effects." *Id.* at 352. An EIS must discuss "[e]nergy requirements and conservation potential of various alternatives and mitigation measures," "[n]atural or depletable resource requirements and conservation potential of various alternatives and mitigation measures," and "[m]eans to mitigate adverse environmental impacts . . . ." 40 C.F.R. §§ 1502.16(a)(6), (7), (9). Council on Environmental Quality regulations make clear that an EIS must include "alternatives, which include the no action alternative; other reasonable courses of action; and mitigation measures (not in the proposed action)." *Id.* at §§ 1501.9(e)(2), 1502.14(e). The Commission's failure to evaluate GHG mitigation completely undermines the action-forcing purpose of NEPA, and ultimately means that the Commission declined to use its statutory authority to minimize one of the most environmentally damaging effects of the Project. *See Sabal Trail*, 867 F.3d at 1374 ("As we have noted, greenhouse-gas emissions are an indirect effect of authorizing [a] project, which FERC could reasonably foresee, and which the agency has legal authority to mitigate." (citing 15 U.S.C. § 717f(e)).

FERC also failed to grasp how approving the Project will have environmental impacts for decades. Not only did it ignore the significance of approving a project that will emit 47.8% of New Jersey's GHG emissions in 2050, it ignored the carbon "lock-in" effect of approving natural gas infrastructure at a time when there is broad social and political agreement that our country must decarbonize as fast as possible to avoid the worst impacts of climate change. The Commission failed to acknowledge the significance of the fact that its Project approval locks in ever-increasing fractions of state and federal GHG emissions, and failed to explain why, for example, it is "required by the present or future public convenience and necessity," 15 U.S.C. § 717f(e), for this Project to operate in 2050, consuming nearly 50% of the New Jersey's emission target merely to "provide more reliable service on peak winter days" and to "provide cost benefits by increasing supply diversity." Certificate Order P 34, JA__.

FERC's analysis fell far short of NEPA's requirements in this case. Despite calculating the social cost of greenhouse gases, FERC did not use that information to determine the significance of the Project's impacts, evaluate alternatives with lesser or greater impacts, or

identify mitigation measures. The Commission's presentation of various calculations, including the social cost of greenhouse gases, has little to no function in the NEPA analysis if it is not used to determine significance and inform the Commission's comparison of alternatives, including the no-action alternative, and consideration of mitigation. An evaluation of the significance of the Project's climate change impacts is also necessary to inform FERC's decisionmaking when determining whether the Project is required by the public convenience and necessity. *See* 15 U.S.C. § 717f(e).

D. FERC Failed to Adequately Consider Downstream Criteria Pollution.

FERC's failure to consider foreseeable indirect downstream pollution violates NEPA. Gas combustion emits "criteria" pollutants—health-harming pollutants regulated by the National Ambient Air Quality Standards—including ozone precursors, nitrogen oxides, and particulate matter. Final EIS at 4-170, JA__. The Final EIS, however, analyzes only criteria pollution from construction and from operating compressor stations, entirely omitting from consideration any criteria pollution from combustion of gas carried by the pipeline. *Id* at 4-168–4-180, JA___–___.

Emissions from combusting gas the pipeline carries are "reasonably foreseeable" indirect effects FERC must consider in its NEPA review. *Department of Transp. v. Public Citizen*, 541 U.S. 752, 764 (2004); *see* 40 C.F.R. § 1508.1(g). When the end use of gas by a local distribution company can be reasonably ascertained, as is the case here, FERC must calculate downstream emissions. *Food & Water Watch v. FERC*, 28 F.4th 277, 288–89 (D.C. Cir. 2022). Indirect downstream emissions are reasonably foreseeable even where analysis "depend[s] on several uncertain variables." *Sabal Trail*, 867 F.3d at 1374. Over 97% of gas is burned,[19] and residential and commercial end use causes significant localized air pollution that harms respiratory health.[20] The

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[19] FERC, Order Den. Reh'g and Stay, *Tennessee Gas Pipeline L.L.C.*, 170 FERC ¶ 61,142 (Feb. 21, 2020), Comm'r Glick dissenting, at P 8, citing U.S. Energy Info. Admin., September 2019 Monthly Energy Review 22, 97 (2019) (reporting that, in 2018, 778 billion cubic feet of natural gas had a non-combustion use compared to 29,956 billion cubic feet of total consumption).

[20] Food & Water Watch, Reh'g Req. at 20, JA__ (citing Zhu, Y, et al., *Effects of Residential Gas Appliances on Indoor and Outdoor Air Quality and Public Health in California*, UCLA Fielding School of Public Health (April 2020), https://ucla.app.box.com/s/xyzt8jc1ixnetiv0269qe704wu0ihif7; Dichter, N., & Aboud, A., *Analysis of Greenhouse Gas Emissions from*

Commission can easily calculate[21] this Project's downstream emissions based on the known gas volumes subscribed by distribution companies. Final EIS at 4-175, JA___ (listing local distribution companies and calculating GHG emissions from downstream combustion). This is therefore not like cases in which this Court found emissions from gas bound for "an unknown destination and for an unknown end use" were not reasonably foreseeable emissions FERC was required to calculate. *Delaware Riverkeeper Network v. FERC*, 45 F.4th 104, 110 (D.C. Cir. 2022).

FERC's decision to entirely ignore downstream criteria pollution is especially egregious because the pipeline's distribution territory includes ozone nonattainment areas, Final EIS at 4-162, JA__, containing cities with overburdened neighborhoods, including

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Residential Heating Technologies in the USA, UC Davis Western Cooling Efficiency Center (2020), https://wcec.ucdavis.edu/wp-content/uploads/GHG-Emissions-from-Residential-Heating-Technologies-091520.pdf.).

[21] Government of Canada, Natural Gas Emissions Calculator, https://www.canada.ca/en/environment-climate-change/services/national-pollutant-release-inventory/report/sector-specific-tools-calculate-emissions/request-natural-gas-combustion-calculator.html.

Baltimore, Philadelphia, Trenton, and Camden. FERC therefore fell short of its recognized obligation to consider environmental justice impacts of its decisions. *Id.* at 4-129, JA__ (citing Exec. Order No. 12,898, 59 Fed. Reg. 7629, 7629, 7632 (Feb. 11, 1994); Exec. Order No. 14,008, 86 Fed. Reg. 7619, 7629 (Jan. 27, 2021)).

Additionally, FERC unreasonably assumed that fugitive methane emissions (*i.e*, unintentional leaks)—which also contain volatile organic compounds that harm human health and contribute to ozone formation—would be *de minimis* by relying on existing estimates, *Id.* at 4-170, JA__; *Id.*, App. C at C-104–C-106, Tbl.C-15, JA__–__, JA__, that have been shown to drastically undercount real world emissions. Food & Water Watch Reh'g Req. at 21, JA__ (citing Josh Saul & Naureen Malik, *As Gas Prices Soar, Nobody Knows How Much Methane Is Leaking*, Bloomberg (May 3, 2022), https://www.bloomberg.com/features/2022-methane-leaks-natural-gas-energy-emissions-data/?sref=qm26bHqj).

IV. FERC Failed to Balance the Public Benefits and Adverse Impacts of the Project in Violation of the Natural Gas Act.

The Natural Gas Act requires the Commission to weigh the benefits and harms, including environmental harms, from the construction and

operation of the proposed Project when deciding whether it "is or will be required by the present or future public convenience and necessity." *See* 15 U.S.C. § 717f(e). Section 7's public convenience and necessity test obligates FERC to "consider all factors bearing on the public interest consistent with its mandate to fulfill the statutory purpose of the [Natural Gas Act]." *S. Coast Air Quality Mgmt. Dist. v. FERC*, 621 F.3d 1085, 1099 (9th Cir. 2010). The Commission's Certificate Policy Statement further specifies that FERC must balance a "proposal's market support, economic, operational, and competitive benefits, and environmental impact." 88 FERC ¶ 61,227, 61,743. FERC's duty under Section 7 of the Gas Act is to "issue a certificate of public convenience and necessity only if a project's public benefits (such as meeting unserved market demand) outweigh its adverse effects (such as deleterious environmental impact on the surrounding community)." *City of Oberlin, Ohio v. FERC*, 937 F.3d 599, 602 (D.C. Cir. 2019) (citing *Certification of New Interstate Pipeline Facilities*, 90 FERC ¶ 61,128 (Feb. 9, 2000), *clarified*, 92 FERC ¶ 61,094 (July 28, 2000)); *see also Sabal Trail*, 867 F.3d at 1379 ("If FERC finds market need, it will then proceed to balance the benefits and harms of the project, and will grant

the certificate if the former outweigh the latter."). "The amount of evidence necessary to establish the need for a proposed project will depend on the potential adverse effects of the proposed project on the relevant interests." 88 FERC ¶ 61,227, 61,748. Thus, as recognized by former Commissioner LaFleur, "[i]n cases where adverse effects are present . . . the amount of evidence necessary to establish need increases." *Spire STL Pipeline LLC*, 164 FERC ¶ 61,085 (2018) (LaFleur, Comm'r, dissenting at 4) (citing 88 FERC ¶ 61,227, 61,748). The Commission has the authority under the Natural Gas Act to deny an application for a Section 7 certificate "on the ground that the pipeline would be too harmful to the environment." *Sabal Trail*, 867 F.3d at 1373. It also has the authority to condition a certificate to mitigate a project's adverse impacts. 88 FERC ¶ 61,227, 61,749 ("The objective is for the applicant to develop whatever record is necessary, *and for the Commission to impose whatever conditions are necessary*, for the Commission to be able to find that the benefits to the public from the project outweigh the adverse impact on the relevant interests." (emphasis added)).

Here, the "Commission's balancing of costs and benefits consisted largely of its *ipse dixit*," *see Spire*, 2 F.4th at 973, in which FERC accepted the Project's highly speculative benefits on the basis of its proponents' unsubstantiated assertions, *see* Section II *supra*, while essentially ignoring the numerous ways in which the Project would harm the public. It did so without any data or analyses of supply diversity or system reliability failures, crediting Transco's bald assertions and the Transco Study, while misrepresenting and/or misunderstanding both the NJ Agencies Study finding that the Project's capacity was unnecessary and the Skipping Stone Study demonstrating that existing capacity easily meets winter peak demand. Instead, it accepted vague assertions of "supply diversity" and "reliability" as sufficient evidence of the existence of a "public benefit," *see, e.g.*, Certificate Order P 38, JA__.

Further, the Project's many substantiated and significant concrete harms are clear and include imposing unnecessary costs on New Jersey ratepayers, and adversely impacting landowners like Petitioner Catherine Folio through tree clearing, ground disturbance, imposition of a gas pipeline on their land, and lowered property values. *See* Folio

Decl. A decision that a project is required by the public convenience and necessity also involves consideration of adverse environmental effects of a project. *Minisink Residents for Env't Preservation & Safety v. FERC*, 762 F.3d 97, 101 (D.C. Cir. 2014) ("Along with [the Natural Gas Act's] main objectives, there are also several 'subsidiary purposes' . . . 'including conservation, environmental, and antitrust' issues." (cleaned up) (first quoting *Hope*, 320 U.S. at 610, then quoting *Pub. Utils. Comm'n of Cal. v. FERC*, 900 F.2d 269, 281 (D.C. Cir. 1990)). FERC entirely failed to consider the significance of the Project's environmental impacts, particularly those from contributions to climate change, in its weighing, despite the fact that "it is hard to imagine a consideration more relevant to the 'public interest' than the existential threat posed by climate change."[22]

The idea that the Commission must consider indirect environmental effects such as climate change within the scope of its Section 7 proceedings is not radical. The Supreme Court held in 1961 that the term "public convenience and necessity" is broad enough to

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[22] Rich Glick & Matthew Christiansen, *FERC and Climate Change*, 40 ENERGY L. J. 1, 6 (2019).

encompass "all factors bearing on the public interest," including the end use of gas being transported. *Fed. Power Comm'n v. Transco,* 365 U.S. 1, 7–8 (1961) (quoting *Atl. Refining Co. v. Pub. Serv. Comm'n*, 360 U.S. 378, 391 (1959)). *See also Spire*, 2 F.4th at 961. In 1967, the D.C. Circuit emphasized that "market demand is not the only relevant factor" and that *conservation* of natural gas was relevant to public convenience and necessity. *Pub. Serv. Comm'n of State of N.Y. v. Fed. Power Comm'n*, 373 F.2d 816, 821 (D.C. Cir. 1967) (citing *Transco*, 365 U.S. at 8). The conservation of natural gas speaks directly to upstream production and requires the Commission to look at how increased resource extraction bears on the public interest.

FERC's failure to discuss and evaluate the significance of the Project's climate impacts renders its conclusion in the Certificate Order that the Project is "environmentally acceptable" arbitrary, capricious, and contrary to the Natural Gas Act. Without this discussion, a "rational connection between the facts found and the choices made" is lacking. *See Billings Clinic v. Azar*, 901 F.3d 301, 312–13 (D.C. Cir. 2018) (quoting *State Farm*, 463 U.S. at 43).

The record is replete with information about the Project's climate impacts, as well as the existential threat of climate change, yet FERC treats these concerns as a nullity when deciding to approve the Project as necessary in the public interest. The Order fails to substantively engage with the fact that the Project would and will *increase* New Jersey's GHG emissions approximately 12% above 2019 levels, Certificate Order P 71, JA__,[23] emit almost 20% of New Jersey's GHG emissions allowable under state law by 2030,[24] and emit 47.8% of the allowable total by 2050. Final EIS at 4-176, JA__. The Project's GHG emissions will create $46 billion in societal costs. *Id.* at 4-180, JA__. FERC's decision to not "characteriz[e] these emissions as significant or insignificant," Certificate Order P 73, JA__, is a staggering dereliction of its duty to weigh a project's substantiated public benefits

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[23] This figure appears to reflect the Commission's understanding that, in fact, New Jersey markets/uses constitute 73.5% of the Project's capacity—not the simple 56% presented in the Certificate Order at P 28, JA__.

[24] *See* New Jersey Exec. Order 274, An Order Advancing Climate Action to Secure New Jersey's Clean Energy Future, at 4, Ordering Paragraph 1 (2021) (mandating a 50% reduction from 2006 GHG emissions levels by 2030 as an interim target essential to achieving the 80x50 Global Warming Response Act requirement).

(nonquantifiable or quantified here) against its substantiated public harms. 88 FERC ¶ 61,227, 61,747; *Atl. Refining Co.,* 360 U.S. at 391, *affirmed in Transcon.,* 365 U.S. at 8 (FERC's holistic public convenience and necessity test requires it to consider all factors bearing on the public interest).[25]

As former Chairman Glick once recognized, FERC's prior practice of claiming that a project has no significant environmental impacts while "refusing to assess the significance of the project's impact on the most important environmental issue of our time is not reasoned decisionmaking." *Adelphia Gateway, LLC*, 169 FERC ¶ 61,220 (2020) (Glick, Comm'r, dissenting in part, P 2). Equally, here where FERC has prepared a deficient EIS rather than concluding the Project has "no significant impact," the effect is the same, and its failure to adequately analyze GHG emissions undermines the rationality of its decision-making under the Natural Gas Act.

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[25] *See also* Glick & Christiansen, *supra*, note 22, at 40 ("because the environmental impacts of a potential pipeline must factor into the Commission's section 7 determination, the Commission must analyze those effects under both the [Natural Gas Act] and [NEPA]").

FERC's conclusion that the Project is "environmentally acceptable" lacks factual basis in the record, and "runs counter to the evidence before the agency." *See State Farm*, 463 U.S. at 43. The Commission's decision not to factor climate change into its decision, as a result of its failure to comply with NEPA, resulted in a "fail[ure] to consider an important aspect of the problem." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007).

CONCLUSION

For the reasons explained above, Petitioners request that this Court vacate and remand FERC's orders granting a certificate of public convenience and necessity for the Project.

DATED: July 26, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) and this Court's order setting the briefing schedule and type-volume limits, because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 19,010 words.

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ORAL ARGUMENT NOT YET SCHEDULED

No. 23-1064
(Consolidated with 23-1074, 23-1077, 23-1129, 23-1130, 23-1137)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NEW JERSEY CONSERVATION FOUNDATION, et al.,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

TRANSCONTINENTAL GAS PIPELINE COMPANY, LLC,
Intervenor for Respondent.

On Petition for Review of Orders of the
Federal Energy Regulatory Commission

Addendum to Opening Brief of Petitioners

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Addendum Table of Contents

Federal Statutes

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Standing Declarations

vides that the action meanwhile is inoperative, for an appeal to superior agency authority.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(c).	June 11, 1946, ch. 324, §10(c), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(d).	June 11, 1946, ch. 324, §10(d), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(e).	June 11, 1946, ch. 324, §10(e), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

Statutory Notes and Related Subsidiaries

ABBREVIATION OF RECORD

Pub. L. 85–791, Aug. 28, 1958, 72 Stat. 941, which authorized abbreviation of record on review or enforcement of orders of administrative agencies and review on the original papers, provided, in section 35 thereof, that: ''This Act [see Tables for classification] shall not be construed to repeal or modify any provision of the Administrative Procedure Act [see Short Title note set out preceding section 551 of this title].''

CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

§ 801. Congressional review

(a)(1)(A) Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing—

(i) a copy of the rule;

(ii) a concise general statement relating to the rule, including whether it is a major rule; and

(iii) the proposed effective date of the rule.

(B) On the date of the submission of the report under subparagraph (A), the Federal agency promulgating the rule shall submit to the Comptroller General and make available to each House of Congress—

(i) a complete copy of the cost-benefit analysis of the rule, if any;

(ii) the agency's actions relevant to sections 603, 604, 605, 607, and 609;

(iii) the agency's actions relevant to sections 202, 203, 204, and 205 of the Unfunded Mandates Reform Act of 1995; and

(iv) any other relevant information or requirements under any other Act and any relevant Executive orders.

(C) Upon receipt of a report submitted under subparagraph (A), each House shall provide copies of the report to the chairman and ranking member of each standing committee with jurisdiction under the rules of the House of Representatives or the Senate to report a bill to amend the provision of law under which the rule is issued.

(2)(A) The Comptroller General shall provide a report on each major rule to the committees of

§ 715m. Cooperation between Secretary of the Interior and Federal and State authorities

The Secretary of the Interior, in carrying out the Act of February 22, 1935, as amended (15 U.S.C., ch. 15A), is authorized to cooperate with Federal and State authorities.

(June 25, 1946, ch. 472, § 3, 60 Stat. 307.)

Editorial Notes

REFERENCES IN TEXT

Act of February 22, 1935, referred to in text, is act Feb. 22, 1935, ch. 18, 49 Stat. 30, popularly known as the ''Hot Oil Act'' and also as the ''Connally Hot Oil Act'', which is classified generally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 715 of this title and Tables.

CODIFICATION

Section was not enacted as a part of act Feb. 22, 1935, which comprises this chapter.

Executive Documents

DELEGATION OF FUNCTIONS

Delegation of President's authority to Secretary of the Interior, see note set out under section 715j of this title.

CHAPTER 15B—NATURAL GAS

§ 717. Regulation of natural gas companies

(a) Necessity of regulation in public interest

As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) Transactions to which provisions of chapter applicable

The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

(c) Intrastate transactions exempt from provisions of chapter; certification from State commission as conclusive evidence

The provisions of this chapter shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this chapter by this subsection are declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction.

(d) Vehicular natural gas jurisdiction

The provisions of this chapter shall not apply to any person solely by reason of, or with respect to, any sale or transportation of vehicular natural gas if such person is—

(1) not otherwise a natural-gas company; or

(2) subject primarily to regulation by a State commission, whether or not such State commission has, or is exercising, jurisdiction over the sale, sale for resale, or transportation of vehicular natural gas.

(June 21, 1938, ch. 556, § 1, 52 Stat. 821; Mar. 27, 1954, ch. 115, 68 Stat. 36; Pub. L. 102–486, title IV, § 404(a)(1), Oct. 24, 1992, 106 Stat. 2879; Pub. L. 109–58, title III, § 311(a), Aug. 8, 2005, 119 Stat. 685.)

Editorial Notes

AMENDMENTS

2005—Subsec. (b). Pub. L. 109–58 inserted ''and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation,'' after ''such transportation or sale,''.
1992—Subsec. (d). Pub. L. 102–486 added subsec. (d).
1954—Subsec. (c). Act Mar. 27, 1954, added subsec. (c).

Statutory Notes and Related Subsidiaries

TERMINATION OF FEDERAL POWER COMMISSION; TRANSFER OF FUNCTIONS

The Federal Power Commission was terminated, and its functions, personnel, property, funds, etc., were transferred to Secretary of Energy (except for certain functions which were transferred to the Federal Energy Regulatory Commission) by sections 7151(b), 7171(a), 7172(a), 7291, and 7293 of Title 42, The Public Health and Welfare.

STATE LAWS AND REGULATIONS

Pub. L. 102–486, title IV, § 404(b), Oct. 24, 1992, 106 Stat. 2879, provided that: ''The transportation or sale of natural gas by any person who is not otherwise a public utility, within the meaning of State law—

''(1) in closed containers; or

''(2) otherwise to any person for use by such person as a fuel in a self-propelled vehicle,

shall not be considered to be a transportation or sale of natural gas within the meaning of any State law, regulation, or order in effect before January 1, 1989. This subsection shall not apply to any provision of any State law, regulation, or order to the extent that such provision has as its primary purpose the protection of public safety.''

EMERGENCY NATURAL GAS ACT OF 1977

Pub. L. 95–2, Feb. 2, 1977, 91 Stat. 4, authorized President to declare a natural gas emergency and to require emergency deliveries and transportation of natural gas until the earlier of Apr. 30, 1977, or termination of emergency by President and provided for antitrust protection, emergency purchases, adjustment in charges for local distribution companies, relationship to Natural Gas Act, effect of certain contractual obligations, administrative procedure and judicial review, enforcement, reporting to Congress, delegation of authorities, and preemption of inconsistent State or local action.

Executive Documents

EXECUTIVE ORDER NO. 11969

Ex. Ord. No. 11969, Feb. 2, 1977, 42 F.R. 6791, as amended by Ex. Ord. No. 12038, Feb. 3, 1978, 43 F.R. 4957, which delegated to the Secretary of Energy the authority vested in the President by the Emergency Natural Gas Act of 1977 except the authority to declare and terminate a natural gas emergency, was revoked by Ex. Ord. No. 12553, Feb. 25, 1986, 51 F.R. 7237.

PROCLAMATION NO. 4485

Proc. No. 4485, Feb. 2, 1977, 42 F.R. 6789, declared that a natural gas emergency existed within the meaning of section 3 of the Emergency Natural Gas Act of 1977, set out as a note above, which emergency was terminated by Proc. No. 4495, Apr. 1, 1977, 42 F.R. 18053, formerly set out below.

PROCLAMATION NO. 4495

Proc. No. 4495, Apr. 1, 1977, 42 F.R. 18053, terminated the natural gas emergency declared to exist by Proc. No. 4485, Feb. 2, 1977, 42 F.R. 6789, formerly set out above.

§ 717a. Definitions

When used in this chapter, unless the context otherwise requires—

(1) ''Person'' includes an individual or a corporation.

(2) ''Corporation'' includes any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, receiver or receivers, trustee or trustees of any of the foregoing, but shall not include municipalities as hereinafter defined.

(3) ''Municipality'' means a city, county, or other political subdivision or agency of a State.

(4) ''State'' means a State admitted to the Union, the District of Columbia, and any organized Territory of the United States.

(5) ''Natural gas'' means either natural gas unmixed, or any mixture of natural and artificial gas.

(6) ''Natural-gas company'' means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.

(7) ''Interstate commerce'' means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.

(8) ''State commission'' means the regulatory body of the State or municipality having jurisdiction to regulate rates and charges for the sale of natural gas to consumers within the State or municipality.

(9) ''Commission'' and ''Commissioner'' means the Federal Power Commission, and a member thereof, respectively.

(10) ''Vehicular natural gas'' means natural gas that is ultimately used as a fuel in a self-propelled vehicle.

(11) ''LNG terminal'' includes all natural gas facilities located onshore or in State waters that are used to receive, unload, load, store, transport, gasify, liquefy, or process natural gas that is imported to the United States from a foreign country, exported to a foreign country from the United States, or transported in interstate commerce by waterborne vessel, but does not include—

(A) waterborne vessels used to deliver natural gas to or from any such facility; or

(B) any pipeline or storage facility subject to the jurisdiction of the Commission under section 717f of this title.

(June 21, 1938, ch. 556, § 2, 52 Stat. 821; Pub. L. 102–486, title IV, § 404(a)(2), Oct. 24, 1992, 106 Stat. 2879; Pub. L. 109–58, title III, § 311(b), Aug. 8, 2005, 119 Stat. 685.)

Editorial Notes

AMENDMENTS

2005—Par. (11). Pub. L. 109–58 added par. (11).
1992—Par. (10). Pub. L. 102–486 added par. (10).

Statutory Notes and Related Subsidiaries

TERMINATION OF FEDERAL POWER COMMISSION; TRANSFER OF FUNCTIONS

The Federal Power Commission was terminated, and its functions, personnel, property, funds, etc., were transferred to the Secretary of Energy (except for cer-

section shall be construed to create a private right of action.

(June 21, 1938, ch. 556, § 4A, as added Pub. L. 109–58, title III, § 315, Aug. 8, 2005, 119 Stat. 691.)

§ 717d. Fixing rates and charges; determination of cost of production or transportation

(a) Decreases in rates

Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) Costs of production and transportation

The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

(June 21, 1938, ch. 556, § 5, 52 Stat. 823.)

§ 717e. Ascertainment of cost of property

(a) Cost of property

The Commission may investigate and ascertain the actual legitimate cost of the property of every natural-gas company, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation and the fair value of such property.

(b) Inventory of property; statements of costs

Every natural-gas company upon request shall file with the Commission an inventory of all or any part of its property and a statement of the original cost thereof, and shall keep the Commission informed regarding the cost of all additions, betterments, extensions, and new construction.

(June 21, 1938, ch. 556, § 6, 52 Stat. 824.)

§ 717f. Construction, extension, or abandonment of facilities

(a) Extension or improvement of facilities on order of court; notice and hearing

Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) Abandonment of facilities or services; approval of Commission

No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) Certificate of public convenience and necessity

(1)(A) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

(B) In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however*, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(2) The Commission may issue a certificate of public convenience and necessity to a natural-gas company for the transportation in interstate commerce of natural gas used by any person for one or more high-priority uses, as defined, by rule, by the Commission, in the case of—

(A) natural gas sold by the producer to such person; and

(B) natural gas produced by such person.

(d) Application for certificate of public convenience and necessity

Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Granting of certificate of public convenience and necessity

Except in the cases governed by the provisos contained in subsection (c)(1) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

(f) Determination of service area; jurisdiction of transportation to ultimate consumers

(1) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization; and

(2) If the Commission has determined a service area pursuant to this subsection, transportation to ultimate consumers in such service area by the holder of such service area determination, even if across State lines, shall be subject to the exclusive jurisdiction of the State commission in the State in which the gas is consumed. This section shall not apply to the transportation of natural gas to another natural gas company.

(g) Certificate of public convenience and necessity for service of area already being served

Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company.

(h) Right of eminent domain for construction of pipelines, etc.

When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided*, That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

(June 21, 1938, ch. 556, §7, 52 Stat. 824; Feb. 7, 1942, ch. 49, 56 Stat. 83; July 25, 1947, ch. 333, 61 Stat. 459; Pub. L. 95–617, title VI, §608, Nov. 9, 1978, 92 Stat. 3173; Pub. L. 100–474, §2, Oct. 6, 1988, 102 Stat. 2302.)

Editorial Notes

AMENDMENTS

1988—Subsec. (f). Pub. L. 100–474 designated existing provisions as par. (1) and added par. (2).

1978—Subsec. (c). Pub. L. 95–617, §608(a), (b)(1), designated existing first paragraph as par. (1)(A) and existing second paragraph as par. (1)(B) and added par. (2).

Subsec. (e). Pub. L. 95–617, §608(b)(2), substituted ''subsection (c)(1)'' for ''subsection (c)''.

1947—Subsec. (h). Act July 25, 1947, added subsec. (h).

1942—Subsecs. (c) to (g). Act Feb. 7, 1942, struck out subsec. (c), and added new subsecs. (c) to (g).

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE OF 1988 AMENDMENT

Pub. L. 100–474, §3, Oct. 6, 1988, 102 Stat. 2302, provided that: ''The provisions of this Act [amending this sec-

tion and enacting provisions set out as a note under section 717w of this title] shall become effective one hundred and twenty days after the date of enactment [Oct. 6, 1988].''

Executive Documents

TRANSFER OF FUNCTIONS

Enforcement functions of Secretary or other official in Department of Energy and Commission, Commissioners, or other official in Federal Energy Regulatory Commission related to compliance with certificates of public convenience and necessity issued under this section with respect to pre-construction, construction, and initial operation of transportation system for Canadian and Alaskan natural gas transferred to Federal Inspector, Office of Federal Inspector for Alaska Natural Gas Transportation System, until first anniversary of date of initial operation of Alaska Natural Gas Transportation System, see Reorg. Plan No. 1 of 1979, §§102(d), 203(a), 44 F.R. 33663, 33666, 93 Stat. 1373, 1376, effective July 1, 1979, set out under section 719e of this title. Office of Federal Inspector for the Alaska Natural Gas Transportation System abolished and functions and authority vested in Inspector transferred to Secretary of Energy by section 3012(b) of Pub. L. 102–486, set out as an Abolition of Office of Federal Inspector note under section 719e of this title. Functions and authority vested in Secretary of Energy subsequently transferred to Federal Coordinator for Alaska Natural Gas Transportation Projects by section 720d(f) of this title.

§ 717g. Accounts; records; memoranda

(a) Rules and regulations for keeping and preserving accounts, records, etc.

Every natural-gas company shall make, keep, and preserve for such periods, such accounts, records of cost-accounting procedures, correspondence, memoranda, papers, books, and other records as the Commission may by rules and regulations prescribe as necessary or appropriate for purposes of the administration of this chapter: *Provided*, *however*, That nothing in this chapter shall relieve any such natural-gas company from keeping any accounts, memoranda, or records which such natural-gas company may be required to keep by or under authority of the laws of any State. The Commission may prescribe a system of accounts to be kept by such natural-gas companies, and may classify such natural-gas companies and prescribe a system of accounts for each class. The Commission, after notice and opportunity for hearing, may determine by order the accounts in which particular outlays or receipts shall be entered, charged, or credited. The burden of proof to justify every accounting entry questioned by the Commission shall be on the person making, authorizing, or requiring such entry, and the Commission may suspend a charge or credit pending submission of satisfactory proof in support thereof.

(b) Access to and inspection of accounts and records

The Commission shall at all times have access to and the right to inspect and examine all accounts, records, and memoranda of natural-gas companies; and it shall be the duty of such natural-gas companies to furnish to the Commission, within such reasonable time as the Commission may order, any information with respect thereto which the Commission may by order require, including copies of maps, contracts, reports of engineers, and other data, records, and papers, and to grant to all agents of the Commission free access to its property and its accounts, records, and memoranda when requested so to do. No member, officer, or employee of the Commission shall divulge any fact or information which may come to his knowledge during the course of examination of books, records, data, or accounts, except insofar as he may be directed by the Commission or by a court.

(c) Books, accounts, etc., of the person controlling gas company subject to examination

The books, accounts, memoranda, and records of any person who controls directly or indirectly a natural-gas company subject to the jurisdiction of the Commission and of any other company controlled by such person, insofar as they relate to transactions with or the business of such natural-gas company, shall be subject to examination on the order of the Commission.

(June 21, 1938, ch. 556, § 8, 52 Stat. 825.)

§ 717h. Rates of depreciation

(a) Depreciation and amortization

The Commission may, after hearing, require natural-gas companies to carry proper and adequate depreciation and amortization accounts in accordance with such rules, regulations, and forms of account as the Commission may prescribe. The Commission may from time to time ascertain and determine, and by order fix, the proper and adequate rates of depreciation and amortization of the several classes of property of each natural-gas company used or useful in the production, transportation, or sale of natural gas. Each natural-gas company shall conform its depreciation and amortization accounts to the rates so ascertained, determined, and fixed. No natural-gas company subject to the jurisdiction of the Commission shall charge to operating expenses any depreciation or amortization charges on classes of property other than those prescribed by the Commission, or charge with respect to any class of property a percentage of depreciation or amortization other than that prescribed therefor by the Commission. No such natural-gas company shall in any case include in any form under its operating or other expenses any depreciation, amortization, or other charge or expenditure included elsewhere as a depreciation or amortization charge or otherwise under its operating or other expenses. Nothing in this section shall limit the power of a State commission to determine in the exercise of its jurisdiction, with respect to any natural-gas company, the percentage rates of depreciation or amortization to be allowed, as to any class of property of such natural-gas company, or the composite depreciation or amortization rate, for the purpose of determining rates or charges.

(b) Rules

The Commission, before prescribing any rules or requirements as to accounts, records, or memoranda, or as to depreciation or amortization rates, shall notify each State commission having jurisdiction with respect to any natural-gas company involved and shall give reasonable

Statutory Notes and Related Subsidiaries

REPEALS

Act Oct. 28, 1949, ch. 782, cited as a credit to this section, was repealed (subject to a savings clause) by Pub. L. 89–554, Sept. 6, 1966, § 8, 80 Stat. 632, 655.

§ 717r. Rehearing and review

(a) Application for rehearing; time

Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Review of Commission order

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which is supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission order

The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(d) Judicial review

(1) In general

The United States Court of Appeals for the circuit in which a facility subject to section 717b of this title or section 717f of this title is proposed to be constructed, expanded, or operated shall have original and exclusive jurisdiction over any civil action for the review of an order or action of a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval (hereinafter collectively referred to as ''permit'') required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.).

(2) Agency delay

The United States Court of Appeals for the District of Columbia shall have original and exclusive jurisdiction over any civil action for the review of an alleged failure to act by a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.), for a facility subject to section 717b of this title or section 717f of this title. The failure of an agency to take action on a permit required under Federal law, other than the Coastal Zone Management Act of 1972, in accordance with the Commission schedule established pursuant to section 717n(c) of this title shall be considered inconsistent with Federal law for the purposes of paragraph (3).

(3) Court action

If the Court finds that such order or action is inconsistent with the Federal law governing such permit and would prevent the construc-

tion, expansion, or operation of the facility subject to section 717b of this title or section 717f of this title, the Court shall remand the proceeding to the agency to take appropriate action consistent with the order of the Court. If the Court remands the order or action to the Federal or State agency, the Court shall set a reasonable schedule and deadline for the agency to act on remand.

(4) Commission action

For any action described in this subsection, the Commission shall file with the Court the consolidated record of such order or action to which the appeal hereunder relates.

(5) Expedited review

The Court shall set any action brought under this subsection for expedited consideration.

(June 21, 1938, ch. 556, § 19, 52 Stat. 831; June 25, 1948, ch. 646, § 32(a), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Pub. L. 85–791, § 19, Aug. 28, 1958, 72 Stat. 947; Pub. L. 109–58, title III, § 313(b), Aug. 8, 2005, 119 Stat. 689.)

Editorial Notes

REFERENCES IN TEXT

The Coastal Zone Management Act of 1972, referred to in subsec. (d)(1), (2), is title III of Pub. L. 89–454, as added by Pub. L. 92–583, Oct. 27, 1972, 86 Stat. 1280, as amended, which is classified generally to chapter 33 (§ 1451 et seq.) of Title 16, Conservation. For complete classification of this Act to the Code, see Short Title note set out under section 1451 of Title 16 and Tables.

CODIFICATION

In subsec. (b), ''section 1254 of title 28'' substituted for ''sections 239 and 240 of the Judicial Code, as amended [28 U.S.C. 346, 347]'' on authority of act June 25, 1948, ch. 646, 62 Stat. 869, the first section of which enacted Title 28, Judiciary and Judicial Procedure.

AMENDMENTS

2005—Subsec. (d). Pub. L. 109–58 added subsec. (d).

1958—Subsec. (a). Pub. L. 85–791, § 19(a), inserted sentence providing that until record in a proceeding has been filed in a court of appeals, Commission may modify or set aside any finding or order issued by it.

Subsec. (b). Pub. L. 85–791, § 19(b), in second sentence, substituted ''transmitted by the clerk of the court to'' for ''served upon'', substituted ''file with the court'' for ''certify and file with the court a transcript of'', and inserted ''as provided in section 2112 of title 28'', and, in third sentence, substituted ''petition'' for ''transcript'', and ''jurisdiction, which upon the filing of the record with it shall be exclusive'' for ''exclusive jurisdiction''.

Statutory Notes and Related Subsidiaries

CHANGE OF NAME

Act June 25, 1948, eff. Sept. 1, 1948, as amended by act May 24, 1949, substituted ''court of appeals'' for ''circuit court of appeals'' wherever appearing.

§ 717s. Enforcement of chapter

(a) Action in district court for injunction

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper district court of the United States, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this chapter or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices or concerning apparent violations of the Federal antitrust laws to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings.

(b) Mandamus

Upon application of the Commission the district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this chapter or any rule, regulation, or order of the Commission thereunder.

(c) Employment of attorneys by Commission

The Commission may employ such attorneys as it finds necessary for proper legal aid and service of the Commission or its members in the conduct of their work, or for proper representation of the public interest in investigations made by it, or cases or proceedings pending before it, whether at the Commission's own instance or upon complaint, or to appear for or represent the Commission in any case in court; and the expenses of such employment shall be paid out of the appropriation for the Commission.

(d) Violation of market manipulation provisions

In any proceedings under subsection (a), the court may prohibit, conditionally or unconditionally, and permanently or for such period of time as the court determines, any individual who is engaged or has engaged in practices constituting a violation of section 717c–1 of this title (including related rules and regulations) from—

(1) acting as an officer or director of a natural gas company; or

(2) engaging in the business of—

(A) the purchasing or selling of natural gas; or

(B) the purchasing or selling of transmission services subject to the jurisdiction of the Commission.

(June 21, 1938, ch. 556, § 20, 52 Stat. 832; June 25, 1948, ch. 646, § 1, 62 Stat. 875, 895; Pub. L. 109–58, title III, § 318, Aug. 8, 2005, 119 Stat. 693.)

Editorial Notes

CODIFICATION

The words ''the District Court of the United States for the District of Columbia'' in subsec. (a) following ''district court of the United States'' and in subsec. (b) following ''district courts of the United States'' omitted as superfluous in view of section 132(a) of Title 28, Judiciary and Judicial Procedure, which states that ''There shall be in each judicial district a district court which shall be a court of record known as the United

able at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

J.R. BIDEN, JR.

SUBCHAPTER I—POLICIES AND GOALS

§ 4331. Congressional declaration of national environmental policy

(a) 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, including financial and technical assistance, 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.

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

(Pub. L. 91–190, title I, § 101, Jan. 1, 1970, 83 Stat. 852.)

Statutory Notes and Related Subsidiaries

COMMISSION ON POPULATION GROWTH AND THE AMERICAN FUTURE

Pub. L. 91–213, §§ 1–9, Mar. 16, 1970, 84 Stat. 67–69, established the Commission on Population Growth and the American Future to conduct and sponsor such studies and research and make such recommendations as might be necessary to provide information and education to all levels of government in the United States, and to our people regarding a broad range of problems associated with population growth and their implications for America's future; prescribed the composition of the Commission; provided for the appointment of its members, and the designation of a Chairman and Vice Chairman; required a majority of the members of the Commission to constitute a quorum, but allowed a lesser number to conduct hearings; prescribed the compensation of members of the Commission; required the Commission to conduct an inquiry into certain prescribed aspects of population growth in the United States and its foreseeable social consequences; provided for the appointment of an Executive Director and other personnel and prescribed their compensation; authorized the Commission to enter into contracts with public agencies, private firms, institutions, and individuals for the conduct of research and surveys, the preparation of reports, and other activities necessary to the discharge of its duties, and to request from any Federal department or agency any information and assistance it deems necessary to carry out its functions; required the General Services Administration to provide administrative services for the Commission on a reimbursable basis; required the Commission to submit an interim report to the President and the Congress one year after it was established and to submit its final report two years after Mar. 16, 1970; terminated the Commission sixty days after the date of the submission of its final report; and authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, such amounts as might be necessary to carry out the provisions of Pub. L. 91–213.

Executive Documents

EXECUTIVE ORDER NO. 11507

Ex. Ord. No. 11507, eff. Feb. 4, 1970, 35 F.R. 2573, which related to prevention, control, and abatement of air and water pollution at federal facilities was superseded by Ex. Ord. No. 11752, eff. Dec. 17, 1973, 38 F.R. 34793, formerly set out below.

EXECUTIVE ORDER NO. 11752

Ex. Ord. No. 11752, Dec. 17, 1973, 38 F.R. 34793, which related to the prevention, control, and abatement of environmental pollution at Federal facilities, was revoked by Ex. Ord. No. 12088, Oct. 13, 1978, 43 F.R. 47707, set out as a note under section 4321 of this title.

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.[1]

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

(Pub. L. 91–190, title I, § 102, Jan. 1, 1970, 83 Stat. 853; Pub. L. 94–83, Aug. 9, 1975, 89 Stat. 424.)

Editorial Notes

AMENDMENTS

1975—Par. (2)(D) to (I). Pub. L. 94–83 added subpar. (D) and redesignated former subpars. (D) to (H) as (E) to (I), respectively.

Statutory Notes and Related Subsidiaries

CERTAIN COMMERCIAL SPACE LAUNCH ACTIVITIES

Pub. L. 104–88, title IV, § 401, Dec. 29, 1995, 109 Stat. 955, provided that: ''The licensing of a launch vehicle or launch site operator (including any amendment, extension, or renewal of the license) under [former] chapter 701 of title 49, United States Code [now chapter 509 (§ 50901 et seq.) of Title 51, National and Commercial Space Programs], shall not be considered a major Federal action for purposes of section 102(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(C)) if—

''(1) the Department of the Army has issued a permit for the activity; and

''(2) the Army Corps of Engineers has found that the activity has no significant impact.''

Executive Documents

EX. ORD. NO. 13352. FACILITATION OF COOPERATIVE CONSERVATION

Ex. Ord. No. 13352, Aug. 26, 2004, 69 F.R. 52989, provided:

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

SECTION 1. *Purpose*. The purpose of this order is to ensure that the Departments of the Interior, Agriculture, Commerce, and Defense and the Environmental Protection Agency implement laws relating to the environ-

[1] So in original. The period probably should be a semicolon.

ment and natural resources in a manner that promotes cooperative conservation, with an emphasis on appropriate inclusion of local participation in Federal decisionmaking, in accordance with their respective agency missions, policies, and regulations.

SEC. 2. *Definition*. As used in this order, the term ''cooperative conservation'' means actions that relate to use, enhancement, and enjoyment of natural resources, protection of the environment, or both, and that involve collaborative activity among Federal, State, local, and tribal governments, private for-profit and nonprofit institutions, other nongovernmental entities and individuals.

SEC. 3. *Federal Activities*. To carry out the purpose of this order, the Secretaries of the Interior, Agriculture, Commerce, and Defense and the Administrator of the Environmental Protection Agency shall, to the extent permitted by law and subject to the availability of appropriations and in coordination with each other as appropriate:

(a) carry out the programs, projects, and activities of the agency that they respectively head that implement laws relating to the environment and natural resources in a manner that:

(i) facilitates cooperative conservation;

(ii) takes appropriate account of and respects the interests of persons with ownership or other legally recognized interests in land and other natural resources;

(iii) properly accommodates local participation in Federal decisionmaking; and

(iv) provides that the programs, projects, and activities are consistent with protecting public health and safety;

(b) report annually to the Chairman of the Council on Environmental Quality on actions taken to implement this order; and

(c) provide funding to the Office of Environmental Quality Management Fund (42 U.S.C. 4375) for the Conference for which section 4 of this order provides.

SEC. 4. *White House Conference on Cooperative Conservation*. The Chairman of the Council on Environmental Quality shall, to the extent permitted by law and subject to the availability of appropriations:

(a) convene not later than 1 year after the date of this order, and thereafter at such times as the Chairman deems appropriate, a White House Conference on Cooperative Conservation (Conference) to facilitate the exchange of information and advice relating to (i) cooperative conservation and (ii) means for achievement of the purpose of this order; and

(b) ensure that the Conference obtains information in a manner that seeks from Conference participants their individual advice and does not involve collective judgment or consensus advice or deliberation.

SEC. 5. *General Provision*. This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, instrumentalities or entities, its officers, employees or agents, or any other person.

GEORGE W. BUSH.

§ 4332a. Repealed. Pub. L. 114–94, div. A, title I, § 1304(j)(2), Dec. 4, 2015, 129 Stat. 1386

Section, Pub. L. 112–141, div. A, title I, § 1319, July 6, 2012, 126 Stat. 551, related to accelerated decisionmaking in environmental reviews.

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE OF REPEAL

Repeal effective Oct. 1, 2015, see section 1003 of Pub. L. 114–94, set out as an Effective Date of 2015 Amendment note under section 5313 of Title 5, Government Organization and Employees.

§ 4333. Conformity of administrative procedures to national environmental policy

All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this chapter and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this chapter.

(Pub. L. 91–190, title I, § 103, Jan. 1, 1970, 83 Stat. 854.)

§ 4334. Other statutory obligations of agencies

Nothing in section 4332 or 4333 of this title shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

(Pub. L. 91–190, title I, § 104, Jan. 1, 1970, 83 Stat. 854.)

§ 4335. Efforts supplemental to existing authorizations

The policies and goals set forth in this chapter are supplementary to those set forth in existing authorizations of Federal agencies.

(Pub. L. 91–190, title I, § 105, Jan. 1, 1970, 83 Stat. 854.)

SUBCHAPTER II—COUNCIL ON ENVIRONMENTAL QUALITY

§ 4341. Omitted

Editorial Notes

CODIFICATION

Section, Pub. L. 91–190, title II, § 201, Jan. 1, 1970, 83 Stat. 854, which required the President to transmit to Congress annually an Environmental Quality Report, terminated, effective May 15, 2000, pursuant to section 3003 of Pub. L. 104–66, as amended, set out as a note under section 1113 of Title 31, Money and Finance. See, also, item 1 on page 41 of House Document No. 103–7.

§ 4342. Establishment; membership; Chairman; appointments

There is created in the Executive Office of the President a Council on Environmental Quality (hereinafter referred to as the ''Council''). The Council shall be composed of three members who shall be appointed by the President to serve at his pleasure, by and with the advice and consent of the Senate. The President shall designate one of the members of the Council to serve as Chairman. Each member shall be a person who, as a result of his training, experience, and attainments, is exceptionally well qualified to analyze and interpret environmental trends and information of all kinds; to appraise programs and

§ 380.7 Format of an environmental impact statement.

In addition to the requirements for an environmental impact statement prescribed in 40 CFR 1502.10 of the regulations of the Council, an environmental impact statement prepared by the Commission will include a section on the literature cited in the environmental impact statement and a staff conclusion section. The staff conclusion section will include summaries of:

(a) The significant environmental impacts of the proposed action;

(b) Any alternative to the proposed action that would have a less severe environmental impact or impacts and the action preferred by the staff;

(c) Any mitigation measures proposed by the applicant, as well as additional mitigation measures that might be more effective;

(d) Any significant environmental impacts of the proposed action that cannot be mitigated; and

(e) References to any pending, completed, or recommended studies that might provide baseline data or additional data on the proposed action.

§ 380.8 Preparation of environmental documents.

The preparation of environmental documents, as defined in §1508.10 of the regulations of the Council (40 CFR 1508.10), on hydroelectric projects, natural gas facilities, and electric transmission facilities in national interest electric transmission corridors is the responsibility of the Commission's Office of Energy Projects, 888 First Street NE., Washington, DC 20426, (202) 502–8700. Persons interested in status reports or information on environmental impact statements or other elements of the NEPA process, including the studies or other information the Commission may require on these projects, can contact this office.

[Order 689, 71 FR 69471, Dec. 1, 2006, as amended by Order 756, 77 FR 4895, Feb. 1, 2012]

§ 380.9 Public availability of NEPA documents and public notice of NEPA related hearings and public meetings.

(a)(1) The Commission will comply with the requirements of 40 CFR 1506.6 of the regulations of the Council for public involvement in NEPA.

(2) If an action has effects of primarily local concern, the Commission may give additional notice in a Commission order.

(b) The Commission will make environmental impact statements, environmental assessments, the comments received, and any underlaying documents available to the public pursuant to the provisions of the Freedom of Information Act (5 U.S.C. 552 (1982)). The exclusion in the Freedom of Information Act for interagency memoranda is not applicable where such memoranda transmit comments of Federal agencies on the environmental impact of the proposed action. Such materials will be made available to the public at the Commission's Public Reference Room at 888 First Street NE., Room 2A, Washington, DC 20426 at a fee and in the manner described in Part 388 of this chapter. A copy of an environmental impact statement or environmental assessment for hydroelectric projects may also be made available for inspection at the Commission's regional office for the region where the proposed action is located.

[Order 486, 52 FR 47910, Dec. 17, 1987, as amended by Order 603–A, 64 FR 54537, Oct. 7, 1999]

§ 380.10 Participation in Commission proceedings.

(a) *Intervention proceedings involving a party or parties*—(1) *Motion to intervene.* (i) In addition to submitting comments on the NEPA process and NEPA related documents, any person may file a motion to intervene in a Commission proceeding dealing with environmental issues under the terms of §385.214 of this chapter. Any person who files a motion to intervene on the basis of a draft environmental impact statement will be deemed to have filed a timely motion, in accordance with §385.214, as long as the motion is filed within the comment period for the draft environmental impact statement.

(ii) Any person that is granted intervention after petitioning becomes a party to the proceeding and accepts the record as developed by the parties as of the time that intervention is granted.

environmental impact statement processes (§ 1501.10 of this chapter).

(h) Preparing environmental impact statements early in the process (§ 1502.5 of this chapter).

(i) Integrating NEPA requirements with other environmental review and consultation requirements (§ 1502.24 of this chapter).

(j) Eliminating duplication with State, Tribal, and local procedures by providing for joint preparation of environmental documents where practicable (§ 1506.2 of this chapter) and with other Federal procedures by providing that agencies may jointly prepare or adopt appropriate environmental documents prepared by another agency (§ 1506.3 of this chapter).

(k) Combining environmental documents with other documents (§ 1506.4 of this chapter).

(l) Using accelerated procedures for proposals for legislation (§ 1506.8 of this chapter).

§ 1500.6 Agency authority.

Each agency shall interpret the provisions of the Act as a supplement to its existing authority and as a mandate to view policies and missions in the light of the Act's national environmental objectives, to the extent consistent with its existing authority. Agencies shall review their policies, procedures, and regulations accordingly and revise them as necessary to ensure full compliance with the purposes and provisions of the Act as interpreted by the regulations in this subchapter. The phrase ''to the fullest extent possible'' in section 102 of NEPA means that each agency of the Federal Government shall comply with that section, consistent with § 1501.1 of this chapter. Nothing contained in the regulations in this subchapter is intended or should be construed to limit an agency's other authorities or legal responsibilities.

PART 1501—NEPA AND AGENCY PLANNING

Sec.

AUTHORITY: 42 U.S.C. 4321–4347; 42 U.S.C. 4371–4375; 42 U.S.C. 7609; E.O. 11514, 35 FR 4247, 35 FR 4247, 3 CFR, 1966–1970, Comp., p. 902, as amended by E.O. 11991, 42 FR 26967, 3 CFR, 1977 Comp., p. 123; and E.O. 13807, 82 FR 40463, 3 CFR, 2017, Comp., p. 369.

SOURCE: 85 FR 43359, July 16, 2020, unless otherwise noted.

§ 1501.1 NEPA thresholds.

(a) In assessing whether NEPA applies or is otherwise fulfilled, Federal agencies should determine:

(1) Whether the proposed activity or decision is expressly exempt from NEPA under another statute;

(2) Whether compliance with NEPA would clearly and fundamentally conflict with the requirements of another statute;

(3) Whether compliance with NEPA would be inconsistent with Congressional intent expressed in another statute;

(4) Whether the proposed activity or decision is a major Federal action;

(5) Whether the proposed activity or decision, in whole or in part, is a nondiscretionary action for which the agency lacks authority to consider environmental effects as part of its decision-making process; and

(6) Whether the proposed action is an action for which another statute's requirements serve the function of agency compliance with the Act.

(b) Federal agencies may make determinations under this section in their agency NEPA procedures (§ 1507.3(d) of this chapter) or on an individual basis, as appropriate.

(1) Federal agencies may seek the Council's assistance in making an individual determination under this section.

(2) An agency shall consult with other Federal agencies concerning their concurrence in statutory determinations made under this section where more than one Federal agency administers the statute.

§ 1501.2 Apply NEPA early in the process.

(a) Agencies should integrate the NEPA process with other planning and authorization processes at the earliest reasonable time to ensure that agencies consider environmental impacts in their planning and decisions, to avoid delays later in the process, and to head off potential conflicts.

(b) Each agency shall:

(1) Comply with the mandate of section 102(2)(A) of NEPA to utilize a systematic, interdisciplinary approach which will ensure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man's environment, as specified by § 1507.2(a) of this chapter.

(2) Identify environmental effects and values in adequate detail so the decision maker can appropriately consider such effects and values alongside economic and technical analyses. Whenever practicable, agencies shall review and publish environmental documents and appropriate analyses at the same time as other planning documents.

(3) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal that involves unresolved conflicts concerning alternative uses of available resources as provided by section 102(2)(E) of NEPA.

(4) Provide for actions subject to NEPA that are planned by private applicants or other non-Federal entities before Federal involvement so that:

(i) Policies or designated staff are available to advise potential applicants of studies or other information foreseeably required for later Federal action.

(ii) The Federal agency consults early with appropriate State, Tribal, and local governments and with interested private persons and organizations when their involvement is reasonably foreseeable.

(iii) The Federal agency commences its NEPA process at the earliest reasonable time (§§ 1501.5(d) and 1502.5(b) of this chapter).

§ 1501.3 Determine the appropriate level of NEPA review.

(a) In assessing the appropriate level of NEPA review, Federal agencies should determine whether the proposed action:

(1) Normally does not have significant effects and is categorically excluded (§ 1501.4);

(2) Is not likely to have significant effects or the significance of the effects is unknown and is therefore appropriate for an environmental assessment (§ 1501.5); or

(3) Is likely to have significant effects and is therefore appropriate for an environmental impact statement (part 1502 of this chapter).

(b) In considering whether the effects of the proposed action are significant, agencies shall analyze the potentially affected environment and degree of the effects of the action. Agencies should consider connected actions consistent with § 1501.9(e)(1).

(1) In considering the potentially affected environment, agencies should consider, as appropriate to the specific action, the affected area (national, regional, or local) and its resources, such as listed species and designated critical habitat under the Endangered Species Act. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend only upon the effects in the local area.

(2) In considering the degree of the effects, agencies should consider the following, as appropriate to the specific action:

(i) Both short- and long-term effects.

(ii) Both beneficial and adverse effects.

(iii) Effects on public health and safety.

(iv) Effects that would violate Federal, State, Tribal, or local law protecting the environment.

§ 1501.4 Categorical exclusions.

(a) For efficiency, agencies shall identify in their agency NEPA procedures (§ 1507.3(e)(2)(ii) of this chapter) categories of actions that normally do not have a significant effect on the human environment, and therefore do

not require preparation of an environmental assessment or environmental impact statement.

(b) If an agency determines that a categorical exclusion identified in its agency NEPA procedures covers a proposed action, the agency shall evaluate the action for extraordinary circumstances in which a normally excluded action may have a significant effect.

(1) If an extraordinary circumstance is present, the agency nevertheless may categorically exclude the proposed action if the agency determines that there are circumstances that lessen the impacts or other conditions sufficient to avoid significant effects.

(2) If the agency cannot categorically exclude the proposed action, the agency shall prepare an environmental assessment or environmental impact statement, as appropriate.

§ 1501.5 Environmental assessments.

(a) An agency shall prepare an environmental assessment for a proposed action that is not likely to have significant effects or when the significance of the effects is unknown unless the agency finds that a categorical exclusion (§ 1501.4) is applicable or has decided to prepare an environmental impact statement.

(b) An agency may prepare an environmental assessment on any action in order to assist agency planning and decision making.

(c) An environmental assessment shall:

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact; and

(2) Briefly discuss the purpose and need for the proposed action, alternatives as required by section 102(2)(E) of NEPA, and the environmental impacts of the proposed action and alternatives, and include a listing of agencies and persons consulted.

(d) For applications to the agency requiring an environmental assessment, the agency shall commence the environmental assessment as soon as practicable after receiving the application.

(e) Agencies shall involve the public, State, Tribal, and local governments, relevant agencies, and any applicants, to the extent practicable in preparing environmental assessments.

(f) The text of an environmental assessment shall be no more than 75 pages, not including appendices, unless a senior agency official approves in writing an assessment to exceed 75 pages and establishes a new page limit.

(g) Agencies may apply the following provisions to environmental assessments:

(1) Section 1502.21 of this chapter—Incomplete or unavailable information;

(2) Section 1502.23 of this chapter—Methodology and scientific accuracy; and

(3) Section 1502.24 of this chapter—Environmental review and consultation requirements.

§ 1501.6 Findings of no significant impact.

(a) An agency shall prepare a finding of no significant impact if the agency determines, based on the environmental assessment, not to prepare an environmental impact statement because the proposed action will not have significant effects.

(1) The agency shall make the finding of no significant impact available to the affected public as specified in § 1506.6(b) of this chapter.

(2) In the following circumstances, the agency shall make the finding of no significant impact available for public review for 30 days before the agency makes its final determination whether to prepare an environmental impact statement and before the action may begin:

(i) The proposed action is or is closely similar to one that normally requires the preparation of an environmental impact statement under the procedures adopted by the agency pursuant to § 1507.3 of this chapter; or

(ii) The nature of the proposed action is one without precedent.

(b) The finding of no significant impact shall include the environmental assessment or incorporate it by reference and shall note any other environmental documents related to it (§ 1501.9(f)(3)). If the assessment is included, the finding need not repeat any of the discussion in the assessment but may incorporate it by reference.

(c) The finding of no significant impact shall state the authority for any mitigation that the agency has adopted and any applicable monitoring or enforcement provisions. If the agency finds no significant impacts based on mitigation, the mitigated finding of no significant impact shall state any enforceable mitigation requirements or commitments that will be undertaken to avoid significant impacts.

§ 1501.7 Lead agencies.

(a) A lead agency shall supervise the preparation of an environmental impact statement or a complex environmental assessment if more than one Federal agency either:

(1) Proposes or is involved in the same action; or

(2) Is involved in a group of actions directly related to each other because of their functional interdependence or geographical proximity.

(b) Federal, State, Tribal, or local agencies, including at least one Federal agency, may act as joint lead agencies to prepare an environmental impact statement or environmental assessment (§ 1506.2 of this chapter).

(c) If an action falls within the provisions of paragraph (a) of this section, the potential lead agencies shall determine, by letter or memorandum, which agency will be the lead agency and which will be cooperating agencies. The agencies shall resolve the lead agency question so as not to cause delay. If there is disagreement among the agencies, the following factors (which are listed in order of descending importance) shall determine lead agency designation:

(1) Magnitude of agency's involvement.

(2) Project approval or disapproval authority.

(3) Expertise concerning the action's environmental effects.

(4) Duration of agency's involvement.

(5) Sequence of agency's involvement.

(d) Any Federal agency, or any State, Tribal, or local agency or private person substantially affected by the absence of lead agency designation, may make a written request to the senior agency officials of the potential lead agencies that a lead agency be designated.

(e) If Federal agencies are unable to agree on which agency will be the lead agency or if the procedure described in paragraph (c) of this section has not resulted in a lead agency designation within 45 days, any of the agencies or persons concerned may file a request with the Council asking it to determine which Federal agency shall be the lead agency. A copy of the request shall be transmitted to each potential lead agency. The request shall consist of:

(1) A precise description of the nature and extent of the proposed action; and

(2) A detailed statement of why each potential lead agency should or should not be the lead agency under the criteria specified in paragraph (c) of this section.

(f) Any potential lead agency may file a response within 20 days after a request is filed with the Council. As soon as possible, but not later than 20 days after receiving the request and all responses to it, the Council shall determine which Federal agency will be the lead agency and which other Federal agencies will be cooperating agencies.

(g) To the extent practicable, if a proposal will require action by more than one Federal agency and the lead agency determines that it requires preparation of an environmental impact statement, the lead and cooperating agencies shall evaluate the proposal in a single environmental impact statement and issue a joint record of decision. To the extent practicable, if a proposal will require action by more than one Federal agency and the lead agency determines that it requires preparation of an environmental assessment, the lead and cooperating agencies should evaluate the proposal in a single environmental assessment and, where appropriate, issue a joint finding of no significant impact.

(h) With respect to cooperating agencies, the lead agency shall:

(1) Request the participation of each cooperating agency in the NEPA process at the earliest practicable time.

(2) Use the environmental analysis and proposals of cooperating agencies

with jurisdiction by law or special expertise, to the maximum extent practicable.

(3) Meet with a cooperating agency at the latter's request.

(4) Determine the purpose and need, and alternatives in consultation with any cooperating agency.

(i) The lead agency shall develop a schedule, setting milestones for all environmental reviews and authorizations required for implementation of the action, in consultation with any applicant and all joint lead, cooperating, and participating agencies, as soon as practicable.

(j) If the lead agency anticipates that a milestone will be missed, it shall notify appropriate officials at the responsible agencies. As soon as practicable, the responsible agencies shall elevate the issue to the appropriate officials of the responsible agencies for timely resolution.

§ 1501.8 Cooperating agencies.

(a) The purpose of this section is to emphasize agency cooperation early in the NEPA process. Upon request of the lead agency, any Federal agency with jurisdiction by law shall be a cooperating agency. In addition, upon request of the lead agency, any other Federal agency with special expertise with respect to any environmental issue may be a cooperating agency. A State, Tribal, or local agency of similar qualifications may become a cooperating agency by agreement with the lead agency. An agency may request that the lead agency designate it a cooperating agency, and a Federal agency may appeal a denial of its request to the Council, in accordance with § 1501.7(e).

(b) Each cooperating agency shall:

(1) Participate in the NEPA process at the earliest practicable time.

(2) Participate in the scoping process (described in § 1501.9).

(3) On request of the lead agency, assume responsibility for developing information and preparing environmental analyses, including portions of the environmental impact statement or environmental assessment concerning which the cooperating agency has special expertise.

(4) On request of the lead agency, make available staff support to enhance the lead agency's interdisciplinary capability.

(5) Normally use its own funds. To the extent available funds permit, the lead agency shall fund those major activities or analyses it requests from cooperating agencies. Potential lead agencies shall include such funding requirements in their budget requests.

(6) Consult with the lead agency in developing the schedule (§ 1501.7(i)), meet the schedule, and elevate, as soon as practicable, to the senior agency official of the lead agency any issues relating to purpose and need, alternatives, or other issues that may affect any agencies' ability to meet the schedule.

(7) Meet the lead agency's schedule for providing comments and limit its comments to those matters for which it has jurisdiction by law or special expertise with respect to any environmental issue consistent with § 1503.2 of this chapter.

(8) To the maximum extent practicable, jointly issue environmental documents with the lead agency.

(c) In response to a lead agency's request for assistance in preparing the environmental documents (described in paragraph (b)(3), (4), or (5) of this section), a cooperating agency may reply that other program commitments preclude any involvement or the degree of involvement requested in the action that is the subject of the environmental impact statement or environmental assessment. The cooperating agency shall submit a copy of this reply to the Council and the senior agency official of the lead agency.

§ 1501.9 Scoping.

(a) *Generally*. Agencies shall use an early and open process to determine the scope of issues for analysis in an environmental impact statement, including identifying the significant issues and eliminating from further study non-significant issues. Scoping may begin as soon as practicable after the proposal for action is sufficiently developed for agency consideration. Scoping may include appropriate preapplication procedures or work conducted prior to publication of the notice of intent.

(b) *Invite cooperating and participating agencies.* As part of the scoping process, the lead agency shall invite the participation of likely affected Federal, State, Tribal, and local agencies and governments, the proponent of the action, and other likely affected or interested persons (including those who might not be in accord with the action), unless there is a limited exception under §1507.3(f)(1) of this chapter.

(c) *Scoping outreach.* As part of the scoping process the lead agency may hold a scoping meeting or meetings, publish scoping information, or use other means to communicate with those persons or agencies who may be interested or affected, which the agency may integrate with any other early planning meeting. Such a scoping meeting will often be appropriate when the impacts of a particular action are confined to specific sites.

(d) *Notice of intent.* As soon as practicable after determining that a proposal is sufficiently developed to allow for meaningful public comment and requires an environmental impact statement, the lead agency shall publish a notice of intent to prepare an environmental impact statement in the FEDERAL REGISTER, except as provided in §1507.3(f)(3) of this chapter. An agency also may publish notice in accordance with §1506.6 of this chapter. The notice shall include, as appropriate:

(1) The purpose and need for the proposed action;

(2) A preliminary description of the proposed action and alternatives the environmental impact statement will consider;

(3) A brief summary of expected impacts;

(4) Anticipated permits and other authorizations;

(5) A schedule for the decision-making process;

(6) A description of the public scoping process, including any scoping meeting(s);

(7) A request for identification of potential alternatives, information, and analyses relevant to the proposed action (*see* §1502.17 of this chapter); and

(8) Contact information for a person within the agency who can answer questions about the proposed action and the environmental impact statement.

(e) *Determination of scope.* As part of the scoping process, the lead agency shall determine the scope and the significant issues to be analyzed in depth in the environmental impact statement. To determine the scope of environmental impact statements, agencies shall consider:

(1) Actions (other than unconnected single actions) that may be connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:

(i) Automatically trigger other actions that may require environmental impact statements;

(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously; or

(iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

(2) Alternatives, which include the no action alternative; other reasonable courses of action; and mitigation measures (not in the proposed action).

(3) Impacts.

(f) *Additional scoping responsibilities.* As part of the scoping process, the lead agency shall:

(1) Identify and eliminate from detailed study the issues that are not significant or have been covered by prior environmental review(s) (§1506.3 of this chapter), narrowing the discussion of these issues in the statement to a brief presentation of why they will not have a significant effect on the human environment or providing a reference to their coverage elsewhere.

(2) Allocate assignments for preparation of the environmental impact statement among the lead and cooperating agencies, with the lead agency retaining responsibility for the statement.

(3) Indicate any public environmental assessments and other environmental impact statements that are being or will be prepared and are related to but are not part of the scope of the impact statement under consideration.

(4) Identify other environmental review, authorization, and consultation

requirements so the lead and cooperating agencies may prepare other required analyses and studies concurrently and integrated with the environmental impact statement, as provided in §1502.24 of this chapter.

(5) Indicate the relationship between the timing of the preparation of environmental analyses and the agencies' tentative planning and decision-making schedule.

(g) *Revisions.* An agency shall revise the determinations made under paragraphs (b), (c), (e), and (f) of this section if substantial changes are made later in the proposed action, or if significant new circumstances or information arise which bear on the proposal or its impacts.

§ 1501.10 Time limits.

(a) To ensure that agencies conduct NEPA reviews as efficiently and expeditiously as practicable, Federal agencies should set time limits appropriate to individual actions or types of actions (consistent with the time intervals required by §1506.11 of this chapter).

(b) To ensure timely decision making, agencies shall complete:

(1) Environmental assessments within 1 year unless a senior agency official of the lead agency approves a longer period in writing and establishes a new time limit. One year is measured from the date of agency decision to prepare an environmental assessment to the publication of an environmental assessment or a finding of no significant impact.

(2) Environmental impact statements within 2 years unless a senior agency official of the lead agency approves a longer period in writing and establishes a new time limit. Two years is measured from the date of the issuance of the notice of intent to the date a record of decision is signed.

(c) The senior agency official may consider the following factors in determining time limits:

(1) Potential for environmental harm.

(2) Size of the proposed action.

(3) State of the art of analytic techniques.

(4) Degree of public need for the proposed action, including the consequences of delay.

(5) Number of persons and agencies affected.

(6) Availability of relevant information.

(7) Other time limits imposed on the agency by law, regulations, or Executive order.

(d) The senior agency official may set overall time limits or limits for each constituent part of the NEPA process, which may include:

(1) Decision on whether to prepare an environmental impact statement (if not already decided).

(2) Determination of the scope of the environmental impact statement.

(3) Preparation of the draft environmental impact statement.

(4) Review of any comments on the draft environmental impact statement from the public and agencies.

(5) Preparation of the final environmental impact statement.

(6) Review of any comments on the final environmental impact statement.

(7) Decision on the action based in part on the environmental impact statement.

(e) The agency may designate a person (such as the project manager or a person in the agency's office with NEPA responsibilities) to expedite the NEPA process.

(f) State, Tribal, or local agencies or members of the public may request a Federal agency to set time limits.

§ 1501.11 Tiering.

(a) Agencies should tier their environmental impact statements and environmental assessments when it would eliminate repetitive discussions of the same issues, focus on the actual issues ripe for decision, and exclude from consideration issues already decided or not yet ripe at each level of environmental review. Tiering may also be appropriate for different stages of actions.

(b) When an agency has prepared an environmental impact statement or environmental assessment for a program or policy and then prepares a subsequent statement or assessment on an action included within the entire program or policy (such as a project- or

site-specific action), the tiered document needs only to summarize and incorporate by reference the issues discussed in the broader document. The tiered document shall concentrate on the issues specific to the subsequent action. The tiered document shall state where the earlier document is available.

(c) Tiering is appropriate when the sequence from an environmental impact statement or environmental assessment is:

(1) From a programmatic, plan, or policy environmental impact statement or environmental assessment to a program, plan, or policy statement or assessment of lesser or narrower scope or to a site-specific statement or assessment.

(2) From an environmental impact statement or environmental assessment on a specific action at an early stage (such as need and site selection) to a supplement (which is preferred) or a subsequent statement or assessment at a later stage (such as environmental mitigation). Tiering in such cases is appropriate when it helps the lead agency to focus on the issues that are ripe for decision and exclude from consideration issues already decided or not yet ripe.

§ 1501.12 Incorporation by reference.

Agencies shall incorporate material, such as planning studies, analyses, or other relevant information, into environmental documents by reference when the effect will be to cut down on bulk without impeding agency and public review of the action. Agencies shall cite the incorporated material in the document and briefly describe its content. Agencies may not incorporate material by reference unless it is reasonably available for inspection by potentially interested persons within the time allowed for comment. Agencies shall not incorporate by reference material based on proprietary data that is not available for review and comment.

PART 1502—ENVIRONMENTAL IMPACT STATEMENT

Sec.

AUTHORITY: 42 U.S.C. 4321–4347; 42 U.S.C. 4371–4375; 42 U.S.C. 7609; and E.O. 11514, 35 FR 4247, 3 CFR, 1966–1970, Comp., p. 902, as amended by E.O. 11991, 42 FR 26967, 3 CFR, 1977 Comp., p. 123.

SOURCE: 85 FR 43363, July 16, 2020, unless otherwise noted.

§ 1502.1 Purpose of environmental impact statement.

The primary purpose of an environmental impact statement prepared pursuant to section 102(2)(C) of NEPA is to ensure agencies consider the environmental impacts of their actions in decision making. It shall provide full and fair discussion of significant environmental impacts and shall inform decision makers and the public of reasonable alternatives that would avoid or minimize adverse impacts or enhance the quality of the human environment. Agencies shall focus on significant environmental issues and alternatives and shall reduce paperwork and the accumulation of extraneous background data. Statements shall be concise, clear, and to the point, and shall be supported by evidence that the agency has made the necessary environmental

analyses. An environmental impact statement is a document that informs Federal agency decision making and the public.

§ 1502.2 Implementation.

(a) Environmental impact statements shall not be encyclopedic.

(b) Environmental impact statements shall discuss impacts in proportion to their significance. There shall be only brief discussion of other than significant issues. As in a finding of no significant impact, there should be only enough discussion to show why more study is not warranted.

(c) Environmental impact statements shall be analytic, concise, and no longer than necessary to comply with NEPA and with the regulations in this subchapter. Length should be proportional to potential environmental effects and project size.

(d) Environmental impact statements shall state how alternatives considered in it and decisions based on it will or will not achieve the requirements of sections 101 and 102(1) of NEPA as interpreted in the regulations in this subchapter and other environmental laws and policies.

(e) The range of alternatives discussed in environmental impact statements shall encompass those to be considered by the decision maker.

(f) Agencies shall not commit resources prejudicing selection of alternatives before making a final decision (*see also* § 1506.1 of this chapter).

(g) Environmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.

§ 1502.3 Statutory requirements for statements.

As required by section 102(2)(C) of NEPA, environmental impact statements are to be included in every Federal agency recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment.

§ 1502.4 Major Federal actions requiring the preparation of environmental impact statements.

(a) Agencies shall define the proposal that is the subject of an environmental impact statement based on the statutory authorities for the proposed action. Agencies shall use the criteria for scope (§ 1501.9(e) of this chapter) to determine which proposal(s) shall be the subject of a particular statement. Agencies shall evaluate in a single environmental impact statement proposals or parts of proposals that are related to each other closely enough to be, in effect, a single course of action.

(b) Environmental impact statements may be prepared for programmatic Federal actions, such as the adoption of new agency programs. When agencies prepare such statements, they should be relevant to the program decision and timed to coincide with meaningful points in agency planning and decision making.

(1) When preparing statements on programmatic actions (including proposals by more than one agency), agencies may find it useful to evaluate the proposal(s) in one of the following ways:

(i) Geographically, including actions occurring in the same general location, such as body of water, region, or metropolitan area.

(ii) Generically, including actions that have relevant similarities, such as common timing, impacts, alternatives, methods of implementation, media, or subject matter.

(iii) By stage of technological development including Federal or federally assisted research, development or demonstration programs for new technologies that, if applied, could significantly affect the quality of the human environment. Statements on such programs should be available before the program has reached a stage of investment or commitment to implementation likely to determine subsequent development or restrict later alternatives.

(2) Agencies shall as appropriate employ scoping (§ 1501.9 of this chapter), tiering (§ 1501.11 of this chapter), and other methods listed in §§ 1500.4 and 1500.5 of this chapter to relate programmatic and narrow actions and to

avoid duplication and delay. Agencies may tier their environmental analyses to defer detailed analysis of environmental impacts of specific program elements until such program elements are ripe for final agency action.

§ 1502.5 Timing.

An agency should commence preparation of an environmental impact statement as close as practicable to the time the agency is developing or receives a proposal so that preparation can be completed in time for the final statement to be included in any recommendation or report on the proposal. The statement shall be prepared early enough so that it can serve as an important practical contribution to the decision-making process and will not be used to rationalize or justify decisions already made (§§ 1501.2 of this chapter and 1502.2). For instance:

(a) For projects directly undertaken by Federal agencies, the agency shall prepare the environmental impact statement at the feasibility analysis (go/no-go) stage and may supplement it at a later stage, if necessary.

(b) For applications to the agency requiring an environmental impact statement, the agency shall commence the statement as soon as practicable after receiving the application. Federal agencies should work with potential applicants and applicable State, Tribal, and local agencies and governments prior to receipt of the application.

(c) For adjudication, the final environmental impact statement shall normally precede the final staff recommendation and that portion of the public hearing related to the impact study. In appropriate circumstances, the statement may follow preliminary hearings designed to gather information for use in the statements.

(d) For informal rulemaking, the draft environmental impact statement shall normally accompany the proposed rule.

§ 1502.6 Interdisciplinary preparation.

Agencies shall prepare environmental impact statements using an interdisciplinary approach that will ensure the integrated use of the natural and social sciences and the environmental design arts (section 102(2)(A) of NEPA). The disciplines of the preparers shall be appropriate to the scope and issues identified in the scoping process (§ 1501.9 of this chapter).

§ 1502.7 Page limits.

The text of final environmental impact statements (paragraphs (a)(4) through (6) of § 1502.10) shall be 150 pages or fewer and, for proposals of unusual scope or complexity, shall be 300 pages or fewer unless a senior agency official of the lead agency approves in writing a statement to exceed 300 pages and establishes a new page limit.

§ 1502.8 Writing.

Agencies shall write environmental impact statements in plain language and may use appropriate graphics so that decision makers and the public can readily understand such statements. Agencies should employ writers of clear prose or editors to write, review, or edit statements, which shall be based upon the analysis and supporting data from the natural and social sciences and the environmental design arts.

§ 1502.9 Draft, final, and supplemental statements.

(a) *Generally*. Except for proposals for legislation as provided in § 1506.8 of this chapter, agencies shall prepare environmental impact statements in two stages and, where necessary, supplement them, as provided in paragraph (d)(1) of this section.

(b) *Draft environmental impact statements*. Agencies shall prepare draft environmental impact statements in accordance with the scope decided upon in the scoping process (§ 1501.9 of this chapter). The lead agency shall work with the cooperating agencies and shall obtain comments as required in part 1503 of this chapter. To the fullest extent practicable, the draft statement must meet the requirements established for final statements in section 102(2)(C) of NEPA as interpreted in the regulations in this subchapter. If a draft statement is so inadequate as to preclude meaningful analysis, the agency shall prepare and publish a supplemental draft of the appropriate portion. At appropriate points in the draft statement, the agency shall discuss all

major points of view on the environmental impacts of the alternatives including the proposed action.

(c) *Final environmental impact statements.* Final environmental impact statements shall address comments as required in part 1503 of this chapter. At appropriate points in the final statement, the agency shall discuss any responsible opposing view that was not adequately discussed in the draft statement and shall indicate the agency's response to the issues raised.

(d) *Supplemental environmental impact statements.* Agencies:

(1) Shall prepare supplements to either draft or final environmental impact statements if a major Federal action remains to occur, and:

(i) The agency makes substantial changes to the proposed action that are relevant to environmental concerns; or

(ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

(2) May also prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so.

(3) Shall prepare, publish, and file a supplement to a statement (exclusive of scoping (§ 1501.9 of this chapter)) as a draft and final statement, as is appropriate to the stage of the statement involved, unless the Council approves alternative procedures (§ 1506.12 of this chapter).

(4) May find that changes to the proposed action or new circumstances or information relevant to environmental concerns are not significant and therefore do not require a supplement. The agency should document the finding consistent with its agency NEPA procedures (§ 1507.3 of this chapter), or, if necessary, in a finding of no significant impact supported by an environmental assessment.

§ 1502.10 Recommended format.

(a) Agencies shall use a format for environmental impact statements that will encourage good analysis and clear presentation of the alternatives including the proposed action. Agencies should use the following standard format for environmental impact statements unless the agency determines that there is a more effective format for communication:

(1) Cover.

(2) Summary.

(3) Table of contents.

(4) Purpose of and need for action.

(5) Alternatives including the proposed action (sections 102(2)(C)(iii) and 102(2)(E) of NEPA).

(6) Affected environment and environmental consequences (especially sections 102(2)(C)(i), (ii), (iv), and (v) of NEPA).

(7) Submitted alternatives, information, and analyses.

(8) List of preparers.

(9) Appendices (if any).

(b) If an agency uses a different format, it shall include paragraphs (a)(1) through (8) of this section, as further described in §§ 1502.11 through 1502.19, in any appropriate format.

§ 1502.11 Cover.

The cover shall not exceed one page and include:

(a) A list of the responsible agencies, including the lead agency and any cooperating agencies.

(b) The title of the proposed action that is the subject of the statement (and, if appropriate, the titles of related cooperating agency actions), together with the State(s) and county(ies) (or other jurisdiction(s), if applicable) where the action is located.

(c) The name, address, and telephone number of the person at the agency who can supply further information.

(d) A designation of the statement as a draft, final, or draft or final supplement.

(e) A one-paragraph abstract of the statement.

(f) The date by which the agency must receive comments (computed in cooperation with EPA under § 1506.11 of this chapter).

(g) For the final environmental impact statement, the estimated total cost to prepare both the draft and final environmental impact statement, including the costs of agency full-time equivalent (FTE) personnel hours, contractor costs, and other direct costs. If practicable and noted where not practicable, agencies also should include

costs incurred by cooperating and participating agencies, applicants, and contractors.

§ 1502.12 Summary.

Each environmental impact statement shall contain a summary that adequately and accurately summarizes the statement. The summary shall stress the major conclusions, areas of disputed issues raised by agencies and the public, and the issues to be resolved (including the choice among alternatives). The summary normally will not exceed 15 pages.

§ 1502.13 Purpose and need.

The statement shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.

[87 FR 23469, Apr. 20, 2022]

§ 1502.14 Alternatives including the proposed action.

The alternatives section should present the environmental impacts of the proposed action and the alternatives in comparative form based on the information and analysis presented in the sections on the affected environment (§ 1502.15) and the environmental consequences (§ 1502.16). In this section, agencies shall:

(a) Evaluate reasonable alternatives to the proposed action, and, for alternatives that the agency eliminated from detailed study, briefly discuss the reasons for their elimination.

(b) Discuss each alternative considered in detail, including the proposed action, so that reviewers may evaluate their comparative merits.

(c) Include the no action alternative.

(d) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.

(e) Include appropriate mitigation measures not already included in the proposed action or alternatives.

(f) Limit their consideration to a reasonable number of alternatives.

§ 1502.15 Affected environment.

The environmental impact statement shall succinctly describe the environment of the area(s) to be affected or created by the alternatives under consideration, including the reasonably foreseeable environmental trends and planned actions in the area(s). The environmental impact statement may combine the description with evaluation of the environmental consequences (§ 1502.16), and it shall be no longer than is necessary to understand the effects of the alternatives. Data and analyses in a statement shall be commensurate with the importance of the impact, with less important material summarized, consolidated, or simply referenced. Agencies shall avoid useless bulk in statements and shall concentrate effort and attention on important issues. Verbose descriptions of the affected environment are themselves no measure of the adequacy of an environmental impact statement.

§ 1502.16 Environmental consequences.

(a) The environmental consequences section forms the scientific and analytic basis for the comparisons under § 1502.14. It shall consolidate the discussions of those elements required by sections 102(2)(C)(i), (ii), (iv), and (v) of NEPA that are within the scope of the statement and as much of section 102(2)(C)(iii) of NEPA as is necessary to support the comparisons. This section should not duplicate discussions in § 1502.14. The discussion shall include:

(1) The environmental impacts of the proposed action and reasonable alternatives to the proposed action and the significance of those impacts. The comparison of the proposed action and reasonable alternatives shall be based on this discussion of the impacts.

(2) Any adverse environmental effects that cannot be avoided should the proposal be implemented.

(3) The relationship between short-term uses of man's environment and the maintenance and enhancement of long-term productivity.

(4) Any irreversible or irretrievable commitments of resources that would be involved in the proposal should it be implemented.

(5) Possible conflicts between the proposed action and the objectives of

Federal, regional, State, Tribal, and local land use plans, policies and controls for the area concerned. (§ 1506.2(d) of this chapter)

(6) Energy requirements and conservation potential of various alternatives and mitigation measures.

(7) Natural or depletable resource requirements and conservation potential of various alternatives and mitigation measures.

(8) Urban quality, historic and cultural resources, and the design of the built environment, including the reuse and conservation potential of various alternatives and mitigation measures.

(9) Means to mitigate adverse environmental impacts (if not fully covered under § 1502.14(e)).

(10) Where applicable, economic and technical considerations, including the economic benefits of the proposed action.

(b) Economic or social effects by themselves do not require preparation of an environmental impact statement. However, when the agency determines that economic or social and natural or physical environmental effects are interrelated, the environmental impact statement shall discuss and give appropriate consideration to these effects on the human environment.

§ 1502.17 Summary of submitted alternatives, information, and analyses.

(a) The draft environmental impact statement shall include a summary that identifies all alternatives, information, and analyses submitted by State, Tribal, and local governments and other public commenters during the scoping process for consideration by the lead and cooperating agencies in developing the environmental impact statement.

(1) The agency shall append to the draft environmental impact statement or otherwise publish all comments (or summaries thereof where the response has been exceptionally voluminous) received during the scoping process that identified alternatives, information, and analyses for the agency's consideration.

(2) Consistent with § 1503.1(a)(3) of this chapter, the lead agency shall invite comment on the summary identifying all submitted alternatives, information, and analyses in the draft environmental impact statement.

(b) The final environmental impact statement shall include a summary that identifies all alternatives, information, and analyses submitted by State, Tribal, and local governments and other public commenters for consideration by the lead and cooperating agencies in developing the final environmental impact statement.

§ 1502.18 List of preparers.

The environmental impact statement shall list the names, together with their qualifications (expertise, experience, professional disciplines), of the persons who were primarily responsible for preparing the environmental impact statement or significant background papers, including basic components of the statement. Where possible, the environmental impact statement shall identify the persons who are responsible for a particular analysis, including analyses in background papers. Normally the list will not exceed two pages.

§ 1502.19 Appendix.

If an agency prepares an appendix, the agency shall publish it with the environmental impact statement, and it shall consist of:

(a) Material prepared in connection with an environmental impact statement (as distinct from material that is not so prepared and is incorporated by reference (§ 1501.12 of this chapter)).

(b) Material substantiating any analysis fundamental to the impact statement.

(c) Material relevant to the decision to be made.

(d) For draft environmental impact statements, all comments (or summaries thereof where the response has been exceptionally voluminous) received during the scoping process that identified alternatives, information, and analyses for the agency's consideration.

(e) For final environmental impact statements, the comment summaries and responses consistent with § 1503.4 of this chapter.

§ 1502.20 Publication of the environmental impact statement.

Agencies shall publish the entire draft and final environmental impact statements and unchanged statements as provided in § 1503.4(c) of this chapter. The agency shall transmit the entire statement electronically (or in paper copy, if so requested due to economic or other hardship) to:

(a) Any Federal agency that has jurisdiction by law or special expertise with respect to any environmental impact involved and any appropriate Federal, State, Tribal, or local agency authorized to develop and enforce environmental standards.

(b) The applicant, if any.

(c) Any person, organization, or agency requesting the entire environmental impact statement.

(d) In the case of a final environmental impact statement, any person, organization, or agency that submitted substantive comments on the draft.

§ 1502.21 Incomplete or unavailable information.

(a) When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement, and there is incomplete or unavailable information, the agency shall make clear that such information is lacking.

(b) If the incomplete but available information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives, and the overall costs of obtaining it are not unreasonable, the agency shall include the information in the environmental impact statement.

(c) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are unreasonable or the means to obtain it are not known, the agency shall include within the environmental impact statement:

(1) A statement that such information is incomplete or unavailable;

(2) A statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment;

(3) A summary of existing credible scientific evidence that is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment; and

(4) The agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community.

(d) For the purposes of this section, ''reasonably foreseeable'' includes impacts that have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.

§ 1502.22 Cost-benefit analysis.

If the agency is considering a cost-benefit analysis for the proposed action relevant to the choice among alternatives with different environmental effects, the agency shall incorporate the cost-benefit analysis by reference or append it to the statement as an aid in evaluating the environmental consequences. In such cases, to assess the adequacy of compliance with section 102(2)(B) of NEPA (ensuring appropriate consideration of unquantified environmental amenities and values in decision making, along with economical and technical considerations), the statement shall discuss the relationship between that analysis and any analyses of unquantified environmental impacts, values, and amenities. For purposes of complying with the Act, agencies need not display the weighing of the merits and drawbacks of the various alternatives in a monetary cost-benefit analysis and should not do so when there are important qualitative considerations. However, an environmental impact statement should at least indicate those considerations, including factors not related to environmental quality, that are likely to be relevant and important to a decision.

§ 1502.23 Methodology and scientific accuracy.

Agencies shall ensure the professional integrity, including scientific integrity, of the discussions and analyses in environmental documents.

Agencies shall make use of reliable existing data and resources. Agencies may make use of any reliable data sources, such as remotely gathered information or statistical models. They shall identify any methodologies used and shall make explicit reference to the scientific and other sources relied upon for conclusions in the statement. Agencies may place discussion of methodology in an appendix. Agencies are not required to undertake new scientific and technical research to inform their analyses. Nothing in this section is intended to prohibit agencies from compliance with the requirements of other statutes pertaining to scientific and technical research.

§ 1502.24 Environmental review and consultation requirements.

(a) To the fullest extent possible, agencies shall prepare draft environmental impact statements concurrent and integrated with environmental impact analyses and related surveys and studies required by all other Federal environmental review laws and Executive orders applicable to the proposed action, including the Fish and Wildlife Coordination Act (16 U.S.C. 661 *et seq.*), the National Historic Preservation Act of 1966 (54 U.S.C. 300101 *et seq.*), and the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*).

(b) The draft environmental impact statement shall list all Federal permits, licenses, and other authorizations that must be obtained in implementing the proposal. If it is uncertain whether a Federal permit, license, or other authorization is necessary, the draft environmental impact statement shall so indicate.

PART 1503—COMMENTING ON ENVIRONMENTAL IMPACT STATEMENTS

Sec.

AUTHORITY: 42 U.S.C. 4321–4347; 42 U.S.C. 4371–4375; 42 U.S.C. 7609; E.O. 11514, 35 FR 4247, 3 CFR, 1966–1970, Comp., p. 902, as amended by E.O. 11991, 42 FR 26967, 3 CFR, 1977 Comp., p. 123; E.O. 13807, 82 FR 40463, 3 CFR, 2017, Comp., p. 369.

SOURCE: 85 FR 43367, July 16, 2020, unless otherwise noted.

§ 1503.1 Inviting comments and requesting information and analyses.

(a) After preparing a draft environmental impact statement and before preparing a final environmental impact statement the agency shall:

(1) Obtain the comments of any Federal agency that has jurisdiction by law or special expertise with respect to any environmental impact involved or is authorized to develop and enforce environmental standards.

(2) Request the comments of:

(i) Appropriate State, Tribal, and local agencies that are authorized to develop and enforce environmental standards;

(ii) State, Tribal, or local governments that may be affected by the proposed action;

(iii) Any agency that has requested it receive statements on actions of the kind proposed;

(iv) The applicant, if any; and

(v) The public, affirmatively soliciting comments in a manner designed to inform those persons or organizations who may be interested in or affected by the proposed action.

(3) Invite comment specifically on the submitted alternatives, information, and analyses and the summary thereof (§ 1502.17 of this chapter).

(b) An agency may request comments on a final environmental impact statement before the final decision and set a deadline for providing such comments. Other agencies or persons may make comments consistent with the time periods under § 1506.11 of this chapter.

(c) An agency shall provide for electronic submission of public comments, with reasonable measures to ensure the comment process is accessible to affected persons.

§ 1503.2 Duty to comment.

Cooperating agencies and agencies that are authorized to develop and enforce environmental standards shall comment on statements within their jurisdiction, expertise, or authority within the time period specified for

procedures shall identify when documentation of a categorical exclusion determination is required.

(iii) Which normally require environmental assessments but not necessarily environmental impact statements.

(3) Procedures for introducing a supplement to an environmental assessment or environmental impact statement into its formal administrative record, if such a record exists.

(f) Agency procedures may:

(1) Include specific criteria for providing limited exceptions to the provisions of the regulations in this subchapter for classified proposals. These are proposed actions that are specifically authorized under criteria established by an Executive order or statute to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive order or statute. Agencies may safeguard and restrict from public dissemination environmental assessments and environmental impact statements that address classified proposals in accordance with agencies' own regulations applicable to classified information. Agencies should organize these documents so that classified portions are included as annexes, so that the agencies can make the unclassified portions available to the public.

(2) Provide for periods of time other than those presented in §1506.11 of this chapter when necessary to comply with other specific statutory requirements, including requirements of lead or cooperating agencies.

(3) Provide that, where there is a lengthy period between the agency's decision to prepare an environmental impact statement and the time of actual preparation, the agency may publish the notice of intent required by §1501.9(d) of this chapter at a reasonable time in advance of preparation of the draft statement. Agency procedures shall provide for publication of supplemental notices to inform the public of a pause in its preparation of an environmental impact statement and for any agency decision to withdraw its notice of intent to prepare an environmental impact statement.

(4) Adopt procedures to combine its environmental assessment process with its scoping process.

(5) Establish a process that allows the agency to use a categorical exclusion listed in another agency's NEPA procedures after consulting with that agency to ensure the use of the categorical exclusion is appropriate. The process should ensure documentation of the consultation and identify to the public those categorical exclusions the agency may use for its proposed actions. Then, the agency may apply the categorical exclusion to its proposed actions.

[85 FR 43373, July 16, 2020, as amended at 87 FR 23469, Apr. 20, 2022]

§1507.4 Agency NEPA program information.

(a) To allow agencies and the public to efficiently and effectively access information about NEPA reviews, agencies shall provide for agency websites or other means to make available environmental documents, relevant notices, and other relevant information for use by agencies, applicants, and interested persons. Such means of publication may include:

(1) Agency planning and environmental documents that guide agency management and provide for public involvement in agency planning processes;

(2) A directory of pending and final environmental documents;

(3) Agency policy documents, orders, terminology, and explanatory materials regarding agency decision-making processes;

(4) Agency planning program information, plans, and planning tools; and

(5) A database searchable by geographic information, document status, document type, and project type.

(b) Agencies shall provide for efficient and effective interagency coordination of their environmental program websites, including use of shared databases or application programming interface, in their implementation of NEPA and related authorities.

PART 1508—DEFINITIONS

Sec.

AUTHORITY: 42 U.S.C. 4321–4347; 42 U.S.C. 4371–4375; 42 U.S.C. 7609; and E.O. 11514, 35 FR

4247, 3 CFR, 1966–1970, Comp., p. 902, as amended by E.O. 11991, 42 FR 26967, 3 CFR, 1977 Comp., p. 123.

SOURCE: 85 FR 43378, July 16, 2020, unless otherwise noted.

§ 1508.1 Definitions.

The following definitions apply to the regulations in this subchapter. Federal agencies shall use these terms uniformly throughout the Federal Government.

(a) *Act* or *NEPA* means the National Environmental Policy Act, as amended (42 U.S.C. 4321, *et seq.*).

(b) *Affecting* means will or may have an effect on.

(c) *Authorization* means any license, permit, approval, finding, determination, or other administrative decision issued by an agency that is required or authorized under Federal law in order to implement a proposed action.

(d) *Categorical exclusion* means a category of actions that the agency has determined, in its agency NEPA procedures (§1507.3 of this chapter), normally do not have a significant effect on the human environment.

(e) *Cooperating agency* means any Federal agency (and a State, Tribal, or local agency with agreement of the lead agency) other than a lead agency that has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal (or a reasonable alternative) for legislation or other major Federal action that may significantly affect the quality of the human environment.

(f) *Council* means the Council on Environmental Quality established by title II of the Act.

(g) *Effects* or *impacts* means changes to the human environment from the proposed action or alternatives that are reasonably foreseeable and include the following:

(1) Direct effects, which are caused by the action and occur at the same time and place.

(2) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

(3) Cumulative effects, which are effects on the environment that result from the incremental effects of the action when added to the effects of other past, present, and reasonably foreseeable actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative effects can result from individually minor but collectively significant actions taking place over a period of time.

(4) Effects 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, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effects will be beneficial.

(h) *Environmental assessment* means a concise public document prepared by a Federal agency to aid an agency's compliance with the Act and support its determination of whether to prepare an environmental impact statement or a finding of no significant impact, as provided in §1501.6 of this chapter.

(i) *Environmental document* means an environmental assessment, environmental impact statement, finding of no significant impact, or notice of intent.

(j) *Environmental impact statement* means a detailed written statement as required by section 102(2)(C) of NEPA.

(k) *Federal agency* means all agencies of the Federal Government. It does not mean the Congress, the Judiciary, or the President, including the performance of staff functions for the President in his Executive Office. For the purposes of the regulations in this subchapter, Federal agency also includes States, units of general local government, and Tribal governments assuming NEPA responsibilities from a Federal agency pursuant to statute.

(l) *Finding of no significant impact* means a document by a Federal agency briefly presenting the reasons why an action, not otherwise categorically excluded (§1501.4 of this chapter), will not

have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared.

(m) *Human environment* means comprehensively the natural and physical environment and the relationship of present and future generations of Americans with that environment. (*See also* the definition of ''effects'' in paragraph (g) of this section.)

(n) *Jurisdiction by law* means agency authority to approve, veto, or finance all or part of the proposal.

(o) *Lead agency* means the agency or agencies, in the case of joint lead agencies, preparing or having taken primary responsibility for preparing the environmental impact statement.

(p) *Legislation* means a bill or legislative proposal to Congress developed by a Federal agency, but does not include requests for appropriations or legislation recommended by the President.

(q) *Major Federal action* or *action* means an activity or decision subject to Federal control and responsibility subject to the following:

(1) Major Federal action does not include the following activities or decisions:

(i) Extraterritorial activities or decisions, which means agency activities or decisions with effects located entirely outside of the jurisdiction of the United States;

(ii) Activities or decisions that are non-discretionary and made in accordance with the agency's statutory authority;

(iii) Activities or decisions that do not result in final agency action under the Administrative Procedure Act or other statute that also includes a finality requirement;

(iv) Judicial or administrative civil or criminal enforcement actions;

(v) Funding assistance solely in the form of general revenue sharing funds with no Federal agency control over the subsequent use of such funds;

(vi) Non-Federal projects with minimal Federal funding or minimal Federal involvement where the agency does not exercise sufficient control and responsibility over the outcome of the project; and

(vii) Loans, loan guarantees, or other forms of financial assistance where the Federal agency does not exercise sufficient control and responsibility over the effects of such assistance (for example, action does not include farm ownership and operating loan guarantees by the Farm Service Agency pursuant to 7 U.S.C. 1925 and 1941 through 1949 and business loan guarantees by the Small Business Administration pursuant to 15 U.S.C. 636(a), 636(m), and 695 through 697g).

(2) Major Federal actions may include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by Federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (§ 1506.8 of this chapter).

(3) Major Federal actions tend to fall within one of the following categories:

(i) Adoption of official policy, such as rules, regulations, and interpretations adopted under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.* or other statutes; implementation of treaties and international conventions or agreements, including those implemented pursuant to statute or regulation; formal documents establishing an agency's policies which will result in or substantially alter agency programs.

(ii) Adoption of formal plans, such as official documents prepared or approved by Federal agencies, which prescribe alternative uses of Federal resources, upon which future agency actions will be based.

(iii) Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.

(iv) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as Federal and federally assisted activities.

(r) *Matter* includes for purposes of part 1504 of this chapter:

(1) With respect to the Environmental Protection Agency, any proposed legislation, project, action or regulation as those terms are used in

section 309(a) of the Clean Air Act (42 U.S.C. 7609).

(2) With respect to all other agencies, any proposed major Federal action to which section 102(2)(C) of NEPA applies.

(s) *Mitigation* means measures that avoid, minimize, or compensate for effects caused by a proposed action or alternatives as described in an environmental document or record of decision and that have a nexus to those effects. While NEPA requires consideration of mitigation, it does not mandate the form or adoption of any mitigation. Mitigation includes:

(1) Avoiding the impact altogether by not taking a certain action or parts of an action.

(2) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.

(3) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.

(4) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.

(5) Compensating for the impact by replacing or providing substitute resources or environments.

(t) *NEPA process* means all measures necessary for compliance with the requirements of section 2 and title I of NEPA.

(u) *Notice of intent* means a public notice that an agency will prepare and consider an environmental impact statement.

(v) *Page* means 500 words and does not include explanatory maps, diagrams, graphs, tables, and other means of graphically displaying quantitative or geospatial information.

(w) *Participating agency* means a Federal, State, Tribal, or local agency participating in an environmental review or authorization of an action.

(x) *Proposal* means a proposed action at a stage when an agency has a goal, is actively preparing to make a decision on one or more alternative means of accomplishing that goal, and can meaningfully evaluate its effects. A proposal may exist in fact as well as by agency declaration that one exists.

(y) *Publish* and *publication* mean methods found by the agency to efficiently and effectively make environmental documents and information available for review by interested persons, including electronic publication, and adopted by agency NEPA procedures pursuant to §1507.3 of this chapter.

(z) *Reasonable alternatives* means a reasonable range of alternatives that are technically and economically feasible, and meet the purpose and need for the proposed action.

(aa) *Reasonably foreseeable* means sufficiently likely to occur such that a person of ordinary prudence would take it into account in reaching a decision.

(bb) *Referring agency* means the Federal agency that has referred any matter to the Council after a determination that the matter is unsatisfactory from the standpoint of public health or welfare or environmental quality.

(cc) *Scope* consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. The scope of an individual statement may depend on its relationships to other statements (§1501.11 of this chapter).

(dd) *Senior agency official* means an official of assistant secretary rank or higher (or equivalent) that is designated for overall agency NEPA compliance, including resolving implementation issues.

(ee) *Special expertise* means statutory responsibility, agency mission, or related program experience.

(ff) *Tiering* refers to the coverage of general matters in broader environmental impact statements or environmental assessments (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basin-wide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared.

[85 FR 43378, July 16, 2020, as amended at 87 FR 23469, Apr. 20, 2022]

§1508.2 [Reserved]

48:2-13 Powers of board; public utility defined; exemptions from jurisdiction

48:2-13. a. The board shall have general supervision and regulation of and jurisdiction and control over all public utilities as defined in this section and their property, property rights, equipment, facilities and franchises so far as may be necessary for the purpose of carrying out the provisions of this Title.

The term "public utility" shall include every individual, copartnership, association, corporation or joint stock company, their lessees, trustees or receivers appointed by any court whatsoever, their successors, heirs or assigns, that now or hereafter may own, operate, manage or control within this State any railroad, street railway, traction railway, autobus, charter bus operation, special bus operation, canal, express, subway, pipeline, gas, electricity distribution, water, oil, sewer, solid waste collection, solid waste disposal, telephone or telegraph system, plant or equipment for public use, under privileges granted or hereafter to be granted by this State or by any political subdivision thereof.

b. Nothing contained in this Title shall extend the powers of the board to include any supervision and regulation of, or jurisdiction and control over any vehicles engaged in ridesharing arrangements with a maximum carrying capacity of not more than 15 passengers, including the driver, where the transportation of passengers is incidental to the purpose of the driver or any vehicles engaged in the transportation of passengers for hire in the manner and form commonly called taxicab service unless such service becomes or is held out to be regular service between stated termini; hotel buses used exclusively for the transportation of hotel patrons to or from local railroad or other common carrier stations, including local airports, or bus employed solely for transporting school children and teachers, to and from school, or any autobus with a carrying capacity of not more than 10 passengers now or hereafter operated under municipal consent upon a route established wholly within the limits of a single municipality or with a carrying capacity of not more than 20 passengers operated under municipal consent upon a route established wholly within the limits of not more than four contiguous municipalities within any county of the fifth or sixth class, which route in either case does not in whole or in part parallel upon the same street the line of any street railway or traction railway or any other autobus route.

c. Except as provided in section 7 of P.L.1995, c.101 (C.58:26-25), the board shall have no regulatory authority over the parties to a contract negotiated between a public entity and a private firm pursuant to P.L.1995, c.101 (C.58:26-19 et al.) in connection with the performance of their respective obligations thereunder. Nothing contained in this title shall extend the powers of the board to include any supervision and regulation of, or jurisdiction and control over, any public-private contract for the provision of water supply services established pursuant to P.L.1995, c.101 (C.58:26-19 et al.).

d. Unless otherwise specifically provided pursuant to P.L.1999, c.23 (C.48:3-49 et al.), all services necessary for the transmission and distribution of electricity and gas, including but not limited to safety, reliability, metering, meter reading and billing, shall remain the jurisdiction of the Board of Public Utilities. The board shall also maintain the necessary jurisdiction with regard to the production of electricity and gas to assure the reliability of electricity and gas supply to retail customers in the State as prescribed by the board or any other federal or multi-jurisdictional agency responsible for reliability and capacity in the State.

e. Notwithstanding the provisions of subsection a. of this section, the board shall have the authority to classify as regulated the sale of any thermal energy service by a cogenerator or district heating system, for the purpose of providing heating or cooling to a residential dwelling if, after notice and hearing, it determines that the customer does not have sufficient space on its property to install an alternative source of equivalent thermal energy, there is no contract governing the provision of thermal energy service for the relevant period of time, and that sufficient competition is no longer present, based upon consideration of such factors as: ease of market entry; presence of other competitors; and the availability of like or substitute services in the relevant geographic area. Upon such a classification, the board may determine such rates for the thermal energy service for the purpose of providing heating or cooling to a residential dwelling as it finds to be consistent with the prevailing cost of alternative sources of thermal energy in similar situations. The board, however, shall continue to monitor the thermal energy service to such residential dwellings and, whenever the board finds that the thermal energy service has again become sufficiently competitive pursuant to the criteria listed above, the board shall cease to regulate the sale or production of the service. The board shall not have the authority to regulate the sale or

production of steam or any other form of thermal energy, including hot and chilled water, to non-residential customers.

f. Nothing contained in this Title shall extend the powers of the board to include supervision and regulation of, or jurisdiction and control over, an entity engaged in the provision or use of sewage effluent for the purpose of providing a cooling medium to an end user or end users on a single site, which provision results in the conservation of potable water which would otherwise have been used for such purposes.

g. Except as provided herein, the board shall have no regulatory authority over the parties to a contract entered into between the governing body of a city of the first class and a duly incorporated nonprofit association in connection with the performance of their respective obligations thereunder when the governing body of a city of the first class shall determine by ordinance that it is in the public interest to contract with that duly incorporated nonprofit association for the provision of water supply services as defined in subsection (16) of section 15 of P.L.1971, c.198 (C.40A:11-15), or for the provision of wastewater treatment services as defined in subsection (19) of section 15 of P.L.1971, c.198 (C.40A:11-15), or the designing, financing, construction, operation, or maintenance, or any combination thereof, of a water supply facility as defined in subsection (16) of section 15 of P.L.1971, c.198 (C.40A:11-15) or a wastewater treatment system as defined in subsection (19) of section 15 of P.L.1971, c.198 (C.40A:11-15), or any component part or parts thereof, including a water filtration system as defined in subsection (16) of section 15 of P.L.1971, c.198 (C.40A:11-15), upon approval of the contract pursuant to the provisions of section 6 of P.L.2002, c.47 (C.58:28-7).

Notwithstanding any other provision of P.L.2002, c.47 whenever the governing body of a city of the first class enters into a contract with a duly incorporated nonprofit association for the provision of water supply services as defined in subsection (16) of section 15 of P.L.1971, c.198 (C.40A:11-15), or the designing, financing, construction, operation, or maintenance, or any combination thereof, of a water supply facility as defined in subsection (16) of section 15 of P.L.1971, c.198 (C.40A:11-15), and that governing body operates water supply facilities as authorized pursuant to the provisions of N.J.S.40A:31-4, which supply water to customers within another local unit, the nonprofit association or governing body shall be subject to the jurisdiction, rate regulation and control of the Board of Public Utilities as provided in N.J.S.40A:31-23, to the extent the nonprofit association or governing body supplies water to customers within that other local unit.

Amended 1946, c.219; 1947, c.162; 1952, c.251, s.1; 1962, c.198, s.9; 1970, c.40, s.4; 1971, c.16, s.1; 1973, c.158, s.1; 1973, c.272, s.1; 1981, c.413, s.10; 1995, c.101, s.10; 1999, c.23, s.52; 2002, c.47, s.10.

48:2-21. Rates

Schedule of rates. (a) The board may require every public utility to file with it complete schedules of every classification employed and of every individual or joint rate, toll, fare or charge made, charged or exacted by it for any product supplied or service rendered within this State, as specified in the requirement.

Fix rates. (b) The board may after hearing, upon notice, by order in writing:

1. Fix just and reasonable individual rates, joint rates, tolls, charges or schedules thereof, as well as commutation, mileage and other special rates which shall be imposed, observed and followed thereafter by any public utility, whenever the board shall determine any existing rate, toll, charge or schedule thereof, commutation, mileage or other special rate to be unjust, unreasonable, insufficient or unjustly discriminatory or preferential. In every such proceeding the board shall complete and close the hearing within 6 months and enter its final order within 8 months after the filing of the order of the board initiating such proceeding, when such proceeding is on the board's own motion; or after issue is joined through the filing of an answer to a complaint, when such proceeding is initiated by complaint.

2. Fix just and reasonable joint rates, which shall be charged, enforced, collected and observed by railroads and street railroads in the carrying of freight. Whenever the railroads or street railroads involved fail to agree upon the apportionment or division of a joint rate so established, the board may issue a supplemental order declaring the apportionment or division of the joint rate.

Demurrage rates. (c) The board may fix the rates or charges to be made by any corporation subject to the provisions of this chapter for the detention of a railroad car containing property transported by railroad to any point in this State or for the use of railroad tracks occupied by such car, commonly called demurrage or car service, or for both such detention and use. Such rates and charges shall conform as nearly as possible to the rates and charges for demurrage or car service prescribed and fixed by the Interstate Commerce Commission for similar service.

Increase in rates; hearings. (d) When any public utility shall increase any existing individual rates, joint rates, tolls, charges or schedules thereof, as well as commutation, mileage and other special rates, or change or alter any existing classification, the board, either upon written complaint or upon its own initiative, shall have power after hearing, upon notice, by order in writing to determine whether the increase, change or alteration is just and reasonable. The burden of proof to show that the increase, change or alteration is just and reasonable shall be upon the public utility making the same. The board, pending such hearing and determination, may order the suspension of the increase, change or alteration until the board shall have approved the same, not exceeding 4 months. If the hearing and determination shall not have been concluded within such 4 months the board may during such hearing and determination order a further suspension for an additional period not exceeding, 4 months. The board shall approve the increase, change or alteration upon being satisfied that the same is just and reasonable.

Amended by L.1962, c. 198, s. 13.

48:2-23. Safe, adequate service

48:2-23. The board may, after public hearing, upon notice, by order in writing, require any public utility to furnish safe, adequate and proper service, including furnishing and performance of service in a manner that tends to conserve and preserve the quality of the environment and prevent the pollution of the waters, land and air of this State, and including furnishing and performance of service in a manner which preserves and protects the water quality of a public water supply, and to maintain its property and equipment in such condition as to enable it to do so.

The board may, pending any such proceeding, require any public utility to continue to furnish service and to maintain its property and equipment in such condition as to enable it to do so.

The board, in requiring any public water utility to furnish safe, adequate and proper service, may require the public water utility to retain in its rate base any property which the board determines is necessary to protect the water quality of a public water supply.

Amended 1962,c.198,s.15; 1970,c.273; 1979,c.86,s.20; 1988,c.163,s.5.

UNITED STATES OF AMERICA88 FERC ¶ 61,227
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: James J. Hoecker, Chairman;
Vicky A. Bailey, William L. Massey,
Linda Breathitt, and Curt Hébert, Jr.

Certification of New Interstate Natural Gas Pipeline Facilities — Docket No. PL99-3-000

STATEMENT OF POLICY

(Issued September 15, 1999)

In the Notice of Proposed Rulemaking (NOPR) in Docket No. RM98-10-000[1] and the Notice of Inquiry (NOI) in Docket No. RM98-12-000,[2] the Commission has been exploring issues related to the current policies on certification and pricing of new construction projects in view of the changes that have taken place in the natural gas industry in recent years.

In addition, on June 7, 1999, the Commission held a public conference in Docket No. PL99-2-000 on the issue of anticipated natural gas demand in the northeastern United States over the next two decades, the timing and the type of growth, and the effect projected growth will have on existing pipeline capacity. All segments of the industry presented their views at the conference and subsequently filed comments on those issues.

[1]Notice of Proposed Rulemaking, Regulation of Short-term Natural Gas Transportation Services, 63 Fed. Reg. 42982, 84 FERC ¶ 61,087 (1998).

[2]Notice of Inquiry, Regulation of Interstate Natural Gas Transportation Services, 63 Fed. Reg. 42974, 84 FERC ¶ 61,087 (July 29, 1998).

Information received in these proceedings as well as recent experience evaluating proposals for new pipeline construction persuade us that it is time for the Commission to revisit its policy for certificating new construction not covered by the optional or blanket certificate authorizations.[3] In particular the Commission's policy for determining whether there is a need for a specific project and whether, on balance, the project will serve the public interest. Many urge that there is a need for the Commission to authorize new pipeline capacity to meet the growing demand for natural gas. At the same time, others already worried about the potential for capacity turnback, have urged the Commission to be cautious because of concerns about the potential for creating a surplus of capacity that could adversely affect existing pipelines and their captive customers.

Accordingly, the Commission is issuing this policy statement to provide the industry with guidance as to how the Commission will evaluate proposals for certificating new construction. This should provide more certainty about how the Commission will evaluate new construction projects that are proposed to meet growth in the demand for natural gas at the same time that some existing pipelines are concerned about the potential for capacity turnback. In considering the impact of new construction projects on existing pipelines, the Commission's goal is to appropriately consider the enhancement of competitive transportation alternatives, the possibility of overbuilding, the avoidance of unnecessary disruption of the environment, and the unneeded exercise of eminent domain. Of course, this policy statement is not a rule. In stating the evaluation criteria, it is the Commission's intent to evaluate specific proposals based on the facts and circumstances relevant to the application and to apply the criteria on a case-by-case basis.

I. Comments Received on the NOPR

In the NOPR the Commission explained that it wants to assure that its policies strike the proper balance between the enhancement of competitive alternatives and the possibility of over building. The Commission asked for comments on whether proposed projects that will establish a new right-of-way in order to compete for existing market share should be subject to the same considerations as projects that will cut a new right-of-way in order to extend gas service to a frontier market area. Also, in reassessing project need, the Commission said that it was considering how best to balance demonstrated

[3] This policy statement does not apply to construction authorized under 18 CFR Part 157, Subparts E and F.

market demand against potential adverse environmental impacts and private property rights in weighing whether a project is required by the public convenience and necessity.

The Commission asked commenters to offer views on three options: One option would be for the Commission to authorize all applications that at a minimum meet the regulatory requirements, then let the market pick winners and losers. Another would be for the Commission to select a single project to serve a given market and exclude all other competitors. Another possible option would be for the Commission to approve an environmentally acceptable right-of-way and let potential builders compete for a certificate.

In addition, the Commission asked commenters to consider the following questions: (1) Should the Commission look behind the precedent agreement or contracts presented as evidence of market demand to assess independently the market's need for additional gas service? (2) Should the Commission apply a different standard to precedent agreements or contracts with affiliates than with non-affiliates? For example, should a proposal supported by affiliate agreements have to show a higher percentage of contracted-for capacity than a proposal supported by non-affiliate agreements, or, should all proposed projects be required to show a minimum percent of non-affiliate support? (3) Are precedent agreements primarily with affiliates sufficient to meet the statutory requirement that construction must be required by the public convenience and necessity, and, if so, (4) Should the Commission permit rolled-in rate treatment for facilities built to serve a pipeline affiliate? (5) Should the Commission, in an effort to check overbuilding and capacity turnback, take a harder look at proposals that are designed to compete for existing market share rather than bring service to a new customer base, and what particular criteria should be applied in looking at competitive applications versus new market applications? (6) Should the Commission encourage pre-filing resolution of landowner issues by subjecting proposed projects to a diminished degree of scrutiny where the project sponsor is able to demonstrate it has obtained all necessary right-of-way authority? (7) Should a different standard be applied to project sponsors who do not plan to use either federal or state-granted rights of eminent domain to acquire right-of-way?

A. Reliance on Market Forces to Determine Optimal Sizing and Route for New Facilities

PG&E, Process Gas Consumers (PGC), Tejas Gas, Washington Gas, Columbia, Market Hub Partners, and Ohio PUC agree that the Commission should continue to let the market decide which projects to pursue. PG&E states that the Commission should authorize all projects that meet minimum regulatory requirements, looking at whether the project will serve new or existing markets, the firmness of commitments and environmental and property right issues. PGC urges the Commission to refrain from

second guessing customers' decisions. Tejas suggests that the Commission rely on the market to the maximum extent; regulatory changes that affect risk/reward allocation will increase regulatory risk and deter new investment. Washington Gas suggests letting the market decide on new construction with market based rates subject only to environmental review and landowner concerns. Columbia comments that it would not be economically efficient to protect competitors from the competition created by new capacity. Market Hub Partners specifies that, when there is no eminent domain involved, the focus should be on competition, not protecting individual competitors from overbuilding. Ohio PUC supports authorizing all applications for new capacity certification which meet the minimum regulatory requirements. Ohio PUC does not support approving a single pipeline's application while excluding all others.

The Regulatory Studies Program of the Mercatus Center, George Mason University suggests allowing projects to be proposed with no certification requirements, but allowing competitors to challenge the need. Investors would be at risk for all investments. Tejas proposes holding pipelines at risk for reduced throughput, thereby avoiding shifting the risk to customers.

On the issue of overbuilding, Millennium, Enron, PGC, Columbia, and Wisconsin PSC disagree with the presumption that overbuilding must be avoided. Millennium asserts that all competitive markets have excess capacity. Enron urges the Commission to be receptive to overbuilding in areas of rapid growth, difficult construction, and environmental sensitivity. PGC agrees that some capacity in excess of initial demand may make environmental and economic sense in that it will reduce the need for future construction, but argues that the pipelines be at risk for those facilities. Columbia alleges that the concern about overbuilding is misguided. Wisconsin PSC contends that concerns of overbuilding should not operate to limit the availability of competitive alternatives to customers currently without choices of pipeline provider. Wisconsin PSC believes the elimination of the discount adjustment mechanism and the imposition of reasonable at risk provisions for new construction will deter pipelines from overbuilding.

On the other hand, UGI recommends that overbuilding be minimized. UGI states that the Commission should ensure a reasonable fit between supply and demand. The Commission should limit certification of new projects to ones which demonstrate unmet demand or demand growth over 1-3 years.

Coastal stresses that competition should not be the only or primary factor in deciding the public convenience and necessity.

Amoco contends that, if the Commission chooses the right-of-way, it will in many cases have chosen the parties that will ultimately build the pipeline. Amoco urges the

Commission not substitute its judgement for that of the marketplace unless there are overwhelming environmental concerns. Tejas also objects to the option of the Commission approving an environmentally acceptable right-of-way and letting potential builders compete for a certificate because it believes it would be difficult for the Commission to implement.

Colorado Springs supports the concept of having the Commission select a single project in a given corridor rather than letting the market pick winners and losers.

PGC and Ohio PUC recommend that the Commission authorize all construction applications meeting certain threshold requirements, leaving the market to decide winners and losers. PGC urge the Commission to facilitate construction of new pipelines that will increase the potential for gas flows. Under no circumstances should the Commission deny a certificate based on a complaint by an LDC or a competing pipeline that new construction will hurt their market position or ability to recover costs. The Commission should not afford protection to traditional suppliers or transporters by constraining the development of new pipeline capacity.

PGC believes that only in unusual situations, where insuperable environmental barriers cannot be resolved through normal mitigation measures, should the Commission select an acceptable right-of-way. Ohio PUC does not support approving a single pipeline's application while excluding all others. Ohio PUC recommends having market forces guide construction projects unless or until obvious shortcomings begin to emerge. In such instances, the option of designating a single right-of-way with competition for the certificate could be used to spur needed construction.

B. Reliance on Contracts to Demonstrate Demand

A number of parties comment that there is no reason to change the current policy regarding certificate need (AlliedSignal, Millennium, Southern Natural, Tejas, Williston, Columbia). National Fuel Gas Supply believes the Commission should keep shipper commitment as the test because it is more accurate than market studies. National Fuel Gas Supply further believes the Commission's present reliance on market forces to establish need, and its environmental review process, form the best approach to reviewing certificate applications. Foothills agrees, but states that a new, flexible regulatory structure for existing pipelines is needed. Indicated Shippers also wants to keep the current policy, but stresses that expedition in processing is needed to lower entry barriers.

Amoco, Consolidated Natural, and Columbia urged the Commission to continue requiring sufficient binding long-term contracts for firm capacity. Millennium and Tejas stated that there is no need to develop different tests for different markets. Columbia also

argued that there is no need to look behind contracts. Williams argues that the Commission should not second guess contracts or make an independent market analysis. Williston alleges that reviewing the firmness of private contracts is ineffectual and futile. Market Hub Partners cautions the Commission not to substitute its judgement for that of the marketplace.

PGC argues that there should be no change to current policy where construction affects landowners. Eminent domain is a necessary tool to delivering clean burning natural gas to growing markets; no individual landowners should be given a veto over pipeline construction. PGC adds that the absence of prefiling right-of-way agreements does not mean that a project is less good or necessary or should be treated more harshly. Southern Natural, Millennium, and National Fuel Gas Supply agree that no market preference should be given for projects that do not use eminent domain. National Fuel Gas Supply agrees that such a preference would tilt the power balance to landowners. Millennium argues that the Commission should not establish certificate preferences for pipelines that do not require eminent domain; such preferences are not needed because a pipeline that does not want to use eminent domain can already build projects under Section 311.

On the other hand, Amoco, El Paso/Tennessee, ConEd, and Wisconsin PSC recommend modifying the current policy. El Paso/Tennessee recommend that the Commission look behind all precedent agreements to see if real markets exist. ConEd suggests considering forecasts for market growth; if there is a disparity with the proposal, the Commission should look at all circumstances. Wisconsin PSC urges the Commission to consider market saturation and growth prospects by looking at market power (HHIs) and the degree of rate discounting in a market. Amoco suggests that the Commission analyze all relevant data. Peco Energy believes the current Commission policy, which provides for minimal market justification for authorizing construction of incremental facilities, coupled with its presumption in favor of rolled-in rate treatment, has contributed to discouraging existing firm shippers from embracing longer term capacity contracts.

Consolidated Natural recommends creating a settlement forum for market demand and reverse open season issues. Washington Gas urges the Commission to adopt an open entry, "let the market decide" policy. IPAA supports a need analysis focusing on the ability of existing capacity to handle projected demand. IPAA alleges that the overall infrastructure is already in place to supply current demand projections.

Some commenters support a sliding scale approach to determine need. ConEd states that the Commission should determine need on a case-by-case basis, using different standards for large or small projects. Enron advocates use of a sliding scale, requiring

more market support for projects with more landowner and/or environmental impact. Enron supports requiring no market showing for projects using existing easements or mutually agreed upon easements. Enron also suggests, in addition to requiring that at least 25% of the precedent agreements supporting a project be with non-affiliates, that the Commission relax its market analysis if 75% or more of those agreements are with non-affiliates. Enron would require more market data for an affiliate-backed project. American Forest & Paper would allow negotiation of risk if there is no subsidy by existing customers. Sempra and UGI urge the Commission to look at whether projects serve identifiable, new or growing markets. NARUC states that each state is unique and that the Commission should consider those differences. Market Hub Partners believes that a project which is at risk, requires little or no eminent domain authority, and has potential to bring competition to a market that is already being served by pipelines and storage operators with market power should be expedited.

The development in recent years of certificate applicants' use of contracts with affiliates to demonstrate market support for projects has generated opposition from affected landowners and competitor pipelines who question whether the contracts represent real market demand. ConEd, Ohio PUC, and Enron believe that a different standard should be applied to affiliates. ConEd argues that the at risk condition is inadequate when a pipeline serves a market served by an affiliate; risk is shifted. Ohio PUC states that pipelines should shoulder the increased risk and that the Commission should look behind contracts with affiliates. Enron would require more market data for affiliate-backed projects and would require that all projects be supported by precedent agreements at least 25% of which are with non-affiliates.

Nevertheless, most of the commenters support applying the same standard to contracts for new capacity with affiliates as non-affiliates. Amoco, Coastal, Millennium, National Fuel, Southern Natural, Tejas, Texas Eastern, Columbia, Market Hub Partners, El Paso/Tennessee, and PGC all support applying the same standard to affiliates as non-affiliates. Market Hub argues that a contract is a contract; treating affiliates differently would be in the interest of incumbent monopolists. El Paso/Tennessee agree that affiliate precedent agreements are sufficient as long as they are supported by market demand. PGC agrees that the same standard should apply as long as the proposed capacity is offered on a non-discriminatory basis to all in an open season. Amoco makes an exception for marketing affiliates, arguing that they do not represent new demand. Columbia also makes an exception for affiliates that are created just to show market for a project.

Other parties also offered comments on affiliate issues. PGC recommends addressing affiliate issues on a case-by-case basis. Exxon supports offering comparable deals to non-affiliates. If there is insufficient capacity, it should be prorated. AGA

supports prohibiting discount adjustments connected with new construction by pipelines or affiliates. National Fuel Gas Supply and Tejas support permitting rolled-in rates for facilities to serve affiliates. PGC argues that there should be no presumption of rolled in rates for affiliates.

The commenters also express concern with the current policy's effect on existing pipelines and their captive customers when the Commission approves pipeline projects proposed to serve the same market. In those cases, they believe that need should be measured differently by, for example, assessing the impact on existing capacity or requiring a strong incremental market showing and more scrutiny of the net benefits. They urge the Commission to balance all the relevant factors before issuing a certificate. A number of parties argued that need should be measured differently when a project is proposed to serve an existing market. UGI urges requiring a strong market showing for such projects. Coastal proposes that the Commission fully integrate the standards announced by the courts [4] with its certificate construction policies, balancing all the relevant factors including the ability of the existing provider to provide the service. El Paso/Tennessee would require more scrutiny of the net benefit. Sempra would require that, prior to construction, all shippers be given the opportunity to turn back capacity. Similarly, Texas Eastern would require the pipeline to use unsubscribed capacity before construction (e.g., a reverse auction).

Other commenters oppose a policy requiring a harder look at projects proposed to serve existing markets. They maintain that market demand for service in order to escape dependence on a dominant pipeline supplier should be accorded the same weight as demand by new incremental load growth. They contend that the benefits of competition and potentially lower gas prices for consumers should control over claims that an existing pipeline needs to be insulated from competition because its revenues may decrease. National Fuel Gas Supply, PGC, Florida Cities, Market Hub Partners, and Southern Natural in particular object to having different policies for new or existing pipelines.

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[4] Citing FPC v. Transcontinental Gas Pipeline Corp., 365 U.S. 1, 23 (1961) and Scenic Hudson Preservation Conference v. FERC, 354 F.2d. 608, 620 (2nd Cir. 1965)

National Fuel Gas Supply contends that generally the policies on new construction and existing pipelines should match. PGC opposes any policy that protects incumbents by requiring a harder look at projects proposed to serve existing markets rather than new demand. Many existing markets have unmet demand. Likewise, Florida Cities is concerned that the NOPR is intended to elicit a new policy where the import and influence of competition is downplayed to minimize or eliminate the risk of unsubscribed capacity on existing pipelines. Florida Cities supports pipeline-on-pipeline competition as a primary factor in determining which new capacity projects receive certificate authority and are constructed. Florida Cities believes that additional pipeline competition would benefit customers and any generic policy that would decrease or inhibit pipeline competition would not be in the best interest of the consumers the Commission is obliged to protect. Market Hub Partners urges the Commission to attempt to limit market incumbents' ability to forestall competition by defeating the efforts of new market entrants to build or operate new capacity. Market Hub Partners contend that incumbents protest on the basis of project safety and environmental concerns when they are primarily concerned with their own welfare and market share. Southern Natural contends the NGA does not permit a rule disfavoring projects that enhance competitive alternatives. Taking a harder look at competitive proposals would effect a preference for monopoly, clearly not endorsed by the NGA or the Courts of Appeal.

Wisconsin Distributor Group believes that meaningful pipe-on-pipe competition can only exist where there are choices among or between pipelines and unsubscribed firm capacity exists. Wisconsin Distributor Group argues the Commission should view favorably new pipeline projects that propose to create competition by introducing an alternative pipeline to markets where no choices exist. Wisconsin Distributor Group contends the Commission's policy should not be driven by self-protective arguments but by the need for competitive alternatives. Wisconsin Distributor Group supports the Commission's analysis in Alliance and Southern because it considers the benefits of competition and potentially lower gas prices for consumers as controlling over claims that an existing pipeline needs to be insulated from competition because its revenues may decrease. Market demand for service in order to escape dependence on a dominant pipeline supplier should be accorded the same weight as demand by new incremental load growth.

UGI, Sempra, and El Paso/Tennessee would require assessing the impact on existing capacity. Sempra states that if existing rates are below the maximum rate, new capacity may not be needed. Sempra adds that the Commission should look at whether expansion capacity can stand on its own without rolled-in treatment. Texas Eastern believes the Commission must consider how best to use existing unsubscribed capacity and capacity that has been turned back to pipelines.

C. The Pricing of New Facilities

A number of commenters submit that the existing presumption in favor of rolled-in rates for pipeline expansions sends the wrong price signals with regard to pricing new construction. They urge the Commission to adopt policies such as incremental pricing for pipeline projects or placing pipelines at risk for recovery of the costs of construction. They submit that such a policy would reveal the true value of existing capacity and properly allocate costs and risks. A number of parties also raised issues concerning rate design in general, but the Commission is deferring for now consideration of those kinds of issues which also affect the Commission's policies for existing pipelines in order to focus on issues concerning the certification of new pipeline construction.

AGA, ConEd, and Michigan Consolidated stress the importance of ensuring the right price signals. AGA urges the Commission to adopt policies that reveal the true value of existing capacity. ConEd states that rate policies should send proper price signals by properly allocating costs and risks.

AGA contends that the Commission's certification policies should protect recourse shippers. AGA and BG&E recommend that the Commission ensure that pipelines are not able to impose the costs of new capacity or the costs of consequent unsubscribed existing capacity on recourse shippers. Amoco asserts pipelines should be at risk for unsubscribed capacity. Similarly, AGA and Philadelphia Gas Works urge the Commission to ensure that pipelines are at risk for unsubscribed capacity relating to construction projects by the pipeline or its affiliate. However, Tejas believes that treatment of any under recovery must address the unique circumstances of deepwater pipelines.

APGA argues that, if the Commission allows initial rates based on the life of the contract rather than the useful life of facilities, the Commission must at least require a uniform contract with the same terms and conditions for all customers involved in the expansion.

The Williams Companies recommend that all new capacity be subject to market-based rates. The Williams Companies argue that, for new capacity priced on an incremental basis rather than a rolled-in basis, competitive circumstances in the industry support the use of market-based rates and terms of service.

AlliedSignal contends depreciation should be based on the life of the facilities not the life of a contract. If the Commission were to promulgate a general rule, it should state that depreciation rates for pipeline facilities in rate and certificate cases should be set at 25 years unless factors are brought to the Commission's attention justifying a lesser or longer time period. NGSA believes that the Commission's current depreciation

methodology is appropriate. NGSA also urges that the appropriate asset life of new facilities be determined when the facilities are constructed and adhered to for the life of the asset. On the other hand, the Williams Companies point out that market-based rates would negate the need for the Commission to approve depreciation rates.

Coastal believes pipelines should have the flexibility to address new facility costs in certificate applications and in rate cases. The Commission should not establish hard and fast rules as to how a facility should be treated in a pipeline's rates over its entire life. Rather, costs should be dealt with in accordance with Commission policies from time to time in pipeline rate cases.

Enron Pipelines contend that the rate treatment for capacity additions should continue to be determined on a case-by-case basis using the system benefits test.

Louisville contends that the Commission should address the question of whether its pricing policies for new capacity provide appropriate incentives at the same time as it considers auctions and negotiated rates and services and that all of these issues should be the subject of a new NOPR.

PGC suggest that initial rates be based on a presumed level of contract commitment (e.g., 80-90%) so the pipeline bears the risks of uncommitted capacity but reaps a reward if it sells at undiscounted rates. Another option would be for the Commission to put at risk only that portion of the proposed facilities for which the pipeline has not obtained firm contracts of a minimum duration. Where an existing pipeline constructs new facilities, PGC support the Commission's current policy favoring rolled-in rates if certain conditions are met.

Williston Basin argues that fixed rates for long-term contracts would create a relatively risk-free contract for shippers while creating a total-risk contract for pipelines.

Arkansas, IPAA, Indicated Shippers, National Fuel Gas Supply, NGSA, Peoples Energy, PGC, and the Williams Companies support the Commission's current policy with its presumption in favor of rolled-in pricing for new capacity only when the impact of new capacity is not more than a 5% increase to existing rates and results in system-wide benefits. AGA, Amoco, IPAA, Philadelphia Gas Works, PGC, and UGI recommend that the Commission more rigidly apply its pricing policy and more closely review claims pertaining to the 5% threshold test and/or system benefits. Nicor urges that pipelines should not be allowed to segment construction with the goal of falling below the 5% pricing policy threshold.

APGA and Consolidated Edison recommend that the Commission adopt a presumption of incremental pricing for pipeline certificate projects. APGA would allow limited exceptions such as when the project would lower rates to existing customers or when the benefits of the project would fully offset the costs of the roll-in. Koch Gateway and Pennsylvania Consumer Advocate also recommend incremental pricing for new capacity.

Arkansas and Brooklyn Union contend that pipelines should be at risk for the recovery of the costs of incremental facilities. Brooklyn Union urges the Commission to eliminate the presumption in favor of rolled-in pricing for new capacity and require pipelines to show the benefits of each new project are proportionate to the total rate increase sought.

El Paso/Tennessee recommend that only fully subscribed projects with revenues equaling or exceeding project costs and supported by demonstrated market need should be eligible for rolled-in rates. El Paso/Tennessee believe that projects intended to compete for existing market should not be eligible for rolled-in rates.

New York questions the 5% presumption for rolled-in pricing and argues that a move away from rolled-in pricing would create competitive markets for new pipeline construction.

AlliedSignal believes pipelines should be at risk for costs relative to new services prior to filing a new rate case. In the new rate case, the burden should be on the pipeline to justify the proper allocation of costs.

Amoco suggests that the pipeline and customer be allowed to enter into any agreement that does not violate existing regulations or statutory requirements, but they must explicitly apportion any risk between themselves.

The Illinois Commerce Commission believes this issue needs more research and should not be addressed until state regulators are consulted further.

Market Hub Partners and PGC contend that rolled-in rate treatment should not be granted for facilities solely or principally being constructed on the basis of affiliate precedent agreements. On the other hand, Millennium asserts that affiliates and non-affiliates should be treated alike with respect to rate design. Also, Southern Natural argues that the fact that an affiliate subscribed for capacity on new facilities cannot alone preclude rolled-in pricing for those facilities; the Commission must leave to individual cases the issue of whether to price facilities on a rolled-in or incremental basis.

Nicor argues that the Commission cannot, in a competitive marketplace, evaluate the enhancements claimed by the pipeline to determine whether new construction should be incrementally priced or receive rolled-in rate treatment. Instead of imposing rolled-in rate treatment on the entire system, the Commission should allow individual "old" shippers to decide whether the supposed benefits are worth the costs.

Pipeline Transportation Customer Coalition contends the existing regulatory process does not reflect a reasonable risk-reward balance between industry segments, asserting that pipeline rates are too high given their relatively low risk exposure.

II. Certificate Policy Goals and Objectives

The comments present a variety of perspectives and no clear consensus on a path the Commission should follow. Nevertheless, the starting point for the Commission's reassessment of its certificate policy is to define the goals and objectives to be achieved. An effective certificate policy should further the goals and objectives of the Commission's natural gas regulatory policies. In particular, it should be designed to foster competitive markets, protect captive customers, and avoid unnecessary environmental and community impacts while serving increasing demands for natural gas. It should also provide appropriate incentives for the optimal level of construction and efficient customer choices.

Commission policy should give the applicant an incentive to file a complete application that can be processed expeditiously and to develop a record that supports the need for the proposed project and the public benefits to be obtained. Commission certificate policy should also provide an incentive for applicants to structure their projects to avoid, or minimize, the potential adverse impacts that could result from construction of the project.

The Commission intends the certificate policy introduced in this order to provide an analytical framework for deciding, consistent with the goals and objectives stated above, when a proposed project is required by the public convenience and necessity. In some respects this policy is not a significant change from the kind of analysis employed currently in certificate cases. By stating more explicitly the Commission's analytical framework, the Commission can provide applicants and other participants in certificate proceedings a better understanding of how the Commission makes its decisions. By encouraging applicants to devote more effort before filing to minimize the adverse effects of a project, the policy gives them the ability to expedite the decisional process by working out contentious issues in advance. Thus, this policy will provide more certainty about the Commission's analytical process and provide participants in certificate

proceedings with a framework for shaping the record that is needed by the Commission to expedite its decisional process.

III. Evaluation of Current Policy

A. Current Policy

Section 1(b) of the Natural Gas Act (NGA) gives the Commission jurisdiction over the transportation of natural gas in interstate commerce and the natural gas companies providing that transportation.[5] Section 7(c) of the NGA provides that no natural gas company shall transport natural gas or construct any facilities for such transportation without a certificate of public convenience and necessity issued by the Commission.[6]

In reaching a final determination on whether a project will be in the public convenience and necessity, the Commission performs a flexible balancing process during which it weighs the factors presented in a particular application. Among the factors that the Commission considers in the balancing process are the proposal's market support, economic, operational, and competitive benefits, and environmental impact.

Under the Commission's current certificate policy, an applicant for a certificate of public convenience and necessity to construct a new pipeline project must show market support through contractual commitments for at least 25 percent of the capacity for the application to be processed by the Commission. An applicant showing 10-year firm commitments for all of its capacity, and/or that revenues will exceed costs is eligible to receive a traditional certificate of public convenience and necessity.

An applicant unable to show the required level of commitment may still receive a certificate but it will be subject to a condition putting the applicant “at risk.” In other words, if the project revenues fail to recover the costs, the pipeline rather than its customers will be responsible for the unrecovered costs. Alternatively, a project sponsor can apply for a certificate under Subpart E of Part 157 of the Commission's regulations for an optional certificate.[7] An optional certificate may be granted to an applicant without any market showing at all; however, in practice optional certificate applicants

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[5] 15 USC 717.

[6] 15 USC 717h.

[7] 18 CFR Part 157, Subpart E.

usually make some form of market showing. The rates for service provided through facilities constructed pursuant to an optional certificate must be designed to impose the economic risk of the project entirely on the applicant.

The Commission also has certificated projects that would serve no new market, but would provide some demonstrated system-benefit. Examples include projects intended to provide improved system reliability, access to new supplies, or more economic operations.

Generally, under the current policy, the Commission does not deny an application because of the possible economic impact of a proposed project on existing pipelines serving the same market or on the existing pipelines' customers. In addition, the Commission gives equal weight to contracts between an applicant and its affiliates and an applicant and unrelated third parties and does not look behind the contracts to determine whether the customer commitments represent genuine growth in market demand.[8]

Under section 7(h) of the NGA, a pipeline with a Commission-issued certificate has the right to exercise eminent domain to acquire the land necessary to construct and operate its proposed new pipeline when it cannot reach a voluntary agreement with the landowner.[9] In recent years, this has resulted in landowners becoming increasingly active before the Commission. Landowners and communities often object both to the taking of land and to the reduction of their land's value due to a pipeline's right-of-way running through the property. As part of its environmental review of pipeline projects, the Commission's environmental staff works to take these landowners' concerns into account, and to mitigate adverse impacts where possible and feasible.

Under the pricing policy for new facilities in Docket No. PL94-4-000,[10] the Commission determines, in the certificate proceeding authorizing the facilities' construction, the appropriate pricing for the facilities. Generally, the Commission applies a presumption in favor of rolled-in rates (rolling-in the expansion costs with the existing

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[8] See, e.g., Transcontinental Gas Pipe Line Corp., 82 FERC ¶ 61,084 at 61,316 (1998).

[9] 15 USC 717f(h).

[10] See Pricing Policy for New and Existing Facilities Constructed by Interstate Natural Gas Pipelines, 71 FERC ¶ 61,241 (1995).

facilities' costs) when the cost impact of the new facilities would result in a rate impact on existing customers of five percent or less, and some system benefits would occur. Existing customers generally bear these rate increases without being allowed to adjust their volumes.

When a pipeline proposes to charge a cost-based incremental rate (establishing separate costs-of-service and separate rates for the existing and expansion facilities) higher than its existing generally applicable rates, the Commission usually approves the proposal. However, the Commission generally will not accept a proposed incremental rate that is lower than the pipeline's existing generally applicable Part 284 rate.

B. Drawbacks of the Current Policy

1. Reliance on Contracts to Demonstrate Demand

Currently, the Commission uses the percentage of capacity under long-term contracts as the only measure of the demand for a proposed project. Many of the commenters have argued that this is too narrow a test. The reliance solely on long-term contracts to demonstrate demand does not test for all the public benefits that can be achieved by a proposed project. The public benefits may include such factors as the environmental advantages of gas over other fuels, lower fuel costs, access to new supply sources or the connection of new supply to the interstate grid, the elimination of pipeline facility constraints, better service from access to competitive transportation options, and the need for an adequate pipeline infrastructure. The amount of capacity under contract is not a good indicator of all these benefits.

The amount of capacity under contract also is not a sufficient indicator by itself of the need for a project, because the industry has been moving to a practice of relying on short-term contracts, and pipeline capacity is often managed by an entity that is not the actual purchaser of the gas. Using contracts as the primary indicator of market support for the proposed pipeline project also raises additional issues when the contracts are held by pipeline affiliates. Thus, the test relying on the percent of capacity contracted does not reflect the reality of the natural gas industry’s structure and presents difficult issues.

In addition, the current policy's preference for contracts with 10-year terms biases customer choices toward longer term contracts. Of course, there are other elements of the Commission’s policies that also have this effect. However, eliminating a specific requirement for a contract of a particular length is more consistent with the Commission's regulatory objective to provide appropriate incentives for efficient customer choices and the optimal level of construction, without biasing those choices through regulatory policies.

Finally, by relying almost exclusively on contract standards to establish the market need for a new project, the current policy makes it difficult to articulate to landowners and community interests why their land must be used for a new pipeline project.

All of these concerns raise difficult questions of establishing the public need for the project.

2. The Pricing of New Facilities

As the industry becomes more competitive the Commission needs to adapt its policies to ensure that they provide the correct regulatory incentives to achieve the Commission's policy goals and objectives. All of the Commission's natural gas policy goals and objectives are affected by its pricing policy, but directly affected are the goals of fostering competitive markets, protecting captive customers, and providing incentives for the optimal level of construction and efficient customer choice. The current pricing policy focuses primarily on the interests of the expanding pipeline and its existing and new shippers, giving little weight to the interests of competing pipelines or their captive customers. As a result, it no longer fits well with an industry that is increasingly characterized by competition between pipelines.

The current pricing policy sends the wrong price signals, as some commenters have argued, by masking the real cost of the expansions. This can result in overbuilding of capacity and subsidization of an incumbent pipeline in its competition with potential new entrants for expanding markets. The pricing policy's bias for rolled-in pricing also is inconsistent with a policy that encourages competition while seeking to provide incentives for the optimal level of construction and customer choice. This is because rolled-in pricing often results in projects that are subsidized by existing ratepayers. Under this policy the true costs of the project are not seen by the market or the new customers, leading to inefficient investment and contracting decisions. This in turn can exacerbate adverse environmental impacts, distort competition between pipelines for new customers, and financially penalize existing customers of expanding pipelines and of pipelines affected by the expansion.

Under existing policy, shippers' rates may change for a number of reasons. These include rolling-in of an expansion's costs, changes in the discounts given other customers, or changes in the contract quantities flowing on the system. As a customer's rates change in a rate case, it is generally unable to change its volumes, even though it may be paying more for capacity. This results in shippers bearing substantial risks of rate changes which they may be ill equipped to bear.

III. The New Policy

A. Summary of the Policy

As a result of the Commission's reassessment of its current policy, the Commission has decided to announce the criteria, set forth below, that it will use in deciding whether to authorize the construction of major new pipeline facilities. This section summarizes the analytical steps the Commission will use under this policy to balance the public benefits against the potential adverse consequences of an application for new pipeline construction. Each of these steps is described in greater detail in the later sections of this policy statement.

Once a certificate application is filed, the threshold question applicable to existing pipelines is whether the project can proceed without subsidies from their existing customers. As discussed below, this will usually mean that the project would be incrementally priced, if built by an existing pipeline, but there are cases where rolled in pricing would prevent subsidization of the project by the existing customers.[11]

The next step is to determine whether the applicant has made efforts to eliminate or minimize any adverse effects the project might have on the existing customers of the pipeline proposing the project, existing pipelines in the market and their captive customers, or landowners and communities affected by the route of the new pipeline. These three interests are discussed in more detail below. This is not intended to be a decisional step in the process for the Commission. Rather, this is a point where the Commission will review the efforts made by the applicant and could assist the applicant in finding ways to mitigate the effects, but the choice of how to structure the project at this stage is left to the applicant's discretion.

If the proposed project will not have any adverse effect on the existing customers of the expanding pipeline, existing pipelines in the market and their captive customers, or the economic interests of landowners and communities affected by the route of the new pipeline, then no balancing of benefits against adverse effects would be necessary. The Commission would proceed, as it does under current practice, to a preliminary

[11] This policy does not apply to construction authorized under 18 CFR Part 157, Subparts E and F.

determination or a final order depending on the time required to complete an environmental assessment (EA) or environmental impact statement (EIS)(whichever is required in the case).

If residual adverse effects on the three interests are identified, after efforts have been made to minimize them, then the Commission will proceed to evaluate the project by balancing the evidence of public benefits to be achieved against the residual adverse effects. This is essentially an economic test. Only when the benefits outweigh the adverse effects on economic interests will the Commission then proceed to complete the environmental analysis where other interests are considered. It is possible at this stage for the Commission to identify conditions that it could impose on the certificate that would further minimize or eliminate adverse impacts and take those into account in balancing the benefits against the adverse effects. If the result of the balancing is a conclusion that the public benefits outweigh the adverse effects then the next steps would be the same as for a project that had no adverse effects. That is, if the EA or EIS would take more than approximately 180 days then a preliminary determination could be issued, followed by the EA or EIS and the final order. If the EA would take less time, then it would be combined with the final order.

B. The Threshold Requirement - No Financial Subsidies

The threshold requirement in establishing the public convenience and necessity for existing pipelines proposing an expansion project is that the pipeline must be prepared to financially support the project without relying on subsidization from its existing customers.[12] This does not mean that the project sponsor has to bear all the financial risk

[12]Projects designed to improve existing service for existing customers, by replacing existing capacity, improving reliability or providing flexibility, are for the benefit of existing customers. Increasing the rates of the existing customers to pay for these improvements is not a subsidy. Under current policy these kinds of projects are permitted to be rolled in and are not covered by the presumption of the current pricing

of the project; the risk can be shared with the new customers in preconstruction contracts, but it cannot be shifted to existing customers. For new pipeline companies, without existing customers, this requirement will have no application.

The requirement that the project be able to stand on its own financially without subsidies changes the current pricing policy which has a presumption in favor of rolled-in pricing. Eliminating the subsidization usually inherent in rolled-in rates recognizes that a policy of incrementally pricing facilities sends the proper price signals to the market. With a policy of incremental pricing, the market will then decide whether a project is financially viable. The commenters were divided on whether the Commission should change its current pricing policy. A number of commenters, however, urged the Commission to allow the market to decide which projects should be built, and this requirement is a way of accomplishing that result.

The requirement helps to address all of the interests that could be adversely affected. Existing customers of the expanding pipeline should not have to subsidize a project that does not serve them. Landowners should not be subject to eminent domain for projects that are not financially viable and therefore may not be viable in the marketplace. Existing pipelines should not have to compete against new entrants into their markets whose projects receive a financial subsidy (via rolled-in rates), and neither pipeline's captive customers should have to shoulder the costs of unused capacity that results from competing projects that are not financially viable. This is the only condition that uniformly serves to avoid adverse effects on all of the relevant interests and therefore should be a test for all proposed expansion projects by existing pipelines. It will be the predicate for the rest of the evaluation of a new project by an existing pipeline.

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policy. Great Lakes Gas Transmission Limited Partnership, 80 FERC ¶ 61,105 (1997) (Pricing policy statement not applicable to facilities constructed solely for flexibility and system reliability).

A requirement that the new project must be financially viable without subsidies does not eliminate the possibility that in some instances the project costs should be rolled into the rates of existing customers. In most instances incremental pricing will avoid subsidies for the new project, but the situation may be different in cases of inexpensive expansibility that is made possible because of earlier, costly construction. In that instance, because the existing customers bear the cost of the earlier, more costly construction in their rates, incremental pricing could result in the new customers receiving a subsidy from the existing customers because the new customers would not face the full cost of the construction that makes their new service possible. The issue of the rate treatment for such cheap expansibility is one that always should be resolved in advance, before the construction of the pipeline.

Another instance where a form of rolling in would be appropriate is where a pipeline has vintages of capacity and thus charges shippers different prices for the same service under incremental pricing, and some customers have the right of first refusal (ROFR) to renew their expiring contracts. Those customers could be allowed to exercise a ROFR at their original contract rate except when the incremental capacity is fully subscribed and there are competing bids for the existing customer's capacity. In that case, the existing customer could be required to match the highest competing bid up to a maximum rate which could be either an incremental rate or a "rolled-up rate" in which costs for expansions are accumulated to yield an average expansion rate. Although the focus of this policy statement is the analysis for deciding whether new capacity should be constructed, it is important for the Commission to articulate the direction of its policy on pricing existing capacity where a pipeline has engaged in expansions. This will enable existing and potential new shippers to make appropriate decisions pre-construction to protect their interests either in the certificate proceeding or in their contracts with the pipeline.

This policy leaves the pipeline responsible for the costs of new capacity that is not fully utilized and obviates the need for an "at risk" condition because it accomplishes the same purpose. Under this policy the pipeline bears the risk for any new capacity that is under-utilized, unless, as recommended by a number of commenters, it contracts with the new customers to share that risk by specifying what will happen to rates and volumes under specific circumstances. If the pipeline finds that new shippers are unwilling to share this risk, this may indicate to the pipeline that others do not share its vision of future demand. Similarly, the risks of construction cost over-runs should not be the responsibility of the pipeline's existing customers but should be apportioned between the pipeline and the new customers in their service contracts. Thus, in pipeline contracts for service on newly constructed facilities, pipelines should not rely on standard "Memphis clauses", but should reach agreement with new shippers concerning who will bear the

risks of underutilization of capacity and cost overruns and the rate treatment for "cheap expansibility."[13]

In sum, if an applicant can show that the project is financially viable without subsidies, then it will have established the first indicator of public benefit. Companies willing to invest in a project, without financial subsidies, will have shown an important indicator of market-based need for a project. Incremental pricing will also lead to the correct price signals for the new project and provide the appropriate incentive for the optimal level of construction. This can avoid unnecessary adverse impacts on landowners or existing pipelines and their captive customers. Therefore, this will be the threshold requirement for establishing that a project will satisfy the public convenience and necessity standard.

C. Factors to be Balanced in Assessing the Public Convenience and Necessity

[13] "Memphis clause" refers to an agreement that the pipeline may change the rate during the term of the contract by making rate filings under NGA section 4.

Ideally, an applicant will structure its proposed project to avoid adverse economic, competitive, environmental, or other effects on the relevant interests from the construction of the new project, and the Commission would be able to approve such projects promptly. Of course, elimination of all adverse effects will not be possible in every instance. When it is not possible, the Commission's policy objective is to encourage the applicant to minimize the adverse impact on each of the relevant interests. After the applicant makes efforts to minimize the adverse effects, construction projects that would have residual adverse effects would be approved only where the public benefits to be achieved from the project can be found to outweigh the adverse effects. Rather than relying only on one test for need, the Commission will consider all relevant factors reflecting on the need for the project. These might include, but would not be limited to, precedent agreements, demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving the market. The objective would be for the applicant to make a sufficient showing of the public benefits of its proposed project to outweigh any residual adverse effects discussed below.

1. Consideration of Adverse Effects on Potentially Affected Interests

In deciding whether a proposal is required by the public convenience and necessity, the Commission will consider the effects of the project on all the affected interests; this means more than the interests of the applicant, the potential new customers, and the general societal interests.

Depending on the type of project, there are three major interests that may be adversely affected by approval of major certificate projects, and that must be considered by the Commission. These are: the interests of the applicant's existing customers, the interests of competing existing pipelines and their captive customers, and the interests of landowners and surrounding communities. There are other interests that may need to be separately considered in a certificate proceeding, such as environmental interests.

Of course, not every project will have an impact on each interest identified. Some projects will be proposed by new pipeline companies to serve new markets, so that there will be no adverse effects on the interests of existing customers; other projects may be constructed so that there may be no adverse effect on landowner interests.

a. Interests of existing customers of the pipeline applicant

The interests of the existing customers of the expanding pipeline may be adversely affected if the expansion results in their rates being increased or if the expansion causes a degradation in service.

b. Interests of existing pipelines that already serve the market and their captive customers

Pipelines that already serve the market into which the new capacity would be built are affected by the potential loss of market share and the possibility that they may be left with unsubscribed capacity investment. The Commission need not protect pipeline competitors from the effects of competition, but it does have an obligation to ensure fair competition. Recognizing the impact of a new project on existing pipelines serving the market is not synonymous with protecting incumbent pipelines from the risk of loss of market share to a new entrant, but rather, is a recognition that the impact on the incumbent pipeline is an interest to be taken into account in deciding whether to certificate a new project. The interests of the existing pipeline's captive customers are slightly different from the interests of the pipeline. The interests of the captive customers of the existing pipelines are affected because, under the Commission's current rate model, they can be asked to pay for the unsubscribed capacity in their rates.

c. Interests of landowners and the surrounding communities

Landowners whose land would be condemned for the new pipeline right-of-way, under eminent domain rights conveyed by the Commission's certificate, have an interest as does the community surrounding the right-of-way. The interest of these groups is to avoid unnecessary construction, and any adverse effects on their property associated with a permanent right-of- way. In some cases, the interests of the surrounding community may be represented by state or local agencies. Traditionally, the interests of the landowners and the surrounding community have been considered synonymous with the environmental impacts of a project; however, these interests can be distinct. Landowner property rights issues are different in character from other environmental issues considered under the National Environmental Policy Act of 1969 (NEPA).[14]

[14] 42 USC § 4321 et seq.

2. Indicators of Public Benefit

To demonstrate that its proposal is in the public convenience and necessity, an applicant must show public benefits that would be achieved by the project that are proportional to the project's adverse impacts. The objective is for the applicant to create a record that will enable the Commission to find that the benefits to be achieved by the project will outweigh the potential adverse effects, after efforts have been made by the applicant to mitigate these adverse effects. The types of public benefits that might be shown are quite diverse but could include meeting unserved demand, eliminating bottlenecks, access to new supplies, lower costs to consumers, providing new interconnects that improve the interstate grid, providing competitive alternatives, increasing electric reliability, or advancing clean air objectives. Any relevant evidence could be presented to support any public benefit the applicant may identify. This is a change from the current policy which relies primarily on one test to establish the need for the project.

The amount of evidence necessary to establish the need for a proposed project will depend on the potential adverse effects of the proposed project on the relevant interests. Thus, projects to serve new demand might be approved on a lesser showing of need and public benefits than those to serve markets already served by another pipeline. However, the evidence necessary to establish the need for the project will usually include a market study. There is no reason for an applicant to do a new market study of its own in every instance. An applicant could rely on generally available studies by EIA or GRI, for example, showing projections of market growth. If one of the benefits of a proposed project would be to lower gas or electric rates for consumers, then the applicant's market study would need to explain the basis for that projection. Vague assertions of public benefits will not be sufficient.

Although the Commission traditionally has required an applicant to present contracts to demonstrate need, that policy, as discussed above, no longer reflects the reality of the natural gas industry's structure, nor does it appear to minimize the adverse impacts on any of the relevant interests. Therefore, although contracts or precedent agreements always will be important evidence of demand for a project, the Commission will no longer require an applicant to present contracts for any specific percentage of the new capacity. Of course, if an applicant has entered into contracts or precedent agreements for the capacity, it will be expected to file the agreements in support of the project, and they would constitute significant evidence of demand for the project.

Eliminating a specific contract requirement reduces the significance of whether the contracts are with affiliated or unaffiliated shippers, which was the subject of a number of comments. A project that has precedent agreements with multiple new customers may

present a greater indication of need than a project with only a precedent agreement with an affiliate. The new focus, however, will be on the impact of the project on the relevant interests balanced against the benefits to be gained from the project. As long as the project is built without subsidies from the existing ratepayers, the fact that it would be used by affiliated shippers is unlikely to create a rate impact on existing ratepayers. With respect to the impact on the other relevant interests, a project built on speculation (whether or not it will be used by affiliated shippers) will usually require more justification than a project built for a specific new market when balanced against the impact on the affected interests.

3. Assessing Public Benefits and Adverse Effects

The more interests adversely affected or the more adverse impact a project would have on a particular interest, the greater the showing of public benefits from the project required to balance the adverse impact. The objective is for the applicant to develop whatever record is necessary, and for the Commission to impose whatever conditions are necessary, for the Commission to be able to find that the benefits to the public from the project outweigh the adverse impact on the relevant interests.

It is difficult to construct helpful bright line standards or tests for this area. Bright line tests are unlikely to be flexible enough to resolve specific cases and to allow the Commission to take into account the different interests that must be considered. Indeed, the current contract test has become problematic. However, the analytical framework described here should give applicants more certainty and sufficient guidance to anticipate how to structure their projects and develop the record to facilitate the Commission's decisional process.

Under this policy, if project sponsors, proposing a new pipeline company, are able to acquire all, or substantially all, of the necessary right-of-way by negotiation prior to filing the application, and the proposal is to serve a new, previously unserved market, it would not adversely affect any of the three interests. Such a project would not need any additional indicators of need and may be readily approved if there are no environmental considerations. Under these circumstances landowners would not be subject to eminent domain proceedings, and because the pipeline was new, there would be no existing customers who might be called upon to subsidize the project. A similar result might be achieved by an existing pipeline extending into a new unserved market by negotiating for a right-of-way for the proposed expansion and following the first requirement for showing need, financing the project without financial subsidies. It would avoid adverse impacts to existing customers by pricing its new capacity incrementally and it is unlikely that other relevant interests would be adversely affected if the pipeline obtained the right-of-way by negotiation.

It may not be possible to acquire all the necessary right-of-way by negotiation. However, the company might minimize the effect of the project on landowners by acquiring as much right-of-way as possible. In that case, the applicant may be called upon to present some evidence of market demand, but under this sliding scale approach the benefits needed to be shown would be less than in a case where no land rights had been previously acquired by negotiation. For example, if an applicant had precedent agreements with multiple parties for most of the new capacity, that would be strong evidence of market demand and potential public benefits that could outweigh the inability to negotiate right-of-way agreements with some landowners. Similarly, a project to attach major new gas supplies to the interstate grid would have benefits that may outweigh the lack of some right-of-way agreements. A showing of significant public benefit would outweigh the modest use of federal eminent domain authority in this example.

In most cases it will not be possible to acquire all the necessary right-of-way by negotiation. Under this policy, a few holdout landowners cannot veto a project, as feared by some commenters, if the applicant provides support for the benefits of its proposal that justifies the issuance of a certificate and the exercise of the corresponding eminent domain rights. The strength of the benefit showing will need to be proportional to the applicant's proposed exercise of eminent domain procedures.

Of course, the Commission will continue to do an independent environmental review of projects, even if the project does not rely on the use of eminent domain and the applicant structures the project to avoid or minimize adverse impacts on any of the identified interests. The Commission anticipates no change to this aspect of its certificate policies. However, to the extent applicants minimize the adverse impacts of projects in advance, this should also lessen the adverse environmental impacts as well, making the NEPA analysis easier. The balancing of interests and benefits that will precede the environmental analysis will largely focus on economic interests such as the property rights of landowners. The other interests of landowners and the surrounding community, such as noise reduction or esthetic concerns will continue to be taken into account in the environmental analysis. If the environmental analysis following a preliminary determination indicates a preferred route other than the one proposed by the applicant, the earlier balancing of the public benefits of the project against its adverse effects would be reopened to take into account the adverse effects on landowners who would be affected by the changed route.

In another example of the proportional approach, a proposal that may have adverse impacts on customers of another pipeline may require evidence of additional benefits to consumers, such as lower rates for the customers to be served. The Commission might also consider how the proposal would affect the cost recovery of the existing pipeline,

particularly the amount of unsubscribed capacity that would be created and who would bear that risk, before approving the project. This evaluation would be needed to ensure consideration of the interests of the existing pipeline and particularly its captive customers. Such consideration does not mean that the Commission would always favor existing pipelines and their captive customers. For instance, a proposed project may be so efficient and offer substantial benefits, such as significant service flexibility, so that the benefits would outweigh the adverse impact on existing pipelines and their captive customers.

A number of commenters were concerned that the Commission might give too much weight to the impact on the existing pipeline and its captive customers and undervalue the benefits that can arise from competitive alternatives. The Commission's focus is not to protect incumbent pipelines from the risk of loss of market share to a new entrant, but rather to take the impact into account in balancing the interests. In such a case the evidence of benefits will need to be more specific and detailed than the generalized benefits that arise from the availability of competitive alternatives. The interests of the captive customers are slightly different from the interests of the incumbent pipeline. The captive customers are affected if the incumbent pipeline shifts to the captive customers the costs associated with its unsubscribed capacity. Under the Commission's current rate model captive customers can be asked to pay for unsubscribed capacity in their rates, but the Commission has indicated that it will not permit all costs resulting from the loss of market share to be shifted to captive customers.[15] Whether and to what extent costs can be shifted is an issue to be resolved in the incumbent pipeline's rate case, but the potential impact on these captive customers is a factor to be taken into account in the certificate proceeding of the new entrant.

In sum, the Commission will approve an application for a certificate only if the public benefits from the project outweigh any adverse effects. Under this policy, pipelines seeking a certificate of public convenience and necessity authorizing the construction of facilities are encouraged to submit applications designed to avoid or minimize adverse effects on relevant interests including effects on existing customers of the applicant, existing pipelines serving the market and their captive customers, and affected landowners and communities. The threshold requirement for approval, that project sponsors must be prepared to develop the project without relying on subsidization by the sponsor's existing customers, protects all of the relevant interests. Applicants also must submit evidence of the public benefits to be achieved by the proposed project such

[15] El Paso Natural Gas Company, 72 FERC ¶ 61,083 (1995); Natural Gas Pipeline Company of America, 73 FERC ¶ 61,050 (1995).

as contracts, precedent agreements, studies of projected demand in the market to be served, or other evidence of public benefit of the project.

V. Conclusion

At a time when the Commission is urged to authorize new pipeline capacity to meet an anticipated increase in the demand for natural gas, the Commission is also urged to act with caution to avoid unnecessary rights-of-way and the potential for overbuilding with the consequent effects on existing pipelines and their captive customers. This policy statement is intended to provide more certainty as to how the Commission will analyze certificate applications to balance these concerns. By encouraging applicants to devote more effort in advance of filing to minimize the adverse effects of a project, the policy gives them the ability to expedite the decisional process by working out contentious issues in advance. Thus, this policy will provide more guidance about the Commission's analytical process and provide participants in certificate proceedings with a framework for shaping the record that is needed by the Commission to expedite its decisional process.

Finally, this new policy will not be applied retroactively. A major purpose of the policy statement is to provide certainty about the decisionmaking process and the impacts that would result from approval of the project. This includes providing participants in a certificate proceeding certainty as to economic impacts that will result from the certificate. It is important for the participants to know the economic consequences that can result before construction begins. After the economic decisions have been made it is difficult to undo those choices. Therefore, the new policy will not be applied retroactively to cases where the certificate has already issued and the investment decisions have been made.

By the Commission. Chairman Hoecker and Commissioners Breathitt and Hébert concurred with a separate statement attached.

(S E A L) Commissioner Bailey dissented with a separate statement statement attached.

David P. Boergers,
Secretary.

Policy Statement for Certification of New Interstate Natural Gas Pipeline Facilities

Docket No. PL99-3-000

(Issued September 15, 1999)

HOECKER, Chairman; BREATHITT and HEBERT, Commissioners, concurring;

Our intention is to apply this policy statement to any filings received by the Commission after July 29, 1998 (the issuance date of the Commission's Notice of Proposed Rulemaking regarding the Regulation of Short-term Natural Gas Transportation Services in Docket No. RM98-10-000 and Notice of Inquiry regarding Regulation of Interstate Natural Gas Transportation Services in Docket No. RM98-12-000), and not before.

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James J. Hoecker
Chairman

_____

Linda K. Breathitt
Commissioner

_____

Curt L. Hébert
Commissioner

Certification of New Interstate Natural Gas Facilities Docket No. PL99-3-000

(Issued September 15, 1999)

BAILEY, Commissioner, dissenting.

Respectfully, I will be dissenting from this policy statement.

The document puts forth the majority's statement of an analytical framework for use in certificate proceedings. Its goal is to give applicants and other participants in those proceedings a better understanding of how the Commission makes its decisions. This is always a good thing to do. But ultimately, I cannot sign on to this statement as representative of my approach to certificate policy for several reasons.

First and foremost, the document purports that the policy outlined is not a significant departure from the kind of analysis used currently in certificate cases. I do not share this view. I know that it does depart from the way I currently look at certificate issues. For example, I cannot say that the sliding scale evaluation process and the weighing and balancing process described in the statement actually reflects the way I look at things. Further, the pricing changes announced are in fact significant departures from current practice. Thus, the document is as much about pricing policy change as it is about articulating an analytical approach to certification questions. I do not completely agree with the statements regarding pricing contained in this document.

The announced policy will now require that new projects meet a pricing threshold before work can proceed on the application – that is they should be incrementally priced and not subsidized by existing customers. The intent behind this is to enhance our certainty that the market is determining which projects come to the Commission.

I do not disagree with the idea that incremental pricing is consistent with the idea of allowing markets to decide. I also recognize that it can protect existing customers from subsidizing expansions as well as insulate existing pipelines from subsidized competition. However, I find the policy statement to be far too categorical in its approach. I am not persuaded that we should depart from our existing policy statement on pricing that we adopted in 1995.

There is too little recognition here that some types of construction projects are not designed solely for new markets or customers, that existing customers can benefit from some projects, and that rolled-in pricing may still be appropriate. Thus, while I can agree with some of the articulated goals such as pricing should allocate risk appropriately, and

that if done properly it can assist in avoiding construction of excess capacity, I would not adopt a threshold requirement that virtually precludes use of rolled-in rates.

Finally, I am at a loss to explain the genesis of this particular outcome. I recognize that certificate policy issues have been problematic for a long time. In attempts to address these issues we have had conferences to explore need issues and we have requested comments on certificate issues in the pending gas Notice of Proposed Rulemaking in Docket No. RM98-10-000 (84 FERC ¶ 61,087 (1998)) and the Notice of Inquiry in Docket No. RM98-12-000 (84 FERC ¶ 61,087 (1998)). The variety of views we have received in these efforts are summarized in the policy statement and it candidly recognizes the lack of clear direction on what path the Commission should follow. Given this lack of industry consensus, I question the advisability of trying to adopt a generic approach at this time. I would prefer to weigh further the relative merits of those comments before embarking on an attempt to articulate a certificate policy.

Vicky A. Bailey
Commissioner

period, and successive reports shall be due annually on the same date thereafter. Without limitation, Peloton acknowledges and agrees that failure to make such timely and accurate reports as required by this Agreement and Order may constitute a violation of Section 19(a)(3) of the CPSA and may subject the Firm to enforcement under section 22 of the CPSA.

36. Notwithstanding and in addition to the above, Peloton shall promptly provide written documentation of any changes or modifications to its compliance program or internal controls and procedures, including the effective dates of the changes or modifications thereto. Peloton shall cooperate fully and truthfully with staff and shall make available all non-privileged information and materials and personnel deemed necessary by staff to evaluate Peloton's compliance with the terms of the Agreement.

37. The parties acknowledge and agree that the Commission may publicize the terms of the Agreement and the Order.

38. Peloton represents that the Agreement:

(i) is entered into freely and voluntarily, without any degree of duress or compulsion whatsoever;

(ii) has been duly authorized; and

(iii) constitutes the valid and binding obligation of Peloton, enforceable against Peloton in accordance with its terms. The individuals signing the Agreement on behalf of Peloton represent and warrant that they are duly authorized by Peloton to execute the Agreement.

39. The signatories represent that they are authorized to execute this Agreement.

40. The Agreement is governed by the laws of the United States.

41. The Agreement and the Order shall apply to, and be binding upon, Peloton and each of its parents, successors, transferees, and assigns; and a violation of the Agreement or Order may subject Peloton, and each of its parents, successors, transferees, and assigns, to appropriate legal action.

42. The Agreement, any attachments, and the Order constitute the complete agreement between the parties on the subject matter contained therein.

43. The Agreement may be used in interpreting the Order. Understandings, agreements, representations, or interpretations apart from those contained in the Agreement and the Order may not be used to vary or contradict their terms. For purposes of construction, the Agreement shall be deemed to have been drafted by both of the parties and shall not, therefore, be construed against any party, for that reason, in any subsequent dispute.

44. The Agreement may not be waived, amended, modified, or otherwise altered, except as in accordance with the provisions of 16 CFR 1118.20(h). The Agreement may be executed in counterparts.

45. If any provision of the Agreement or the Order is held to be illegal, invalid, or unenforceable under present or future laws effective during the terms of the Agreement and the Order, such provision shall be fully severable. The balance of the Agreement and the Order shall remain in full force and effect, unless the Commission and Peloton agree in writing that severing the provision materially affects the purpose of the Agreement and the Order.

(Signatures on next page)

PELOTON INTERACTIVE, INC.
Dated: 12/8/22
By: /s/Barry McCarthy
Barry McCarthy, Peloton Interactive, Inc., CEO & President

Dated: 12/9/2022
By: /s/Erin M. Bosman
Erin M. Bosman, Morrison Foerster LLP, Counsel to Peloton Interactive, Inc.

U.S. CONSUMER PRODUCT SAFETY COMMISSION
Mary B. Murphy, Director
Leah Ippolito, Supervisory Attorney
Michael J. Rogal, Trial Attorney

Dated: 12/14/22
By: /s/Michael J. Rogal
Michael J. Rogal, Trial Attorney, Division of Enforcement and Litigation, Office of Compliance and Field Operations

United States of America Consumer Product Safety Commission

In the Matter of: PELOTON INTERACTIVE, INC.

CPSC Docket No.: 23–C0001

Order

Upon consideration of the Settlement Agreement entered into between Peloton Interactive, Inc. (''Peloton''), and the U.S. Consumer Product Safety Commission (''Commission'' or ''CPSC''), and the Commission having jurisdiction over the subject matter and over Peloton, and it appearing that the Settlement Agreement and the Order are in the public interest, the Settlement Agreement is incorporated by reference and it is:

Provisionally accepted and provisional Order issued on the 28th day of December, 2022.

By Order of the Commission.

/s/Alberta Mills
Alberta E. Mills,
Secretary, U.S. Consumer Product Safety Commission.

[FR Doc. 2023–00146 Filed 1–6–23; 8:45 am]

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COUNCIL ON ENVIRONMENTAL QUALITY

[CEQ–2022–0005]

RIN 0331–AA06

National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change

AGENCY: Council on Environmental Quality.

ACTION: Notice of interim guidance; request for comments.

SUMMARY: The Council on Environmental Quality (CEQ) is issuing this interim guidance to assist agencies in analyzing greenhouse gas (GHG) and climate change effects of their proposed actions under the National Environmental Policy Act (NEPA). CEQ is issuing this guidance as interim guidance so that agencies may make use of it immediately while CEQ seeks public comment on the guidance. CEQ intends to either revise the guidance in response to public comments or finalize the interim guidance.

DATES: This interim guidance is effective immediately. CEQ invites interested persons to submit comments on or before March 10, 2023.

ADDRESSES: You may submit comments, identified by docket number CEQ–2022–0005, by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–456–6546.
- *Mail:* Council on Environmental Quality, 730 Jackson Place NW, Washington, DC 20503.

All submissions received must include the agency name, ''Council on Environmental Quality,'' and the docket number, CEQ–2022–0005. All comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided. Do not submit electronically any information you consider to be private, Confidential Business Information (CBI), or other information, the disclosure of which is restricted by statute.

FOR FURTHER INFORMATION CONTACT: Jomar Maldonado, Director for NEPA, 202–395–5750 or *Jomar.MaldonadoVazquez@ceq.eop.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The Council on Environmental Quality (CEQ) issues this guidance to assist Federal agencies in their consideration of the effects of greenhouse gas (GHG) emissions [1] and climate change when evaluating proposed major Federal actions in accordance with the National Environmental Policy Act (NEPA) [2] and the CEQ Regulations Implementing the Procedural Provisions of NEPA (CEQ Regulations).[3] This guidance will facilitate compliance with existing NEPA requirements, improving the efficiency and consistency of reviews of proposed Federal actions for agencies, decision makers, project proponents, and the public.[4] This guidance provides Federal agencies a common approach for assessing their proposed actions, while recognizing each agency's unique circumstances and authorities.

The United States faces a profound climate crisis and there is little time left to avoid a dangerous—potentially catastrophic—climate trajectory. Climate change is a fundamental environmental issue, and its effects on the human environment fall squarely within NEPA's purview.[5] Major Federal actions may result in substantial GHG emissions or emissions reductions, so Federal leadership that is informed by sound analysis is crucial to addressing the climate crisis. Federal proposals may also be affected by climate change, so they should be designed in consideration of resilience and adaptation to a changing climate.[6] Climate change is a particularly complex challenge given its global nature and the inherent interrelationships among its sources and effects. Further, climate change raises environmental justice concerns because it will disproportionately and adversely affect human health and the environment in some communities, including communities of color, low-income communities, and Tribal Nations and Indigenous communities. Given the urgency of the climate crisis and NEPA's important role in providing critical information to decision makers and the public, NEPA reviews should quantify proposed actions' GHG emissions, place GHG emissions in appropriate context and disclose relevant GHG emissions and relevant climate impacts, and identify alternatives and mitigation measures to avoid or reduce GHG emissions. CEQ encourages agencies to mitigate GHG emissions associated with their proposed actions to the greatest extent possible, consistent with national, science-based GHG reduction policies established to avoid the worst impacts of climate change.[7]

As discussed in this guidance, when conducting climate change analyses in NEPA reviews, agencies should consider: (1) the potential effects of a proposed action on climate change, including by assessing both GHG emissions and reductions from the proposed action; and (2) the effects of climate change on a proposed action and its environmental impacts. Analyzing reasonably foreseeable climate effects in NEPA reviews [8] helps ensure that decisions are based on the best available science and account for the urgency of the climate crisis. Climate change analysis also enables agencies to evaluate reasonable alternatives and mitigation measures that could avoid or reduce potential climate change-related effects and help address mounting climate resilience and adaptation challenges.

Accurate and clear climate change analysis:

- Helps decision makers, stakeholders, and the public to identify and assess reasonable courses of action that will reduce GHG emissions and climate change effects;
- Enables agencies to make informed decisions to help meet applicable Federal, State, Tribal, regional, and local climate action goals; [9]
- Promotes climate change resilience and adaptation and prioritizes the national need to ensure climate-resilient infrastructure and operations, including by considering the reasonably foreseeable effects of climate change on infrastructure investments and the resources needed to protect such investments over their lifetime; [10]
- Protects national security by helping to identify and reduce climate change-related threats including potential resource conflicts, stresses to military operations and installations, and the potential for abrupt stressors; [11]
- Enables agencies to better understand and address the effects of climate change on vulnerable communities, thereby responding to environmental justice concerns and promoting resilience and adaptation;

[1] For purposes of this guidance, CEQ defines GHGs consistent with CEQ's *Federal Greenhouse Gas Accounting and Reporting Guidance* (Jan. 17, 2016), *https://www.sustainability.gov/pdfs/federal_ghg%20accounting_reporting-guidance.pdf* (carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, nitrogen trifluoride, and sulfur hexafluoride). Also, for purposes of this guidance, ''emissions'' includes release of stored GHGs as a result of land management activities affecting terrestrial GHG pools such as carbon stocks in forests and soils, as well as actions that affect the future changes in carbon stocks. To facilitate comparisons between emissions of the different GHGs, a common unit of measurement for GHGs is metric tons of CO_2 equivalent (mt CO_2-e).

[2] 42 U.S.C. 4321 *et seq.*

[3] 40 CFR parts 1500–1508.

[4] This guidance is not a rule or regulation, and the recommendations it contains may not apply to a particular situation based upon the individual facts and circumstances. This guidance does not change or substitute for any law, regulation, or other legally binding requirement, and is not legally enforceable. The use of non-mandatory language such as ''guidance,'' ''recommend,'' ''may,'' ''should,'' and ''can,'' describes CEQ policies and recommendations. The use of mandatory terminology such as ''must'' and ''required'' describes controlling requirements under the terms of NEPA and the CEQ regulations, but this document does not affect legally binding requirements.

[5] NEPA recognizes ''the profound impact of man's activity on the interrelations of all components of the natural environment . . . .'' 42 U.S.C. 4331(a). Among other things, it was enacted to promote efforts that will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of humans. 42 U.S.C. 4321. *See also* 42 U.S.C. 4332(2)(F) (requiring all Federal agencies to ''recognize the worldwide and long-range character of environmental problems'').

[6] *See* 42 U.S.C. 4332(2)(A) (directing agencies to ensure the use of ''the environmental design arts'' in planning and decision making).

[7] *See* White House Fact Sheet, *President Biden Sets 2030 Greenhouse Gas Pollution Reduction Target* (Apr. 22, 2021), *https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/22/fact-sheet-president-biden-sets-2030-greenhouse-gas-pollution-reduction-target-aimed-at-creating-good-paying-union-jobs-and-securing-u-s-leadership-on-clean-energy-technologies/; see also* Executive Order (E.O.) 14008, *Tackling the Climate Crisis at Home and Abroad,* 86 FR 7619 (Jan. 25, 2021), *https://www.federalregister.gov/d/2021-02177;* E.O. 14057, *Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability,* 86 FR 70935 (Dec. 13, 2021), *https://www.federalregister.gov/d/2021-27114.*

[8] The term ''NEPA review'' as used in this guidance includes the analysis, process, and documentation required under NEPA. While this document focuses on reviews conducted pursuant to NEPA, agencies should analyze GHG emissions and climate-resilient design issues early in the planning and development of proposed actions and projects under their substantive authorities.

[9] For example, the United States has set an economy-wide target of reducing its net GHG emissions by 50 to 52 percent below 2005 levels in 2030. *See* United Nations Framework Convention on Climate Change (UNFCC), U.S. Nationally Determined Contribution (Apr. 20, 2021), *https://unfccc.int/NDCREG.*

[10] Resilience is a priority for Federal agency actions. *See, e.g.,* E.O. 14057, *supra* note 7; *see also* E.O. 14008, *supra* note 7.

[11] *See, e.g.,* Nat'l Intel. Council, *Implications for U.S. National Security of Anticipated Climate Change* (Sept. 21, 2016), NIC WP 2016–01, *https://www.dni.gov/files/documents/Newsroom/Reports%20and%20Pubs/Implications_for_US_National_Security_of_Anticipated_Climate_Change.pdf; see also* Dep't of Def., Directive 4715.21, *Climate Change Adaptation and Resilience* (Jan. 14, 2016), *https://dod.defense.gov/Portals/1/Documents/pubs/471521p.pdf.*

• Supports the international leadership of the United States on climate issues; [12] and

• Enables agencies to better assess courses of action that will provide pollution reduction co-benefits and long-term cost savings and reduce litigation risk to Federal actions—including projects carried out pursuant to the Bipartisan Infrastructure Law [13] and the Inflation Reduction Act.[14]

This interim [15] GHG guidance, effective upon publication, builds upon and updates CEQ's 2016 *Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews (''2016 GHG Guidance''),* highlighting best practices for analysis grounded in science and agency experience.[16] CEQ is issuing this guidance to provide for greater clarity and more consistency in how agencies address climate change in NEPA reviews. This guidance applies longstanding NEPA principles to the analysis of climate change effects, which are a well-recognized category of effects on the human environment requiring consideration under NEPA. In fact, Federal agencies have been analyzing climate change impacts and GHG emissions in NEPA documents for many years. CEQ intends the guidance to assist agencies in publicly disclosing and considering the reasonably foreseeable effects of their proposed actions. CEQ encourages agencies to integrate the climate and other environmental considerations described in this guidance early in their planning processes. CEQ will review any agency proposals for revised NEPA procedures, including any revision of existing categorical exclusions, in light of this guidance.[17]

II. Summary of Key Content

This guidance explains how agencies should apply NEPA principles and existing best practices to their climate change analyses by:

• Recommending that agencies leverage early planning processes to integrate GHG emissions and climate change considerations into the identification of proposed actions, reasonable alternatives (as well as the no-action alternative), and potential mitigation and resilience measures;

• Recommending that agencies quantify a proposed action's projected GHG emissions or reductions for the expected lifetime of the action, considering available data and GHG quantification tools that are suitable for the proposed action;

• Recommending that agencies use projected GHG emissions associated with proposed actions and their reasonable alternatives to help assess potential climate change effects;

• Recommending that agencies provide additional context for GHG emissions, including through the use of the best available social cost of GHG (SC–GHG) estimates, to translate climate impacts into the more accessible metric of dollars, allow decision makers and the public to make comparisons, help evaluate the significance of an action's climate change effects, and better understand the tradeoffs associated with an action and its alternatives;

• Discussing methods to appropriately analyze reasonably foreseeable direct, indirect, and cumulative GHG emissions;

• Guiding agencies in considering reasonable alternatives and mitigation measures, as well as addressing short- and long-term climate change effects;

• Advising agencies to use the best available information and science when assessing the potential future state of the affected environment in NEPA analyses and providing up to date examples of existing sources of scientific information;

• Recommending agencies use the information developed during the NEPA review to consider reasonable alternatives that would make the actions and affected communities more resilient to the effects of a changing climate;

• Outlining unique considerations for agencies analyzing biogenic carbon dioxide sources and carbon stocks [18] associated with land and resource management actions under NEPA;

• Advising agencies that the ''rule of reason'' inherent in NEPA and the CEQ Regulations should guide agencies in determining, based on their expertise and experience, how to consider an environmental effect and prepare an analysis based on the available information; and

• Reminding agencies to incorporate environmental justice considerations into their analyses of climate-related effects, consistent with Executive Orders 12898 and 14008.

III. Background

Consistent with NEPA, climate change analysis is a critical component of environmental reviews and integral to Federal agencies managing and addressing climate change.[19] Recognizing the increasing urgency of the climate crisis and advances in climate science and GHG analysis techniques, CEQ has clarified and updated its 2016 GHG guidance on particular components including basic updates to reflect developments in climate science, methods to provide context for the impacts associated with GHG emissions, analysis of indirect effects, programmatic approaches, and environmental justice considerations. This guidance is applicable to all Federal actions subject to NEPA, with a focus on those for which an environmental assessment or environmental impact statement is prepared.[20] This guidance does not—and cannot—expand the range of Federal agency actions that are subject to NEPA.[21]

[12] *See* 42 U.S.C. 4332(2)(F) (requiring all Federal agencies to ''recognize the worldwide and long-range character of environmental problems'').

[13] Infrastructure Investment and Jobs Act, Public Law 117–58, 135 Stat. 429.

[14] Public Law 117–169, 136 Stat. 1818.

[15] CEQ is issuing this guidance as interim guidance so that agencies may make use of it immediately while CEQ seeks public comment on the guidance. CEQ may revise the guidance in response to public comments or finalize the interim guidance at a later date.

[16] CEQ, Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews, 81 FR 51866 (Aug. 8, 2016), *https://ceq.doe.gov/docs/ceq-regulations-and-guidance/nepa_final_ghg_guidance.pdf.* On April 5, 2017, CEQ withdrew the final 2016 guidance, as directed by E.O. 13783. 82 FR 16576 (Apr. 5, 2017). On June 26, 2019, CEQ issued draft GHG guidance. 84 FR 30097 (June 26, 2019). CEQ rescinded this draft guidance on February 19, 2021, pursuant to E.O. 13990. 86 FR 10252 (Feb. 19, 2021). In addition, on April 20, 2022, CEQ issued a Final Rule for its ''Phase 1'' NEPA rulemaking. 87 FR 23453. CEQ will be proceeding with updates to the NEPA regulations as set forth in the 2022 Regulatory Agenda.

[17] *See* 40 CFR 1507.3. Agencies should review their policies and implementing procedures and revise them as necessary to ensure compliance with NEPA. Agency NEPA implementing procedures can be, but are not required to be, in the form of regulation. Section 1507.3 encourages agencies to publish explanatory guidance, and agencies also should consider whether any updates to explanatory guidance are necessary in light of this guidance.

[18] *See infra* section IV(I).

[19] This updated guidance is also consistent with E.O.s 13990, 14008, and 14057, which set forth commitments to address climate change; direct that Federal infrastructure investment reduce climate pollution; and that Federal permitting decisions consider the effects of GHG emissions and climate change. *See* E.O. 13990, 86 FR 7037 (Jan. 25, 2021); E.O. 14008, *supra* note 7; E.O. 14057, *supra* note 7.

[20] Notwithstanding this focus, where appropriate, agencies also should apply this guidance to consider climate impacts and GHG emissions in establishing new categorical exclusions (CEs) and extraordinary circumstances in their agency NEPA procedures. *See* 40 CFR 1507.3(e)(2)(ii); CEQ, Final Guidance for Federal Departments and Agencies on Establishing, Applying, and Revising Categorical Exclusions Under the National Environmental Policy Act, 75 FR 75628 (Dec. 6, 2010).

[21] *See* 40 CFR 1508.1(q).

A. NEPA

NEPA is designed to promote consideration of potential effects on the human environment [22] that would result from proposed Federal agency actions, and to provide the public and decision makers with useful information regarding reasonable alternatives [23] and mitigation measures to improve the environmental outcomes of Federal agency actions. NEPA encourages early planning, ensures that the environmental effects of proposed actions are considered before decisions are made, and informs the public of significant environmental effects of proposed Federal agency actions, promoting transparency and accountability.[24]

Agencies implement NEPA through one of three levels of analysis: a categorical exclusion (CE); an environmental assessment (EA); or an environmental impact statement (EIS). Agencies have discretion in how they tailor their individual NEPA reviews in consideration of this guidance, consistent with the CEQ Regulations and their respective implementing procedures and policies.[25] NEPA reviews should identify measures to avoid, minimize, or mitigate adverse effects of Federal agency actions.[26] Better analysis and informed decisions are the ultimate goal of the NEPA process.[27] Inherent in NEPA and the CEQ Regulations is a ''rule of reason'' that allows agencies to determine, based on their expertise and experience, how to consider an environmental effect and prepare an analysis based on the available information. The usefulness of that information to the decision-making process and the public, and the extent of the anticipated environmental consequences, are important factors to consider when applying that ''rule of reason.''

B. Climate Change

Climate change is a defining national and global environmental challenge of this time, threatening broad and potentially catastrophic impacts to the human environment. It is well established that rising global atmospheric GHG concentrations are substantially affecting the Earth's climate, and that the dramatic observed increases in GHG concentrations since 1750 are unequivocally caused by human activities including fossil fuel combustion.[28] CEQ's first Annual Report in 1970 discussed the various ways that human-driven actions were understood to potentially alter global temperatures and weather patterns.[29] At that time, the mean level of atmospheric carbon dioxide (CO_2) had been measured as increasing to 325 parts per million (ppm) from a pre-Industrial average of 280 ppm.[30] Since 1970, the global average concentration of atmospheric CO_2 has increased to 414.21 ppm as of 2021, setting a new record high.[31] Methane is a potent GHG; over a 100-year period, the emissions of a ton of methane contribute 28 to 36 times as much to global warming as a ton of carbon dioxide. Over a 20-year timeframe, methane is about 84 times as potent as carbon dioxide.[32] Concentrations of methane (CH_4), have more than doubled from pre-Industrial levels.[33] Methane concentrations continue to grow rapidly.[34] Concentrations of other GHGs have similarly continued to grow, including nitrous oxide (N_2O) and hydrofluorocarbons (HFC).[35] Since the publication of CEQ's first Annual Report, human activities have caused the carbon dioxide content of the atmosphere of our planet to increase to

[22] 42 U.S.C. 4331(a) (''[R]ecognizing the profound impact of [human] activity on the interrelations of all components of the natural environment . . . .'').

[23] 40 CFR 1501.9(e)(2) (''Alternatives, which include the no action alternative; other reasonable courses of action; and mitigation measures (not in the proposed action).'').

[24] *See* 42 U.S.C. 4332 and 40 CFR 1501.2.

[25] *See* 40 CFR 1502.23 (methodology and scientific accuracy).

[26] 40 CFR 1505.2(a)(3).

[27] 40 CFR 1500.1(a) (''NEPA's purpose is . . . to provide for informed decision making and foster excellent action.'').

[28] *See, e.g.,* Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2021: The Physical Science Basis* (''The Physical Science Basis''), *Summary for Policymakers,* SPM–5 (Aug. 7, 2021), *https://www.ipcc.ch/report/ar6/wg1/chapter/summary-for-policymakers/* (''Observed increases in well-mixed greenhouse gas (GHG) concentrations since around 1750 are unequivocally caused by human activities''); *see also id., Technical Summary,* TS–45, *https://www.ipcc.ch/report/ar6/wg1/chapter/technical-summary/;* United States Global Change Research Program (''USGCRP''), *Fourth National Climate Assessment* (''Fourth National Climate Assessment''), *Volume II: Impacts, Risks, and Adaptation in the United States,* 76 (2018), *https://nca2018.globalchange.gov/* (''Many lines of evidence demonstrate that human activities, especially emissions of greenhouse gases from fossil fuel combustion, deforestation, and land-use change, are primarily responsible for the climate changes observed in the industrial era, especially over the last six decades''); IPCC, *Climate Change 2014 Synthesis Report,* 46 (2014), *https://www.ipcc.ch/site/assets/uploads/2018/05/SYR_AR5_FINAL_full_wcover.pdf* (''Emissions of CO_2 from fossil fuel combustion and industrial processes contributed about 78% of the total GHG emissions increase from 1970 to 2010, with a similar percentage contribution for the increase during the period 2000 to 2010 (high confidence).''). These conclusions are built upon a robust scientific record that has been created with substantial contributions from the USGCRP, which informs the United States' response to global climate change through coordinated Federal programs of research, education, communication, and decision support. *See* section 103, Public Law 101–606, 104 Stat. 3096. For additional information on the USGCRP, visit *http://www.globalchange.gov.* The USGCRP, formerly the Climate Change Science Program, coordinates and integrates the activities of 13 Federal agencies that conduct research on changes in the global environment and their implications for society. The USGCRP began as a Presidential initiative in 1989 and was codified in the Global Change Research Act of 1990 (Pub. L. 101–606). USGCRP-participating agencies are the Departments of Agriculture, Commerce, Defense, Energy, the Interior, Health and Human Services, State, and Transportation; the U.S. Agency for International Development, the Environmental Protection Agency, NASA, the National Science Foundation, and the Smithsonian Institution.

[29] *See* CEQ, *Environmental Quality: The First Annual Report,* 93 (Aug. 1970), *https://ceq.doe.gov/ceq-reports/annual_environmental_quality_reports.html.*

[30] *See* USGCRP, *Climate Change Impacts in the United States: The Third National Climate Assessment, Appendix 3: Climate Science Supplement,* 739 (J.M. Melillo et al. eds., 2014) (''Third National Climate Assessment''), U.S. Env't Protection Agency (EPA), EPA 430–R–15–004, *Inventory of U.S. Greenhouse Gas Emissions and Sinks, 1990–2013* (Apr. 2015), *https://www.epa.gov/sites/default/files/2015-12/documents/us-ghg-inventory-2015-main-text.pdf; see also* D.L. Hartmann et al., *Observations: Atmosphere and Surface, in Climate Change 2013: The Physical Science Basis.* Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (T.F. Stocker et al. eds., Cambridge Univ. Press 2013), *https://archive.ipcc.ch/pdf/assessment-report/ar5/wg1/WG1AR5_Chapter02_FINAL.pdf.*

[31] Nat'l Oceanic and Atmospheric Admin. (NOAA), *Climate Change: Atmospheric Carbon Dioxide* (June 23, 2022), *https://www.climate.gov/news-features/understanding-climate/climate-change-atmospheric-carbon-dioxide.*

[32] Although there are different ways to weight methane compared to carbon dioxide, the U.S. nationally determined contribution (NDC) under the Paris Agreement uses the 100-year GWP from the IPCC's Fifth Assessment Report. *See* IPCC, *Climate Change 2014 Synthesis Report, supra* note 28, at 5. To avoid potential ambiguity, CEQ encourages agencies to use the 100-year GWP when disclosing the GHG emissions impact from an action in their NEPA documents.

[33] *See* EPA, Proposed Rule on Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review, 86 FR 63110, 63114 (Nov. 15, 2021), *https://www.federalregister.gov/d/2021-24202; see also* Climate and Clean Air Coalition and United Nations Environment Programme (UNEP), *Global Methane Assessment,* 18 (2021), *https://www.ccacoalition.org/en/resources/global-methane-assessment-full-report;* USGCRP, Fourth National Climate Assessment, *supra* note 28, Volume I, 82. Methane emissions are responsible for about 20 percent of climate forcing globally. *See* California Air Resources Board, *Short-Lived Climate Pollutant Reduction Strategy,* 7 (Mar. 2017), *https://ww2.arb.ca.gov/sites/default/files/2020-07/final_SLCP_strategy.pdf.*

[34] *See, e.g.,* NOAA, *Increase in atmospheric methane set another record during 2021* (Apr. 7, 2022), *https://www.noaa.gov/news-release/increase-in-atmospheric-methane-set-another-record-during-2021.*

[35] *See* USGCRP, Fourth National Climate Assessment, *supra* note 28, Volume I, 81 (Figure 2.5).

its highest level in at least 800,000 years.[36]

Rising GHG levels are causing corresponding increases in average global temperatures and in the frequency and severity of natural disasters including storms, flooding, and wildfires.[37] Even if the United States and the world meet ambitious decarbonization targets, those trends will continue for many years, adversely affecting critical components of the human environment, including water availability, ocean acidity, sea-level rise, ecosystem functions, biodiversity, energy production, energy transmission and distribution, agriculture and food security, air quality, and human health.[38]

Based primarily on the scientific assessments of the U.S. Global Change Research Program (USGCRP), the National Research Council, and the Intergovernmental Panel on Climate Change (IPCC), in 2009 the Environmental Protection Agency (EPA) issued a finding that declared that the changes in our climate caused by elevated concentrations of GHGs in the atmosphere are reasonably anticipated to endanger the public health and welfare of current and future generations.[39] Since then, EPA has acknowledged more recent scientific assessments that highlight the urgency of addressing the rising concentration of GHGs in the atmosphere[40] and has found that certain communities, including communities of color, low-income communities, Tribal Nations and Indigenous communities, are especially vulnerable to climate-related effects.[41] Climate change also is likely to increase a community's vulnerability to other environmental impacts, further exacerbating environmental justice concerns. The effects of climate change observed to date and projected to occur in the future include more frequent and intense heat waves, longer fire seasons and more severe wildfires, degraded air quality, increased drought, greater sea-level rise, an increase in the intensity and frequency of extreme weather events, harm to water resources, harm to agriculture, ocean acidification, and harm to wildlife and ecosystems.[42] The IPCC Assessment Report reinforces these findings by providing scientific evidence of the impacts of climate change driven by human-induced GHG emissions, on our ecosystems, infrastructure, human health, and socioeconomic makeup.[43] Moreover, the effects of climate change are likely to fall disproportionately on vulnerable communities, including communities of color, low-income communities and Tribal Nations and Indigenous communities with environmental justice concerns.[44]

IV. Quantifying, Disclosing, and Contextualizing Climate Impacts, and Addressing the Potential Climate Change Effects of Proposed Federal Actions

Consistent with section 102(2)(C) of NEPA, Federal agencies must disclose and consider the reasonably foreseeable effects of their proposed actions including the extent to which a proposed action and its reasonable alternatives (including the no action alternative) would result in reasonably foreseeable GHG emissions that contribute to climate change. Federal agencies also should consider the ways in which a changing climate may impact the proposed action and its reasonable alternatives, and change the action's environmental effects over the lifetime of those effects.

This guidance is intended to assist agencies in disclosing and considering the effects of GHG emissions and climate change. This guidance does not establish any particular quantity of GHG emissions as ''significantly'' affecting the quality of the human environment. However, quantifying a proposed action's reasonably foreseeable GHG emissions whenever possible, and placing those emissions in appropriate context are important components of analyzing a proposed action's reasonably foreseeable climate change effects.

This section of the guidance identifies and explains the following steps agencies should take when analyzing a proposed action's climate change effects under NEPA:

(1) Quantify the reasonably foreseeable GHG emissions (including direct and indirect emissions) of a proposed action, the no action alternative, and any reasonable alternatives as discussed in Section IV(A) below.

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[36] *See* Nat'l Aeronautics and Space Admin. (NASA) Earth Observatory, *The Carbon Cycle* (June 16, 2011), *http://earthobservatory.nasa.gov/Features/CarbonCycle;* Univ. of Cal. Riverside, NASA, and Riverside Unified School District, *Down to Earth Climate Change, http://globalclimate.ucr.edu/resources.html;* USGCRP, Fourth National Climate Assessment, *supra* note 28, Volume II, 1454.

[37] *See* IPCC, *Climate Change 2022: Impacts, Adaptation, and Vulnerability* (''Climate Change 2022''), *Summary for Policymakers,* 8 (H.-O. Pörtner et al. eds., 2022), *https://www.ipcc.ch/report/sixth-assessment-report-working-group-ii/;* USGCRP, Fourth National Climate Assessment, *supra* note 28, Climate Science Special Report, Chapter 7, 207, *https://science2017.globalchange.gov/downloads/CSSR_Ch7_Precipitation.pdf;* NOAA, *Climate Change Increased Chances of Record Rains in Louisiana by at Least 40 Percent* (Sept. 7, 2016, *https://www.noaa.gov/media-release/climate-change-increased-chances-of-record-rains-in-louisiana-by-at-least-40-percent.*

[38] *See* USGCRP, Fourth National Climate Assessment, *supra* note 28; IPCC, *Special Report on the Ocean and Cryosphere in a Changing Climate,* (H.-O. Portner et al., eds., 2019), *https://www.ipcc.ch/srocc/;* IPCC, *Special Report on Climate Change and Land,* (P.R. Shukla et al., eds., 2019), *https://www.ipcc.ch/srccl/; see also* USGCRP, *http://www.globalchange.gov;* 40 CFR 1508.1(g)(4) (''effects 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); USGCRP, *The Impacts of Climate Change on Human Health in the United States: A Scientific Assessment* (2016), *https://health2016.globalchange.gov/.*

[39] *See generally* EPA, Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act; Final Rule, 74 FR 66496 (Dec. 15, 2009) (noting, for example, ''[t]he evidence concerning how human-induced climate change may alter extreme weather events also clearly supports a finding of endangerment, given the serious adverse impacts that can result from such events and the increase in risk, even if small, of the occurrence and intensity of events such as hurricanes and floods. Additionally, public health is expected to be adversely affected by an increase in the severity of coastal storm events due to rising sea levels,'' *id.* at 66497–98).

[40] See EPA, Final Rule for Phasedown of Hydrofluorocarbons: Establishing the Allowance Allocation and Trading Program Under the American Innovation and Manufacturing Act, 86 FR 55124 (Oct. 5, 2021), *https://www.federalregister.gov/d/2021-21030.*

[41] *See* EPA, *Final Rule for Carbon Pollution Emission Guidelines for Existing Stationary Sources Electric Utility Generating Units,* 80 FR 64661, 64647 (Oct. 23, 2015), *https://www.federalregister.gov/d/2015-22842* (''[c]ertain groups, including children, the elderly, and the poor, are most vulnerable to climate-related effects.'' Recent studies also find that certain communities, including low-income communities and some communities of color . . . are disproportionately affected by certain climate change related impacts—including heat waves, degraded air quality, and extreme weather events—which are associated with increased deaths, illnesses, and economic challenges. Studies also find that climate change poses particular threats to the health, well-being, and ways of life of indigenous peoples in the U.S.); *see also* EPA, EPA 430–R–21–003, *Climate Change and Social Vulnerability in the United States: A Focus on Six Impacts* (''Six Impacts'') (Sept. 2021), *https://www.epa.gov/system/files/documents/2021-09/climate-vulnerability_september-2021_508.pdf.*

[42] *See* 80 FR 64647, *supra* note 41; *see also* USGCRP, Fourth National Climate Assessment, *supra* note 28, Volume II, Chapters 2–12 (Sectors) and Chapters 18–27 (Regions); Thomas R. Knutson et. al., *Global Projections of Intense Tropical Cyclone Activity for the Late Twenty-First Century from Dynamical Downscaling of CMIP5/RCP4.5 Scenarios,* 7221 (Sep. 15, 2015), *https://journals.ametsoc.org/view/journals/clim/28/18/jcli-d-15-0129.1.xml;* Ashley E. Payne et. al., *Responses and Impacts of Atmospheric Rivers to Climate Change,* 143, 154 (Mar. 9, 2020), *https://www.nature.com/articles/s43017-020-0030-5;* IPCC, *Climate Change 2022, supra* note 37; IPCC, *Special Report on Climate Change and Land, supra* note 38, at 270–72; U.S. Nat'l Park Service (NPS), *Wildlife and Climate Change* (last updated Dec. 8, 2021), *https://www.nps.gov/articles/000/wildlife-climateimpact.htm.*

[43] See IPCC, *Climate Change 2022,* supra note 37, *Summary for Policymakers.*

[44] See, *e.g.,* EPA, Six Impacts, supra note 41.

(2) Disclose and provide context for the GHG emissions and climate impacts associated with a proposed action and alternatives, including by, as relevant, monetizing climate damages using estimates of the SC–GHG, placing emissions in the context of relevant climate action goals and commitments, and providing common equivalents, as described below in Section IV(B).

(3) Analyze reasonable alternatives, including those that would reduce GHG emissions relative to baseline conditions, and identify available mitigation measures to avoid, minimize, or compensate for climate effects.

A. Quantifying a Proposed Action's GHG Emissions

To ensure that Federal agencies consider the incremental contribution of their actions to climate change, agencies should quantify the reasonably foreseeable direct and indirect GHG emissions of their proposed actions and reasonable alternatives (as well as the no-action alternative) and provide additional context to describe the effects associated with those projected emissions in NEPA analysis.[45]

Climate change results from an increase in atmospheric GHG concentrations from the incremental addition of GHG emissions from a vast multitude of individual sources.[46] The totality of climate change impacts is not attributable to any single action, but is exacerbated by a series of actions including actions taken pursuant to decisions of the Federal Government. Therefore, it is crucial for the Federal Government to analyze and consider the potential climate change effects of its proposed actions.[47]

NEPA requires more than a statement that emissions from a proposed Federal action or its alternatives represent only a small fraction of global or domestic emissions. Such a statement merely notes the nature of the climate change challenge, and is not a useful basis for deciding whether or to what extent to consider climate change effects under NEPA. Moreover, such comparisons and fractions also are not an appropriate method for characterizing the extent of a proposed action's and its alternatives' contributions to climate change because this approach does not reveal anything beyond the nature of the climate change challenge itself—the fact that diverse individual sources of emissions each make a relatively small addition to global atmospheric GHG concentrations that collectively have a large effect.

Therefore, when considering GHG emissions and their significance, agencies should use appropriate tools and methodologies to quantify GHG emissions, compare GHG emission quantities across alternative scenarios (including the no action alternative), and place emissions in relevant context, including how they relate to climate action commitments and goals. This approach allows an agency to present the environmental and public health effects of a proposed action in clear terms and with sufficient information to make a reasoned choice between no action and other alternatives and appropriate mitigation measures. This approach will also ensure the professional and scientific integrity of the NEPA review.[48]

As part of the NEPA documents they prepare, agencies should quantify the reasonably foreseeable gross GHG emissions increases and gross GHG emission reductions[49] for the proposed action, no action alternative, and any reasonable alternatives over their projected lifetime, using reasonably available information and data.[50] Agencies generally should quantify gross emissions increases or reductions (including both direct and indirect emissions) individually by GHG, as well as aggregated in terms of total CO_2 equivalence[51] by factoring in each pollutant's global warming potential (GWP), using the best available science and data.[52] Agencies also should quantify proposed actions' total net GHG emissions or reductions[53] (both by pollutant and by total CO_2-equivalent emissions) relative to baseline conditions.[54] To facilitate readability, agencies should include an overview of this information in the summary sections of EISs and, when relevant, in the summary section of EAs. Agencies also may use visual tools, such as charts and figures, to help readers more easily comprehend emissions data and compare emissions across alternatives.

Where feasible, agencies should also present annual GHG emission increases or reductions. This is particularly important where a proposed action presents both reasonably foreseeable GHG emission increases and GHG emission reductions. The agency generally should present annual GHG emissions increases or reductions, as well as net GHG emissions over the projected lifetime of the action, consistent with existing best practices.[55] Agencies should be guided by a rule of reason and the concept of proportionality in undertaking this analysis, particularly for proposed actions with net beneficial climate effects, as described below.

Quantification and assessment tools are widely available and are already in broad use in the Federal Government and private sector, by state and local governments, and globally. CEQ maintains a GHG Accounting Tools website listing many such tools.[56] These tools are designed to assist agencies, institutions, organizations, and companies that have different levels of

[45] *See* 40 CFR 1502.16.

[46] Some sources emit GHGs in quantities that are orders of magnitude greater than others. *See* EPA, *Greenhouse Gas Reporting Program, 2021 Reported Data,* Figure 1: Direct GHG Emissions Reported by Sector (2021), *https://www.epa.gov/ghgreporting/ghgrp-reported-data* (showing amounts of GHG emissions by sector).

[47] In addition to NEPA's requirement to describe the environmental impacts of the proposed action and any adverse environmental effects that cannot be avoided should the proposal be implemented, 42 U.S.C. 4332(2)(C)), NEPA also articulates a policy to use all practicable means and measures ''to foster and promote the general welfare, to create and maintain conditions under which [humans] and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans,'' including by ''attain[ing] the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences.'' 42 U.S.C. 4331(a)–(b).

[48] *See* 40 CFR 1502.23 (requiring agencies to ensure the professional and scientific integrity of the discussions and analyses in environmental impact statements).

[49] Note that agencies should be guided by a rule of reason and the concept of proportionality in undertaking this analysis, particularly for proposed actions with net beneficial climate effects, as described in Section IV(A).

[50] *See, e.g., Sierra Club* v. *Fed. Energy Regul. Comm'n,* 867 F.3d 1357, 1374 (D.C. Cir. 2017); *San Juan Citizens Alliance* v. *Bureau of Land Mgmt.,* 326 F. Supp. 3d 1227, 1241–44 (D.N.M. 2018); *see generally Scientists' Inst. for Pub. Info., Inc.* v. *Atomic Energy Comm'n,* 481 F.2d 1079, 1092 (D.C. Cir 1973) (''Reasonable forecasting and speculation is thus implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as 'crystal ball inquiry.' '').

[51] This is typically expressed in metric tons of CO_2 equivalent, or mt CO_2-e.

[52] As discussed above, methane is a potent GHG. *See supra* note 32.

[53] Net emissions can be calculated by totaling gross emissions (all reasonably foreseeable direct and indirect GHG emissions from the proposed action) and subtracting any gross emissions reductions from the proposed action, such as renewable energy generation that will displace more carbon intensive energy sources or the addition of carbon sinks. The resulting net value may be either a net increase in total GHG emissions or a net decrease in emissions. In rare circumstances, agencies should consider whether a significant delay between increased emissions and decreased emissions could undermine the value of a net emissions calculation as a metric of climate impact.

[54] *See infra* section IV(D).

[55] For example, certain types of actions may involve construction emissions in their first year or two, followed by operational emissions increases in a few years prior to achieving net emissions reductions in later years.

[56] *See* CEQ, *GHG Tools and Resources, https://ceq.doe.gov/guidance/ghg-tools-and-resources.html.*

technical sophistication, data availability, and GHG source profiles. Agencies should use tools that reflect the best available science and data. These tools can provide GHG emissions estimates, including emissions from fossil fuel combustion and carbon sequestration [57] for many of the sources and sinks potentially affected by proposed resource management actions.[58] When considering which tools to employ, it is important to consider the proposed action's temporal scale and the availability of input data.[59] Furthermore, agencies should seek to obtain the information needed to quantify GHG emissions, including by requesting or requiring information held by project applicants or by conducting modeling when relevant.

In the rare instance when an agency determines that tools, methodologies, or data inputs are not reasonably available to quantify GHG emissions associated with a specific action, the agency should explain why such an analysis cannot be done, and should seek to present a reasonable estimated range of quantitative emissions for the proposed action and alternatives. Where tools are available for some aspects of the analysis but not others, agencies should use all reasonably available tools and describe any relevant limitations. Agencies are encouraged to identify and communicate any data or tool gaps that they encounter to CEQ.

If an agency determines that it cannot provide even a reasonable range of potential GHG emissions, the agency should provide a qualitative analysis and its rationale for determining that a quantitative analysis is not possible. A qualitative analysis may include sector-specific descriptions of the GHG emissions from the category of Federal agency action that is the subject of the NEPA analysis, but should seek to provide additional context for potential resulting emissions.

Agencies should be guided by the rule of reason, as well as their expertise and experience, in conducting analysis commensurate with the quantity of projected GHG emissions and using GHG quantification tools suitable for the proposed action.[60] The rule of reason and the concept of proportionality caution against providing an in-depth analysis of emissions regardless of the insignificance of the quantity of GHG emissions that the proposed action would cause. For example, some proposed actions may involve net GHG emission reductions or no net GHG increase, such as certain infrastructure or renewable energy projects. For such actions, agencies should generally quantify projected GHG emission reductions, but may apply the rule of reason when determining the appropriate depth of analysis such that precision regarding emission reduction benefits does not come at the expense of efficient and accessible analysis. Absent exceptional circumstances, the relative minor and short-term GHG emissions associated with construction of certain renewable energy projects, such as utility-scale solar and offshore wind, should not warrant a detailed analysis of lifetime GHG emissions. As a second example, actions with only small GHG emissions may be able to rely on less detailed emissions estimates.

B. Disclosing and Providing Context for a Proposed Action's GHG Emissions and Climate Effects

In addition to quantifying emissions as described in Section IV(A), agencies should disclose and provide context for GHG emissions and climate effects to help decision makers and the public understand proposed actions' potential GHG emissions and climate change effects. To disclose effects and provide additional context for proposed actions' emissions once GHG emissions have been estimated, agencies should use the following best practices, as relevant:

(1) In most circumstances, once agencies have quantified GHG emissions, they should apply the best available estimates of the SC–GHG [61] to the incremental metric tons of each individual type of GHG emissions [62] expected from a proposed action and its alternatives.[63] SC–GHG estimates allow monetization (presented in U.S. dollars) of the climate change effects from the marginal or incremental emission of GHG emissions, including carbon dioxide, methane, and nitrous oxide.[64] These 3 GHGs represent more than 97 percent of U.S. GHG emissions.[65] The SC–GHG provides an appropriate and valuable metric that gives decision makers and the public useful information and context about a proposed action's climate effects even if no other costs or benefits are monetized, because metric tons of GHGs can be difficult to understand and assess the significance of in the abstract.[66] The SC–GHG translates metric tons of emissions into the familiar unit of dollars, allows for comparisons to other monetized values, and estimates the damages associated with GHG emissions over time and associated with different GHG pollutants.[67] The SC–GHG also can

[57] Carbon sequestration is the long-term carbon storage in plants, soils, geologic formations, and oceans.

[58] For example, the U.S. Department of Agriculture's (USDA's) Forest Inventory and Analysis tool can be used to assess the carbon sequestration of existing forestry activities along with the reduction in carbon sequestration (emissions) of project-level activities. *See* USDA, *Forest Inventory Data & Tools (FIA), https://www.fs.usda.gov/research/products/dataandtools/forestinventorydata.*

[59] *See* 40 CFR 1502.21.

[60] *See* 40 CFR 1502.2(b) (environmental impact statements shall discuss impacts in proportion to their significance); 40 CFR 1502.15 (data and analyses in a statement shall be commensurate with the importance of the impact).

[61] The SC–GHG estimates provide an aggregated monetary measure (in U.S. dollars) of the future stream of damages associated with an incremental metric ton of emissions and associated physical damages (*e.g.,* temperature increase, sea-level rise, infrastructure damage, human health effects) in a particular year. The ''Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates under Executive Order 13990'' released by the Interagency Working Group on Social Cost of Greenhouse Gases (IWG SC–GHG) in February 2021 presents interim estimates of the social cost of carbon, methane, and nitrous oxide, which are the same as those developed by the IWG in 2013 and 2016 (updated to 2020 dollars). *See* IWG SC–GHG, U.S. Gov't, *Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates under Executive Order 13990* (Feb. 2021), *https://www.whitehouse.gov/wp-content/uploads/2021/02/TechnicalSupportDocument_SocialCostofCarbonMethaneNitrousOxide.pdf.* The Technical Support Document notes that estimates of the SC–GHG have been used in NEPA analysis.

[62] Note that applying the specific social cost of each individual GHG to the quantifications of that GHG is more accurate than transforming the gases into CO_2-equivalents and then multiplying the CO_2-equivalents by the social cost of CO_2. *See* IWG SC–GHG, U.S. Gov't, *Addendum to Technical Support Document on Social Cost of Carbon for Regulatory Impact Analysis under Executive Order 12866: Application of the Methodology to Estimate the Social Cost of Methane and the Social Cost of Nitrous Oxide,* 2 (Aug. 2016), *https://www.epa.gov/sites/default/files/2016-12/documents/addendum_to_sc-ghg_tsd_august_2016.pdf.*

[63] *See* IWG SC–GHG, *Technical Support Document, supra* note 61. Agencies should typically apply the best available estimates of the SC–GHG to the incremental metric tons of GHG emissions expected from a proposed action and its alternatives. In uncommon circumstances, an agency may choose not to do so if doing so would be confusing, there are no available estimates for the GHG at issue, or, consistent with the concept of proportionality, an agency does not produce a quantitative estimate of GHG emissions because the emissions at issue are *de minimis.*

[64] Estimates of SC–HFCs have been developed and are available for use in NEPA analysis. *See, e.g.,* EPA, Regulatory Impact Analysis for Phasing Down Production and Consumption of Hydrofluorocarbons (HFCs) (June 2022), *https://www.epa.gov/system/files/documents/2022-07/RIA%20for%20Phasing%20Down%20Production%20and%20Consumption%20of%20Hydrofluorocarbons%20%28HFCs%29.pdf.*

[65] EPA, EPA 430–R–22–003, *Inventory of U.S. Greenhouse Gas Emissions and Sinks, 1990–2020* (Apr. 2022), *https://www.epa.gov/system/files/documents/2022-04/us-ghg-inventory-2022-main-text.pdf.*

[66] As described in section VI(F), NEPA does not require a cost-benefit analysis in which all monetized benefits and costs are directly compared.

[67] For example, if alternatives or mitigation strategies would result in varying emissions or

assist agencies and the public in assessing the significance of climate impacts. This is a simple and straightforward calculation that should not require additional time or resources.

Certain circumstances may make monetization using the SC–GHG particularly useful, such as if a NEPA review monetizes other costs and benefits for the proposed action (see Section VI(F)); if the alternatives differ in GHG emissions over time or in the type of GHGs emitted; or if the significance of climate change effects is difficult to assess or not apparent to the public without monetization. SC–GHG estimates can help describe the net social costs of increasing GHG emissions as well as the net social benefits of reducing such emissions. Given NEPA's mandates to consider worldwide and long-range environmental problems,[68] it is most appropriate for agencies to focus on SC–GHG estimates that capture global climate damages and, consistent with the best available science, reflect a timespan covering the vast majority of effects and discount future effects at rates that consider future generations. It is often also worth affirming that SC–GHG estimates, including those available at the publication of this guidance, may be conservative underestimates because various damage categories (like ocean acidification) are not currently included.

(2) Where helpful to provide context, such as for proposed actions with relatively large GHG emissions or reductions or that will expand or perpetuate reliance on GHG-emitting energy sources, agencies should explain how the proposed action and alternatives would help meet or detract from achieving relevant climate action goals and commitments, including Federal goals, international agreements, state or regional goals, Tribal goals, agency-specific goals, or others as appropriate.[69] However, as explained above, NEPA requires more than a statement that emissions from a proposed Federal action or its alternatives represent only a small fraction of global or domestic emissions. Such comparisons and fractions are not an appropriate method for characterizing the extent of a proposed action's and its alternatives' contributions to climate change. Agencies also should discuss whether and to what extent the proposal's reasonably foreseeable GHG emissions are consistent with GHG reduction goals, such as those reflected in the U.S. nationally determined contribution under the Paris Agreement. Federal planning documents that illustrate multi-decade pathways to achieve policy may also provide useful information, such as the *Long-Term Strategy of the United States: Pathways to Net-Zero Greenhouse Gas Emissions by 2050.*[70] Similarly, agencies' own climate goals may provide relevant context. Evaluating a proposed action's and its alternatives' consistency with such goals and commitments can help illuminate the policy context, the importance of considering alternatives and mitigation, and tradeoffs of the decision and help agencies evaluate the significance of a proposed action's GHG emissions and climate change effects. This type of comparison provides a different kind of disclosure and context than that provided by application of SC–GHG estimates as described above, demonstrating the potential utility of multiple contextualization methods.

(3) Where relevant, agencies should summarize and cite to available scientific literature to help explain the real-world effects—including those that will be experienced locally in relation to the proposed action—associated with an increase in GHG emissions that contribute to climate change, such as sea-level rise, temperature changes, ocean acidity, and more frequent and severe wildfires and drought, and human health effects (including to underserved populations).[71] Agencies should use the best available information, including scenarios and climate modeling information that are most relevant to a proposed action.[72]

(4) Agencies also can provide accessible comparisons or equivalents to help the public and decision makers understand GHG emissions in more familiar terms. Techniques may include placing a proposed action's GHG emissions in more familiar metrics such as household emissions per year, annual average emissions from a certain number of cars on the road, or gallons of gasoline burned.[73] Such comparisons may be a useful supplement and can, for example, be presented along with monetized damage estimates using SC–GHG values. Agencies should use disclosure and contextualization methods that best fit their proposed actions and alternatives.

C. Reasonable Alternatives

Considering reasonable alternatives, including alternatives that avoid or mitigate GHG emissions, is fundamental to the NEPA process and accords with Sections 102(2)(C) and 102(2)(E) of NEPA, which independently require the consideration of alternatives in environmental documents.[74] NEPA calls upon agencies to use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects on the human environment.[75]

Consideration of alternatives provides an agency decision maker the information needed to examine other possible approaches to a particular proposed action (including the no action alternative) that could alter environmental effects or the balance of factors considered in making the decision. Agencies make better informed decisions by comparing relevant GHG emissions, GHG emission reductions, and carbon sequestration potential across reasonable alternatives, assessing trade-offs with other environmental values, and evaluating

reductions of carbon dioxide, methane, and nitrous oxide over time, presenting emissions estimates in metric tons of each gas, or in metric tons of CO_2e, alone cannot fully illustrate the differences in the temporal pathways of these pollutants' impacts on society. The SC–GHG estimates can capture these differences when estimating the damages from the emission of each specific pollutant in a common unit of measurement, *i.e.,* the U.S. Dollar.

[68] *See, e.g.,* NEPA's direction that agencies shall consider the ''worldwide and long-range character of environmental problems.'' 42 U.S.C. 4332(2)(F).

[69] For example, the U.S. Department of the Interior's Bureau of Land Management (BLM) has discussed how agency actions in California, especially joint projects with the State, may or may not facilitate California reaching its GHG emission reduction goals, including goals under the State's Assembly Bill 32 (Global Warming Solutions Act) and related legislation. *See, e.g.,* BLM, Desert Renewable Energy Conservation Plan Proposed Land Use Plan Amendment and Final Environmental Impact Statement, Vol. I, section I.3.3.2, 12 (Oct. 2015), *https://eplanning.blm.gov/public_projects/lup/66459/20012403/250016887/I.3_Planning_Process.pdf; see also* 40 CFR 1506.2(d) (directing agencies to discuss any inconsistency of a proposed action with an approved State, Tribal, or local plan or law); BLM, Environmental Assessment for Oberon Renewable Energy Project, 33–34 (Aug. 2021), *https://eplanning.blm.gov/public_projects/2001226/200478716/20043975/250050165/Environmental%20Assessment%201-Main%20Text.pdf.*

[70] U.S. Dep't of State (DOS) & U.S. Exec. Off. of the President (EOP), *The Long-Term Strategy of the United States: Pathways to Net-Zero Greenhouse Gas Emissions by 2050* (Nov. 2021), *https://www.whitehouse.gov/wp-content/uploads/2021/10/US-Long-Term-Strategy.pdf.*

[71] For example, see the scientific studies referenced in section III(B).

[72] In addition, newer tools or modelling may enable agencies in some cases to provide information on localized or ''downscaled'' climate effects in addition to global effects. *See, e.g.,* Romany M. Webb et al., *Evaluating Climate Risk in NEPA Reviews: Current Practices and Recommendations for Reform,* 29, *https://blogs.edf.org/climate411/files/2022/02/Evaluating-Climate-Risk-in-NEPA-Reviews-Full-Report.pdf.*

[73] *See* EPA's equivalency calculator, *https://www.epa.gov/energy/greenhouse-gas-equivalencies-calculator.*

[74] *See* 42 U.S.C. 4332(2)(C) and (2)(E).

[75] *See* 42 U.S.C. 4332(2)(C)(iii); 40 CFR 1502.1, 1502.14.

the risks from or resilience to climate change inherent in a proposed action and its design.

Agencies must consider a range of reasonable alternatives, as well as reasonable mitigation measures if not already included in the proposed action or alternatives, consistent with the level of NEPA review (*e.g.,* EA or EIS) and the purpose and need for the proposed action.[76] Agencies should leverage the early phases of their existing planning processes to help identify potential alternatives to address an action's anticipated environmental effects. When analyzing alternatives, agencies should compare the anticipated levels of GHG emissions from each alternative—including the no action alternative—and mitigation to provide information to the public and enable the decision maker to make an informed choice. To help provide clarity, agencies should consider presenting charts, tables, or figures, as appropriate, to compare GHG emissions and climate effects across alternatives.

Neither NEPA, the CEQ Regulations, or this guidance require the decision maker to select the alternative with the lowest net GHG emissions or climate costs or the greatest net climate benefits. However, and in line with the urgency of the climate crisis, agencies should use the information provided through the NEPA process to help inform decisions that align with climate change commitments and goals. For instance, agencies should evaluate reasonable alternatives that may have lower GHG emissions, which could include technically and economically feasible clean energy alternatives to proposed fossil fuel-related projects, and consider mitigation measures to reduce GHG emissions to the greatest extent possible.

Where relevant—such as for proposed actions that will generate substantial GHG emissions—agencies should identify the alternative with the lowest net GHG emissions or the greatest net climate benefits among the alternatives they assess. And, as described throughout this guidance, they should use the NEPA process to make informed decisions grounded in science that are transparent with respect to how Federal actions will help meet climate change goals and commitments, or alternately, detract from them.

D. Baseline for Considering Environmental Effects

A NEPA review must identify the area affected by a proposed action (*i.e.,* the affected environment).[77] Identification of the affected environment includes identifying and describing reasonably foreseeable environmental trends, including climate change effects. The NEPA review also must identify the current and projected future state of the affected environment without the proposed action (*i.e.,* the no action alternative), which serves as the baseline for considering the effects of the proposed action and its reasonable alternatives.[78] For an estimate of GHG emissions from the proposed action to have meaningful context, an accurate estimate of GHG emissions without the proposed action should be included in a NEPA review. The temporal bounds for the analysis are determined by the projected initiation of the action and the expected life of the proposed action and its effects.[79] It is noteworthy that the impacts of GHGs can be very long-lasting.[80]

E. Direct and Indirect Effects

NEPA requires agencies to consider the reasonably foreseeable direct and indirect effects of their proposed actions and reasonable alternatives (as well as the no-action alternative).[81] The term ''direct effects'' refers to reasonably foreseeable effects that are caused by the action and occur at the same time and place.[82] The term ''indirect effects'' refers to effects that are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.[83] Indirect effects generally include reasonably foreseeable emissions related to a proposed action that are upstream or downstream of the activity resulting from the proposed action.[84] For example, where the proposed action involves fossil fuel extraction, direct emissions typically include GHGs emitted during the process of exploring for and extracting the fossil fuel. The reasonably foreseeable indirect effects of such an action likely would include effects associated with the processing, refining, transporting, and end-use of the fossil fuel being extracted, including combustion of the resource to produce energy. Indirect emissions[85] are often reasonably foreseeable since quantifiable connections frequently exist between a proposed activity that involves use or conveyance of a commodity or resource, and changes relating to the production or consumption of that resource.[86]

As discussed in Section IV(A), agencies generally should quantify all reasonably foreseeable emissions associated with a proposed action and reasonable alternatives (as well as the no-action alternative). Quantification should include the reasonably foreseeable direct and indirect GHG emissions of their proposed actions. Agencies also should disclose the information and any assumptions used in the analysis and explain any uncertainty.[87] In assessing a proposed action's, and reasonable alternatives', reasonably foreseeable direct and indirect GHG emissions, the agency should use the best available information.[88] As with any NEPA review, the rule of reason should guide the agency's analysis and the level of

[76] *See* 42 U.S.C. 4332(2)(C), 4332(2)(E), and 40 CFR 1502.14(e), 1501.5(c)(2). The purpose and need for action usually reflects both the extent of the agency's statutory authority and its policies.

[77] *See* 40 CFR 1502.15 (providing that environmental impact statements shall succinctly describe the environmental impacts on the area(s) to be affected or created by the alternatives under consideration).

[78] *See, e.g.,* CEQ, Memorandum to Agencies: Forty Most Asked Questions Concerning CEQ's NEPA Regulations, Question 3, ''No-Action Alternative'' (1986) (''This analysis provides a benchmark, enabling decisionmakers to compare the magnitude of environmental effects of the action alternatives'').

[79] CEQ, *Considering Cumulative Effects Under the National Environmental Policy Act* (1997), *https://ceq.doe.gov/publications/cumulative_effects.html.* Agencies also should consider proposed actions pursuant to E.O. 13653, *Preparing the United States for the Impacts of Climate Change,* 78 FR 66817 (Nov. 6, 2013), which considers how capital investments will be affected by a changing climate over time.

[80] Elevated concentrations of carbon dioxide will persist in the atmosphere for hundreds or thousands of years, so the earth will continue to warm in the coming decades. The warmer it gets, the greater the risk for more severe changes to the climate and the earth's system. EPA, *Impacts of Climate Change, https://www.epa.gov/climatechange-science/impacts-climate-change* (last updated Aug. 19, 2022); EPA, *Understanding Global Warming Potentials, https://www.epa.gov/ghgemissions/understanding-global-warming-potentials* (last updated May 5, 2022).

[81] 42 U.S.C. 4332(2)(C)(i); 40 CFR 1508.1(g).

[82] 40 CFR 1508.1(g)(1).

[83] 40 CFR 1508.1(g)(2); *see also Birckhead* v. *Fed. Energy Regul. Comm'n,* 925 F.3d 510, 516 (D.C. Cir. 2019).

[84] These indirect emissions are sometimes referred to as ''upstream'' or ''downstream emissions,'' described in relation to where in the causal chain they fall relative to the proposed action.

[85] As used in this guidance, ''indirect emissions'' refers to emissions that are indirect effects of the proposed action.

[86] For example, natural gas pipeline infrastructure creates the economic conditions for additional natural gas production and consumption, including both domestically and internationally, which produce indirect (both upstream and downstream) GHG emissions that contribute to climate change.

[87] *See* 40 CFR 1502.21.

[88] For example, agencies may consider consulting information available from the U.S. Energy Information Administration, the International Energy Agency, the Federal Energy Management Program, or the Department of Energy. *See, e.g.,* U.S. Energy Info. Admin., Annual Energy Outlook 2022 (Mar. 3, 2022), *https://www.eia.gov/outlooks/aeo/;* International Energy Agency (IEA), *Net Zero by 2050,* (May 2021), *https://www.iea.org/reports/net-zero-by-2050.*

effort can be proportionate to the scale of the net GHG effects and whether net effects are positive or negative, with actions resulting in very few or an overall reduction in GHG emissions generally requiring less detailed analysis than actions with large emissions.[89]

Agencies should seek to obtain the information needed to quantify emissions, including by requesting or requiring information held by other entities (such as project applicants), because such information is generally essential to reasoned decision making.[90] Where information regarding direct or indirect emissions is not available, agencies should make best efforts to develop a range of potential emissions.[91] Agencies can provide an upper bound for effects analysis by treating the resource provided or enabled by the actions they take as new or additional. In the example of fossil fuel extraction or transportation, this is sometimes referred to as a ''full burn'' assumption, as the agency can provide an upper bound estimate of GHG emissions by assuming that all of the available resources will be produced and combusted to create energy.[92]

Some proposed actions, such as those increasing the supply of certain energy resources like oil, natural gas, or renewable energy generation, may result in changes to the resulting energy mix as energy resources substitute for one another on the domestic or global energy market.[93] Different energy resources emit different amounts of GHGs and other air pollutants.[94] For proposed actions involving such resource substitution considerations, where relevant, CEQ encourages agencies to conduct substitution analysis to provide more information on how a proposed action and its alternatives are projected to affect the resulting resource or energy mix, including resulting GHG emissions.[95] Substitution analysis generally is relevant to actions related to the extraction, transportation, refining, combustion, or distribution of fossil fuels, for example. Agencies should not simply assume that if the federal action does not take place, another action will perfectly substitute for it and generate identical emissions, such that the action's net emissions relative to the baseline are zero.[96] Such an assumption of perfect substitution typically contradicts basic economic principles of supply and demand.[97] Instead, where relevant, agencies can use available models to help conduct substitution analysis.[98] Agencies should disclose any assumptions and inputs used in substitution analysis and use models that accurately account for reasonable and available energy substitute resources, including renewable energy. Further, the analysis generally should be complemented with evaluation that compares the proposed action's and reasonable alternatives' energy use against scenarios or energy use trends that are consistent with achieving science-based GHG reduction goals, such as those pursued in the *Long-Term Strategy of the United States.*[99]

In addition to addressing an action's direct and indirect effects, NEPA requires agencies to address the effects of ''connected'' actions.[100] When evaluating a proposed Federal action, agencies should account for other closely related actions that should be discussed in the same EIS or EA. Actions are connected if they: (i) automatically trigger other actions that may require environmental impact statements; (ii) cannot or will not proceed unless other actions are taken previously or simultaneously; or (iii) are interdependent parts of a larger action and depend on the larger action for their justification.[101] For example, NEPA reviews for proposed resource extraction and development projects typically should address the reasonably foreseeable effects of other closely related agency actions that authorize separate phases or aspects of development. Depending on the relationship between any of the phases, as well as the authority under which they may be carried out, agencies should use the analytical scope that best informs their decision making.

F. Cumulative Effects

In addition to analyzing a proposed action's direct and indirect effects, NEPA and CEQ's regulations require an agency to also consider the proposed action's cumulative effects.[102] Cumulative effects are effects on the environment that result from the incremental effects of the action when added to the effects of other past, present, and reasonably foreseeable actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.[103] In evaluating a proposed action's cumulative climate change effects, an

[89] For example, as noted in section (IV)(A)(1), for proposed actions that involve net GHG emission reductions (such as renewable energy projects), agencies should attempt to quantify net GHG emission reductions, but may apply the rule of reason when determining the appropriate depth of analysis such that precision regarding emission reduction benefits does not come at the expense of efficient and accessible analysis.

[90] *See* 40 CFR 1502.21(b); *see also Birckhead,* 925 F.3d at 520; *Barnes* v. *U.S. Dep't of Transp.,* 655 F.3d 1124 (9th Cir. 2011). Agencies also may consider amendments to their regulations, where appropriate, to ensure they are able to gather from applicants the information needed to analyze the climate change effects of proposed actions.

[91] *See, e.g.,* Jayni Hein, Jason Schwartz, and Avi Zevin, *Pipeline Approvals and Greenhouse Gas Emissions,* 29–30 (Apr. 2019), discussing availability of tools for quantifying substitution effects and noting the need for further modeling tool development.

[92] A full burn assumption is consistent with analyses prepared by some agencies. *See* BLM, Environmental Assessment, DOI–BLM–CO–S010–2011–0074–EA, 81 (2017), *https://eplanning.blm.gov/public_projects/nepa/70895/127910/155610/King_II_Lease_Mod_Final_EA_2017-1012.pdf* (stating that the agency ''assume[d] that the remaining portion of the maximum year coal to be shipped . . . is eventually combusted.'').

[93] *See, e.g., WildEarth Guardians* v. *BLM.,* 870 F.3d 1222, 1235 (10th Cir. 2017) (''[W]hen coal carries a higher price, for whatever reason that may be, the nation burns less coal in favor of other sources. A force that drives up the cost of coal could thus drive down coal consumption.''); *see also* Jayni Hein and Natalie Jacewicz, *Implementing NEPA in the Age of Climate Change,* 10 Mich. J. Envtl L. 1, 40–43 (2020) (describing energy substitution analysis and how agencies can conduct it for NEPA analysis).

[94] *See* Hein & Jacewicz, *supra* note 93, at 42 (citing B.D. Hong & E.R. Slatick, U.S. Energy Info. Admin., *Carbon Dioxide Emission Factors for Coal, https://www.eia.gov/coal/production/quarterly/co2_article/co2.html*).

[95] *See, e.g.,* Peter Howard, Inst. for Pol'y Integrity, N.Y.U. Sch. of L., *The Bureau of Land Management's Modeling Choice for the Federal Coal Programmatic Review* (June 2016), *https://policyintegrity.org/files/publications/BLM_Model_Choice.pdf* (describing multiple power sector models available to Federal agencies for use in NEPA analysis); *see also WildEarth Guardians,* 870 F.3d at 1235 (holding that an agency's ''blanket assertion that coal would be substituted from other sources, unsupported by hard data, does not provide 'information sufficient to permit a reasoned choice' between the preferred alternative and no action alternative.'').

[96] Hein & Jacewicz, *supra* note 93, at 43–44 (describing the fallacy of perfect substitution); *id.* at 51–52 (describing litigation concerning the Wright Area coal leases).

[97] *See, e.g., WildEarth Guardians,* 870 F.3d at 1235–37.

[98] Available models include the Bureau of Ocean Energy Management's Revised Market Simulation Model, the U.S. Energy Information Administration's National Energy Modeling System, and ICF International's Integrated Planning Model.

[99] DOS & EOP, *supra* note 70; *see also* Hein & Jacewicz, *supra* note 93, at 48 (stating, ''[a] far more rational approach would be to model at least two policy scenarios: one taking the ''constant demand'' approach, and the other based on fossil fuel consumption consistent with meeting the 1.5 or 2 degrees Celsius warming targets laid out in the Paris Accord.'').

[100] Note that the concepts of ''connected actions'' and ''indirect effects'' bear some similarities but are analytically distinct. ''Connected actions'' are actions related to a proposed action that an agency must consider in the same environmental impact statement. *See* 40 CFR 1501.9(e)(1). ''Indirect effects'' are not actions in themselves, but rather reasonably foreseeable effects that are caused by the proposed action.

[101] 40 CFR 1501.9(e)(1).

[102] *See* 40 CFR 1502.16, 1508.1(g)(3).

[103] 40 CFR 1508.1(g)(3).

agency should consider the proposed action in the context of the emissions from past, present, and reasonably foreseeable actions. When assessing cumulative effects, agencies should also consider whether certain communities experience disproportionate cumulative effects, thereby raising environmental justice concerns.[104]

All types of GHG emissions contribute to real-world physical changes. Given that climate change is the result of the increased global accumulation of GHGs climate effects analysis is inherently cumulative in nature. Thus, the analysis and public disclosure of cumulative effects can be accomplished by quantifying GHG emissions and providing context for understanding their effects as discussed above, including by monetizing climate damages using estimates of the SC–GHG, placing those damages in the context of relevant climate action goals and commitments, and summarizing and citing to available scientific literature to help explain real world effects.

G. Short- and Long-Term Effects

When considering effects, agencies should take into account both the short- and long-term adverse and beneficial effects using a temporal scope that is grounded in the concept of reasonable foreseeability. Some proposed actions and reasonable alternatives will require consideration of effects from different stages of the action to ensure the direct effects and reasonably foreseeable indirect effects are appropriately assessed; for example, the effects of construction are different from the effects of the operations and maintenance of a facility.

The effects analysis should cover the action's reasonably foreseeable lifetime, including anticipated GHG emissions associated with construction, operations, and decommissioning. Agencies should identify an appropriate lifetime for the proposed action using available indicators and guided by the concept of reasonable foreseeability.

Identifying an appropriate lifetime for the action also will inform assessment of long-term emissions benefits of proposed actions and reasonable alternatives. For example, development of a new wind energy project may result in short-term construction GHG emissions but overall long-term GHG benefits. Agencies should describe both short- and long-term effects in comparison to the no action alternative in NEPA reviews and clearly explain the net effect of their actions even if precision regarding the timing of short- and long-term effects is not possible.

H. Mitigation

Identifying and analyzing potential mitigation measures is an important component of the NEPA process.[105] Evaluating potential mitigation measures generally involves first determining whether impacts from a proposed action or alternatives can be avoided, then considering whether adverse impacts can be minimized, then, when impacts are unavoidable, rectifying them and, if appropriate, requiring compensation for residual impacts.[106] Mitigation plays a particularly important role in how agencies should assess the potential climate change effects of proposed actions and reasonable alternatives. Agencies should consider mitigation measures that will avoid or reduce GHG emissions. Given the urgency of the climate crisis, CEQ encourages agencies to mitigate GHG emissions to the greatest extent possible.

Agencies should consider mitigation, particularly avoidance and minimization, as early as possible in the development of their actions, including during scoping, public engagement, and alternatives analysis. As part of early and meaningful public engagement, agencies should solicit public input on potential mitigation measures, including from communities that the proposed action and reasonable alternatives may affect. In their NEPA documents, agencies should discuss any mitigation measures considered and whether they included those measures in the preferred alternative. Where potential mitigation measures are not adopted, agencies should explain why as early as practicable in the NEPA process.

Agencies should consider available mitigation measures that avoid, minimize, or compensate for GHG emissions and climate change effects when those measures are reasonable and consistent with achieving the purpose and need for the proposed action. Such mitigation measures could include enhanced energy efficiency, renewable energy generation and energy storage, lower-GHG-emitting technology, reduced embodied carbon in construction materials, carbon capture and sequestration, sustainable land management practices, and capturing GHG emissions such as methane.

Federal agencies also should evaluate the quality of that mitigation by ensuring it meets appropriate performance standards.[107] Appropriate performance standards help ensure that GHG mitigation is additional, verifiable, durable, enforceable, and will be implemented.[108] NEPA does not limit consideration of mitigation to actions involving significant effects. However, mitigation can be particularly effective in helping agencies reduce or avoid significant effects.[109] Agencies can discuss the scope of their mitigation authority to support any mitigation commitments relied upon in NEPA analysis, including mitigation supporting a finding of no significant impact.[110] In addition, consistent with existing agency best practice, an agency's decision on a proposed action should identify the mitigation measures that the agency commits to take, recommends, or requires others to take.[111]

The CEQ Regulations and guidance also recognize the value of monitoring to ensure that mitigation is carried out as provided in a record of decision or finding of no significant impact.[112] Monitoring intensity and duration

[104] *See infra* section VI(E).

[105] *See* 42 U.S.C. 4332(2)(C) (requiring consideration of mitigation measures in impact statements by requiring the consideration of ''any adverse environmental effects which cannot be avoided'').

[106] *See* 40 CFR 1508.1(s), 1501.9(e)(2) (alternatives include mitigation measures not included in the proposed action); *see generally* 10 CFR 900.3 (2019) (identifying ''mitigation hierarchy'' as ''first seeking to avoid, then minimize impacts, then, when necessary, compensate for residual impacts''); U.S. Fish and Wildlife Service (FWS) Mitigation Policy (Nov. 21, 2016), *https://www.federalregister.gov/d/2016-27751.*

[107] *See* CEQ, Memorandum to Heads of Federal Agencies, Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact (''Appropriate Use of Mitigation and FONSI Memo''), 8–9, 76 FR 3843 (Jan. 21, 2011), *https://ceq.doe.gov/docs/ceq-regulations-and-guidance/Mitigation_and_Monitoring_Guidance_14Jan2011.pdf.*

[108] *See id.; see also* U.S. Army Corps of Engineers and EPA, Final Rule, Compensatory Mitigation for Losses of Aquatic Resources, 73 FR 19593 (Apr. 10, 2008) (discussing verifiable and enforceable performance standards for mitigation).

[109] See 40 CFR 1501.6(c).

[110] *See id.* (The finding of no significant impact shall state the authority for any mitigation that the agency has adopted and any applicable monitoring or enforcement provisions. If the agency finds no significant impacts based on mitigation, the mitigated finding of no significant impact shall state any enforceable mitigation requirements or commitments that will be undertaken to avoid significant impacts.); *see also* CEQ, Appropriate Use of Mitigation and FONSI Memo, *supra* note 107, at 7 (''Mitigation commitments needed to lower the level of impacts so that they are not significant should be clearly described in the mitigated FONSI document and in any other relevant decision documents related to the proposed action.'').

[111] *See* CEQ, Appropriate Use of Mitigation and FONSI Memo, *supra* note 107, at 13–14.

[112] See 40 CFR 1505.2(a)(3), 1505.3; *see also* CEQ, Appropriate Use of Mitigation and FONSI Memo, *supra* note 107.

should be aligned with the mitigation action taken.

Finally, while this subsection primarily addresses mitigating a proposed action's GHG emissions, agencies also should consider environmental design features, alternatives, and mitigation measures to address the effects of climate change on the proposed action, including to enhance resilience and adaptation. See Section IV(D).

I. Special Considerations for Biological GHG Sources and Sinks

Many GHG emissions come from combusting fossil fuels and releasing substances into the atmosphere.[113] In addition to these sources, some GHG emissions are related to the natural carbon cycle,[114] or result from the combustion, harvest, decomposition, or other processing of biologically based materials.[115] These types of emissions are referred to as ''biogenic.'' [116] Biogenic GHG emissions from land management actions—such as prescribed burning, timber stand improvements, fuel load reductions, and scheduled harvesting—involve GHG emissions and carbon sequestration that operate within the global carbon and nitrogen cycle, which may be affected by those actions. Similarly, some water management practices have GHG emission consequences that may require unique consideration (*e.g.,* reservoir management practices can reduce methane releases, wetlands management practices can enhance carbon sequestration, and water conservation can improve energy efficiency).

In the land and resource management context, how a proposed action and reasonable alternatives (as well as the no-action alternative) affects a net carbon sink or source will depend on multiple factors such as the local or regional climate and environment, the distribution of carbon across carbon pools in the action area, ongoing activities and trends, and the role of natural disturbances in the relevant area.

In NEPA reviews, for actions involving potential changes to biological GHG sources and sinks, agencies should include a comparison of net GHG emissions and carbon stock [117] changes that are anticipated to occur, with and without implementation of the proposed action and reasonable alternatives. The analysis should consider the estimated GHG emissions (from biogenic and fossil-fuel sources), carbon sequestration potential, and the net change in relevant carbon stocks in light of the proposed actions and timeframes under consideration, and explain the basis for the analysis.

Some actions that involve ecosystem restoration [118] can generate short-term biogenic emissions while resulting in overall long-term net reductions of atmospheric GHG concentrations through increases in carbon stocks or reduced risks of future emissions. One example is certain vegetation management practices that affect the risk of wildfire, insect and disease outbreak, or other disturbance. Some resource management activities, such as a prescribed burn or certain non-commercial thinning of forests or grasslands conducted to reduce wildfire risk or insect infestations, might result in short-term GHG emissions or loss of stored carbon but greater long-term ecosystem health, including an overall net increase in carbon sequestration and storage. However, other types of land-use changes, such as permanent deforestation, can adversely alter ecosystem long-term carbon dynamics, resulting in net emissions. Agencies can use relevant tools to analyze the anticipated long-term GHG emissions implications from proposed ecosystem restoration actions.

Federal land and resource management agencies should consider developing and maintaining agency-specific principles and guidance for considering biological carbon in management and planning decisions.[119] Such guidance can help address the importance of considering biogenic carbon fluxes and storage within the context of other management objectives and ecosystem service goals, and integrating carbon considerations as part of a balanced and comprehensive program of sustainable management, climate change mitigation, and climate change adaptation.

V. Considering the Effects of Climate Change on a Proposed Action

According to the USGCRP and others, GHGs already in the atmosphere will continue altering the climate system into the future, even with current or future emissions control efforts.[120] To illustrate how climate change may impact proposed actions and alternatives and to consider climate resilience, NEPA reviews should consider the ongoing impacts of climate change and the foreseeable state of the environment, especially when evaluating project design, siting, and reasonable alternatives. In addition, climate change resilience [121] and adaptation [122] are important

[113] Burning fossil fuels (such as oil, coal, and natural gas), wood, and other forms of carbon releases stored carbon into the atmosphere, where it becomes a GHG. GHGs are gases in the atmosphere that absorb and release heat. Dep't of Energy, Off. of Science, *DOE Explains...the Carbon Cycle, https://www.energy.gov/science/doe-explainsthe-carbon-cycle.*

[114] The carbon cycle is the process that moves carbon between plants, animals, and microbes; minerals in the earth; and the atmosphere. Most carbon on Earth is stored in rocks and sediments. The rest is in the ocean, atmosphere, and in living organisms. Scientists use the term ''carbon sinks'' to refer to places where carbon is stored away from the atmosphere. *Id.*

[115] Fossil fuels are not considered biologically based materials. *See, e.g.,* EPA, *Framework for Assessing Biogenic CO_2 Emissions from Stationary Sources,* 5 (Nov. 2014), *https://www.epa.gov/sites/default/files/2016-08/documents/framework-for-assessing-biogenic-co2-emissions.pdf* (''In contrast to the relatively short timescale of the biological carbon cycle, carbon in fossil fuel reservoirs, such as coal seams and oil and gas deposits, was removed from the atmosphere by plants over millions of years but was not returned to the atmosphere through the natural processes described above. Instead, because of geologic processes, the carbon that accumulated in these deposits has been isolated from the active biological cycling of carbon to and from the atmosphere. Without human intervention, carbon in fossil fuel reservoirs could remain isolated from the biogeochemical cycling of carbon long into the future.'')

[116] EPA, *Carbon Dioxide Emissions Associated with Bioenergy and Other Biogenic Sources, https://19january2017snapshot.epa.gov/climatechange/carbon-dioxide-emissions-associated-bioenergy-and-other-biogenic-sources_.html; see also* Merriam-Webster Dictionary, *Biogenic* (Online Ed., last updated Oct. 21, 2022), *https://www.merriam-webster.com/dictionary/biogenic* (defining ''biogenic'' as ''produced by living organisms'').

[117] *See, e.g.,* 10 CFR 300.2 (''Carbon stocks mean the quantity of carbon stored in biological and physical systems including: trees, products of harvested trees, agricultural crops, plants, wood and paper products and other terrestrial biosphere sinks, soils, oceans, and sedimentary and geological sinks.'').

[118] For example, Federal agencies sometimes consider actions that would benefit ecosystems by restoring degraded lands or restoring shoreline.

[119] *See, e.g.,* USDA Forest Service, *Considering Forest and Grassland Carbon in Land Management* (2017), *https://www.fs.usda.gov/research/treesearch/54316; see also* U.S. Dep't of the Interior, Order No. 3399, *Department-Wide Approach to the Climate Crisis and Restoring Transparency and Integrity to the Decision-Making Process* (Apr. 16, 2021), *https://www.doi.gov/sites/doi.gov/files/elips/documents/so-3399-508_0.pdf.*

[120] *See* USGCRP, Fourth National Climate Assessment, *supra* note 28, Chapter 2, *Our Changing Climate, https://nca2018.global change.gov/chapter/2/.*

[121] Resilience refers to the ability to prepare for and adapt to changing conditions and withstand and recover rapidly from disruption. U.S. Dep't of Commerce Nat'l Inst. of Standards and Tech. (NIST), SP 800–160 Vol. 2, Rev. 1, 76, *https://csrc.nist.gov/glossary/term/resilience#:~:text=with%20mission%20needs.-,Source(s)%3A,naturally%20occurring%20threats%20or%20incidents.*

[122] Adaptation refers to actions taken at the individual, local, regional, and national levels to reduce risks from even today's changed climate conditions and to prepare for impacts from additional changes projected for the future. USGCRP, Fourth National Climate Assessment, *supra* note 28, Chapter 28, *Reducing Risks Through*

Continued

considerations for agencies contemplating and planning actions.[123]

A. Affected Environment

Agencies should identify the affected environment to provide a basis for comparing the current and future state of the environment as affected by the proposed action or its reasonable alternatives.[124] As discussed in Section IV(D), the current and projected future state of the environment without the proposed action (*i.e.,* the no action alternative) represents the reasonably foreseeable affected environment. In considering the effects of climate change on a proposed action, the agency should describe the affected environment for the proposed action based on the best available climate change reports,[125] which often project at least two possible future emissions scenarios.[126] The temporal bounds for the description of the affected environment are determined by the projected initiation of implementation and the expected life of the proposed action and its effects.[127]

B. Effects

The analysis of climate change effects should focus on those aspects of the human environment that are impacted by the agency's potential action (*i.e.,* the proposed action or its alternatives) and climate change. The analysis also should consider how climate change can make a resource, ecosystem, human community, or structure more vulnerable to many types of effects and lessen its resilience to other environmental effects. This increase in vulnerability can exacerbate the environmental effects of potential actions, including environmental justice impacts. For example, a proposed action or its alternatives may require water from a stream that has diminishing quantities of available water because of decreased snow pack in the mountains, or add heat to a water body that is already warming due to increasing atmospheric temperatures. Such considerations are squarely within the scope of NEPA and can inform decisions on siting, whether to proceed with and how to design potential actions and reasonable alternatives, and to eliminate or mitigate effects exacerbated by climate change. They also can inform possible adaptation measures to address the effects of climate change, ultimately enabling the selection of smarter, more resilient actions.

C. Using Available Assessments and Scenarios To Assess Present and Future Impacts

In accordance with NEPA's rule of reason and standards for obtaining information regarding reasonably foreseeable effects on the human environment, agencies may summarize and incorporate by reference relevant scientific literature concerning the physical effects of climate change.[128] For example, agencies may summarize and incorporate by reference the relevant chapters of the most recent national climate assessments or reports from the USGCRP and the IPCC.[129] Particularly relevant to some proposed actions and reasonable alternatives are the most current reports on climate change effects on water resources, ecosystems, vulnerable communities, agriculture and forestry, health, coastlines, and ocean and arctic regions in the United States.[130]

Agencies should remain aware of the evolving body of scientific information as more refined estimates of the effects of climate change, both globally and at a localized level, become available.[131] Agencies should use the most up-to-date scientific projections available, identify any methodologies and sources used, and where relevant, disclose any relevant limitations of studies, climate models, or projections they rely on.[132]

In addition to considering climate change effects at the relevant global and national levels, agencies should identify and use information on future projected GHG emissions scenarios to evaluate potential future impacts (such as flooding, high winds, extreme heat, and other climate change-related impacts) and what those impacts will mean for the physical and other relevant conditions in the affected area. Such information should help inform development of the proposed action and alternatives, including by ensuring that proposed actions and alternatives consider appropriate resilience measures, environmental justice issues, and existing State, Tribal, or local adaptation plans. When relying on a single study or projection, agencies should consider any relevant limitations and discuss them.[133]

D. Resilience and Adaptation

As discussed in Section III(B), climate change presents risks to a wide array of potential actions across a range of sectors. Agencies should consider climate change effects on the environment and on proposed actions in assessing vulnerabilities and resilience to the effects of climate change such as increasing sea level, drought, high intensity precipitation events, increased fire risk, or ecological change. Consistent with NEPA, environmental reviews should provide relevant information that agencies can use to consider siting issues, the initial project design and consistency with existing State, Tribal, and local adaptation plans, as well as reasonable alternatives with preferable overall environmental outcomes and improved resilience to climate effects.[134] Climate resilience and adaptation may be particularly relevant to the description of a proposed action, the alternatives analysis, and the description of environmental consequences. For instance, agencies should consider increased risks associated with development in floodplains, avoiding such development wherever there is a practicable alternative, as required by Executive Orders 11988 and 13690.[135] Agencies also should consider the likelihood of increased temperatures and more frequent or severe storm events over the lifetime of the proposed action, and reasonable alternatives (as well as the

Adaptation Actions, https://nca2018.globalchange.gov/chapter/28/.

[123] *See* E.O. 14008, *supra* note 7 and E.O. 14057, *supra* note 7.

[124] *See* 40 CFR 1502.15 (providing that environmental impact statements shall succinctly describe the environmental impacts on the area(s) to be affected or created by the alternatives under consideration). Note, however, that GHG emissions have effects that are global in scale.

[125] *See, e.g.,* USGCRP, Fourth National Climate Assessment, *supra* note 28 (regional impacts chapters).

[126] *See, e.g., id.* (considering a low future global emissions scenario and a high emissions scenario).

[127] CEQ, *Considering Cumulative Effects Under the National Environmental Policy Act, supra* note 79. Agencies also should consider their work under relevant executive orders. *See* E.O. 13990, *supra* note 16; E.O. 14008, *supra* note 7; E.O. 14057, *supra* note 7. Note that the effects of GHG emissions by their nature can be very long-lasting.

[128] *See* 40 CFR 1501.12 (material may be incorporated by reference if it is reasonably available for inspection by potentially interested persons during public review and comment).

[129] *See* USGCRP, Fourth National Climate Assessment, *supra* note 28; IPCC, *The Physical Science Basis, supra* note 28.

[130] *See* USGCRP, Fourth National Climate Assessment, *supra* note 28. Agencies should consider the latest final assessments and reports as they are updated.

[131] *See, e.g., id.*

[132] *See* 40 CFR 1502.23. Agencies can consult *www.data.gov/climate/portals* for model data archives, visualization tools, and downscaling results.

[133] *Id.*

[134] See 40 CFR 1502.16(a)(5), 1506.2(d).

[135] *See* E.O. 11988, *Floodplain Management,* 42 FR 26951 (May 24, 1977), *http://www.archives.gov/federal-register/codification/executive-order/11988.html;* E.O. 13690, *Establishing a Federal Flood Risk Management Standard and a Process for Further Soliciting and Considering Stakeholder Input,* 80 FR 6425 (Jan. 30, 2015), *https://www.federalregister.gov/d/2015-02379* (reinstated by E.O. 14030, *Climate-Related Financial Risk,* 86 FR 27967 (May 20, 2021), *https://www.federalregister.gov/d/2021-11168*).

no-action alternative).[136] For example, an agency considering a proposed development of transportation infrastructure on a coastal barrier island should consider climate change effects on the environment and, as applicable, consequences of rebuilding where sea level rise and more intense storms will shorten the projected life of the project and change its effects on the environment.[137]

Agencies should integrate the NEPA review process with the agency's planning, siting, and design efforts at the earliest possible time that would allow for a meaningful analysis.[138] Agencies may incorporate information developed during early planning processes that precede a NEPA review into the NEPA review. Decades of NEPA practice have shown that integrating environmental considerations with the planning processes provides useful information that program and project planners can consider in designing the proposed action, alternatives, and potential mitigation measures.

Agencies also may consider co-benefits of the proposed action, alternatives, and potential mitigation measures for human health, economic and social stability, ecosystem services, or other benefits that increase climate change preparedness or resilience. Individual agency adaptation plans and interagency adaptation strategies, such as agency Climate Adaptation Plans, the National Fish, Wildlife and Plants Climate Adaptation Strategy, and the National Action Plan: Priorities for Managing Freshwater Resources in a Changing Climate, provide other good examples of the type of relevant and useful information that agencies can consider.[139]

Considering the effects of climate change on a proposed action, and reasonable alternatives (as well as the no-action alternative), also helps to develop potential mitigation measures to reduce climate risks and promote resilience and adaptation. Where the analysis identifies climate-related risks to a proposed action or to the area affected by the proposed action, the agency should consider possible resilience and adaptation measures—including measures consistent with State, Tribal, or local adaptation plans—that could be employed to manage those effects. For example, where one or more climate effects could impair the operation of the proposed action, the agency should identify possible adaptation measures to enhance the action's climate resilience. The agency should indicate whether the proposed action includes measures to adapt to climate change and, if so, describe those measures and the climate projections that informed them. The agency also should consider whether any potential measures undertaken to address a proposed action's climate risk could result in any undesirable or unintended consequences.[140]

In addition, agencies should consider their ongoing efforts to incorporate environmental justice principles into their programs, policies, actions, and activities, including the environmental justice strategies required by Executive Orders 12898 and 14008, and consider whether the effects of climate change in association with the effects of the proposed action may result in disproportionately high and adverse effects on communities with environmental justice concerns, which often include communities of color, low-income communities, and Tribal Nations and Indigenous communities, in the area affected by the proposed action.[141] Federal agencies should identify any communities with environmental justice concerns, including communities of color, low-income communities, and Tribal Nations and Indigenous communities, impacted by the proposed action, and consider how impacts from the proposed action could potentially amplify climate change-related hazards such as storm surge, heat waves, drought, flooding, and sea level change.[142] Moreover, Executive Order 13985 calls for an all-of-government approach to advancing equity for underserved populations, including rural communities and persons with disabilities. Agencies should meaningfully engage with affected communities regarding their proposed actions and consider the effects of climate change on vulnerable communities in designing the action or selection of alternatives, including alternatives that can reduce disproportionate effects on such communities. For example, chemical facilities located near the coastline could have increased risk of spills or leaks due to sea level rise or increased storm surges, putting local communities and environmental resources at greater

[136] *See, e.g.,* E.O. 14030, *supra* note 135.

[137] *See* U.S. Dep't of Transp., FHWA–HEP–15–007, *Assessing Transportation Vulnerability to Climate Change Synthesis of Lessons Learned and Methods Applied, Gulf Coast Study, Phase 2* (Oct. 2014), *http://www.fhwa.dot.gov/environment/climate_change/adaptation/ongoing_and_current_research/gulf_coast_study/phase2_task6/fhwahep15007.pdf* (focusing on the Mobile, Alabama region); U.S. Climate Change Science Program, *Impacts of Climate Change and Variability on Transportation Systems and Infrastructure, Gulf Coast Study, Phase I* (Mar. 2008), *https://downloads.globalchange.gov/sap/sap4-7/sap4-7-final-all.pdf* (focusing on a regional scale in the central Gulf Coast). Information about the Gulf Coast Study is available at *https://www.fhwa.dot.gov/environment/sustainability/resilience/ongoing_and_current_research/gulf_coast_study/index.cfm; see also* Third National Climate Assessment, *supra* note 30, Chapter 28, *Adaptation,* 675, *http://nca2014.globalchange.gov/report/response-strategies/adaptation#intro-section-2* (noting that Federal agencies in particular can facilitate climate adaptation by ''ensuring the establishment of [F]ederal policies that allow for 'flexible' adaptation efforts and take steps to avoid unintended consequences'').

[138] *See* 42 U.S.C. 4332 (''agencies of the Federal Government shall . . . utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making''); 40 CFR 1501.2 (''Agencies should integrate the NEPA process with other planning and authorization processes at the earliest reasonable time. . . .''); *see also* CEQ, Memorandum for Heads of Federal Departments and Agencies, *Improving the Process for Preparing Efficient and Timely Environmental Reviews under the National Environmental Policy Act* (''Efficient Environmental Reviews''), 77 FR 14473 (Mar. 12, 2012), *https://ceq.doe.gov/docs/ceq-regulations-and-guidance/Improving_NEPA_Efficiencies_06Mar2012.pdf.*

[139] *See https://www.sustainability.gov/progress.html* for agency sustainability plans and agency adaptation plans; *see also* U.S. Climate Resilience Tool Kit, *National Fish, Wildlife, and Plants Climate Adaptation Strategy, https://toolkit.climate.gov/tool/national-fish-wildlife-and-plants-climate-adaptation-strategy;* Interagency Climate Adaptation Task Force, *National Action Plan: Priorities for Managing Freshwater Resources in a Changing Climate* (Oct. 2011), *https://www.epa.gov/sites/default/files/2016-12/documents/2011_national_action_plan_1.pdf;* and CEQ, Off. of the Federal Chief Sustainability Officer, *Climate Resilient Infrastructure and Operations, https://www.sustainability.gov/adaptation/.*

[140] *See, e.g.,* Jane Ebinger & Walter Vergara, World Bank, *Climate Impacts on Energy Systems: Key Issues for Energy Sector Adaptation,* 89–90 (2011), *https://openknowledge.worldbank.org/bitstream/handle/10986/2271/600510PUB0ID181mpacts09780821386972.pdf?sequence=1&isAllowed=y* (describing the potential for adaptation-related decision errors including ''maladaptation,'' in which actions are taken that constrain the ability of other decision makers to manage the impacts of climate change).

[141] *See infra Section* VI(E); E.O. 12898, *Federal Actions to Address Environmental Justice in Minority and Low-Income Populations,* 59 FR 7629 (Feb. 16, 1994), *https://www.archives.gov/files/federal-register/executive-orders/pdf/12898.pdf,* as amended by E.O. 14008, *supra* note 7, section 219 (''Agencies shall make achieving environmental justice part of their missions by developing programs, policies, and activities to address the disproportionately high and adverse human health, environmental, climate-related and other cumulative impacts on disadvantaged communities, as well as the accompanying economic challenges of such impacts.''); CEQ, *Environmental Justice Guidance Under the National Environmental Policy Act* (Dec. 1997), *https://ceq.doe.gov/docs/ceq-regulations-and-guidance/regs/ej/justice.pdf.*

[142] *See, e.g.,* Federal Interagency Working Group on Environmental Justice & NEPA Committee, *Promising Practices for EJ Methodologies in NEPA Reviews* (Mar. 2016), *https://www.epa.gov/sites/default/files/2016-08/documents/nepa_promising_practices_document_2016.pdf.*

risk. Increased resilience could minimize such potential future effects. Finally, considering climate change preparedness and resilience can help ensure that agencies evaluate the potential for generating additional GHGs if a project has to be replaced, repaired, or modified, and minimize the risk of expending additional time and funds in the future.

VI. Traditional NEPA Tools and Practices

A. Scoping and Framing the NEPA Review

Scoping helps agencies integrate decision making, avoid duplication, and focus NEPA reviews.[143] In scoping, the agency determines the issues that the NEPA review will address and identifies the effects related to the proposed action that the analysis will consider.[144] An agency can use the scoping process to help it determine whether analysis is relevant and, if so, the extent of analysis appropriate for a proposed action.[145] When scoping for the climate change issues associated with the proposed action, and reasonable alternatives (as well as the no-action alternative), the nature, location, timeframe, and type of the proposed action and the extent of its effects will help determine the degree to which to consider climate projections, including whether climate change considerations warrant emphasis, detailed analysis, and disclosure.[146]

Consistent with this guidance, agencies may develop their own agency-specific practices and guidance for framing NEPA reviews. Grounded in the principles of proportionality and the rule of reason, such practices and guidance can help an agency determine the extent to which it should explore climate change effects in its decision-making processes and will assist in the analysis of the no action and proposed alternatives and mitigation.[147] The agency should explain such a framing process and its application to the proposed action to the decision makers and the public during the NEPA review and in the EA or EIS document.

B. Incorporation by Reference

Agencies should consider using incorporation by reference in considering GHG emissions or where an agency is considering the implications of climate change for the proposed action and its environmental effects. The NEPA review for a specific action can incorporate by reference earlier programmatic studies or information such as management plans, inventories, assessments, and research, as well as any relevant programmatic or other NEPA reviews.[148] Agencies should identify situations where prior studies or NEPA analyses are likely to cover emissions or adaptation issues, in whole or in part, and incorporate them by reference in NEPA documents (including tiered NEPA documents) where appropriate. Agencies should confirm that prior studies or programmatic documents were conducted within a reasonable timeframe of the proposed action under consideration such that underlying assumptions are still applicable. Incorporation by reference may be helpful when larger scale analyses have considered climate change effects and GHG emissions, and calculating GHG emissions for a specific action would provide only limited information beyond the information already collected and considered in the larger scale analyses.

Agencies should use the scoping process to consider whether they should incorporate by reference GHG analyses from other programmatic studies, action specific NEPA reviews, or programmatic NEPA reviews to avoid duplication of effort. Furthermore, agencies should engage other agencies and stakeholders with knowledge of related actions to participate in the scoping process to identify relevant GHG and adaptation analyses from other actions or programmatic NEPA documents. In addition, agencies are encouraged to use searchable databases, websites, GIS tools, and other technology to share NEPA reviews with relevant agencies, stakeholders, and the public.

C. Programmatic or Broad-Based Studies and NEPA Reviews

In the context of long-range energy, transportation, resource management, or similar programs or strategies, an agency may decide that it would be useful and efficient to provide an aggregate analysis of GHG emissions or climate change effects in a programmatic analysis and then incorporate it by reference into future NEPA reviews. These broad analyses may occur through programmatic NEPA documents, or they may occur through other processes by which agencies conduct analyses or studies at the national or other broad scale level (*e.g.,* landscape, regional, or watershed) to assess the status of one or more resources or to determine trends in changing environmental conditions.[149] In appropriate circumstances, agencies may rely on programmatic analyses to make project-level NEPA reviews more efficient by evaluating and analyzing effects at an earlier stage and at a broader level than project-specific actions. Agencies also can use programmatic analysis to analyze emissions from related activities in a given region or sector, or to serve as benchmark against which agencies can measure site-specific actions.[150]

A tiered, analytical decision-making approach using a programmatic NEPA review is used for many types of Federal actions and can be particularly relevant to addressing proposed land, aquatic, and other resource management plans. Under such an approach, an agency conducts a broad-scale programmatic NEPA analysis for decisions such as establishing or revising the USDA Forest Service land management plans, Bureau of Land Management resource

[143] *See* 40 CFR 1501.9 (''Agencies shall use an early and open process to determine the scope of issues for analysis in an environmental impact statement, including identifying the significant issues and eliminating from further study non-significant issues.''); *see also* CEQ, Efficient Environmental Reviews, *supra* note 139 (the CEQ Regulations explicitly require scoping for preparing an EIS; however, agencies also can take advantage of scoping whenever preparing an EA).

[144] *See* 40 CFR 1500.4(d), 1500.4(i), 1501.9(a) and (e).

[145] *See* 40 CFR 1501.9 (The agency preparing the NEPA analysis must use the scoping process to, among other things, determine the scope and identify the significant issues to be analyzed in depth); CEQ, *Memorandum for General Counsels, NEPA Liaisons, and Participants in Scoping* (Apr. 30, 1981), *https://www.energy.gov/sites/default/files/nepapub/nepa_documents/RedDont/G-CEQ-scopingguidance.pdf.*

[146] As noted *infra* in section VI(E), to address environmental justice concerns, agencies should use the scoping process to identify potentially affected communities and provide early notice of opportunities for public engagement.

[147] *See, e.g.,* U.S. Forest Service, *The Science of Decisionmaking: Applications for Sustainable Forest and Grassland Management in the National Forest System* (2013), *https://www.fs.usda.gov/research/treesearch/44326;* U.S. Forest Service, *The Comparative Risk Assessment Framework and Tools* (2010), *https://www.fs.usda.gov/treesearch/pubs/34561;* Julien Martin, et al., *Structured decision making as a conceptual framework to identify thresholds for conservation and management,* 19 Ecological Applications 1079–90 (2009), *https://pubs.er.usgs.gov/publication/70036878.*

[148] *See* 40 CFR 1502.4(b), 1501.12.

[149] Programmatic studies may be distinct from programmatic NEPA reviews in which the programmatic action itself is subject to NEPA requirements. *See* CEQ, *Memorandum for Heads of Federal Departments and Agencies, Effective Use of Programmatic NEPA Reviews,* section I(A), 9 (Dec. 18, 2014), *https://ceq.doe.gov/docs/ceq-regulations-and-guidance/Effective_Use_of_Programmatic_NEPA_Reviews_Final_Dec2014_searchable.pdf* (discussing non-NEPA types of programmatic analyses such as data collection, assessments, and research, which previous NEPA guidance described as joint inventories or planning studies).

[150] For instance, where a planning level programmatic review of GHG emissions indicates that a collection of individual actions will collectively reduce GHG emissions, the NEPA analyses for the individual actions can demonstrate that the action is consistent with the emission reductions examined in the programmatic review.

management plans, or Natural Resources Conservation Service conservation programs. Subsequent NEPA analyses for proposed site-specific decisions—such as proposed actions that are consistent with land, aquatic, and other resource management plans—may be tiered from the broader programmatic analysis, drawing upon its basic framework analysis to avoid repeating analytical efforts for each tiered decision. Examples of project- or site-specific actions that may benefit from being able to tier to a programmatic NEPA review include: siting and constructing transmission lines; siting and constructing wind, solar or geothermal projects; conducting wildfire risk reduction activities such as prescribed burns or hazardous fuels reduction; approving grazing leases; granting rights-of-way; and approving site-specific resilience or climate adaptation actions.

A programmatic NEPA review also may serve as an efficient mechanism in which to assess Federal agency efforts to adopt broad-scale sustainable practices for energy efficiency, GHG emissions avoidance and emissions reduction measures, petroleum product use reduction, and renewable energy use, as well as other sustainability practices.[151] While broad department- or agency-wide goals may be of a far larger scale than a particular program, policy, or proposed action, an analysis that informs how a particular action affects that broader goal can be of value.

D. Using Available Information

Agencies should make decisions using current scientific information and methodologies. CEQ does not necessarily expect agencies to fund and conduct original climate change research to support their NEPA analyses or for agencies to require project proponents to do so. Agencies should exercise their discretion to select and use the tools, methodologies, and scientific and research information that are of high quality and available to assess relevant effects, alternatives, and mitigation.[152]

E. Environmental Justice Considerations

Numerous studies have found that environmental hazards (including those driven by climate change) are more prevalent in and pose particular risks to areas where people of color and low-income populations represent a higher fraction of the population compared with the general population.[153] The NEPA process calls for identifying potential environmental justice-related issues and meaningfully engaging with communities that proposed actions and reasonable alternatives (as well as the no-action alternative) may affect.

Agencies should be aware of the ongoing efforts to address the effects of climate change on human health and vulnerable communities.[154] Certain groups, including children, the elderly, communities with environmental justice concerns, which often include communities of color, low-income communities, Tribal Nations and Indigenous communities, and underserved communities are more vulnerable to climate-related health effects and may face barriers to engaging on issues that disproportionately affect them. CEQ recommends that agencies regularly engage environmental justice experts and leverage the expertise of the White House Environmental Justice Interagency Council [155] to identify approaches to avoid or minimize adverse effects on communities of color and low-income communities.[156]

When assessing environmental justice considerations in NEPA analyses, agencies should use the scoping process to identify potentially affected communities and provide early notice of opportunities for public engagement. This is important for all members of the public and stakeholders, but especially for communities of color and low-income communities, including those who have suffered disproportionate public health or environmental harms and those who are at increased risk for climate change-related harms. Agencies should engage such communities early in the scoping and project planning process to understand any unique climate-related risks and concerns. Agencies also should use the NEPA process to identify and analyze reasonably foreseeable effects, reasonable alternatives, and measures to avoid or minimize any such effects.

F. Monetizing Costs and Benefits

NEPA does not require a cost-benefit analysis where all monetized benefits and costs are directly compared. In a NEPA review, the weighing of the merits and drawbacks of the various alternatives need not be displayed using a monetary cost-benefit analysis and should not be when there are important qualitative considerations.[157] Using the SC–GHG to provide an estimate of the cost to society from GHG emissions—or otherwise monetizing discrete costs or benefits of a proposed Federal action—does not necessitate conducting a benefit-cost analysis in NEPA documents. As described in Section IV(B), the SC–GHG estimates are useful information disclosure metrics that can help decision makers and the public understand and contextualize GHG emissions and climate damages. Agencies can use the SC–GHG to provide information on climate impacts even if other costs and benefits cannot be quantified or monetized.

If an agency determines that a monetary cost-benefit analysis is appropriate and relevant to the choice among different alternatives the agency is considering, the agency may include the analysis in or append it to the NEPA document, or incorporate it by reference [158] as an aid in evaluating the environmental consequences. For example, a rulemaking could have useful information for the NEPA review in an associated regulatory impact analysis, which the agency could incorporate by reference in a NEPA document.[159]

When using a monetary cost-benefit analysis, just as with tools to quantify emissions, an agency should disclose the assumptions, alternative inputs, and

[151] *See* E.O. 14057, *supra* note 7 (establishing government-wide and agency GHG reduction goals and targets).

[152] *See* 40 CFR 1502.23 (requiring agencies to ensure the professional and scientific integrity of the discussions and analyses in environmental impact statements).

[153] *See, e.g.,* USGCRP, Fourth National Climate Assessment, *supra* note 28, Volume II, 342 and 1077–78; USGCRP, *The Impacts of Climate Change on Human Health in the United States: A Scientific Assessment* (Apr. 2016), *https://health2016.globalchange.gov/downloads;* EPA, *Six Impacts, supra* note 41, at 8 (Figure ES.2), *https://www.epa.gov/system/files/documents/2021-09/climate-vulnerability_september-2021_508.pdf.*

[154] USGCRP, *The Impacts of Climate Change on Human Health in the United States: A Scientific Assessment, supra* note 153.

[155] For more information on the White House Environmental Justice Interagency Council, *see https://www.energy.gov/lm/white-house-environmental-justice-interagency-council-resources.*

[156] President's Memorandum for the Heads of All Departments and Agencies, Executive Order on Federal Actions to Address Environmental Justice in Minority and Low-Income Populations (Feb. 11, 1994), *https://www.epa.gov/sites/production/files/2015-02/documents/clinton_memo_12898.pdf;* CEQ, *Environmental Justice Guidance Under the National Environmental Policy Act* (Dec. 10, 1997), *https://ceq.doe.gov/docs/ceq-regulations-and-guidance/regs/ej/justice.pdf.*

[157] *See* 40 CFR 1502.22.

[158] *See* 40 CFR 1501.12 (material may be cited if it is reasonably available for inspection by potentially interested persons within the time allowed for public review and comment).

[159] For example, the regulatory impact analysis was used as a source of information and aligned with the NEPA review for Corporate Average Fuel Economy (CAFE) standards. *See* Nat'l Highway Traffic Safety Admin., *Corporate Average Fuel Economy Standards, Passenger Cars and Light Trucks, Model Years 2017–2025, Final Environmental Impact Statement*, Docket No. NHTSA–2011–0056, section 5.3.2 (July 2012), *https://www.nhtsa.gov/corporate-average-fuel-economy/environmental-impact-statement-cafe-standards-2017-2025.*

levels of uncertainty associated with such analysis. Finally, if an agency chooses to monetize some but not all effects of an action, the agency providing this additional information should explain its rationale for doing so.[160]

VII. Conclusions and Effective Date

Agencies should use this guidance to inform the NEPA review for all new proposed actions. Agencies should exercise judgment when considering whether to apply this guidance to the extent practicable to an on-going NEPA process. CEQ does not expect agencies to apply this guidance to concluded NEPA reviews and actions for which a final EIS or EA has been issued. Agencies should consider applying this guidance to actions in the EIS or EA preparation stage if this would inform the consideration of alternatives or help address comments raised through the public comment process.

Dated: January 4, 2023.

Brenda Mallory,

Chair.

[FR Doc. 2023–00158 Filed 1–6–23; 8:45 am]

BILLING CODE 3325–F3–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2022–SCC–0112]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Federal Direct Loan Program Regulations for Forbearance and Loan Rehabilitation

AGENCY: Federal Student Aid (FSA), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing an extension without change of a currently approved information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before February 8, 2023.

ADDRESSES: Written comments and recommendations for proposed information collection requests should be submitted within 30 days of publication of this notice. Click on this link *www.reginfo.gov/public/do/PRAMain* to access the site. Find this information collection request (ICR) by selecting ''Department of Education'' under ''Currently Under Review,'' then check the ''Only Show ICR for Public Comment'' checkbox. *Reginfo.gov* provides two links to view documents related to this information collection request. Information collection forms and instructions may be found by clicking on the ''View Information Collection (IC) List'' link. Supporting statements and other supporting documentation may be found by clicking on the ''View Supporting Statement and Other Documents'' link.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Beth Grebeldinger, 202–377–4018.

SUPPLEMENTARY INFORMATION: The Department is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Federal Direct Loan Program Regulations for Forbearance and Loan Rehabilitation.

OMB Control Number: 1845–0119.

Type of Review: An extension without change of a currently approved ICR.

Respondents/Affected Public: Individuals and households.

Total Estimated Number of Annual Responses: 129,027.

Total Estimated Number of Annual Burden Hours: 35,094.

Abstract: This information collection for the Direct Loan (DL) Program regulations is related to regulations for forbearance in § 685.205 and reasonable and affordable loan rehabilitation in § 685.211. The Department of Education is requesting an extension without change of the current burden calculated for this information collection. Due to the COVID–19 pandemic and loan payment pause, there is not sufficient information to estimate burden changes. These regulations provide additional flexibilities for DL borrowers and permit oral requests for forbearance, as well as allow a borrower to object to the initially established reasonable and affordable loan repayment amount. In addition, if a borrower incurs changes to his or her financial circumstances, the borrower can provide supporting documentation to change the amount of the reasonable and affordable loan monthly repayment amount. There has been no change to the regulatory language.

Dated: January 4, 2023.

Juliana Pearson,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2023–00160 Filed 1–6–23; 8:45 am]

BILLING CODE 4000–01–P

ELECTION ASSISTANCE COMMISSION

Sunshine Act Meetings

AGENCY: U.S. Election Assistance Commission.

ACTION: Sunshine Act notice; notice of public meeting agenda.

SUMMARY: Public Meeting: U.S. Election Assistance Commission Technical Guidelines Development Committee Annual Meeting.

DATES: Thursday, January 26, 2023, 1:00–4:30 p.m. ET.

ADDRESSES: The virtual meeting is open to the public and will be livestreamed on the U.S. Election Assistance Commission YouTube Channel: *https://www.youtube.com/channel/UCpN6i0g2rlF4ITWhwvBwwZw.*

FOR FURTHER INFORMATION CONTACT: Kristen Muthig, Telephone: (202) 897–9285, Email: *kmuthig@eac.gov.*

SUPPLEMENTARY INFORMATION:

Purpose: In accordance with the Government in the Sunshine Act (Sunshine Act), Public Law 94–409, as amended (5 U.S.C. 552b), the U.S. Election Assistance Commission (EAC) will conduct the virtual annual meeting of the EAC Technical Guidelines Development Committee (TGDC) to discuss regular business of the board.

Agenda: The EAC and TGDC members will hold a virtual meeting to discuss program updates for EAC Testing and Certification and the National Institute of Standards and Technology (NIST) Voting Program. The meeting will also include the status of the Voluntary Electronic Pollbook Pilot Program, the annual review of proposed changes to the Voluntary Voting System Guidelines (VVSG), as well as public feedback from the October 2022 Path to

[160] For example, the information may be responsive to public comments or useful to the decision maker in further distinguishing between alternatives and mitigation measures. In all cases, the agency should ensure that its consideration of the information and other factors relevant to its decision is consistent with applicable statutory or other authorities, including requirements for the use of cost-benefit analysis.

DECLARATION OF CATHERINE FOLIO

1. My name is Catherine Folio and I am of legal age and competent to give this declaration, and all information herein is based on my personal knowledge, unless otherwise indicated.
2. I live on and own and operate an organic farm on my property, located at 1557 Sugar Hollow Road, Effort, PA 18330 ("my land"). I have lived on my land for ten years. I am a dedicated conservationist and am extremely passionate about maintaining my land and organic farm.
3. My land will be affected by the Regional Energy Access Expansion Project ("REAE"). I granted an Option and Right of Way Easement to REAE under the impending threat of eminent domain across my property. I use and enjoy the surrounding areas of my property, which has been and will continue to be harmed by REAE.
4. Sugar Hollow Creek, a high-quality cold-water stream containing trout, runs through my farm on the east side of my property.[1] Transco would have to "dewater" my creek to bury REAE under it, which would adversely affect the trout in the creek and my magpie duck that lives along the creek and minimizes pests. I am very concerned that the dewatering of the creek and

[1] Attached is a screenshot of satellite imagery of my property, which shows the stream.

subsequent boring would harm the trout and may kill the duck or drive him away.

5. I have two grants on my land from the local conservation district and the US Department of Agriculture/Natural Resources Conservation Service for conservation measures and invasive species removal. The local conservation district planted 44 native trees and shrubs on my land, and they planted a riparian buffer zone between Sugar Hollow Creek and my crops.
6. I did not want to sign the easement, and I am adamantly opposed to the project, but I knew that if I didn't sign the easement agreement, Transco would use eminent domain and forcefully acquire rights to my land anyway. I continue to oppose REAE on the grounds that it will cause irreversible damage on my property and my farm, interfere with my property rights, and damage the character and environmental integrity of lands I have worked so hard to conserve. For example, on April 30, 2021, I submitted comments in Transco's FERC docket CP21-94, wherein I threatened to sue Williams for compensation if Transco would damage, destroy, or contaminate any of the following on my land: my storage sheds; my shallow well; the plants my family and I installed for conservation purposes; any native trees and shrubs that the local conservation district and USDA/NRCS installed; and Sugar Hollow Creek. (Accession No. 20210430-5075). On April 19, 2022, I

submitted more comments that urged FERC to consider the Regional Access Pipeline's significant adverse impacts to climate change, environmental justice communities, wildlife, streams, forests, and natural resources more fully. I encouraged FERC to deny the Regional Access Pipeline Project. (Accession No.20220419-5041).

7. My land has already been damaged by tree-felling for the pipeline – and this damage will only be exacerbated as Transco continues construction. On issuance of the Notice to Proceed with tree felling on March 16, Transco immediately came out and began cutting my trees on March 16th at around 4:15 pm. My understanding is that they did this prior to issuing a rehearing order. Transco cut down the trees on my property that were the only visual screen protecting my home from the stripped land for REAE. The damage caused by the construction of REAE is a highly visible eyesore for me.
8. In addition to the trees that have already been cut down, my land will suffer from significant and irreversible damage, including, but not limited to:
    a. Additional, exacerbated flooding from yet more tree and vegetation clearing, which would negatively impact my well, my crops, vegetation, and the water table generally;
    b. Contamination from REAE's crossing of Sugar Hollow Creek directly next to, or potentially on, my land;

c. Contamination to water from my well, which is right next to the easement, and damage to the water table and hydrology generally, because my well water is consistently at an approximate shallow depth of 5 feet throughout my land; and

d. Adverse impacts to my storage sheds, at least one of which is right next to or potentially within the temporary workspace easement; increased, exacerbated flooding; contamination of my creek, shallow water table and well; and adverse impacts to my storage sheds.

9. I grew up in Elizabethport, New Jersey where I was exposed to and experienced significant noise and environmental pollution. I bought this rural land ten years ago for peace and solace and to farm organically. Now I cannot enjoy my own property or work outside while Transco is working because of the dust and noise. If the pipeline becomes operational, its presence and infringement on my land will continuously interfere with my use and enjoyment of my land.

10. REAE has already and will continue to adversely impact and interfere with my conservation efforts, general use, and enjoyment of my land.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 19, 2023

Catherine Folio

Catherine Folio

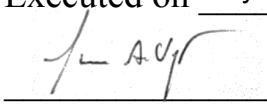
DECLARATION OF
AQUASHICOLA POHOPOCO WATERSHED CONSERVANCY

1) My name is Jim Vogt. I have been the President of the Aquashicola Pohopoco Watershed Conservancy ("APWC") since 2010.
2) APWC is a 501(c)(3) citizen-based, volunteer non-profit organization that was formed in 2001 as a watchdog for the Aquashicola and Pohopoco Watersheds in Monroe County, Pennsylvania.
3) REAE will adversely affect APWC because it will run through Monroe County and specifically impact the areas APWC protects, including Pohopoco Creek, Poplar Creek (a tributary to Pohopoco Creek), Sugar Hollow Creek, and Princess Run, thereby damaging the areas that APWC exists to protect and adversely impacting APWC's stewardship of and ability to raise public awareness about these special resources.
4) REAE will cut across the watersheds' drainage patterns and create ground disturbances and runoffs that will adversely impact the watersheds' water quality and the wildlife that depend on it to thrive.
5) APWC uses the watersheds throughout the year for educational and community events, water monitoring, recreational activities, and conservation work. APWC's volunteers fish, hike, and bird in the creeks that REAE will traverse through. REAE would diminish APWC volunteers'

enjoyment and use of the watersheds, and would impede APWC's pursuit of its organizational mission to preserve them. APWC protects the public interest in these resources, and will suffer directly from FERC's erroneous conclusion that this project serves the public interest.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 20, 2023



Jim Vogt
President

DECLARATION OF JIM VOGT

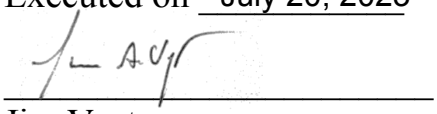
1) My name is Jim Vogt. I have been the President of the Aquashicola Pohopoco Watershed Conservancy ("APWC") since 2010.
2) I have lived on Aquashicola Creek for 36 years and have found it to be a great source for fishing, birding, and hiking – not to mention the peace of mind given by listening to the sound of rushing water over gravel bars. I have caught small native brook trout, marveling at the amazing colors of our Pennsylvania State fish. Native brook trout live within the waterbodies that REAE will cross and thus will be directly affected by the project. REAE could negatively impact native brook trout through direct contact with construction equipment, disruption of critical spawning and foraging areas, introduction of pollutants, and impediments to migration, affecting their population and habitat health, and adversely impact my ongoing and future use and enjoyment of the impacted waters.
3) I have been birding in the area since we moved here, and have seen the remarkable arrival of the Spring warblers, looking like feathered jewels as they arrive from their long flights from Central and South America, either passing through or claiming territories to rear a new generation. REAE would hurt the quality of habitat for forest species like the warblers because its construction and operation would result in a loss of forest habitat that

includes tree felling, expansion of existing corridors, and the creation of open early succession and induced edge habitats.

4) I have participated in the Great Backyard Bird Count, a three day event in February to list all species observed. In the past few years, I have seen Bald Eagles, our National symbol, in increasing numbers. This is something I never thought to see in my lifetime, and is an indicator of the value of preserved land. The best breeding habitats, roosting, and foraging for the Bald Eagle are areas near waterbodies like the Pohopoco Creek. Bald Eagles are sensitive to human activities such as construction, noise, and disturbance potentially causing them to abandon their habitat. Thus, REAE's construction and crossing of waterbodies like the Pohopoco Creek will adversely affect my birding activities, and thus my overall use and enjoyment of the impacted waterbodies in which I frequent.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 20, 2023



Jim Vogt
Resident in Aquashicola Creek, and President of APWC

DECLARATION OF ALEXANDER JACKSON, PhD

I, Alexander Jackson, PhD, state and affirm as follows:

1. I am of legal age, I am competent to give this declaration, and I have personal knowledge of the statements contained herein unless otherwise indicated, and could competently testify to them if called as a witness.

2. My address is 1355 Mathews Drive, Blakeslee, Pennsylvania.

3. I am a biologist, and I earned my PhD from the University of California.

4. I have been working for a local non-profit, the Brodhead Watershed Association, as an environmental educator for years. I am also a member of Delaware Riverkeeper Network. As a member of Delaware Riverkeeper Network, I participate by providing valuable information to Delaware Riverkeeper Network staff about impacts to waterways and habitats in my area.

5. My family and I live 1400 feet away from Transcontinental Gas Pipe Line Company, LLC's easement, near Effort Loop MP 53.5. I drive through this easement every day of my life to carry on my affairs.

6. All residents of Sierra View, which total over 1500, must drive through the easement regularly, because the two roads that cross the easement are the only egress out of the Sierra View community.

7. Lately, the pipeline construction has caused traffic in the neighborhood on Mathews drive, and Allegheny drive, significantly disrupting my daily routine.

8. The sound of the bulldozers and other heavy equipment travels easily over 1400 feet and disrupts my quality of sleep, and thus my overall welfare.

9. Tree felling was extremely disruptive to our community, and now all the stumps have been ground and removed, leaving over 100 feet of open dirt along

our entire community causing significant visual negative impacts on our previously scenic viewsheds.

10. I enjoy the bucolic, rural nature of my community. Seeing dozens of acres of open dirt and loud heavy equipment and the destruction of the habitat for wildlife and pollinators has severely impacted my enjoyment of this community and has been devastating to my morale.

11. The pipeline company has also destroyed the scenic viewshed of the Pocono Plateau escarpment visible from SR 115, half of the previously forested ridge is now open dirt, which has had significant negative impacts on my welfare as a resident.

12. Because the pipeline company decided to rush construction during the growing season, instead of waiting until after November, all the pollinator and wildlife habitat has been significantly disrupted during the vital nesting and foraging season. This pollinator and wildlife habitat is an important component of my overall enjoyment and benefits the welfare of our community. By deciding to do the project directly in the growing season, it is likely that significant generational impacts will be felt for years to come which will negatively impact my welfare.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: 7/21/23

Signed: _____
Alexander Jackson, PhD

DECLARATION OF DAVID L. STEINBERG

Pursuant to 28 U.S.C. § 1746, I, David L; Steinberg, hereby declare:

1. I reside at 825 East Clements Bridge Rd. Apartment #313, Runnemede Borough, Camden County, NJ 08078. My home is located in a senior housing facility less than one half mile from NJ TPK, Exit #3.

2. My residence is within the Delaware River Basin.

3. I have been a member of the Delaware Riverkeeper Network ("DRN") since September 26, 2019. I joined DRN because I believe in their mission of preserving and protecting the Delaware River, its tributaries, and the communities that it supports, and I wanted to learn more about pollution and other environmental threats that impact my home and community.

4. Since 2018, I served as Chair of the "Towns Helping Towns Committee" within *Tri-County Sustainability*, a group that is the official HUB or region, for Burlington, Camden, and Gloucester Counties for Sustainable Jersey. I provide Mentors who help Communities become Certified with Sustainable Jersey.

a. My committee was awarded the 2020 Sustainable Jersey's "Collaboration Award" because my team of Mentors assisted ten (10) new towns to become Certified Bronze and Silver with Sustainable Jersey, during the first year of Covid-19.

b. Sustainable Jersey certification is a free, voluntary, and prestigious designation for municipal governments in New Jersey. Municipalities that achieve certification are considered by their peers, state government and experts and civic organizations in New Jersey, to be among the leaders in the state in fighting greenhouse gases and promoting actions that enhance sustainability for not only the towns, but there are many actions for their residents, as well.

c. To qualify for certification, there are 18 categories: Animals in the Community; Arts and Creative Culture; Brownfields; Community Partnership and Outreach; Diversity and Equity; Emergency Management and Resiliency; Energy; Food; Green Design; Health and Wellness; Innovative Community Projects; Land Use and Transportation; Local Economies; Natural Resources; Operations & Maintenance; Public Information and Engagement; Sustainability & Climate Planning; and Waste Management.

d. Towns can choose from over 180 actions and there are between 4 and 15 actions in each category. Each action has a point category assigned to it from 5 to 50 points depending on the level of difficulty. There are stringent criteria that must be met for each action with sufficient documentation by the town in order to qualify. There are three designations:

Bronze -150 points, Silver - 350 points and for Gold, there must be high levels of achievement in Energy, Health, and Water Actions. Sustainable Jersey provides guidance, assistance, municipal grants, resources, events, and technical support to help towns achieve their certifications. The website is: https://www.sustainablejersey.com/

e. These activities have reduced municipal and property owners carbon footprints, reduces dependence on fossil fuels, provides cleaner air and water, helps to restore nature, saves taxpayers money by being more efficient in operation of the city or town, saves precious resources, and improves the quality of life for each resident. As of December 2022, there have been 466 total registered towns out of 565 towns in NJ, 199 are Currently Certified, 15,735 Actions Approved, and 4 Gold Stars Awarded.

5. Volunteering for Delaware Riverkeeper Network in 2020, I have helped oppose the proposed Liquified Natural Gas export plant in Gibbstown, NJ by New Fortress Energy. I have made presentations to many municipalities seeking to issue a resolution against this project. In addition, I have partnered with many individuals and other environmental groups, such as Sierra Club and Food and Water Watch, etc., and together we have secured a total of 39 Resolutions, including 18 Towns, and 21 Environmental, Faith Based and Civic Groups.

6. Since December 2022, I have been volunteering for Camden For Clean Air, a group that fighting to close a Covanta incinerator, another emitter of dangerous chemicals in a densely populated area because of the high rate of cancer, asthma, and other diseases in the immediate area that is located in Camden, NJ, an Environmental Justice Community designated by the Environmental Justice Law passed in 2020 (N.J. Stat. § 13:1D-157).

7. If the Transco REAE Project is built and becomes operational, it will substantially increase New Jersey's greenhouse gas emissions according to the Environmental Impact Statement prepared by FERC.

8. I have devoted considerable time and effort to reduce greenhouse gas emissions and air pollution in my region and across the state through my involvement in Sustainable Jersey and in opposing specific high-emitting projects, and the approval of such a large source of greenhouse gases and pollution directly counters those efforts and achievements. Increased air pollution in my state will

9. In 2019, I was honored by New Jersey *League of Conservation Voters* with their "Changemaker Award" for my work with the now-closed *Philadelphia Energy Solutions* refinery, which was built in stages starting in 1870, directly over the Potomac-Raritan-Magothy Aquifer System. I have spoken to officials in the Pennsylvania Department of Environmental Protection, Environmental Protection Agency Regions 2 and 3, and New Jersey Department of Environmental Protection,

researched and attended about 35 to 40 meetings to determine if the pollution already detected in the Refinery site found in the aquifer that has migrated to the Philadelphia Navy Yard. My concern is that it could or will affect my food and/or drinking water, as farmers use this water for their crops and livestock and the aquifer supplies drinking water in New Jersey.

10. Groundwater pollution in my region is an important issue to me, and Transco's proposal to develop additional infrastructure (in the form of a compressor station) near the Solvay Specialty Polymers USA site may disturb contaminated groundwater. This site has been under NJ DEP remediation for many years. In 2013, PFAS chemicals were found to be in nearby Mantua and Woodbury Creeks and in the water supply of West Deptford, Paulsboro, Mantua, Woodbury and other nearby towns.

11. I often visit the RiverWinds Recreation Area in West Deptford, NJ that attracts people from a wide geographic area because of the scenic vistas overlooking the skyline of Philadelphia and directly across the Delaware River from the Philadelphia Airport where my friends and I love to watch airplanes take off and land. This is a beautiful, serene place to spend time relaxing and renewing. The site originally was supposed to be the site of a refinery, but it was never built, the land was sold, and hundreds of beautiful homes were built, with a regional community center, athletic fields, a restaurant overlooking the river, an amphitheater, very

popular with a boaters, a golf course all the while preserving hundreds of acres teeming with wildlife. RiverWinds also fronts on a body of water known as the Main Ditch, which empties into the Delaware River and is within a few hundred feet of the proposed location of the West Deptford Compressor Station. I intend to continue visiting RiverWinds with friends on a regular basis.

12. If the Transco REAE Project is built and becomes operational, I will not be able to enjoy my time at RiverWinds as much as I have been because of my concern that construction disturbing the contaminated site would degrade the water quality even more, impacting the habitats and wildlife that depend on the Delaware River for survival. My ability to enjoy the RiverWinds area, as well as my general well-being will be harmed by increased air pollution caused by the combustion and emissions of gas transported by the Project. My enjoyment of the area will also be diminished as these habitats and wildlife will suffer from climate-change-related adverse effects as a result of the Project's large contribution to New Jersey's greenhouse gas budget and resulting inability to meet reduction goals.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 21st Day of July 2023.

David L. Steinberg

David L. Steinberg

DECLARATION OF MAYA VAN ROSSUM

Pursuant to 28 U.S.C. § 1746, I, Maya van Rossum, hereby declare:

1. I reside at 716 South Roberts Road, Bryn Mawr, Delaware County, Pennsylvania, 19010. My residence is within the Delaware River Basin. In addition I own a part time residence at 263 Lebanon Road, Glen Spey, NY. This part time home is located within the Delaware River Basin.

2. I earned my Juris Doctor from Pace University School of Law, and then earned a Masters of Law in Corporate Finance from Widener University School of Law. While at Pace University, I secured a certificate for pursuing a special program focused on environmental law and participated in the Environmental Law Clinic that pursued legal work addressing River issues. In 1992 I worked as the staff attorney in the Environmental Law Clinic at Widener University School of Law where I engaged in advocacy and litigation on behalf of the Delaware Riverkeeper Network while providing support to Law Clinic students similarly engaged. In 1994, I came to work for the Delaware Riverkeeper Network as the organization's Executive Director. In 1996, I was appointed Delaware Riverkeeper and leader of the Delaware Riverkeeper Network. I am also a member of the Delaware Riverkeeper Network.

3. Delaware Riverkeeper Network was established in 1988. It is a nonprofit 501(c)(3) membership organization. Delaware Riverkeeper Network

advocates for the protection of the Delaware River, its tributary streams, and the habitats and communities of the Delaware River Watershed. The mission of Delaware Riverkeeper Network is to champion the rights of communities to a Delaware River and tributary streams that are free flowing, clean, healthy and abundant with a diversity of life.

4. The Delaware Riverkeeper Network office is located at 925 Canal Street, Suite 3701, Bristol, PA 19007. Currently there are 22 staff members and numerous volunteers. The volunteer network is fluid, constantly changing, and project-specific. The exact number changes on a year-to-year basis. Thousands of individuals have done work for us in the past, undertaking water quality monitoring, stream clean ups, habitat restoration projects, and/or getting actively engaged in defending the Delaware River, its watershed, habitats and ecosystems through, for example, letter writing, participation in the public process, organizing activities and events, sharing information, and educating others to become involved.

5. Delaware Riverkeeper Network's professional staff and volunteers work throughout the entire Delaware River Watershed, including the four watershed states of Pennsylvania, New Jersey, Delaware, and New York. Delaware Riverkeeper Network is also involved at the national level and in other states in the United States to the extent involvement advances our mission and goals as an organization. Delaware Riverkeeper Network and its volunteers maintain a breadth

of knowledge about the environment, as well as expertise specific to rivers and watersheds. Delaware Riverkeeper Network provides effective environmental advocacy, volunteer monitoring programs, stream restoration projects, technical analyses, and public education. In addition, Delaware Riverkeeper Network takes steps necessary to ensure the enforcement of environmental laws, including pursuing legal actions as needed and appropriate.

6. Our membership provides irreplaceable participation in, and support for, Delaware Riverkeeper Network advocacy, restoration, scientific monitoring and data collection, education and litigation initiatives. Membership is demonstrated in a number of different ways, including but not limited to: making donations, participating in events, signing letters targeted to decision-makers, participating in Delaware Riverkeeper Network public information sessions, helping distribute Delaware Riverkeeper Network information including alerts and fact sheets, responding to Delaware Riverkeeper Network calls for action on projects and issues, volunteering as a water quality monitor, assisting with Delaware Riverkeeper Network restoration projects or actively communicating with Delaware Riverkeeper Network about our work and issues of concern in the Watershed, signing up and/or donating financial support. Delaware Riverkeeper Network basic membership is free of charge.

7. Delaware Riverkeeper Network has on the order of 26,000 members, the vast majority of whom live, work, and/or recreate within the Delaware River Basin. We represent the recreational, educational, and aesthetic interest of our members who enjoy many outdoor activities in the Delaware River Basin, including camping, boating, swimming, fishing, birdwatching, hunting and hiking. Additionally, we represent the economic interests of many of our members who own businesses that rely on a clean river ecosystem, such as ecotourism activities, fishing, or boating. Furthermore, Delaware Riverkeeper Network also represents the health interests of those who use the Delaware River watershed's resources for drinking, cooking, farming, swimming, or gardening. And we support the protection and restoration of the Delaware River, its tributaries and watershed, and the creation and honoring of constitutional environmental rights for the benefit of present and future generations.

8. Delaware Riverkeeper Network has members who use and enjoy the areas to be impacted by Transcontinental Gas Pipe Line Company, LLC's Regional Energy Access Expansion ("Project"). These members will be harmed by impacts to their aesthetic and recreational uses of wetlands, forests, and parks near the Project, including but not limited to birding, fishing, wildlife-spotting, nature walks, and hiking. Delaware Riverkeeper Network members will be harmed by the pollution and ecological damages that will be associated with the construction and operation

of the Project. Injuries will take the form of diminished aesthetic beauty of these natural systems; diminished recreational enjoyment due to the temporary and permanent ecological damage that will be inflicted; the permanent loss of ecological resources they value personally, professionally and aesthetically; and damaged family values and enjoyment of healthy natural spaces. Delaware Riverkeeper Network members will be damaged by injuries to their health and their sense of wellbeing and safety that result from the operation of the Project surrounding properties they own as well as public parks they enjoy and have contributed financially (either through direct donations or through tax dollar contributions) to help preserve. Delaware Riverkeeper Network members will be damaged by the adverse impacts that will result from increased climate instability resulting from methane and other greenhouse gas emissions resulting from Project construction, operation and maintenance and the ramifications of climate instability on sea level rise as well as increased flooding and flood damages in the Delaware River system.

9. An important service that Delaware Riverkeeper Network provides to its members is providing them with information about federal, state, and private actions that may impact our members' recreational, aesthetic, and economic interests. We obtain this information by closely tracking projects as they move through regulatory and local approval processes, and by submitting requests under laws such as the federal Freedom of Information Act, Pennsylvania's Right to Know

Law, New Jersey's Open Public Records Act, New York's Freedom of Information Law, and Delaware's Freedom of Information Act, for relevant applications, government analyses, and other environmental documents. Our professional staff then uses their expert knowledge and experience to interpret the information obtained, communicate with our members and help our members understand the direct, indirect, cumulative and synergistic ramifications of the actions and/or decisions proposed. We help communities understand the public process around government decisionmaking and how they can be involved. The amount of time and resources Delaware Riverkeeper Network spends on providing these services depends on the thoroughness and availability of environmental documents. The more thorough and comprehensive these documents are, the easier it is for Delaware Riverkeeper Network to communicate to its members about the action's effects on their interests, and less resources are spent on providing that service.

10. Many Delaware Riverkeeper Network members are concerned with the expansion of natural gas infrastructure within the Delaware River Watershed and the resulting impact the construction, operation and/or maintenance activities have on the streams, rivers, wetlands, forests and ecological systems of the four states of the Delaware River watershed. I have also witnessed firsthand the harms to wetlands and protected waterways that have resulted from erosion and sedimentation as a direct result of mature tree clearing and soil compaction leading to greater

stormwater runoff that is associated with construction, including pipeline construction activities, and expect to be harmed by those same activities for the proposed Project. The tree clearing, grading, and pipeline construction for the Project and the continued maintenance of the right-of-way, including within exceptional value wetlands, as emergent wetlands as opposed to forested wetlands has harmed and will harm my aesthetic and recreational interests as well as those of Delaware Riverkeeper Network members who use and enjoy the areas affected by the Project. I and Delaware Riverkeeper Network members are harmed by the loss of the ecological services provided by these mature forested areas, a loss that will lead to erosion and sedimentation pollution of pristine streams and wetlands as well as to degradation of fish and wildlife habitat.

11. Delaware Riverkeeper Network members have communicated their concerns to me and my staff regarding the harms to their aesthetic and recreational interests, to their property values, to the quality of their lives, to the natural resources they value, to their businesses and/or the economies that would suffer from the construction, operation, and maintenance of the Project. Delaware Riverkeeper Network represents our members' interests that will be negatively affected by the Project in bringing this action.

12. As the Delaware Riverkeeper and as a member of Delaware Riverkeeper Network, I personally have enjoyed areas that will be impacted by the

Project. I have personally visited the streams, wetlands, and adjacent forested areas in the watershed, by myself, with my family, with friends, and/or with colleagues, for recreational, personal and/or professional reasons and have plans to return to these areas for recreational purposes, including among other things, boating, hiking, nature walks, wildlife observation and enjoyment as well as for professional purposes. I enjoy my visits to these areas whether in my professional or personal capacity or as a parent. I often include my family in my enjoyment of the areas of the watershed where I work, and find them beautiful and unique natural areas important to share with my children for their personal and educational growth. I have a great appreciation for the public lands and scenery contained within the watershed to be affected by the Project, including but not limited to the Long Pond Nature Preserve.

13. In my capacity as the Delaware Riverkeeper, a mother, and a person who enjoys the out of doors, I will be personally and professionally harmed by the damage that will be inflicted by the construction and operational activities of the Project.

14. I fully expect my personal, professional, recreational, and family trips to the many natural systems included in the Project area will continue in the near and far future as they include some of the most special places in our region. My personal, recreational, family and professional activities in the past and future have, and will

continue, to be composed of hiking, boating, and otherwise enjoying the River waters, the forests, the wildlife and the natural scenic beauty of these areas.

15. My use and enjoyment of the natural beauty of these areas and my joy in sharing it with my children and other family will be negatively affected by the construction within waterways and wetlands, the widening and maintenance of pipeline rights of way, the ongoing operation of the Project which would result in greenhouse gas and other air pollutants, and other harms to the watershed. These activities will negatively affect the way I interact with these natural areas on an aesthetic, recreational, professional, and family level.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this __21__ day of July 2023.

Maya van Rossum,
the Delaware Riverkeeper

DECLARATION OF MARILYN QUINN

I, Marilyn Quinn declare the following:

1. I am over eighteen years of age and do not suffer from any legal incapacity. I have personal knowledge of the following facts.

2. I am a member in good standing of Food & Water Watch.

3. I live in West Deptford, New Jersey, in the Reserve at Riverwinds senior development, about a mile from the Delaware River, off Riverwinds Drive.

4. I live about two miles away from the location where a compressor station is planned to be built on Mantua Grove Road in West Deptford as part of the Regional Energy Access Expansion gas pipeline project. I often drive by the location of the planned compressor station on my way to the supermarket.

5. If the planned compressor station is built, I am concerned about how pollution from it would affect my health, especially if the compressor station will be powered by gas. Even if it's powered by electricity, I'm still concerned about emissions of methane and other chemicals like VOCs and benzene from the compressor. Chemicals like benzene are known carcinogens and can cause respiratory issues. I

would be exposed to emissions from the compressor station when I'm out walking, gardening, or sitting in my backyard.

6. I love nature and like to be outside all the time. I was a runner and completed two marathons, but now I mostly do fast walking. My twin sister lives next door to me, and we'll go out together in the neighborhood. She will jog and I'll do fast walking, and I'll talk to all the dogwalkers in the neighborhood.

7. I try to go walking in other places nearby, not just in my neighborhood. I often go exploring down some of the routes I take to the supermarket, which would include the area of the planned compressor station. I also sometimes walk up and down the Delaware River.

8. I try to get out for a walk every day, but I look at the air quality every day and don't go if the air pollution is bad. For example, on the days in early June this year when there was a lot of pollution from the Canadian wildfires, I did not go out and I did not open the windows of my house, even though I usually like to have my windows open.

9. I'm an avid gardener and starting each spring, I spend time outside tending my garden multiple days each week. I mostly grow

flowers, shrubs, and bushes in my yard, and I try to grow mainly native plants. I recently had to dig up my back yard to remove an invasive chameleon plant that was spreading and strangling other plants in my yard. I spend time planting, weeding, mulching, and maintaining the garden. For example, after my lilacs bloom, I have to clip them to prepare for the next year's bloom. I spend a lot of time just walking around the garden and making sure everything's weeded. I really enjoy gardening, and I often completely lose track of time when I'm outside working on my garden.

10. I also enjoy spending time sitting outside in my yard, watching the birds at my birdfeeders and enjoying nature. I'm having my patio redone this summer, because the invasive chameleon plant has grown roots under my patio, and once the new patio is installed, I expect to be spending a lot more time sitting outside on the patio.

11. I'm worried that if the compressor station is built, I will be exposed to more air pollution while walking, gardening, and spending time in my yard, and that this will negatively impact my health. I'm also worried that it would worsen the air quality so that there would be

more days with bad pollution on which I would have to stay inside instead of going for walks.

12. I'm also concerned that my health will be negatively affected by pollution from all of the construction equipment and construction traffic used in building the compressor station. While construction traffic is not likely to go through my neighborhood, it would go down the roads I take to the supermarket and would worsen the air quality in my nearby neighborhood.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on June 30, 2023 in West Deptford, NJ.

Marilyn Quinn

Marilyn Quinn

DECLARATION OF
NEW JERSEY CONSERVATION FOUNDATION

1) New Jersey Conservation Foundation ("NJCF") is a statewide non-profit whose mission is to preserve land and natural resources throughout New Jersey for the benefit of all.

2) NJCF has donors, active projects, and land holdings (including easements and properties it owns in fee) in the counties where Regional Energy Access Expansion Project's ("REAE") new compressor facility and existing compressor facilities sought to be modified for this project would be sited: Somerset, Middlesex, and Gloucester.

3) NJCF manages these properties and easements for recreational, agricultural, and conservation purposes for the benefit of all New Jerseyans, and REAE runs counter to NJCF's active conservation and preservation work in the affected counties.

4) These injuries are concrete and particularized, as construction and modification of compressor stations for this unnecessary pipeline will damage land and natural resources in areas where NJCF's donors, active projects, and land holdings are situated. These injuries fall within the zones of interests that both the Gas Act and NEPA protect.

5) The construction and operation of the compressor stations will diminish air quality in the state of New Jersey, which will interfere with NJCF's organizational mission and goal of protecting air quality in New Jersey.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on 7/19/23

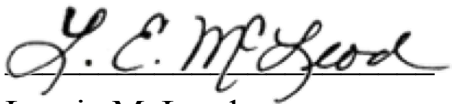
Tom Gilbert
Executive Director of the New Jersey Conservation Foundation

DECLARATION OF
NEW JERSEY LEAGUE OF CONSERVATION VOTERS EDUCATION FUND

1) My name is Laurie McLeod and I am the Chief Operating Officer of New Jersey League of Conservation Voters Education Fund ("NJLCV").
2) NJLCV is a 501(c)(3) non-profit organization whose mission is to raise awareness of key environmental challenges and increase the efficacy of the entire environmental conservation community in New Jersey.
3) NJLCV will be adversely impacted by the Regional Energy Access Expansion Project (REAE) because it will threaten public health and exacerbate climate change in the state of New Jersey, thereby frustrating NJLCV's purpose and inhibiting NJLCV from reaching its goals.
4) NJLCV works in coalition with allies to ensure that future generations have the clean drinking water, air, and open spaces that they deserve in New Jersey.
5) REAE would increase greenhouse gas emissions in the state of New Jersey and jeopardize New Jersey's ability to meet its statutory target of an 80% reduction in carbon emissions from their 2006 levels by 2050, which would impede NJLCV's efforts, including its programs, goals, and expenditures of funds and resources on cutting greenhouse gas emissions.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 19, 2023



Laurie McLeod
Chief Operating Officer
New Jersey League of Conservation Voters Education Fund

DECLARATION OF RANDY JONES

I, RANDY JONES, declare and state as follows:

1. My name is Randy Jones and I am of legal age and competent to give this declaration, and all information herein is based on my own personal knowledge, unless otherwise indicated.
2. I have served as a board member of the New Jersey League of Conservation Voters Education Fund ("NJLCV") for four (4) years. I have served as a Commissioner for the Somerset County Park Commission for six (6) months. I have served on the Somerset County Open Space Advisory Committee for eleven (11) years. I was a member of the New Jersey Audubon Society for eleven years (11) and served for three (3) years as chair.
3. I have lived in Franklin Township, Somerset County, New Jersey for twenty-five (25) years.
4. The Regional Energy Access Expansion project ("REAE") includes modifications to compressor station 505 in Somerset County, NJ.
5. I am an active birder, and I frequent various parks and open spaces in Somerset County, New Jersey. In these areas I observe grasshopper sparrows, brown thrashers, great blue herons, common yellowthroats, red-winged blackbirds, Cooper's hawks, red-tailed hawks, American robins,

bobolinks, Canada warblers, golden-winged warblers, prairie warblers, wood thrushes, and wood ducks. My understanding is that these species will potentially be adversely affected by REAE.

6. REAE will cause the temporary and permanent loss of bird habitat (throughout New Jersey, including in Somerset County) associated with the removal of existing vegetation, which would be most damaging if construction activities take place during nesting season. Construction would displace birds into adjacent habitats, which could cause stress and negatively impact reproductive success. Modifications to compressor station 505 in Somerset County require tree-clearing.
7. In addition, REAE will confuse migratory birds by requiring the addition of lighting to compressor stations in New Jersey. Artificial light is known to confuse and endanger birds.
8. The construction of REAE will increase noise and dust levels and eliminate bird habitat, thereby threatening bird species that I now regularly see and enjoy in the area.
9. I am concerned that REAE will negatively impact the vitality of bird populations in New Jersey, both in Somerset County and elsewhere.
10. I have been playing golf at Neshanic Valley Golf Course for five (5) years, and I will continue to do so for years to come.

11. REAE will require modifications to Compressor Station 505, which is within 0.2 mile of the Neshanic Valley Golf Course.
12. The modifications to Compressor Station 505 will increase noise and dust, which impacts may be perceptible from the golf course.
13. The increase in pollution emissions from Compressor Station 505 will permanently impact the air quality in the area, including where I regularly like to spend time outdoors on the golf course, potentially adversely impacting my health, enjoyment, and overall well-being.
14. If this unneeded project is permitted to continue to move forward, the ongoing construction and future operation of the REAE pipeline and associated compressor stations threaten the wildlife and air quality in New Jersey, adversely impacting my general health, and my use and enjoyment of the surrounding land, as well as the organizational mission of NJLCV.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 20, 2023

Randy Jones, Board Member of New Jersey League of Conservation Voters

I, Regina Simmons declare the following:

1. I am over eighteen years of age and do not suffer from any legal incapacity. I have personal knowledge of the following facts.

2. I have been a member in good standing of Sierra Club for 18 years.

3. I live in West Deptford, New Jersey. I've lived there for twenty-four years. Part of the reason I moved to West Deptford at that time is because I previously lived downwind of an oil refinery and was negatively affected by the soot from that facility, and West Deptford has better air quality.

4. I live about one and a half miles away from the location where a compressor station is planned to be built on Mantua Grove Road in West Deptford as part of the Regional Energy Access Expansion gas pipeline project.

5. If the planned compressor station is built, I am concerned about how pollution from it would affect my health, especially if the compressor station will be powered by gas. Even if it's powered by electricity, I'm still concerned about chemical emissions from the

compressor. I would be exposed to emissions from the compressor station when I'm out walking or gardening.

6. I love nature and am an avid outdoorsperson. I garden at home, take walks around the neighborhood and hike.

7. I try to get out for a walk every day, but as an asthmatic, I don't go out if the air pollution is bad. The pollution from the Canadian wildfires this spring and summer, for example, caused some particularly bad air quality days, so on those days I didn't go outside for walking or gardening and did not open the windows of my house, even though I often keep the windows open in the spring.

8. I'm also a respiratory therapist at a nearby hospital who treats patients with respiratory issues such as asthma and chronic obstructive pulmonary disease. From both my professional experience and my personal experience with asthma, I know that bad air quality exacerbates respiratory issues.

9. Extreme heat is also bad for people with lung disease, such as myself and my patients, and infrastructure like the proposed pipeline and compressor station will contribute to more extreme heat due to climate change. The site of the planned compressor station was also one

of the last undeveloped portions of land in West Deptford before Transco cleared all the trees. Trees absorb heat, so clearing them will also exacerbate heat effects on my asthma and my patients' conditions.

10. I'm worried that if the compressor station is built, I will be exposed to more air pollution while walking and gardening, and that this will negatively impact my health. I'm also worried that it would worsen the air quality so that there would be more days with bad pollution on which I would have to stay inside instead of going for walks or gardening.

11. While construction traffic from construction of the compressor station is not likely to go through my neighborhood, it would go down nearby roads and cause more traffic in the area and would possibly worsen the air quality in my nearby neighborhood.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on July 17, 2023 in West Deptford.

Regina Simmons

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