ORAL ARGUMENT HAS NOT BEEN SCHEDULED

In the United States Court of Appeals for the District of Columbia Circuit

Nos. 23-1064, *et al.* (consolidated)

NEW JERSEY CONSERVATION FOUNDATION, *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITIONS FOR REVIEW OF ORDERS OF THE FEDERAL ENERGY REGULATORY COMMISSION

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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Washington, D.C. 20426

November 28, 2023

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

The parties before this Court are identified in the brief of Petitioners, except that New Jersey, Washington, Connecticut, Maryland, Massachusetts, New York, Oregon and Vermont, the Institute for Policy Integrity, the Interstate Natural Gas Association of America, the American Petroleum Institute and the American Gas Association are participating in this appeal as amici.

B. Rulings Under Review

- *Transcontinental Gas Pipe Line Co.*, 182 FERC ¶ 61,006 (2023), JA 541;
- *Transcontinental Gas Pipe Line Co.*, 182 FERC ¶ 62,146 (2023), JA 789;
- *Transcontinental Gas Pipe Line Co.*, 182 FERC ¶ 61,148 (2023), JA 793;
- *Transcontinental Gas Pipe Line Co.*, FERC Docket No. CP21-94 (Mar. 16, 2023), JA 791;
- *Transcontinental Gas Pipe Line Co.*, FERC Docket No. CP21-94 (Mar. 23, 2023), JA 893;
- *Transcontinental Gas Pipe Line Co.*, 183 FERC ¶ 62,054 (2023), JA 895; and
- *Transcontinental Gas Pipe Line Co.*, 183 FERC ¶ 61,071 (2023), JA 897.

C. Related Cases

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

/s/ *Lona T. Perry*
Lona T. Perry
Deputy Solicitor

November 28, 2023

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GLOSSARY

Certificate Order	*Transcon. Gas Pipe Line Co., LLC,* 182 FERC ¶ 61,006 (2023)
Certificate Policy Statement	*Certification of New Interstate Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000)
Commission or FERC	Federal Energy Regulatory Commission
Environmental Impact Statement, or Statement	Final Environmental Impact Statement for the Regional Energy Access Expansion Project (July 2022)
Foundation	Petitioners New Jersey Conservation Foundation, New Jersey League of Conservation Voters, Aquashicola Pohopoco Watershed Conservancy, Catherine Folio, Delaware Riverkeeper Network, Maya Van Rossum, Sierra Club and Food & Water Watch
NEPA	National Environmental Policy Act
New Jersey Study	Market study prepared by the London Economics International Group and submitted by New Jersey Board of Public Utilities and New Jersey Division of Rate Counsel
Rate Counsel	Petitioner-Intervenor New Jersey Division of Rate Counsel
P	The internal paragraph number within a FERC order
Project	Transco's Regional Energy Access Expansion project

R.	Record item number in the Certified Index to the Record
Rehearing Order	*Transcon. Gas Pipe Line Co., LLC,* 182 FERC ¶ 61,148 (2023)
Skipping Stone Study	Market study prepared by Skipping Stone, LLC and submitted by the New Jersey Conservation Foundation
Transco	Transcontinental Gas Pipe Line Company, LLC
Transco Study	Market study prepared by Levitan and Associates and submitted by Transco

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BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

In the orders challenged in this appeal, the Federal Energy Regulatory Commission (Commission or FERC) issued a certificate of "public convenience and necessity" under section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c), to Transcontinental Gas Pipe Line Co., LLC (Transco) to construct and operate an incremental expansion of its existing pipeline system. *See Transcon. Gas Pipe Line Co., LLC,* 182 FERC ¶ 61,006 (Certificate Order), R. 984, JA 541, *reh'g denied,* 182

FERC ¶ 61,148 (2023) (Rehearing Order), R. 1192, JA 793. The Regional Energy Access Expansion Project (Project) will deliver natural gas from northeastern Pennsylvania to New Jersey, Pennsylvania, and Maryland. With regard to economic issues, the Commission found market need for the Project based upon long-term precedent agreements for 100 percent of Project capacity (most with unaffiliated companies) and other record evidence including market studies and shipper comments. The Commission also found the Project would provide public benefits by increasing service reliability on peak winter days and lowering costs with minimal adverse economic effects.

As to environmental matters, in its July 2022 Final Environmental Impact Statement on the Project (Environmental Impact Statement or Statement), R. 930, JA 427, the Commission determined that mitigation measures and the Commission's environmental conditions would reduce the Project's adverse environmental impacts to less than significant levels. (The Commission provided and considered information about Project greenhouse gas emissions but was unable to determine the significance of the Project's effect on climate change).

Ultimately, upon balancing public benefits against adverse impacts, the Commission determined the Project would serve the public interest and was an environmentally acceptable action.

Petitioners' Joint Opening Brief (Foundation Brief)[1] and Intervenor New Jersey Division of Rate Counsel's Brief (Rate Counsel Brief) challenge Commission findings under the Natural Gas Act and the National Environmental Policy Act (NEPA). *The issues presented for review are as follows:*

Natural Gas Act: Whether the Commission, after considering competing market studies offered by Project supporters and opponents, reasonably found market need for, and public benefits from, the Project, which was 100 percent customer-subscribed and would improve reliability of service and lower costs; and

NEPA: Whether the Commission reasonably complied with its environmental responsibilities in describing the Project purpose as

[1] Petitioners are New Jersey Conservation Foundation, New Jersey League of Conservation Voters, Aquashicolo Pohopoco Watershed Association, Catherine Folio, Delaware Riverkeeper Network, Maya Van Rossum, Sierra Club and Food & Water Watch (collectively Foundation).

natural gas transportation and providing quantitative and qualitative analysis of emission impacts that are reasonably foreseeable and causally related to the Project through comparison to national, regional and local figures.

STATUTORY AND REGULATORY PROVISIONS

Pertinent statutes and regulations are contained in the attached Addendum.

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY BACKGROUND

A. The Natural Gas Act

In the Natural Gas Act, Congress declared that the transportation and sale of natural gas in interstate commerce for ultimate distribution to the public are in the public interest. *See* 15 U.S.C. § 717(a). The Act is designed "'to encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices.'" *Pub. Utils. Comm'n of Cal. v. FERC*, 900 F.2d 269, 281 (D.C. Cir. 1990) (quoting *NAACP v. FPC*, 425 U.S. 662, 670 (1976)). To that end, sections 1(b) and (c) grant the Commission jurisdiction over the transportation and wholesale sale of natural gas in interstate commerce. 15 U.S.C. §§ 717(b), (c).

Before a company may construct a natural gas pipeline, it must obtain from the Commission a "certificate of public convenience and necessity" under Natural Gas Act section 7(c), 15 U.S.C. § 717f(c). Under section 7(e), the Commission shall issue a certificate to any qualified applicant upon finding that the proposed construction and operation of the pipeline facility "is or will be required by the present or future public convenience and necessity." 15 U.S.C. § 717f(e).

B. The Commission's Certificate Policy Statement

In 1999, the Commission established its policy for certificating new pipeline construction. *See Certification of New Interstate Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999) (Certificate Policy Statement), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000). The Commission sought to balance anticipated growth in demand for natural gas against concerns about overbuilding, subsidization by existing captive customers, and unnecessary exercise of eminent domain. Certificate Policy Statement at 61,736-37.

To achieve that balance, the Commission adopted a multi-step analysis. First, an existing pipeline faces a threshold question whether the project can proceed without subsidies from its existing customers.

Id. at 61,745. *See Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1309 (D.C. Cir. 2015).

Next, the Commission will consider adverse effects on the economic interests of the applicant's existing customers, competing pipelines and their captive customers, and landowners and surrounding communities, and will balance any adverse effects against a project's public benefits. Certificate Policy Statement at 61,747; *see Myersville*, 783 F.3d at 1309. Public benefits may 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." Certificate Policy Statement at 61,748; *Minisink Residents for Env't Pres. & Safety v. FERC*, 762 F.3d 97, 101 n.1 (D.C. Cir. 2014). The Commission completes an environmental analysis only if the public benefits outweigh the project's adverse economic effects. Certificate Policy Statement at 61,745.

C. The National Environmental Policy Act

The Commission's consideration of an application for a certificate of public convenience and necessity triggers NEPA. *See* 42 U.S.C.

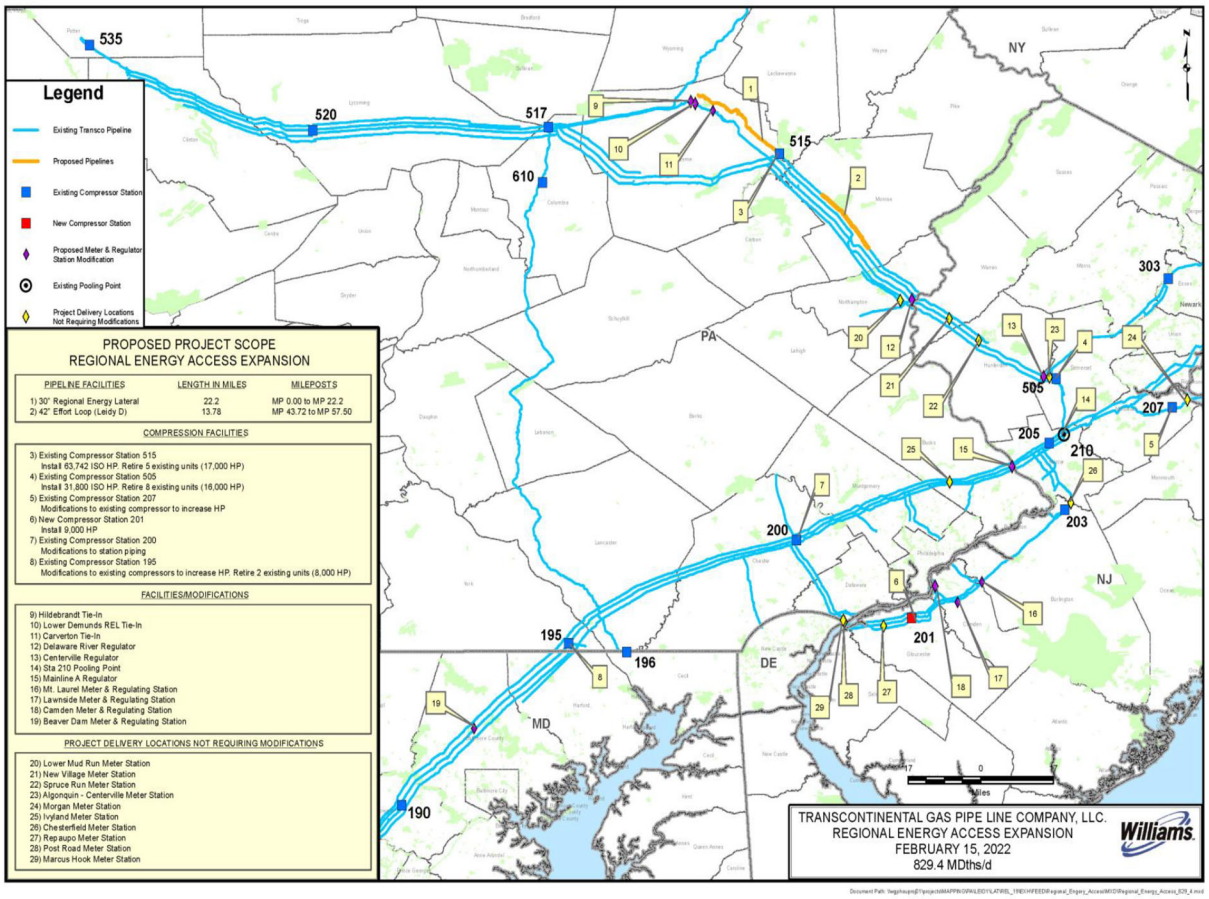
§§ 4321, *et seq*. NEPA sets out procedures to be followed by federal agencies to ensure that the environmental effects of proposed actions are "adequately identified and evaluated." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 768 (2004). "NEPA is a procedural statute; it 'does not mandate particular results, but simply prescribes the necessary process.'" *Minisink*, 762 F.3d at 111 (quoting *Robertson*, 490 U.S. at 350). An agency must take a "hard look" at "the environmental impact of its action[]." *Id.*; *see also Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983) (same).

Regulations implementing NEPA require federal agencies to consider the environmental effects of a proposed action by preparing either an environmental assessment, if supported by a finding of no significant impact, or a more comprehensive environmental impact statement. *See* 40 C.F.R. § 1501.3(a) (detailing when to prepare an environmental impact statement versus an environmental assessment).

II. PROCEDURAL BACKGROUND

Pursuant to 15 U.S.C. § 717f(c), the challenged orders authorized Transco to construct and operate the Project, an incremental addition to

the Transco pipeline intended to deliver natural gas from the Marcellus Shale formation to New Jersey, Pennsylvania, and Maryland. *See* Certificate Order PP 3-4, JA 542; Rehearing Order P 4, JA 794. This map shows the incremental addition (in orange) to the existing Transco pipeline (in blue). Environmental Impact Statement at 2-2, JA 434.



The Commission found that the record established need for the Project. *See* Certificate Order PP 1, 21-35, 82-86, JA 541, 550-59; 584-85; Rehearing Order PP 29-71, JA 810-32. Transco entered into long-term contracts with eight shippers for 100 percent of the Project

capacity. Certificate Order P 21, JA 550. Transco also submitted a market study, prepared by Levitan and Associates (Transco Study), (R. 711, JA 43), demonstrating market need, and the Project's seven unaffiliated shippers submitted comments supporting the Project. *Id.*

Several parties opposed to the Project submitted their own market studies to show that Project capacity is not needed to supply the four New Jersey local distribution company Project shippers. *Id.* PP 22-23, JA 551-52. These include a study sponsored by New Jersey state agencies (the New Jersey Board of Public Utilities and the New Jersey Rate Counsel) and prepared by the London Economics International Group (New Jersey Study) (R. 916, JA 253), and one sponsored by the New Jersey Conservation Foundation and prepared by Skipping Stone, LLC (Skipping Stone Study) (R. 917, JA 417). *Id.*

After considering the three studies and other record evidence, the Commission found that the Project will provide more reliable service on peak winter days and will lower costs by increasing supply diversity. *See id.* PP 25-35, JA 553-59. The Commission explained that both the Transco Study and the New Jersey Study provided "valuable information" but that they reached different conclusions based

essentially on differences in tolerance of reliability risk. *See id.* PP 34-35, JA 558-59. The Commission ultimately found the Transco Study more persuasive as it was more consistent with accepted traditional local distribution company planning practices—which reflect those companies' obligation to provide reliable service even in extreme conditions—had fewer methodological deficiencies, and more closely aligned with the Commission's market analysis. Certificate Order P 34, JA 558; Rehearing Order P 41, JA 816. The Commission also explained why it found the Skipping Stone Study unpersuasive and accordingly placed less weight on it. *See*, *e.g.*, Rehearing Order P 44, JA 818.

The Commission balanced the need for and the benefits to be derived from the Project against the potential adverse economic consequences, including impacts to landowners, and concluded that the Project's benefits outweighed its minimal adverse effects. *See* Certificate Order PP 34, 38, JA 558, 560.

The Commission also considered the Project's environmental effects. *See* Certificate Order PP 49-81, JA 565-83; Rehearing Order PP 72-131, JA 833-71. The Commission's analysis included threatened and endangered species (Certificate Order P 52, JA 567), environmental

justice (*id.* PP 53-66, JA 568-76), greenhouse gas emissions and climate change (*id.* PP 67-74, JA 576-80), and landowner concerns (*id.* PP 75-80, JA 581-83); *see also* Rehearing Order PP 90-131, JA 844-71 (addressing effects related to greenhouse gas emissions, air quality, water resources, and conservation easements). The Environmental Impact Statement concluded that the Project would result in some adverse environmental impacts, mostly temporary (during construction). Certificate Order P 51, JA 567. Impacts would be reduced to less than significant levels through implementation of mitigation measures and the Commission's environmental conditions, although the Commission was unable to assess the significance of Project climate impacts. *Id.* The Commission concluded that the Project is an environmentally acceptable action. Certificate Order P 81, JA 583.

Having considered the Project's adverse impacts, the Commission found those impacts outweighed by the Project benefits of improving reliability and diversifying supply, and therefore found the Project in the "public convenience and necessity" under the Natural Gas Act. Certificate Order P 82, JA 584; Rehearing Order P 133, JA 874.

SUMMARY OF ARGUMENT

Natural Gas Act

Prior to granting a certificate, the Commission must determine that the proposed project "is or will be required by the present or future public convenience and necessity." 15 U.S.C. 717f(e). The Commission first asks whether the project meets a market need. Here, as repeatedly affirmed by this Court, long-term precedent agreements for 100 percent of Project capacity (82 percent of capacity contracted to unaffiliated entities) amply demonstrate market need.

Transco's market study and supporting comments from Project shippers further corroborate that finding. Both Foundation and Rate Counsel point to market studies purporting to show Project capacity is unneeded to serve the four New Jersey local distribution company Project shippers. But the Commission reasonably found Transco's study more persuasive. Transco's study was more consistent with traditional local distribution company planning designed to assure reliable service even under extreme conditions. Transco's study also addressed demand from gas-fired generators and Project cost savings.

Once market need is shown, the Commission weighs project public benefits against harm to economic interests. Here, the Commission found the Project will provide public benefits by: (1) increasing the reliability of service to local distribution companies on peak winter days; (2) alleviating pipeline constraints that hamper service to gas-fired generation; and (3) lowering costs by increasing supply diversity. These benefits were not outweighed as the Project would have no adverse effect on other pipelines and their customers and would have minimal impacts on landowners and surrounding communities. Foundation and Rate Counsel argue that these public benefits were not supported by substantial record evidence, but the Commission reasonably relied on Transco's market study and shipper comments to support the public benefits finding.

NEPA

Having reasonably found that Project benefits outweigh adverse economic impacts, the Commission considered Project environmental impacts under NEPA in a comprehensive Environmental Impact Statement. The Commission concluded that the Project is an environmentally acceptable action because, while it would result in

some adverse environmental impacts, mitigation measures and the Commission's environmental conditions would reduce those impacts to acceptable levels.

Under applicable regulations, an Environmental Impact Statement must state the underlying purpose and need to which the agency is responding in considering alternatives to the proposed action. Here, the Statement reasonably defined Project purpose as providing natural gas transportation from the Marcellus Shale production area to shipper delivery points. Foundation argues this purpose improperly excludes no action or non-gas alternatives. But this Court has upheld agencies' use of an applicant's project purpose as the basis for evaluating alternatives, and the Commission reasonably rejected alternatives that would not transport natural gas. Nor did Foundation identify any specific non-gas proposals by entities willing to pursue them. Speculation regarding hypothetical alternatives, especially those outside the Commission's jurisdiction, is beyond NEPA's rule of reason.

As for Project emissions, consistent with NEPA, the Environmental Impact Statement considered and discussed the Project's reasonably foreseeable and causally connected greenhouse gas

emissions, which are emissions from the Project's construction and operation and the downstream combustion of gas transported by the Project. The Commission: (1) quantified the emissions; (2) placed them in context by comparing them to national and state total greenhouse gas emissions; and (3) identified climate impacts in the region. The Commission also disclosed the social cost of carbon for Project greenhouse gas emissions over the 20-year assumed project life.

Foundation argues that the Commission must formally assess the significance of Project impacts on climate change. While the Commission found that Project emissions will contribute incrementally to climate change, the Commission could not identify a methodology to attribute discrete environmental effects to Project emissions, nor does Foundation identify any such methodology. As this Court has held, in this circumstance, an agency may instead quantify emissions and compare them to national and state levels as a reasonable proxy for assessing climate impacts. Foundation fails to demonstrate that any more was required.

The Commission reasonably concluded that any upstream greenhouse gas emissions from natural gas production would not be a

reasonably foreseeable or causally related Project impact. Consistent with this Court's precedent, there is no causal link here because there is no showing that the Project would spur additional production; the Project will add only a small amount of incremental capacity on Transco's existing 10,000-mile interstate pipeline system. This Court's precedent also supports finding the location of any incremental production too speculative to be reasonably foreseeable. The Project will receive gas from the Marcellus Shale formation, but this Court has recognized the difficulty of locating incremental production within a regional shale play extending for thousands of square miles.

With regard to air emissions, the Environmental Impact Statement analyzed Project construction and operational emissions and found that they would not significantly impact air quality in the region. Foundation argues the Commission should also have considered the localized ozone impacts of emissions from downstream combustion. However, downstream combustion emits only ozone precursors; ozone itself results from the interaction of ozone precursors with sunlight. The Commission found that assessing the magnitude of any localized increases in ozone precursors from the Project's incremental

downstream combustion is highly uncertain. Further, estimating ozone effects resulting from any localized emissions of ozone precursors would require the Commission to conduct complex regional photochemical modeling with myriad assumptions. The Commission reasonably found the number of important assumptions needed to develop an estimated range of indirect ozone emissions goes well beyond the reasonable forecasting that NEPA requires.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews Commission actions under the Administrative Procedure Act's narrow "arbitrary and capricious" standard. 5 U.S.C. § 706(2)(A). Under that standard, the question is not "whether a regulatory decision is the best one possible or even whether it is better than the alternatives." *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 292 (2016). The reviewing court must uphold the Commission's determination "if the agency has examined the relevant considerations and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." *Id.* (citation and alterations omitted); *see also FCC v. Prometheus Radio*

Project, 141 S. Ct. 1150, 1158 (2021) ("deferential" arbitrary-and-capricious standard requires only that agency action "be reasonable and reasonably explained").

Because the grant or denial of a section 7 certificate is within the Commission's discretion under the Natural Gas Act, the Court does not substitute its judgment for that of the Commission. *See Myersville*, 783 F.3d at 1308; *see generally FPC v. Transcon. Gas Pipe Line Corp.*, 365 U.S. 1, 7 (1961) (Commission is "the guardian of the public interest," entrusted "with a wide range of discretionary authority"); *Columbia Gas Transmission Corp. v. FERC*, 750 F.2d 105, 112 (D.C. Cir. 1984) (Commission is "vested with wide discretion to balance competing equities against the backdrop of the public interest"). The Commission has "broad discretion to invoke its expertise in balancing competing interests and drawing administrative lines." *Minisink*, 762 F.3d at 111 (citation omitted). The Court evaluates only whether the Commission considered relevant factors and whether there was a clear error of judgment. *Del. Riverkeeper Network v. FERC*, 45 F.4th 104, 108 (D.C. Cir. 2022) (citing *Myersville*, 783 F.3d at 1308).

The Administrative Procedure Act's arbitrary and capricious standard also applies to challenges under the National Environmental Policy Act. *Del. Riverkeeper*, 45 F.4th at 108; *Sierra Club v. FERC*, 867 F.3d 1357, 1367 (D.C. Cir. 2017). "[T]he court's role is 'simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious.'" *Nat'l Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323, 1327 (D.C. Cir. 2004) (quoting *Balt. Gas & Elec.*, 462 U.S. at 97-98). Agency actions taken pursuant to NEPA are entitled to a high degree of deference. *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 377-78 (1989). This Court evaluates agency compliance with NEPA under a "rule of reason" standard. *Minisink*, 762 F.3d at 112 (citations omitted). "[A]s long as the agency's decision is 'fully informed' and 'well-considered,' it is entitled to judicial deference and a reviewing court should not substitute its own policy judgment." *Nat. Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288, 294 (D.C. Cir. 1988) (quoting *N. Slope Borough v. Andrus*, 642 F.2d 589, 599 (D.C. Cir. 1980)).

The Commission's factual findings are conclusive if supported by substantial evidence. Natural Gas Act § 19(b), 15 U.S.C. § 717r(b). The

substantial evidence standard "'requires more than a scintilla' but 'less than a preponderance' of evidence." *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 54 (D.C. Cir. 2014). If the evidence is susceptible of more than one rational interpretation, the Court must uphold the agency's findings. *See Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966); *Fla. Gas Transmission Co. v. FERC*, 604 F.3d 636, 645 (D.C. Cir. 2010).

II. THE COMMISSION REASONABLY FOUND THE PROJECT IN THE PUBLIC CONVENIENCE AND NECESSITY.

Prior to granting a certificate, the Commission must determine that the proposed project "is or will be required by the present or future public convenience and necessity." 15 U.S.C. § 717f(e). This inquiry involves two steps. First, FERC asks whether the project will "stand on its own financially" because it meets a "market need." *Sierra Club*, 867 F.3d at 1379 (quoting *Myersville*, 783 F.3d at 1309). This showing ensures that the project will not be subsidized by existing customers. *Myersville*, 783 F.3d at 1309. Under its 1999 Certificate Policy Statement, the Commission "will consider all relevant factors reflecting on need for the project," which may include, but are not 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." Rehearing Order P 30, JA 810 (quoting Certificate Policy Statement at 61,747).

If market need is shown, FERC will then balance the public benefits and harms of the project. *Sierra Club*, 867 F.3d at 1379. Public benefits of a project can 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." Certificate Policy Statement at 61,748. Examination of the adverse economic effects of a project largely focuses on interests such as landowners' property rights. *Id*. at 61,745. If the public benefits outweigh the adverse effects on economic interests, the Commission will consider environmental factors. *Id*.

Here, the Commission reasonably found market need for the Project based upon long-term precedent agreements for 100 percent of Project capacity and other record evidence including market studies and shipper comments. Certificate Order PP 34-35, JA 558-59; Rehearing Order P 30, JA 810. As for public benefit, the Commission reasonably found that the Project will increase the reliability of service on peak

winter days to local distribution companies which are obligated to provide reliable service to homes and businesses. Certificate Order P 34, JA 558; Rehearing Order PP 30, 61, JA 810, 827. The Project will alleviate locational constraints caused by limited pipeline takeaway capacity that hamper Transco's ability to serve gas-fired generation demand in the region during extreme cold events. Certificate Order PP 21, 26, JA 550, 553; Rehearing Order PP 59, 67, JA 825, 830. The Project will also provide cost benefits by increasing supply diversity. Certificate Order P 34, JA 558; Rehearing Order PP 30, 61, JA 810, 827. These Project benefits were not outweighed by adverse economic effects, as the Project would have no adverse effect on Transco's shippers or other pipelines and their customers, and would have minimal impacts on landowners and surrounding communities. Certificate Order PP 36-38, JA 559-60.

Petitioner Foundation and Intervenor Rate Counsel challenge the Commission's findings of Project market need and public benefit. *See* Foundation Brief at 34-67; Rate Counsel Brief at 13-35. As demonstrated below, these challenges are without merit.

A. Precedent Agreements For 100 Percent Of Project Capacity Demonstrate Market Need.

Under the Certificate Policy Statement, precedent agreements for a project's capacity are always "'important evidence of demand for a project.'" *Minisink*, 762 F.3d at 111 n.10 (quoting Certificate Policy Statement at 61,748). Transco's execution of long-term precedent agreements for 100 percent of Project capacity demonstrates market need for the Project. Certificate Order P 21, JA 550; Rehearing Order P 30, JA 810. This Court has repeatedly recognized that precedent agreements for gas transportation service demonstrate a market need. *See, e.g.*, *Del. Riverkeeper*, 45 F.4th at 114; *City of Oberlin v. FERC*, 937 F.3d 599, 605-606 (D.C. Cir. 2019); *Appalachian Voices v. FERC*, 2019 WL 847199 at *1 (D.C. Cir. Feb. 19, 2019); *Sierra Club*, 867 F.3d at 1379; *Myersville*, 783 F.3d at 1311; *Minisink*, 762 F.3d at 111 n.10. Indeed, the Commission is "not ordinarily required 'to assess a project's benefits by looking beyond the market need reflected by the applicant's existing contracts with shippers.'" *Del. Riverkeeper*, 45 F.4th at 114 (quoting *Minisink,* 762 F.3d at 111 n.10); *see also Oberlin*, 937 F.3d at 605-606; *Myersville*, 783 F.3d at 1311. A contract for pipeline capacity reflects a business decision that need exists. *Township of Bordentown*

v. FERC, 903 F.3d 234, 262 (3d Cir. 2018). Without objective market demand for the additional gas, "no rational company would spend money to secure the excess capacity." *Id.*

Here, Transco executed binding precedent agreements for the full project capacity with eight shippers for primary terms ranging from 15 to 17 years. Certificate Order P 7, JA 543. The majority of Project capacity (56 percent) is subscribed by four New Jersey local distribution companies. *Id.* P 8, JA 544. A Pennsylvania local distribution company contracted for 12 percent and a Maryland local distribution company contracted for 5 percent. *Id.* The remaining capacity (27 percent) is under contract to two natural gas marketers. *Id.* Accordingly, the Commission reasonably concluded that there was market need for the Project because it is 100 percent subscribed and this evidence of need is not outweighed by other evidence. Rehearing Order P 34, JA 812.

Foundation challenges the Commission's reliance on the precedent agreements, claiming the Project's local distribution company shippers are "profiteering" by subscribing to unneeded capacity at ratepayer expense that they can somehow remarket for shareholder benefit. Foundation Brief at 63-64. As this Court has found, however, the

"market need" test is whether the project will be self-supporting, which can be demonstrated by showing precedent agreements for project capacity. *See, e.g., Sierra Club*, 867 F.3d at 1379 (rejecting challenges to FERC's market need analysis based on alleged profit motive).

Further, Foundation fails to support its self-dealing claims. Rehearing Order P 67, JA 830. The Project is designed to provide shippers with additional firm transportation to increase reliability and diversify energy infrastructure in the Northeast, providing cost savings. *Id*. The Project is 100 percent subscribed, with non-affiliates subscribing to 82 percent of the capacity. *Id*. While Williams, a Transco affiliate, contracted for 18 percent of Project capacity, Williams is a wholesale energy marketer, not a local distribution company able to pass through costs to captive customers, and is accordingly at risk for recovering the costs of the capacity contract. *Id*.

This case is therefore unlike *Environmental Defense Fund v. FERC*, 2 F.4th 953 (D.C Cir. 2021) (discussed in Foundation Brief at 63-67). Rehearing Order P 133 n.433, JA 874. In that case, the pipeline applicant had a single precedent agreement with an affiliated shipper, reached after the pipeline's open season had produced no demand and

there was "identified plausible evidence of self-dealing." *Id.*; *Del. Riverkeeper*, 45 F.4th at 114 (quoting *Env't Def. Fund*, 2 F.4th at 975). The plausible evidence of self-dealing included record evidence that the pipeline was not being built to serve increasing load demand or to lead to cost savings. *Env't Def. Fund*, 2 F.4th at 975. Here, in contrast, there is ample evidence of demand and public benefit as demonstrated by precedent agreements (largely with unaffiliated entities), supported by market studies and shipper comments. Rehearing Order P 133 n.433, JA 874 (citing Certificate Order PP 21-35, JA 550-59).

Foundation's "profiteering" argument is in fact inconsistent with its argument that Project capacity is unneeded because there is already ample available capacity in New Jersey. Rehearing Order P 65 n.191, JA 829. If there is an ample supply of capacity making the Project redundant, then there would be no market for local distribution companies' excess capacity, let alone at above-market prices. *Id.*

B. Transco's Market Study Demonstrates Market Need.

Under the Certificate Policy Statement, the Commission considers all relevant factors reflecting on project need. Rehearing Order P 30, JA 810. In addition to precedent agreements, that includes "demand

projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving the market." *Id*. (quoting Certificate Policy Statement at 61,747).

Here, the Commission examined three market studies. *Id*. The Transco Study found Project market need and public benefits. Certificate Order P 21, JA 550. The New Jersey Study (submitted by New Jersey agencies) and the Skipping Stone Study (submitted by Foundation) found Project capacity unneeded to serve New Jersey local distribution companies. *Id*. PP 22-23, JA 551-52.

The Commission found the Transco Study was the most persuasive study in the record. Rehearing Order P 41, JA 816. The Transco Study: (1) was generally consistent with accepted, traditional local distribution supply planning practices; (2) appropriately considered competing demand for natural gas from gas-fired electric generators in the study region, which more accurately reflects overall demand than a focus only on local distribution company demand; and (3) was the most methodologically sound study and more closely aligned with the Commission's market analysis. *Id*. Based upon this analysis, the Commission concluded that the Project is needed to provide more

reliable service on peak winter days to both local distribution companies and to gas-fired electric generators and will provide cost benefits to Project customers by providing supply diversity. *Id*. PP 41-42, JA 816-17; Certificate Order P 34, JA 558.

Foundation and Rate Counsel challenge the Commission's reliance on the Transco Study instead of their sponsored studies. Foundation Brief at 34-59; Rate Counsel Brief at 13-29. As demonstrated below, the orders show that the Commission carefully considered the competing studies before making its findings. In this context, the Court's "important but limited role is to ensure that the Commission engaged in reasoned decisionmaking" – that it weighed competing views, made a choice with adequate support in the record and intelligibly explained the reasons for making that choice. *Elec. Power Supply Ass'n*, 577 U.S. at 295. While the Transco Study was not flawless, *see* Rate Counsel Brief at 19, 22 (describing Commission criticisms), the Commission is not required to obtain perfect data, but rather to make a reasonable predictive judgment on the evidence it has. *Prometheus Radio*, 141 S.Ct. at 1160. The Commission's exercise of its expert judgment here warrants deference. *See*, *e.g.*, *Ind. Mun. Power Agency v. FERC*, 56

F.3d 247, 255 (D.C. Cir. 1995) (deferring to the Commission's choice of one study over another); *Transmission Agency of N. Cal. v. FERC*, 628 F.3d 538, 551 (D.C. Cir. 2010) (court defers to Commission's resolution of factual disputes between expert witnesses).

1. Transco's Market Study Demonstrates Market Need For Project Capacity To Permit Local Distribution Company Shippers To Meet Demand.

All three market studies purported to address the existing capacity available to local distribution company shippers to satisfy their current and future "design day" demand. *See* Rehearing Order PP 32-57, JA 811-24; Certificate Order PP 26-35, JA 553-59 (discussing study findings). The "design day" is the basis for planning gas capacity requirements. Certificate Order P 21 n.41, JA 551. Design day demand is the highest gas demand that a local distribution company expects to be obligated to serve on an extremely cold winter day. *Id.* Design day planning principles consider the obligation of local distribution companies to provide reliable service, which necessarily requires adequate available capacity to meet design day demand. Rehearing Order P 47, JA 819. Utilities typically structure a portfolio of firm pipeline transportation and storage entitlements, firm natural gas

supply, and peak shaving to provide the gas supplies required by their firm customers in design day conditions. *Id.* P 25 n.79, JA 808. Design days are extreme events where it cannot be assumed that interruptible transmission or capacity release will be available to meet demand. *Id.*

The Transco Study assessed whether existing capacity was sufficient to accommodate current and future design day demand requirements of the Project's six local distribution company shippers, located in Pennsylvania, New Jersey and Maryland. Certificate Order P 21, JA 550. The study concluded that the Project is needed to remedy shortfalls in capacity to meet design day requirements. *Id.*

Specifically, the Transco Study found that existing firm capacity in the region would fall short of the local distribution companies' design day customer demand in New Jersey and Southeastern Pennsylvania during the 2022/2023 winter heating season by 345,200 dekatherms per day, and the shortfall would increase to 774,000 dekatherms per day by the 2029/2030 winter heating season. Certificate Order P 26, JA 553. By the 2038/2039 winter heating seasons, the shortfall would range between 774,400 dekatherms per day to 1,345,600 dekatherms per day,

depending on the three demand scenarios analyzed in the study. *Id.* (citing Transco Study at 2-3, JA 50-51).

The New Jersey Study in contrast concluded that existing capacity is sufficient to serve the Project's four New Jersey local distribution company shippers' design day requirements and will continue to be sufficient if gains in energy efficiency are realized and non-pipeline alternatives are made available. Certificate Order P 28, JA 554 (citing New Jersey Study at 79, JA 331). The New Jersey Study concerned only the needs of the four New Jersey local distribution company shippers, whose contracts together comprise 56 percent of Project capacity. Rehearing Order P 33, JA 812; Certificate Order P 28, JA 554.

As demonstrated below, the Commission reasonably concluded that both the New Jersey Study and the Transco Study provided valuable information, but the Transco Study was more persuasive. Rehearing Order P 41, JA 816. The Commission further reasonably found the Skipping Stone Study unhelpful, as it did not properly apply design day planning principles. *Id.* P 47, JA 819; Certificate Order P 33, JA 558.

a. Projected Availability Of Downstream Third-Party Capacity To Meet Design Day Demand.

On the supply side, the Transco and New Jersey Studies differed on a key assumption: the projected design day availability to local distribution companies of off-system peaking resources (i.e. capacity through New Jersey contracted on a firm basis[2] to users with downstream primary delivery points, such as New York or New England). *See* Rehearing Order PP 38, 40, JA 814, 816. Local distribution companies often supplement their storage and pipeline transportation entitlements with such third-party supplies purchased under short-term contracts. *See* Transco Study at 33, JA 81.

The Transco Study assumed that all third-party capacity with primary firm delivery in the New Jersey/Southeastern Pennsylvania region would be available to meet local distribution company design day demand. Transco Study at 41-42, JA 89-90. But the Transco Study did not include, in projected supply, third-party firm capacity with primary

[2] Under a firm service contract, service is expected without interruption under almost all operating conditions. Rehearing Order P 47 n.145, JA 819; *see also Myersville*, 783 F.3d at 1307 n.1.

delivery points downstream of that region. Certificate Order P 27, JA 553; Rehearing Order P 40, JA 816. Contracts with primary delivery points downstream can only be allocated to the New Jersey/Southeastern Pennsylvania region on a secondary basis and would be subject to superior downstream rights. Transco Study at 8, JA 56. Accordingly, New Jersey local distribution companies cannot rely on this downstream capacity on a design day. *Id*.

The New Jersey Study, in contrast, assumed constant availability of comparable amounts of off-system peaking resources well into the future based on the current availability of such resources. Certificate Order P 29, JA 555; Rehearing Order P 65, JA 829. The Commission reasonably concluded that circumstances, such as potential extreme weather events, undermined this assumption. Rehearing Order P 65, JA 829 (citing *Env't Action, Inc. v. FERC*, 939 F.2d 1057, 1064 (D.C. Cir. 1991) (finding it within FERC's expertise to make a prediction about the market it regulates, and its reasonable prediction is entitled to deference even if there might be another reasonable view). *See also Citadel FNGE Ltd. v. FERC*, 77 F.4th 842, 860 (D.C. Cir. 2023) (same); *S.C. Pub. Serv. Auth.*, 762 F.3d at 96 (same).

The Commission recognized that some downstream capacity had been available to New Jersey local distribution companies in the past, and therefore may be available in the future on the same short-term basis. Rehearing Order P 40, JA 816; Certificate Order P 27, JA 553. However, the ability to obtain such capacity in the future is uncertain because these short-term arrangements are dependent on pipeline capacity being available year to year. Rehearing Order PP 38, 65, JA 814, 829. *See also* New Jersey Study at 98, JA 350 (recognizing the short-term nature of these contracts). New Jersey local distribution companies have to compete to access this capacity with other entities—such as downstream local distribution companies in New York and New England and gas-fired electric generators—that would also be subject to the same design day conditions. Certificate Order P 29, JA 555. *See also* Transco Study at 19-20, 35-36, JA 61-68, 83-84. Indeed, the New Jersey Study listed its assumption regarding off-system peaking resources as a caveat to its conclusion that New Jersey has enough capacity to meet demand. New Jersey Study at 100, JA 352.

Foundation argues that the New Jersey Study's projection was not uncertain because it was based on the local distribution companies' own

numbers. Foundation Brief at 39; *see also* Rate Counsel Brief at 19 (both citing New Jersey Study at 98-99, JA 350-51). But the study relied on local distribution companies' projected use of off-system resources through the winter of 2024/2025—and then continued to assume the use of a constant 619,000 dekatherms a day until the winter of 2029/2030. Certificate Order P 29, JA 555; Rehearing Order P 38, JA 814 (both citing New Jersey Study at 98-99, JA 350-51). Moreover—as Foundation (Brief at 40) and Rate Counsel (Brief at 19) acknowledge—the study assumed that New Jersey Natural Gas Company would contract for 200,000 dekatherms a day until the winter of 2029/2030 even though New Jersey Natural Gas itself projected that it would not contract for *any* off-system peaking resources after 2022. Rehearing Order P 38 n.120, JA 814; Certificate Order P 29, JA 555. *See* New Jersey Study at 98, JA 350.

Foundation dismisses the New Jersey Natural Gas projections as inconsistent with past practice. Brief at 40-41. The Commission found to the contrary that the ability to obtain sufficient off-system peaking resources in the future is uncertain, and New Jersey Natural Gas is in a strong position to judge the availability of future resources based on its

contracting experience and statutory reliability responsibilities, among other factors. Rehearing Order P 65, JA 829.

b. Projected Effect Of New Jersey Energy Efficiency Goals On Design Day Demand.

On the demand side, the Transco and New Jersey Studies applied differing assumptions about the speed and success of achieving New Jersey's energy efficiency and electrification goals. Certificate Order P 28, JA 554; Rehearing Order P 39, JA 815. The Transco Study assumed the accuracy of the New Jersey local distribution companies' design day demand forecasts, which incorporate expected efficiency gains. Certificate Order P 27, JA 553; Rehearing Order P 40, JA 816. Because these forecasts are conservatively oriented to ensure reliability, they may overstate future demand. Certificate Order P 27, JA 553.

The New Jersey Study in contrast reduced the local distribution companies' demand assumptions by projecting higher energy efficiency gains and fewer oil-to-natural gas conversions in light of state policies encouraging electrification of heating systems. Certificate Order P 28, JA 554; Rehearing Order P 39, JA 815. The Commission found that the New Jersey Study did not account for offsetting effects that may undercut its claim that gas demand will decrease. Rehearing Order

P 37, JA 814. The Commission recognized that New Jersey has policy goals to achieve certain environmental targets, including the requirement in the 2018 New Jersey Clean Energy Act that local distribution companies reduce natural gas consumption by 0.75 percent annually. Rehearing Order P 26, JA 808. But there are no mandated mechanisms or prescribed methods to implement those goals or to require conservation or replacement of gas equipment with non-gas alternatives. *Id.* PP 26, 70, JA 808, 831; Certificate Order P 31, JA 556. The State has directed local distribution companies to consider non-pipeline alternatives in meeting peak-day demand,[3] but it is not required, and local distribution companies may decline to adopt such alternatives where they are feasible but not economic. Certificate Order P 31, JA 556. The Commission found the record did not support the conclusion that sufficient non-pipeline alternatives will necessarily be in place to eliminate the need for the Project. *Id.*

[3] Non-pipeline alternatives include energy efficiency, voluntary demand response, direct load control, building electrification, renewable natural gas, green hydrogen, liquefied natural gas and advanced leak detection. Certificate Order P 28 n.64, JA 555.

Moreover, building electrification does not mean that demand for natural gas would disappear. Rehearing Order P 37, JA 814. Much of that demand may simply be transferred from the local distribution companies to gas-fired electric generators that would presumably need to increase output to meet increased demand for electricity. *Id*.

Rate Counsel argues that the Commission's criticism of the New Jersey Study demand assumptions was flawed, because Scenario 1a of the study used the local distribution companies' demand projections but still found a surplus of capacity of 163,000 dekatherms per day through 2030 with existing capacity. Rate Counsel Brief at 15-18 (citing New Jersey Study at 54, 56, JA 306, 308). The Commission acknowledged this scenario, but found the conclusion of a surplus still assumes that the New Jersey local distribution companies will in the future reliably continue to obtain 619,000 dekatherms a day of off-system peaking resources (i.e., rights to downstream capacity), an assumption which, as discussed above in Section II.B.1.a, the Commission reasonably found unwarranted. Rehearing Order P 25, JA 808. Moreover, the New Jersey Study itself rejects using Scenario 1a in a Shortfall Risk Assessment. New Jersey Study at 56, JA 308; *see also* Rate Counsel

Brief at 16 n.17 (acknowledging that the New Jersey Study found the Scenario 1a growth rate too high).

On balance, given the foregoing, the Commission reasonably found the Transco Study more persuasive. Certificate Order P 34, JA 558; Rehearing Order P 41, JA 816. The Transco Study reflected a lower risk tolerance, which the Commission found consistent with traditional local distribution company planning practices designed to assure they can meet their obligation to reliably serve their customers (both residential and industrial) even on extreme weather design days. Certificate Order P 34, JA 558; Rehearing Order P 41, JA 816. The Transco Study also had fewer methodological deficiencies, which supported its credibility and accuracy. Rehearing Order P 41, JA 816.

Foundation (Brief at 37-38) argues that the Commission should have given more weight to New Jersey's perspective, quoting the Commission's *Updated Policy Statement on Certification of New Interstate Natural Gas Facilities*, 178 FERC ¶ 61,107 P 70, *converted to draft status*, 178 FERC ¶ 61,197 (2022). *See also* Rate Counsel Intervenor Brief at 27-28; Amicus Brief of the Institute for Policy Integrity at 18-19, 26-28; Amicus Brief of New Jersey, *et al*. at 23-24.

But the quoted statement concerns the usefulness of state utility or public service commission comments "as to how a proposed project may impact existing pipelines." *See* Foundation Brief at 38 (quoting *Updated Policy Statement* at P 70). The impact of the Project on other existing pipelines is not at issue in this case. In any event, as this Court noted, the Commission "made clear that it would not apply the Updated Certificate Policy Statement 'to pending applications or applications filed before the Commission issues any final guidance in these dockets.'" *Del. Riverkeeper*, 45 F.4th at 115 (quoting *Order on Draft Policy Statements*, 178 FERC ¶ 61,197 P 2).

Further, the Commission has jurisdiction to determine whether projects transporting natural gas in interstate commerce are required by the public convenience and necessity, and the Commission's determinations regarding project need are consistent with its jurisdiction. Rehearing Order P 24, JA 807. The Commission's findings in no way preclude New Jersey from reviewing the prudence of any purchase agreement by a New Jersey local distribution company, consistent with the state's jurisdiction. *Id*. PP 28, 71, JA 809, 832. Nor does the Commission's analysis of the New Jersey Study preclude the

use of the study by New Jersey to support its own determinations related to matters within its jurisdiction. *Id*. P 24, JA 807.

c. The Commission Reasonably Found The Skipping Stone Study Unhelpful In Assessing Design Day Demand.

The Skipping Stone Study also concluded that Project capacity was unneeded to meet New Jersey local distribution company design day demand. Certificate Order P 23, JA 552. The Commission found the study unhelpful because it compared design day demand to supply options that are available only when the system is not constrained. *Id*. P 33, JA 558; Rehearing Order P 44, JA 818.

While the Skipping Stone Study used local distribution company design day figures for demand (Foundation Brief at 47), the study compared that demand to four types of pipeline capacity, only one of which is firm transmission capacity held by the New Jersey local distribution companies. Rehearing Order P 48, JA 819. The three other categories of allegedly available supply are firm transmission capacity contracted by others that traverses New Jersey, but does not necessarily have primary delivery points in New Jersey: (1) so-called "stranded" pipeline capacity; (2) "merchant" pipeline capacity; and (3)

"load-serving entity" pipeline capacity. *Id.* PP 45, 49, JA 818, 820 (citing Skipping Stone Study at 4-5, JA 420-21).

The study thus assumed that large volumes of third-party capacity contracts that pass through New Jersey should be counted as available to New Jersey local distribution companies even if the primary, firm delivery points of the gas are not in New Jersey. Certificate Order P 32, JA 557; Rehearing Order P 45, JA 818. This assumption ignores that the capacity will not be available if the firm capacity holders exercise their superior rights at a time of high demand. *Id.* Local distribution companies would have to compete with other market participants for what might be very limited capacity. Rehearing Order P 48, JA 819. These types of capacity are not sources of reliable supply on design days. *Id.* P 49, JA 820.

The study thus did not address "design day demand *relative to* firm supply," i.e., whether the local distribution companies hold sufficient contract rights to reliably serve design day demand. *Id.* P 48, JA 819 (emphasis added).[4] Design day planning principles consider the

[4] The Skipping Stone Winter Reliability study, *see* Foundation Brief at 52 n.12, was over five years old and likewise assumed that

obligation of local distribution companies to provide reliable service, which necessarily requires ownership of firm capacity rights and the availability of capacity to meet design day demand. *Id*. P 47, JA 819.

Foundation argues that "stranded" capacity would be available on a design day. Foundation Brief at 51-58. This argument assumes that, in the future, there will continue to be more capacity under firm contract to flow gas into New Jersey than is contracted to flow gas out, and that the difference between the two—the "stranded" capacity—will be available to New Jersey local distribution companies. Rehearing Order P 56, JA 824.

This assumption is based on an historical comparison rather than a reasonable application of design day principles. *Id*. Downstream shippers may, in the future, use a greater percentage of the firm capacity to which they are entitled, particularly during extreme weather events, or may choose to secure firm takeaway capacity from

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downstream capacity contracted to others on a firm basis will nevertheless be available to New Jersey distribution companies in the future, even on a design day. Rehearing Order P 52, JA 822. The Commission therefore reasonably concluded that it too was unhelpful to the Commission's need analysis. *Id*.

their delivery points. *Id*. PP 55, 57, JA 823-24. It is unreasonable to assume this capacity will always be available under stressed conditions like a design day. *Id*. Similarly, it is unreasonable to assume that, because actual peak load in 2018-2019 was met by existing capacity, that local distribution companies have no need for additional firm capacity in the future to meet design day demand. *Id*. PP 48, 50, JA 819, 820. The Commission reasonably found the Skipping Stone Study did not refute the finding of need for Project capacity to provide reliability under stressed conditions. *Id*. P 57, JA 824.

2. Transco's Market Study Demonstrates Market Need For Project Capacity To Accommodate Gas-Fired Electric Generator Demand.

The Commission also found that the Transco Study—unlike the New Jersey Study—considered the market need to accommodate gas-fired electric generators' competing demand for natural gas, which more accurately reflects overall future demand for natural gas in the region than a focus solely on local distribution company demand. Certificate Order P 27, JA 553; Rehearing Order P 41, JA 816. Gas-fired generator demand often peaks on extreme winter days when the demand for gas heating is highest. Certificate Order P 27, JA 553.

The Transco Study found that the Project will alleviate locational constraints caused by limited pipeline takeaway capacity that hamper Transco's ability to serve gas-fired generation demand in the region during extreme cold events. Certificate Order PP 21, 26, JA 550, 553; Rehearing Order PP 59, 67, JA 825, 830. As the study concluded, simulation modeling shows that the Project increases the supply available to combined cycle plants and peakers in New Jersey and Southeastern Pennsylvania that Transco would not otherwise be able to serve on very cold winter days. Transco Study at 4, JA 52. Project capacity will improve the quantity and scheduling flexibility of the secondary firm and interruptible transportation upon which these generators usually rely. *Id.*

The Commission properly considered this growing demand in its analysis of potential shortfall in available capacity. Rehearing Order P 63, JA 828; Certificate Order P 31, JA 556. Indeed, the New Jersey Study recognized that natural gas demand in New Jersey is growing, driven by increased deliveries to electric power consumers and industrial customers. Rehearing Order P 37 n.119, JA 814 (citing New Jersey Study at 37, JA 289). *See also* New Jersey Study at 39, JA 291

("Though gas consumption has been growing over the past decade, most of this growth has been from the electric power sector."). These New Jersey Study findings support the Commission's own findings regarding increasing demand from gas-fired electric generation. *See* Rehearing Order P 37 n.119, JA 814 (citing the Commission's public report, "Winter Energy Market and Reliability Assessment" for 2022-23) (projecting substantial increases in gas-fired generation in each of the three FERC-jurisdictional regional electricity markets in the Northeast).

Foundation argues that there is sufficient capacity to meet generators' interruptible demand. Brief at 43. But the Commission did not find adequate capacity to meet even local distribution company firm demand on a constrained design day when gas-fired generator demand often also peaks. Rehearing Order P 63, JA 828; Certificate Order PP 27, 31, JA 553, 556. While interruptible load does not factor into local distribution company design day planning (Foundation Brief at 42, Rate Counsel Brief at 24-25), that does not mean the Commission's market need determination cannot consider such an important sector of demand. Rehearing Order P 63, JA 828.

3. Transco's Market Study Demonstrates That The Project Will Provide Cost Savings.

The Commission additionally concluded that the Transco Study corroborated Transco's application statement that the Project will provide cost savings by increasing supply diversity. Certificate Order P 34, JA 558; Rehearing Order P 59, JA 825 (citing Transco Study at 5, JA 53). As the Transco Study explained, additional supply tends to put downward pressure on prices. Transco Study at 5, JA 53. The Project's incremental capacity "will likely have a significant impact on delivered natural gas prices in New Jersey and Southeastern Pennsylvania in the winter, especially on days when current capacity is used fully." *Id.* at 5-6, JA 53-54. Local distribution companies in the region purchase at favorable prices in upstream producing basins, such as Marcellus Shale and the Gulf Coast. *Id.* at 120, JA 168. But when pipeline capacity to the New Jersey/Southeastern Pennsylvania region is at or near maximum delivery, prices can spike to several times the prices at those upstream basins. *Id.* Incremental capacity can reduce or eliminate price premiums caused by pipeline constraints. *Id.* at 117, JA 165.

In particular, Project capacity offers a more cost-effective means to satisfy local distribution companies' statutory obligations to provide reliable and affordable service than continued reliance on third party peaking services. Certificate Order P 35, JA 559. As the Transco Study explained, the third party short-term peaking contracts on which local distribution companies rely to ensure reliability in constrained conditions can be very costly. Transco Study at 42, JA 90. Local distribution companies in the region must compete for these supplies with other market participants, including gas-fired generators and downstream local distribution companies. *Id.* Generators in the region hold limited firm transportation capacity and are therefore dependent on third parties to meet their supply needs. *Id.* at 34, JA 82. Downstream local distribution companies in New York and New England are likely to experience design day conditions at the same time as the New Jersey/Southeastern Pennsylvania region and would also compete for the same discretionary supply. *Id.* at 19, JA 67. This competition for discretionary tranches of capacity, where pipeline infrastructure is constrained as it is here, leads to price spikes, which have occurred in New Jersey, Southeastern Pennsylvania, New York

and New England during cold weather or other periods of high demand and/or limited supply. *Id*. at 34, JA 82. Project capacity will allow its local distribution company customers to lower their costs by purchasing lower-priced gas instead of peaking contracts. Certificate Order P 35, JA 559. *See also* Transco Study at 42, JA 90.

C. Shipper Comments Support Market Need.

As this Court has recognized, shipper comments evidencing demand provide independent support for a finding of market need. *Allegheny Def. Project v. FERC*, 932 F.3d 940, 947 (D.C. Cir. 2019) (precedent agreements alone support a finding of market need, but finding is also supported by shipper comments and a market study), *aff'd in relevant part*, 954 F.3d 1, 19 (D.C. Cir. 2020) (*en banc*) (reviewing court need not address objections to precedent agreements where the Commission also grounded its finding of market need on shipper comments and a market study). Project shipper comments support the Commission's findings here. Rehearing Order P 59 & n.174, JA 825; Certificate Order PP 21, 31, 35, JA 550, 556, 559 (citing comments).

The four New Jersey local distribution company customers all filed comments expressing their need for Project capacity. South Jersey Gas Company and Elizabethtown Gas Company stated that "the Project will support overall reliability and diversification of energy infrastructure in the Northeast, decreasing peak day constraints caused by limited pipeline takeaway capacity." Certificate Order P 21, JA 550 (quoting South Jersey Gas Company and Elizabethtown Gas Company April 30, 2021 Motion to Intervene and Comments, R. 91 at 4-5, JA 33-34). As the companies explained, "[a]bsent the Project, [the companies] would need to rely on third-party peaking services, which do not provide reliable, long-term service options, thereby making these third-party options an economically inefficient and operationally unattractive means to utilities to serve their customers." April 30, 2021 Motion to Intervene and Comments at 5, JA 34.

New Jersey Natural Gas similarly wrote that the Project would allow it to "improve reliability, ensure competitive pricing and price stability, and enhance operating flexibility." Certificate Order P 21, JA 550 (quoting New Jersey Natural Gas Nov. 9, 2022 Letter, R. 968, JA 538). New Jersey's natural gas market already is supply

constrained and positioned to become increasingly so in the absence of access to new capacity like the Project, particularly in light of New Jersey Natural Gas' forecasted annual customer growth. April 30, 2021 Amendment to Motion to Intervene and Comments in Support of New Jersey Natural Gas Company, R. 73 at 3, JA 18. Even without another added customer, there are reliability risks under design day and other high-usage, cold weather conditions. *Id.* The Project would eliminate design day shortfalls. *Id.* at 4, JA 19. The Project also would lessen price volatility during times of high demand. *Id.* at 5, JA 20.

PSEG Energy Resources & Trade LLC, which makes purchases on behalf of New Jersey local distribution company Public Service Electric and Gas Company, stated that the Project would allow Public Service to "meet growing firm demand among its high-priority customers and to address projected peak-day deficits." Certificate Order P 21, JA 550 (quoting PSEG April 30, 2021 Comments, R. 68 at 2, JA 9). Public Service faces a series of potential shortfalls in meeting projected peak-day needs in the upcoming years, beginning in winter 2022-2023. The Project's additional volume of 60,000 dekatherms per day on a long-term basis would permit Public Service to meet near-term needs and

significantly mitigate needs in the future. PSEG April 30, 2021 Comments at 2-4, JA 9-11.

Exelon, the parent company of two local distribution company customers (Baltimore Gas and Electric Company and PECO Energy Company, providing service in Maryland and Pennsylvania respectively), stated that Project capacity would allow the companies to lessen their need for short-term contracts and to more reliably meet winter demand. Certificate Order P 21, JA 550 (citing Exelon April 28, 2021 Comments in Support of Application, R. 45 at 3, JA 5).

South Jersey Resources Group, LLC, a natural gas marketing company customer, stated that the Project was needed to address "current challenges . . . including increased natural gas prices during the winter months for consumers in the Northeast, and limited power generation supplies in some regions that hinder the ability to respond to extreme weather events." Certificate Order P 21, JA 550 (quoting South Jersey Resources Group LLC Nov. 9, 2022 Letter, R. 967, JA 536). As South Jersey explained, it serves power plants, refineries, and retail customers and has over 100,000 dekatherms per day of firm commitments off the Transco system. April 30, 2021 Motion for Leave

to Intervene and Comments in Support of South Jersey Resources Group, LLC, R. 90 at 5, JA 27. However, without the Project, it holds only 71,400 dekatherms per day of firm capacity and is required to use secondary capacity (which may or may not be available based on market conditions) and to buy third-party gas to cover any shortfall. *Id.* The Project would increase its overall capacity by 30,000 dekatherms per day and would allow South Jersey Resource Group to meet its firm obligations year-round. *Id.* The Project's incremental capacity would guarantee that all of South Jersey's customers receive firm deliveries, which is especially critical during periods of peak demand. *Id.*

D. The Commission Reasonably Balanced Project Benefits And Adverse Economic Impacts.

Under its Certificate Policy Statement, if market need is shown, the Commission then balances the benefits and economic harms of the project. *Sierra Club*, 867 F.3d at 1379. Public benefits may 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." Certificate Policy Statement at 61,748; *Minisink*, 762 F.3d at 101 n.1.

These benefits are balanced against adverse economic effects on the applicant's existing customers, competing existing pipelines and their captive customers, and landowners and surrounding communities. Certificate Policy Statement at 61,745, 61,747. Only when the public benefits outweigh the adverse effects on economic interests will the Commission complete an environmental analysis. *Id*. at 61,745. The Commission has broad discretion to balance competing equities in determining the public interest. *See Bordentown*, 903 F.3d at 263 (FERC is afforded broad discretion in balancing public benefits against adverse economic effects); *Minisink*, 762 F.3d at 111 (same).

Foundation does not challenge the Commission's determination that the Project would not have adverse economic impacts on Transco's existing shippers or the existing customers of other pipelines and will have minimal impacts on the interests of landowners and surrounding communities. *See* Certificate Order PP 36-38, JA 559-60.

Foundation claims, however, that the Project benefits of more reliable service on peak winter days and decreasing costs by increasing supply diversity (*see* Certificate Order PP 31, 34, JA 556, 558; Rehearing Order P 59, JA 825) are unsupported. Foundation Brief at

59-63. As discussed above, *see* section II.B *supra*, these findings were corroborated by Transco's market study. Rehearing Order P 59, JA 825; Certificate Order PP 21, 34, JA 550, 558. In addition, as demonstrated in section II.C *supra*, shippers expressed their support and need for the Project, echoing the benefits. Rehearing Order P 59 & n.174, JA 825; Certificate Order PP 21, 31, 35, JA 550, 556, 559 (citing comments).

Foundation claims the Certificate Policy Statement required the Commission to quantify Project benefits. Foundation Brief at 60; *see also* Rate Counsel Brief at 29-31. The Certificate Policy Statement does state that applicants may not rely on vague assertions, Foundation Brief at 60 (citing Certificate Policy Statement at 61,748), but it does so in the context of requiring evidence to support claimed benefits. *See Env't Def. Fund*, 2 F.4th at 972 (quoting Certificate Policy Statement at 61,748). Again, Transco's market study and Project shipper comments corroborated the benefit findings here. Rehearing Order P 59, JA 825; Certificate Order PP 21, 34, JA 550, 558.

In particular, as to cost savings, this Court in *Environmental Defense Fund* (cited in Foundation Brief at 61; Rate Counsel Brief at 30), recognized that evidence of cost savings would support a finding of

need. *See* 2 F.4th at 973-75. The Certificate Policy Statement provides that "[i]f one of the benefits of the 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." Certificate Policy Statement at 61,748.

As discussed in section II.B.3 above, Transco's market study made that demonstration. Indeed, this Court in *Environmental Defense Fund* distinguished that situation, where there was no market study, from a case where a submitted market study showed the need for and benefits of the proposed project. *See* 2 F.4th at 975 (citing *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 at 61,297 (2017)). There is no requirement that the study attempt to quantify the exact amount of the cost savings; the Commission may rely on qualitative benefits demonstrated by substantial record evidence to approve a Project, as it does here. Rehearing Order P 59, JA 825.

Further, the Commission has found, and this court has affirmed, that precedent agreements—here for 100 percent of Project capacity—are sufficient evidence of need for a project. *See Del. Riverkeeper*, 45 F.4th at 114; *City of Oberlin*, 937 F.3d at 605-606; *Appalachian Voices*,

2019 WL 847199 at *1; *Sierra Club*, 867 F.3d at 1379; *Myersville*, 783 F.3d at 1311; *Minisink*, 762 F.3d at 111 n.10.

III. THE COMMISSION FULLY COMPLIED WITH ITS ENVIRONMENTAL REVIEW RESPONSIBILITIES UNDER NEPA.

Any proposed "'major federal action[] significantly affecting the quality of the human environment'" triggers an agency obligation to prepare an Environmental Impact Statement discussing in detail the environmental impact of the proposed action, alternatives to the action, and other considerations. *Myersville*, 783 F.3d at 1322 (citing 42 U.S.C. § 4332(C)). An agency may preliminarily prepare an Environmental Assessment to determine whether there are significant impacts requiring preparation of an Environmental Impact Statement. *Id*.[5]

Here, the Commission prepared the more extensive Environmental Impact Statement, which addressed: geology; soils; groundwater; surface water; wetlands; aquatic resources; vegetation and wildlife; land use and visual resources; cultural resources;

[5] A newly enacted provision of NEPA confirms that an agency may proceed with an Environmental Assessment even where the significance of certain environmental effects is "unknown." 42 U.S.C. § 4336(b)(2).

socioeconomics (including environmental justice); air quality and noise; greenhouse gas emissions and climate change; reliability and safety; and alternatives. Certificate Order P 51, JA 567. The Statement concluded that the Project's adverse environmental impacts would be adequately mitigated and that the Project is an environmentally acceptable action. *Id*. PP 51, 81, JA 567, 583.

Foundation challenges the Commission's determinations regarding Project purpose and alternatives and Project emissions. *See* Foundation Brief at 68-99. As demonstrated below, these objections are without merit.

A. The Environmental Impact Statement Reasonably Defined Project Purpose And Evaluated Alternatives.

Under the Council on Environmental Quality's NEPA regulations, an Environmental Impact Statement must "briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." Rehearing Order P 76 & n.229, JA 835 (quoting 40 C.F.R. § 1502.13). Courts review the statement of purpose and selection of alternatives under a rule of reason. Rehearing Order P 81, JA 839; *Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 73 (D.C. Cir. 2011).

The Environmental Impact Statement defined the Project purpose as "provid[ing] an incremental 829,400 dekatherms per day of year-round firm transportation capacity from the Marcellus Shale production area in northeastern Pennsylvania to delivery points in New Jersey, Pennsylvania and Maryland." Rehearing Order P 78, JA 836 (quoting Environmental Impact Statement at 1-2, JA 432); *see also* Statement at 3-1, JA 436. The Statement then used that purpose to consider a reasonable range of alternatives: a no-action alternative, the potential use of other natural gas transmission systems, modification to alternatives to Transco's existing system, pipeline route alternatives, alternative compressor station locations, and the use of electric motor-driven compressors. Rehearing Order P 78, JA 836 (citing Statement at ES-10, 3-1 to 3-32, JA 430, 436-67).

Foundation argues that the Commission's definition of Project purpose unduly restricted the consideration of alternatives. Brief at 69-76. But courts have upheld the use of an applicant's project purpose in environmental documents and as the basis for evaluating alternatives. Rehearing Order P 76, JA 835 (citing *City of Grapevine v. U.S. Dep't of Transp*., 17 F.3d 1502, 1506 (D.C. Cir. 1994); and *Citizens Against*

Burlington, Inc. v. Busey, 938 F.2d 190, 196, 199 (D.C. Cir. 1991)). The Commission recognized that a project's purpose may not be so narrowly defined as to preclude consideration of reasonable alternatives. *Id.* P 77, JA 836. Nevertheless, an agency need only evaluate alternatives that will bring about the ends of the proposed action, and that evaluation is "'shaped by the application at issue and by the function that the agency plays in the decisional process.'" *Id.* (quoting *Citizens Against Burlington*, 938 F.2d at 199). *See also, e.g.*, *City of Grapevine*, 17 F.3d at 1506 (consideration of alternatives "'may accord substantial weight to the preferences of the applicant and/or sponsor in the siting and design of the project'") (quoting *Citizens Against Burlington*, 938 F.2d at 197-98).

Foundation (Brief at 70, 72, 73, 76) cites the 2022 revisions to the Council on Environmental Quality's regulations, *National Environmental Policy Act Implementing Regulations Revisions*, 87 Fed. Reg. 23,453 (Apr. 20, 2022). But the revisions do not affect the result here. Rehearing Order P 86, JA 841. In its 2022 final rule, as relevant here, the Council on Environmental Quality removed 2020 revisions to the regulation on the purpose and need statement (40 C.F.R. § 1502.13),

reverting to the previous 1978 regulation language. *See* 87 Fed. Reg. at 23,457. The Commission prepared the Environmental Impact Statement under the 1978 regulation, not the 2020 revised language. *See* Environmental Impact Statement at 1-2 n.16, JA 432. Under the 1978 regulation language, which was reinstated in the 2022 final rule, nothing "foreclose[s] an agency from considering the goals of the applicant." Rehearing Order P 86, JA 841 (quoting 87 Fed. Reg. at 23,458). To the contrary, the Council on Environmental Quality 2022 final rule expressly reaffirmed the holding in *Citizens Against Burlington*, 938 F.2d at 196-99, that the agency's consideration of the applicant's goals to develop the purpose and need of the action was reasonable. *See* 87 Fed. Reg. at 23,459.

Courts have affirmed purpose statements like that here. Rehearing Order P 77, JA 836 (citing *Sierra Club, Inc. v. U.S. Forest Serv.*, 897 F.3d 582, 598-600 (4th Cir. 2018)). In *Sierra Club*, the Mountain Valley pipeline's purpose was described as: "'transport[ing] natural gas produced in the Appalachian Basin to markets in the Northeast, Mid-Atlantic, and Southeastern United States. Specifically, the [pipeline] would deliver the identified gas volumes (2 Bcf/d) to five

contracted shippers"" via a pooling point in Virginia. *Sierra Club*, 897 F.3d at 599 (quoting FERC Environmental Impact Statement). As here, that statement of project purpose explained "where the gas must come from, where it will go, [and] how much [the project] would deliver." *Id.* *See* Rehearing Order P 77 n.233, JA 836. The court found this statement broad enough to allow for a wide range of alternatives but narrow enough that "there are not an infinite number of alternatives." *Sierra Club*, 897 F.3d at 599. "It also reflects the goals Congress set forth in the Natural Gas Act, which bestows upon FERC 'the power to perform any and all acts . . . to carry out the provisions of' the [Natural Gas Act] in the transportation of natural gas in interstate commerce." *Id.* (citing 15 U.S.C. §§ 717(b); 717o).

Similarly, the reviewing court in *Fuel Safe Washington v. FERC*, 389 F.3d 1313, 1324 (10th Cir. 2004) (cited in Rehearing Order P 81 n.248, JA 839), affirmed a project purpose of "'provid[ing] a transportation system for natural gas to supply the growing demand for natural gas on Vancouver Island [and] [i]n particular . . . [to] transport natural gas . . . to two new electric generation facilities on Vancouver Island.'" *Id.* (quoting Environmental Impact Statement).

The Commission further reasonably focused on alternatives that could meet the Project objective. Rehearing Order P 78, JA 836. When an agency must decide whether to adopt a private applicant's proposal, and if so, to what degree, a reasonable range of alternatives includes rejecting the proposal, adopting the proposal, or adopting the proposal with some modification. *Id.* P 81, JA 839 (citing *Theodore Roosevelt Conservation P'ship*, 661 F.3d at 72-74). An agency may eliminate alternatives that will not achieve the project's goal or that cannot be carried out because they are too speculative, infeasible or impractical. *Id.* (citing *Fuel Safe*, 389 F.3d at 1323).

Foundation (Brief at 72) argues that the Commission erred in rejecting non-gas alternatives, including the no-action alternative. The Environmental Impact Statement explained that it excluded renewable energy and energy efficiency alternatives because those alternatives do not transport natural gas and would not feasibly achieve the Project's aims. Rehearing Order P 85, JA 841 (citing Environmental Impact Statement at 3-3, JA 438) (because "FERC is tasked with authorizing infrastructure to be used for the transportation of natural gas," "alternatives that do not also facilitate the transportation of natural gas

cannot be a function surrogate"). Neither the no-action alternative nor any non-gas alternative can meet the purpose of the Project, and therefore they were eliminated from detailed study. *Id.*; Environmental Impact Statement at ES-10, 3-3, JA 430, 438.

This Court recently affirmed the Commission's rejection of a no-action alternative (where nothing like the project is ever built) because "it would not fulfill the Project's purpose, which is to commercialize natural gas from Alaska's North Slope." *Ctr. for Biological Diversity v. FERC*, 67 F.4th 1176, 1182 (D.C. Cir. 2023). *See also, e.g., Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1067 (9th Cir. 1998) (cited in Rehearing Order PP 80 n.243, 81 n.246, JA 838, 839) (affirming agency rejection of no-action alternative that is "plainly inconsistent with the project's overarching purposes and needs" of meeting timber demand).

In addition, Foundation failed to identify any specific non-gas proposals by entities willing to pursue such alternatives. Rehearing Order PP 82, 85, JA 839, 841. Speculation regarding hypothetical energy alternatives outside of the Commission's jurisdiction goes beyond NEPA's rule of reason. *Id.* P 87, JA 842. FERC is "not obligated

to reject [the proposed project] in favor of a non-natural gas alternative which [is] purely hypothetical and speculative." *Fuel Safe*, 369 F.3d at 1324. "Given that the agency is only obligated to consider reasonable, non-speculative alternatives, we cannot say that its review of non-natural gas pipeline alternatives, and rejection of them in favor of [the proposed project], was arbitrarily and improperly restricted by its definition of the scope and purpose of the project." *Id.*

Foundation (Brief at 74) also claims the Commission should have considered satisfying demand using existing capacity. But the Environmental Impact Statement did consider the use of existing capacity, and concluded (1) that existing natural gas transmission systems in the Project area lack available capacity to meet the purpose of the Project and (2) modifying these systems would result in impacts similar to the Project or would be economically impractical. Environmental Impact Statement at ES-10, 3-3 to 3-5, JA 430, 438-40. Foundation does not challenge this finding. Moreover, the Commission found insufficient capacity available to satisfy Project demand on a non-firm basis because the Commission did not find adequate capacity to

meet even firm demand on a constrained design day. Rehearing Order P 63, JA 828; Certificate Order P 31, JA 556.

B. The Commission Reasonably Considered Project Emissions.

NEPA requires that agencies prepare, as part of every "major Federal action[] significantly affecting the quality of the human environment," a "detailed statement" discussing and disclosing the environmental impact of the action. *Sierra Club*, 867 F.3d at 1367 (quoting 42 U.S.C. § 4332(C)). The Council on Environmental Quality defines impacts as "changes to the human environment from the proposed action or alternatives that are reasonably foreseeable." Certificate Order P 67, JA 576 (quoting 40 C.F.R. §1508.1(g)). An impact is reasonably foreseeable if it is "sufficiently likely to occur such that a person of ordinary prudence would take it into account in reaching a decision." *Id.* (quoting 40 C.F.R. §1508.1(aa)).

Here, the Environmental Impact Statement concluded that construction and operation of the Project would result in some adverse environmental impacts. Certificate Order P 51, JA 567. With the exception of potential impacts on climate change, the Statement concluded that these impacts would be reduced to less than significant

levels through mitigation measures and the Commission's environmental conditions. *Id.*

Foundation challenges the Commission's determinations regarding Project emissions. Foundation Brief at 76-92. As demonstrated below, however, the Commission fully complied with NEPA by quantifying and considering causally related and reasonably foreseeable Project emissions: the Project's construction and direct operational emissions and emissions from the downstream combustion of transported gas. Certificate Order P 67, JA 576. The Commission reasonably did not formally assess the significance of such emissions given the lack of methodology to do so. Rehearing Order P 114, JA 859. The Commission also did not analyze greenhouse gas emissions from upstream gas production or the potential for localized increases in ozone from downstream gas combustion because those effects were too uncertain to be reasonably foreseeable. Certificate Order P 68, JA 577; Rehearing Order P 118, JA 862. This Court defers to the Commission on issues like these "that demand its technical and scientific expertise." *Sierra Club v. FERC*, 38 F.4th 220, 235 (D.C. Cir. 2022). *See also Myersville*, 783 F.3d at 1308 ("when considering FERC's evaluation of

scientific data within its technical expertise, we afford FERC an extreme degree of deference"). In particular, this Court has deferred to the Commission's informed discretion and technical expertise in determining the foreseeability of emissions, *Del. Riverkeeper*, 45 F.4th at 109-110, and in evaluating the climate change impacts of Project emissions. *Ctr. for Biological Diversity*, 67 F.4th at 1183-84.

1. The Commission Reasonably Considered Project Greenhouse Gas Emissions But Did Not Assess The Significance Of Their Impact On Climate Change.

Consistent with NEPA, the Environmental Impact Statement considered and discussed the reasonably foreseeable and causally connected greenhouse gas emissions associated with the Project, which are emissions from the Project's construction and operation and the downstream combustion of gas transported by the Project. Certificate Order P 67, JA 576; Rehearing Order P 106, JA 855. The Commission met its NEPA obligations to consider these emissions by:
(1) quantifying the emissions associated with the Project (Certificate Order P 69, JA 578; Statement at 4-175, JA 486); (2) placing those emissions in context by comparing them to national and state total greenhouse gas emissions and state reduction targets (Certificate Order

PP 70-72, JA 578-80; Statement at 4-176 to 4-177, JA 487-88); and (3) identifying climate impacts in the region (Certificate Order P 73, JA 580; Statement at 4-173 to 4-175, JA 484-86). *See* Rehearing Order P 106, JA 855. The Commission also, for informational purposes, disclosed the social cost of carbon for the Project's annual greenhouse gas emissions over the 20-year assumed project life. *Id*. P 116, JA 860; Statement at 4-179 to 4-180, JA 490-91.

Foundation argues the Commission was required to take the additional step of determining the significance of Project emissions impacts on climate change. Foundation Brief at 82-89. But, as this Court has repeatedly recognized, where an agency cannot attribute physical effects of climate change to a project's incremental emissions, the agency may instead quantify the emissions and compare them to national and state emission levels as a "reasonable proxy" for assessing climate impacts. *WildEarth Guardians v. Jewell*, 738 F.3d 298, 309 (D.C. Cir. 2013). *See also Ctr. for Biological Diversity*, 67 F.4th at 1184 (finding FERC's approach "reasonable" when it compared Project emissions with state and national emissions after finding no adequate methodology to estimate Project effects on global climate change);

Sierra Club, 867 F.3d at 1374 ("[q]uantification [of greenhouse gas emissions] would permit the agency to compare emissions from this project to emissions from other projects, to total emissions from the state or the region, or to regional or national emissions-control goals").

Here, the Commission reasonably found it was unable to link Project emissions to particular climate impacts. Rehearing Order PP 104-107, 114, JA 854-56, 859. Greenhouse gas emissions do not result in proportional local and immediate impacts; it is the combined concentration in the atmosphere that affects the global climate system. Environmental Impact Statement at 4-173, JA 484. These global impacts then result in local and regional climate change impacts. *Id*.

The Commission recognized that the Project would incrementally increase the atmospheric concentration of greenhouse gases, in combination with past, current and future emissions from all other sources globally. Rehearing Order P 105, JA 855 (citing Environmental Impact Statement at 4-175, JA 486); Certificate Order P 73, JA 580. But the Commission was not able to identify a methodology to attribute discrete, physical effects on the environment to the Project's incremental contribution. Rehearing Order PP 104-107, 114, JA 854-

56, 859; Environmental Impact Statement at 4-175, JA 486. The Commission found atmospheric modeling used by other agencies not reasonable for project-level analysis, and could not identify a reliable, less complex model to determine specific localized or regional impacts from Project emissions. *See* Statement at 4-179, JA 490. The Commission has an open, generic proceeding to determine whether and how the Commission will conduct significance determinations going forward. *See* Rehearing Order P 106 & n.345, JA 855 (citing *Consideration of Greenhouse Gas Emissions in Nat. Gas Infrastructure Project Reviews*, 178 FERC ¶ 61,108, *converted to draft status*, 178 FERC ¶ 61,197 (2022)); Certificate Order P 73, JA 580.

Foundation does not propose a methodology the Commission could use to assess the significance of Project emissions. Rehearing Order P 114 n.369, JA 860. This Court has rejected arguments that the Commission must assess significance where petitioners failed to identify a workable method the Commission could use to make that determination. *Id.* (citing *Food & Water Watch v. FERC*, 28 F.4th 277, 290 (D.C. Cir. 2022)). *See also EarthReports, Inc. v. FERC*, 828 F.3d 949, 956 (D.C. Cir. 2016) (upholding Commission orders declining to

assess significance in the absence of petitioners identifying any method the Commission could use).

Northern Natural Gas Co., 174 FERC ¶ 61,189 (2021) (cited in Foundation Brief at 83), did not determine any methodology for assessing significance. Rather, it acknowledged the Commission's ongoing generic proceeding to determine how it will conduct significance determinations in the future. *N. Nat*, 174 FERC ¶ 61,189 P 33. *See* Rehearing Order P 106 & n.345, JA 855. *Northern Natural* found nevertheless that, in that case, project greenhouse gas emissions would not be considered significant no matter how "the Commission's approach to the significance analysis evolves." 174 FERC ¶ 61,189 PP 33-36 (finding project operations would increase national emissions by 0.000006 percent and state emissions by 0.000078 percent and 0.0002 percent). The Commission made no equivalent finding here.

Foundation also points to the Council on Environmental Quality's 2023 guidance, *National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change*, 88 Fed. Reg. 1196 (Jan. 9, 2023) (Brief at 84-85), but this guidance is inapplicable. The guidance states that agencies should apply it to new

proposed actions, but agencies are not expected to apply this guidance to concluded NEPA reviews and actions for which an Environmental Impact Statement has been issued, as was the case here. Rehearing Order PP 86, 110 & n.359, JA 841, 857 (citing 88 Fed. Reg. at 1212). Because the guidance does not apply, the Commission reasonably found no supplemental Environmental Impact Statement was required. *Id.* P 111, JA 858. *See* Foundation Brief at 85 (arguing the 2023 guidance required a supplemental Environmental Impact Statement). In any event, the guidance "does not establish any particular quantity of greenhouse gas emissions as 'significantly' affecting the quality of the human environment." *See Guidance*, 88 Fed. Reg. at 1200. Instead, the guidance states that "quantifying a proposed action's reasonably foreseeable [greenhouse gas] emissions whenever possible, and placing those emissions in an appropriate context are important components of analyzing a proposed action's reasonably foreseeable climate change effects." *Id.*

Nor did the Commission err in declining to discuss mitigation of Project greenhouse gas effects. Foundation Brief at 86-87. Foundation fails to identify any specific mitigation measures that the Commission

should have undertaken. Rehearing Order P 109, JA 857. In the absence of any specific proposed measures, the Commission reasonably concluded that a further discussion of potential mitigation measures would not, consistent with the purpose of NEPA, meaningfully inform the Commission or the public's consideration of the proposed Project and alternatives. *Id*. *See also id*. at P 110 n.359, JA 858 (citing *Methow Valley*, 490 U.S. at 351-52) (NEPA does not require specific measures to be employed to mitigate the adverse effects of major federal actions).

Foundation also argues that the Commission failed to consider the Project's long-term impact on New Jersey greenhouse gas emissions or the carbon "lock-in effect" of approving gas infrastructure. Foundation Brief at 88-89. The Environmental Impact Statement compared projected Project emissions to state greenhouse gas emission goals, including New Jersey's. Rehearing Order P 107, JA 856 (citing Statement at 4-176 to 4-177, JA 487-88). However, the Commission is unable to determine how individual projects will affect international, national or state-wide greenhouse gas emissions reduction targets or whether a project's greenhouse gas emissions comply with those goals or laws. *Id*.; Statement at 4-178, JA 489. As for the "lock-in" effect, the

Commission recognized that the Project would increase the atmospheric concentration of greenhouse gas emissions, in combination with past and future emissions from all other sources, and would contribute cumulatively to climate change. Rehearing Order P 107, JA 856; Certificate Order P 73, JA 580; Statement at 4-177, JA 488. Further, the Commission did disclose the social cost of greenhouse gas emissions values over the 20-year period of the assumed Project life for informational purposes, which is consistent with the Commission's practice for other projects. Rehearing Order P 116, JA 860 (citing Statement at 4-180, JA 491). Foundation has not shown that anything more was required. *Id*. PP 114, 116, JA 859, 860.

2. The Commission Reasonably Found Upstream Impacts Not Causally Related And Unforeseeable.

The Commission reasonably concluded that any upstream greenhouse gas emissions from the production of natural gas would not be a reasonably foreseeable or causally related impact of this project. Rehearing Order PP 93, 100, JA 846, 851; Certificate Order P 68, JA 577; Environmental Impact Statement at 4-178, JA 489.

Causation in this context requires a showing that the Project would spur production; i.e., that more wells will be required to support Project demand. Rehearing Order PP 97, 99-100, JA 849, 850-52. *See Del. Riverkeeper*, 45 F.4th at 109 (finding causation lacking where petitioners failed to point to any evidence that additional wells would be needed to support project demand); *Birckhead v. FERC*, 925 F.3d 510, 517 (D.C. Cir. 2019) (causation not shown where petitioners identified no evidence that production would not occur absent the project). The record here does not show that the Project would spur additional production; the Project would add only a small amount of incremental capacity on Transco's existing 10,000-mile interstate pipeline system. Rehearing Order P 97, JA 849. *See* Project Map *supra* at page 8 (showing incremental addition of pipeline). Thus, there is no demonstrated causal connection between the Project and upstream gas production. Rehearing Order P 100, JA 851.

Even if a causal relationship between the Project and upstream production were presumed, the scope of the impacts from any such production is speculative and therefore not reasonably foreseeable. Rehearing Order P 94 & n.298, JA 847 (citing *Dominion Transmission*,

Inc., 163 FERC ¶ 61,128 P 61 (2018)). Neither the Commission nor the applicant generally has sufficient information to determine the origin of transported gas. *Id.* While shippers might contract with a specific producer for their gas supply, the shipper might not know the source of the gas and the producer itself also might not know in advance the exact source of production. *Id.*

Where the supply source is unknown, upstream production environmental impacts are generally not reasonably foreseeable consequences of project approval. Rehearing Order P 93, JA 846; Certificate Order P 68, JA 577. Here, the Commission reasonably found the supply source unknown. *Id.* While the Project would receive gas from the Marcellus Shale production area, the Marcellus Shale formation extends from Ohio and West Virginia northeast through Pennsylvania and southern New York. Rehearing Order P 95 & n.305, JA 848; Certificate Order P 68 & n.160, JA 577. This Court has recognized the difficulty of identifying the location of production that may occur anywhere within a regional shale play. *Sierra Club v. U.S. Dep't of Energy*, 867 F.3d 189, 200 (D.C. Cir. 2017). Because a shale play stretches for thousands of square miles, identifying the shale play

does not provide any information about where incremental production caused by a project would occur within that shale play. *Id.*

The Commission requested that Transco provide flow maps showing receipt points where gas from the Marcellus Shale region would enter the Transco system. Rehearing Order PP 95, 103, JA 848, 853; Certificate Order P 68, JA 577. Transco responded that the Project would receive gas from existing gathering infrastructure in the Marcellus Shale production area via new connections with Williams Field Services Company, LLC, Regency NEPA, and UGI North. Rehearing Order P 95, JA 848; Certificate Order P 68, JA 577.

The Commission reasonably concluded that this information was not sufficient to render the upstream impacts reasonably foreseeable. Rehearing Order P 95, JA 848. Although the Project's receipt points are at interconnections with large gathering systems in Northeast Pennsylvania, Project shippers are responsible for sourcing their own gas. *Id.* PP 94, 103, JA 847, 853. The record therefore does not indicate from whom Project shippers may source their gas within the Marcellus Shale production area. *Id.* PP 93-95, JA 846-49; Certificate Order P 68, JA 577. Indeed, the Project purpose is to diversify fuel supply access.

Certificate Order P 68, JA 577. Moreover, shippers may change the gas suppliers from whom they source their gas throughout Project operation. Rehearing Order PP 93-95, 103, JA 846-49, 853; Certificate Order P 68, JA 577.

The Commission, therefore, reasonably concluded that it lacked information to predict the number and location of any additional wells that would be drilled as a result of any demand associated with the Project. Rehearing Order P 93, JA 846. Foundation argues that this information is unnecessary (Brief at 77-81) but this Court has affirmed prior Commission orders finding a lack of foreseeability in this circumstance. Rehearing Order P 99, JA 850 (citing *Birckhead*, 925 F.3d at 517). *See also Del. Riverkeeper*, 45 F.4th at 109 (finding upstream impacts unforeseeable where, as in *Birckhead*, petitioners "'have identified no record evidence that would help the Commission predict the number and location of any additional wells that would be drilled as a result of production demand created by the Project'") (quoting *Birckhead*, 925 F.3d at 517).

Foundation argues that 40 C.F.R. § 1502.21 requires FERC to evaluate upstream effects regardless of any missing information.

Foundation Brief at 80. But that regulation concerns unavailable information required to evaluate "reasonably foreseeable significant adverse effects." *See* 40 C.F.R. 1502.21(a). The regulation was intentionally limited to reasonably foreseeable impacts so that it would "generate information and discussion on those consequences of greatest concern to the public and of greatest relevance to the agency's decision." *Methow Valley*, 490 U.S. at 356 (quoting *National Environmental Policy Act Regulations*, 50 Fed. Reg. 32234, 32237 (Aug. 9, 1985)) (discussing 40 C.F.R. § 1502.22, which was the prior numbering for the regulation currently located at 40 C.F.R. § 1502.21). *See Ctr. for Biological Diversity*, 67 F.4th 1175, 1184 n.5 (explaining the change in the regulation's numbering). Here, the Project's upstream impacts are *not* reasonably foreseeable and therefore this regulation is inapplicable.

Foundation again points to the Council on Environmental Quality's 2023 guidance, *National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change*, 88 Fed. Reg. 1196 (Brief at 77-78), but this guidance does not apply. The guidance states that agencies should apply it to new proposed actions but agencies are not expected to apply it to concluded NEPA reviews

and actions for which an Environmental Impact Statement has been issued, as here. Rehearing Order P 86, JA 841 (citing 88 Fed. Reg. at 1212).

Foundation further claims that the Commission has estimated project upstream emissions in the past without the information it now claims is required. Foundation Brief at 79 (citing *Atl. Coast Pipeline*, 161 FERC ¶ 61,042 P 293 (2017); *Nat'l Fuel Gas Supply Corp.*, 158 FERC ¶ 61,145 PP 185, 189 (2017)). But Commission orders prior to this Court's 2019 *Birckhead* decision—which include the 2017 orders in *Atlantic Coast* and *National Fuel*—relied on Department of Energy studies to calculate broad estimates of upstream emissions for informational purposes, but stated that these analyses were not required by NEPA because the Commission lacked detailed information about the precise source of the gas to be transported. *See Atl. Coast*, 161 FERC ¶ 61,042 PP 294-295; *Nat'l Fuel*, 158 FERC ¶ 61,145 P 184. *Birckhead* made clear that the Commission does not violate NEPA in not considering upstream greenhouse gas emissions where there is no evidence to predict the number and location of additional wells that would be drilled as a result of a project. 925 F.3d at 518.

3. The Commission Reasonably Found Localized Ozone Impacts From Downstream Combustion Unforeseeable.

With regard to air emissions, the Environmental Impact Statement analyzed both construction and operational emissions from the Project. Certificate Order PP 63-64, JA 574-75. The Statement concluded, and the Commission agreed, that the Project would not result in a significant impact on air quality in the region, including air impacts on environmental justice communities. *Id*. P 64, JA 574 (citing Environmental Impact Statement at 4-157, JA 470).

Foundation does not challenge this analysis. Foundation argues, however, that the Commission should also have considered the localized ozone impacts of downstream combustion of the transported gas. Foundation Brief at 89-92. Foundation points out that the Project's distribution territory includes ozone nonattainment areas, including Baltimore and Philadelphia. *Id*. at 91-92. Foundation relies on *Food & Water Watch*, 28 F.4th at 288-89, concerning the foreseeability of greenhouse gas emissions from downstream combustion of gas being delivered to a local distribution company. *Id*. at 90.

But greenhouse gas emissions include gases, like carbon dioxide and methane, that are released directly into the atmosphere. Rehearing Order P 119 n.381, JA 863. As a result, greenhouse gas emissions generally can be estimated using relatively straight-forward arithmetic based upon project capacity. *Id*.

Ozone, in contrast, is not directly released into the atmosphere during combustion, but rather forms when emissions of ozone precursors (nitrogen oxides and volatile organic compounds) react to sunlight. *Id*. P 119, JA 863 (citing *WildEarth Guardians*, 738 F.3d at 311). These emissions vary between commercial, industrial, and residential uses based on combustion practices, efficiency, and the age of the combustion units, and assumptions regarding these factors would have a large impact on the final emissions estimates. *Id.*

The Commission reasonably determined that the localized impacts due to potential increases in ozone in Baltimore, Philadelphia, and the other local distribution areas were too uncertain to be reasonably foreseeable. Rehearing Order P 118, JA 862. The Commission recognized that the Project's incremental increase in gas combustion will likely result in some increase in pollutant emissions, including

potential increases in ozone precursors which would contribute to potential increases in ozone concentrations. *Id.* However, assessing the magnitude of any such increases is highly uncertain and would require the Commission to engage in conjecture regarding where and how the gas is combusted and the conditions under which the ozone precursors resulting from the combustion mix and react in the atmosphere. *Id.* (citing *Tenn. Gas Pipeline Co., L.L.C.*, 181 FERC ¶ 61,051 P 30 (2022)). The extensive assumptions required would include assuming the volume of gas delivered by each local distribution company in each specific nonattainment area, assuming 100 percent utilization of the Project, assuming the end use for the portion of Project gas delivered to marketer shippers, and assuming the volume of gas going to power generation and industrial sources, which would potentially be covered by Clean Air Act permits. *Id.* P 118 n.380, JA 862. The resulting range of potential emissions would be of limited utility to the Commission or to the public. *Id.* P 118, JA 862.

Further, because combustion releases only ozone precursors, estimating ozone effects would require the Commission to conduct complex regional photochemical modeling that considers the emissions

during each season, atmospheric conditions, and existing emissions in the region. *Id.* Incorrect assumptions or data inputs—regarding either the quantity of precursors produced or, for example, the season in which they are produced—would also result in large variations in estimated indirect ozone emissions. *Id.*

The Commission therefore reasonably found that the need to make large numbers of important assumptions in order to develop a useful estimated range of indirect ozone emissions goes well beyond the sort of reasonable forecasting that NEPA requires. *Id.* (citing *Sierra Club*, 867 F.3d at 198 ("reasonable" being the operative word")); *see also WildEarth Guardians*, 738 F.3d at 312 ("'The NEPA process involves an almost endless series of judgment calls.'") (quoting *Coal. On Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 66 (D.C. Cir. 1987)); Rehearing Order P 120 n.388, JA 864 (citing *Sierra Club*, 867 F.3d at 199 (agency determination that an economic model estimating localized impacts would be far too speculative to be useful is a product of the agency's expertise in energy markets and is entitled to deference)).

The Commission is mindful of the Project's potential impacts on environmental justice communities and, to that end, Commission staff

conducted a robust air quality analysis in the Environmental Impact Statement, including specifically considering reasonably foreseeable air quality impacts on environmental justice communities. Rehearing Order P 120, JA 864. This analysis resulted in the ultimate conclusion that "air quality impacts from construction and the operation of project facilities would not result in a significant impact on air quality in the region, including air quality impacts on environmental justice communities." *Id.* (quoting Certificate Order P 64, JA 574); *see also* Environmental Impact Statement at 4-157 to 4-158, JA 470-71.

Foundation also challenges the Commission's analysis of fugitive methane emissions (i.e. unintentional leaks). Foundation Brief at 92. As the Commission found, however, Foundation only cites to a general article on methane leakage (*see id.*, citing article) that is unrelated the Project. Rehearing Order P 121, JA 864. The Commission found this argument—which does not even cite to any part of the Commission's analysis to which Foundation objects—was not raised with sufficient specificity to evaluate the claim. *Id.* In any event, the Environmental Impact Statement included fugitive emissions as part of its operational

emissions analysis. *Id.* (citing Environmental Impact Statement at 4-172-173, JA 483-84).

C. The Commission Reasonably Balanced Public Benefits And Adverse Impacts.

When evaluating a proposal for a certificate of public necessity and convenience under Natural Gas Act Section 7, 15 U.S.C. § 717f(e), "FERC must consider all factors bearing on the public interest consistent with its mandate to fulfill the statutory purpose of the [Natural Gas Act], which is to encourage the development of adequate natural gas supplies at reasonable prices." *S. Coast Air Quality Mgmt. Dist. v. FERC*, 621 F.3d 1085, 1098-99 (9th Cir. 2010) (cited in Foundation Brief at 93). "'Among the factors that [FERC] considers in the balancing process are the proposal's market support, economic, operational, and competitive benefits, and environmental impact.'" *Id.* (quoting Certificate Policy Statement at 61,743).

As discussed in Section II.D *supra*, the Commission reasonably found that Project need and benefits—demonstrated by the substantial evidence of precedent agreements, market studies and shipper comments—outweighed minimal adverse economic impacts on landowners and surrounding communities. Rehearing Order P 133 &

n.433, JA 874. Under Commission policy, the NEPA environmental review also is part of the Commission's analysis in deciding whether and under what terms to authorize major new pipeline facilities. *Id.* (citing Certificate Policy Statement at 61,749).

Here, following an extensive NEPA review, the Commission reasonably concluded that, with the Commission's environmental conditions, the Project was an environmentally acceptable action. Certificate Order P 81, JA 583. The Commission incorporated this finding into its balancing of Project benefits and adverse consequences as discussed in Section II.D, and—balancing the concerns of all interested parties without giving undue weight to any parties' interests—the Commission reasonably concluded that the benefits of the Project in improving reliability and diversifying supply outweigh potential adverse effects. Rehearing Order P 133, JA 874. *See, e.g., Ctr. for Biological Diversity*, 67 F.4th at 1148 (rejected NEPA challenges "fare no better when framed as [Natural Gas Act] challenges"); *Del Riverkeeper*, 45 F.4th at 115 (where the Commission's NEPA analysis was adequate, the argument that the Commission failed to adequately

balance public benefits against adverse environmental consequences "necessarily fails").

Accordingly, the Commission reasonably rejected Foundation's argument that the Commission's ultimate balancing of costs and benefits here "consisted largely of its *ipse dixit*.'" Foundation Brief at 95 (quoting *Env't Def. Fund*, 2 F.4th at 973). *See* Rehearing Order at P 133 n.433, JA 874 (citing Certificate Order PP 21-35, JA 550-59 (evaluating need and Project benefits); PP 36-38, JA 559-60 (evaluating impacts on customers and surrounding communities); PP 49-81, JA 565-84 (analyzing environmental impacts)). *See also* Rehearing Order PP 29-71, JA 810-32 (evaluating need and Project benefits); PP 72-133, JA 833-75 (analyzing environmental impacts). The Commission fully complied with the Natural Gas Act, NEPA and the Administrative Procedure Act. Foundation and Rate Counsel have failed to provide "any reason for this court to disturb the Commission's reasonable determinations." *Ctr. for Biological Diversity*, 67 F.4th at 1188.

CONCLUSION

For the foregoing reasons, the petitions for review should be denied and the challenged FERC orders should be affirmed.

Respectfully submitted,

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/s/ Lona T. Perry
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For Respondent
Federal Energy Regulatory Commission
Washington, D.C.

November 28, 2023

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P 32(g), Circuit Rule 32(e) and this Court's June 6, 2023 Order setting a 20,000 word limit for Respondent, I certify that this brief complies with the type-volume limitation of Fed. R. App. P 32(a)(7)(B) and this Court's June 6, 2023 Order because it contains 16,560 words excluding the parts of the brief exempted by Fed. R. App. P 32(f) and Circuit Rule 32(e)(1).

I further certify that this brief complies with the type-face requirements of Fed. R. App. P 32(a)(5) and the type-style requirements of Fed. R. App. P 32(a)(6) because it has been prepared using Century Schoolbook 14-point font, in Microsoft Word.

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November 28, 2023

ADDENDUM

Statutes And Regulations

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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

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

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 55. National Environmental Policy (Refs & Annos)
Subchapter I. Policies and Goals (Refs & Annos)

42 U.S.C.A. § 4336

§ 4336. Procedure for determination of level of review

Effective: June 3, 2023
Currentness

(a) Threshold determinations

An agency is not required to prepare an environmental document with respect to a proposed agency action if--

(1) the proposed agency action is not a final agency action within the meaning of such term in chapter 5 of Title 5;

(2) the proposed agency action is excluded pursuant to one of the agency's categorical exclusions, another agency's categorical exclusions consistent with section 4336c of this title, or another provision of law;

(3) the preparation of such document would clearly and fundamentally conflict with the requirements of another provision of law; or

(4) the proposed agency action is a nondiscretionary action with respect to which such agency does not have authority to take environmental factors into consideration in determining whether to take the proposed action.

(b) Levels of review

(1) Environmental impact statement

An agency shall issue an environmental impact statement with respect to a proposed agency action requiring an environmental document that has a reasonably foreseeable significant effect on the quality of the human environment.

(2) Environmental assessment

An agency shall prepare an environmental assessment with respect to a proposed agency action that does not have a reasonably foreseeable significant effect on the quality of the human environment, or if the significance of such effect is unknown, unless the agency finds that the proposed agency action is excluded pursuant to one of the agency's categorical exclusions, another agency's categorical exclusions consistent with section 4336c of this title, or another provision of law. Such environmental assessment shall be a concise public document prepared by a Federal agency to set forth the basis of such agency's finding of no significant impact or determination that an environmental impact statement is necessary.

(3) Sources of information

In making a determination under this subsection, an agency--

(A) may make use of any reliable data source; and

(B) is not required to undertake new scientific or technical research unless the new scientific or technical research is essential to a reasoned choice among alternatives, and the overall costs and time frame of obtaining it are not unreasonable.

CREDIT(S)

(Pub.L. 91-190, Title I, § 106, as added Pub.L. 118-5, Div. C, Title III, § 321(b), June 3, 2023, 137 Stat. 39.)

42 U.S.C.A. § 4336, 42 USCA § 4336
Current through P.L.118-13. Some statute sections may be more current, see credits for details.

End of Document

§ 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

consultation with the Department of Energy, to conduct a study on the natural gas pipeline transmission network in New England and natural gas storage facilities associated with that network, and submit a report on the results to Congress by not later than 1 year after Dec. 17, 2002.

§ 717n. Process coordination; hearings; rules of procedure

(a) Definition

In this section, the term ''Federal authorization''—

(1) means any authorization required under Federal law with respect to an application for authorization under section 717b of this title or a certificate of public convenience and necessity under section 717f of this title; and

(2) includes any permits, special use authorizations, certifications, opinions, or other approvals as may be required under Federal law with respect to an application for authorization under section 717b of this title or a certificate of public convenience and necessity under section 717f of this title.

(b) Designation as lead agency

(1) In general

The Commission shall act as the lead agency for the purposes of coordinating all applicable Federal authorizations and for the purposes of complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(2) Other agencies

Each Federal and State agency considering an aspect of an application for Federal authorization shall cooperate with the Commission and comply with the deadlines established by the Commission.

(c) Schedule

(1) Commission authority to set schedule

The Commission shall establish a schedule for all Federal authorizations. In establishing the schedule, the Commission shall—

(A) ensure expeditious completion of all such proceedings; and

(B) comply with applicable schedules established by Federal law.

(2) Failure to meet schedule

If a Federal or State administrative agency does not complete a proceeding for an approval that is required for a Federal authorization in accordance with the schedule established by the Commission, the applicant may pursue remedies under section 717r(d) of this title.

(d) Consolidated record

The Commission shall, with the cooperation of Federal and State administrative agencies and officials, maintain a complete consolidated record of all decisions made or actions taken by the Commission or by a Federal administrative agency or officer (or State administrative agency or officer acting under delegated Federal authority) with respect to any Federal authorization. Such record shall be the record for—

(1) appeals or reviews under the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.), provided that the record may be supplemented as expressly provided pursuant to section 319 of that Act [16 U.S.C. 1465]; or

(2) judicial review under section 717r(d) of this title of decisions made or actions taken of Federal and State administrative agencies and officials, provided that, if the Court determines that the record does not contain sufficient information, the Court may remand the proceeding to the Commission for further development of the consolidated record.

(e) Hearings; parties

Hearings under this chapter may be held before the Commission, any member or members thereof, or any representative of the Commission designated by it, and appropriate records thereof shall be kept. In any proceeding before it, the Commission in accordance with such rules and regulations as it may prescribe, may admit as a party any interested State, State commission, municipality or any representative of interested consumers or security holders, or any competitor of a party to such proceeding, or any other person whose participation in the proceeding may be in the public interest.

(f) Procedure

All hearings, investigations, and proceedings under this chapter shall be governed by rules of practice and procedure to be adopted by the Commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision, rule, or regulation issued under the authority of this chapter.

(June 21, 1938, ch. 556, § 15, 52 Stat. 829; Pub. L. 109–58, title III, § 313(a), Aug. 8, 2005, 119 Stat. 688.)

Editorial Notes

REFERENCES IN TEXT

The National Environmental Policy Act of 1969, referred to in subsec. (b)(1), is Pub. L. 91–190, Jan. 1, 1970, 83 Stat. 852, as amended, which is classified generally to chapter 55 (§ 4321 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of Title 42 and Tables.

The Coastal Zone Management Act of 1972, referred to in subsec. (d)(1), 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.

AMENDMENTS

2005—Pub. L. 109–58 substituted ''Process coordination; hearings; rules of procedure'' for ''Hearings; rules of procedure'' in section catchline, added subsecs. (a) to (d), and redesignated former subsecs. (a) and (b) as (e) and (f), respectively.

§ 717*o*. Administrative powers of Commission; rules, regulations, and orders

The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter.

Among other things, such rules and regulations may define accounting, technical, and trade terms used in this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

(June 21, 1938, ch. 556, § 16, 52 Stat. 830.)

§ 717p. Joint boards

(a) Reference of matters to joint boards; composition and power

The Commission may refer any matter arising in the administration of this chapter to a board to be composed of a member or members, as determined by the Commission, from the State or each of the States affected or to be affected by such matter. Any such board shall be vested with the same power and be subject to the same duties and liabilities as in the case of a member of the Commission when designated by the Commission to hold any hearings. The action of such board shall have such force and effect and its proceedings shall be conducted in such manner as the Commission shall by regulations prescribe. The Board shall be appointed by the Commission from persons nominated by the State commission of each State affected, or by the Governor of such State if there is no State commission. Each State affected shall be entitled to the same number of representatives on the board unless the nominating power of such State waives such right. The Commission shall have discretion to reject the nominee from any State, but shall thereupon invite a new nomination from that State. The members of a board shall receive such allowances for expenses as the Commission shall provide. The Commission may, when in its discretion sufficient reason exists therefor, revoke any reference to such a board.

(b) Conference with State commissions regarding rate structure, costs, etc.

The Commission may confer with any State commission regarding rate structures, costs, accounts, charges, practices, classifications, and regulations of natural-gas companies; and the Commission is authorized, under such rules and regulations as it shall prescribe, to hold joint hearings with any State commission in connection with any matter with respect to which the Commission is authorized to act. The Commission is authorized in the administration of this chapter to avail itself of such cooperation, services, records, and facilities as may be afforded by any State commission.

(c) Information and reports available to State commissions

The Commission shall make available to the several State commissions such information and reports as may be of assistance in State regulation of natural-gas companies. Whenever the Commission can do so without prejudice to the efficient and proper conduct of its affairs, it may, upon request from a State commission, make available to such State commission as witnesses any of its trained rate, valuation, or other experts, subject to reimbursement of the compensation and traveling expenses of such witnesses. All sums collected hereunder shall be credited to the appropriation from which the amounts were expended in carrying out the provisions of this subsection.

(June 21, 1938, ch. 556, § 17, 52 Stat. 830.)

§ 717q. Appointment of officers and employees

The Commission is authorized to appoint and fix the compensation of such officers, attorneys, examiners, and experts as may be necessary for carrying out its functions under this chapter; and the Commission may, subject to civil-service laws, appoint such other officers and employees as are necessary for carrying out such functions and fix their salaries in accordance with chapter 51 and subchapter III of chapter 53 of title 5.

(June 21, 1938, ch. 556, § 18, 52 Stat. 831; Oct. 28, 1949, ch. 782, title XI, § 1106(a), 63 Stat. 972.)

Editorial Notes

CODIFICATION

Provisions that authorized the Commission to appoint and fix the compensation of such officers, attorneys, examiners, and experts as may be necessary for carrying out its functions under this chapter ''without regard to the provisions of other laws applicable to the employment and compensation of officers and employees of the United States'' are omitted as obsolete and superseded.

As to the compensation of such personnel, sections 1202 and 1204 of the Classification Act of 1949, 63 Stat. 972, 973, repealed the Classification Act of 1923 and all other laws or parts of laws inconsistent with the 1949 Act. The Classification Act of 1949 was repealed by Pub. L. 89–554, Sept. 6, 1966, § 8(a), 80 Stat. 632, and reenacted as chapter 51 and subchapter III of chapter 53 of Title 5, Government Organization and Employees. Section 5102 of Title 5 contains the applicability provisions of the 1949 Act, and section 5103 of Title 5 authorizes the Office of Personnel Management to determine the applicability to specific positions and employees.

Such appointments are now subject to the civil service laws unless specifically excepted by those laws or by laws enacted subsequent to Executive Order 8743, Apr. 23, 1941, issued by the President pursuant to the Act of Nov. 26, 1940, ch. 919, title I, § 1, 54 Stat. 1211, which covered most excepted positions into the classified (competitive) civil service. The Order is set out as a note under section 3301 of Title 5.

''Chapter 51 and subchapter III of chapter 53 of title 5'' substituted in text for ''the Classification Act of 1949, as amended'' on authority of Pub. L. 89–554, § 7(b), Sept. 6, 1966, 80 Stat. 631, the first section of which enacted Title 5.

AMENDMENTS

1949—Act Oct. 28, 1949, substituted ''Classification Act of 1949'' for ''Classification Act of 1923''.

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

§ 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

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

§ 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.

(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.
1508.1 Definitions.
1508.2 [Reserved]

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; and E.O. 13807, 82 FR 40463, 3 CFR, 2017, Comp., p. 369.

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 have a reasonably close causal relationship to the proposed action or alternatives, including those effects that occur at the same time and place as the proposed action or alternatives and may include effects that are later in time or farther removed in distance from the proposed action or alternatives.

(1) Effects include ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic (such as the effects on employment), social, or health effects. Effects may also include those resulting from actions that may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

(2) A ''but for'' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA. Effects should generally not be considered if they are remote in time, geographically remote, or the product of a lengthy causal chain. Effects do not include those effects that the agency has no ability to prevent due to its limited statutory authority or would occur regardless of the proposed action.

(3) An agency's analysis of effects shall be consistent with this paragraph (g). Cumulative impact, defined in 40 CFR 1508.7 (1978), is repealed.

(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, meet the purpose and need for the proposed action, and, where applicable, meet the goals of the applicant.

(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.

§ 1508.2 [Reserved]

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 28th day of November 2023, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system.

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/s/ Lona Perry
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