ORAL ARGUMENT NOT YET SCHEDULED

No. 20-1427

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

SIERRA CLUB, *et al.*,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent,

MOUNTAIN VALLEY PIPELINE, LLC, *et al.*,

Intervenors.

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

JOINT ANSWERING BRIEF FOR RESPONDENT-INTERVENORS MOUNTAIN VALLEY PIPELINE, LLC AND PUBLIC SERVICE COMPANY OF NORTH CAROLINA, INC.

Matthew Eggerding
Mountain Valley Pipeline, LLC
by and through its operator,
EQM Gathering Opco, LLC
2200 Energy Drive
Canonsburg, PA 15317
Phone: 412.553.5786
Email: meggerding@equitransmidstream.com

Jeremy C. Marwell
Matthew X. Etchemendy
James T. Dawson
Vinson & Elkins LLP
2200 Pennsylvania Avenue, NW
Suite 500 West
Washington, DC 20037
Phone: 202.639.6507
Email: jmarwell@velaw.com
Email: metchemendy@velaw.com
Email: jamesdawson@velaw.com

Counsel for Mountain Valley Pipeline, LLC

(Names and addresses of additional counsel appear inside cover.)

July 12, 2021

B. Craig Collins
Dominion Energy Services, Inc.
Mail Code C222
220 Operation Way
Cayce, SC 29033
Phone: 803.217.7513
Email: b.collins@dominionenergy.com

Charlotte Taylor
Stephen Petrany
Jones Day
51 Louisiana Ave. NW
Washington, DC 20001
Phone: 202.879.3939
Email: ctaylor@jonesday.com
Email: spetrany@jonesday.com

James Olson
Jones Day
717 Texas St. #3300
Houston, TX 77002
Phone: 832.239.3939
Email: jolson@jonesday.com

Counsel for Public Service Company of North Carolina, Inc.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Intervenors Mountain Valley Pipeline, LLC and Public Service Company of North Carolina submit this certificate as to parties, rulings, and related cases.

A. PARTIES AND AMICI

All parties, intervenors, and *amici* appearing in this Court are listed in the Petitioners' Opening Brief.

B. RULINGS UNDER REVIEW

References to the rulings at issue appear in the Brief of Respondent Federal Energy Regulatory Commission ("FERC").

C. RELATED CASES

The case on review has not previously been before this Court or any other court.

Although the cases do not appear to meet this Court's standard for "related cases," in *Sierra Club v. FERC*, Nos. 20-1512 & 21-1040 (D.C. Cir.), Sierra Club, Appalachian Voices, and others seek review of FERC orders permitting certain construction activities and extending the time to complete construction of Mountain Valley's Mainline System. The Mainline System is distinct from the Southgate Project at issue in this case.

Although the cases also do not appear to meet this Court's standard for "related cases," in *Bold Alliance v. FERC*, No. 18-5322 (D.C. Cir.), and *Bohon v. FERC*, No. 20-5203 (D.C. Cir.), various petitioners have appealed from decisions of the U.S. District Court for the District of Columbia dismissing lawsuits that raised a range of statutory and constitutional issues unrelated to the issues in this case, and that sought (among other remedies) injunctive relief to prevent Mountain Valley from exercising eminent domain authority under the Natural Gas Act. Mountain Valley is an appellee in both of those appeals.

In addition, although the case is no longer pending and does not appear to meet this Court's standard for "related cases," in *Appalachian Voices v. FERC*, Nos. 17-1271 *et al.*, 2019 WL 847199 (D.C. Cir. Feb. 19, 2019), this Court denied petitions for review of FERC's orders authorizing Mountain Valley's Mainline System.

Finally, although the cases also do not appear to meet this Court's standard for "related cases," Mountain Valley notes the pendency of *Wild Virginia v. U.S. Bureau of Land Management*, No. 21-1082 (4th Cir.), *Wild Virginia v. U.S. Forest Service*, No. 21-1039 (4th Cir.), *Appalachian Voices v. U.S. Department of the Interior*, No. 20-2159 (4th Cir.), *Sierra Club v. U.S. Army Corps of Engineers*, No. 20-2039 (4th Cir.), *Sierra Club v. U.S. Army Corps of Engineers*, No. 20-2042 (4th Cir.), and *Sierra Club v. U.S. Army Corps of Engineers*, No. 18-1713 (4th Cir.), in

which the Fourth Circuit is considering petitions for review of U.S. Bureau of Land Management, U.S. Forest Service, U.S. Fish and Wildlife Service, and U.S. Army Corps of Engineers authorizations for Mountain Valley's Mainline System.

At this time, counsel is unaware of any other arguably related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

Date: July 12, 2021

Respectfully submitted,

/s/ Jeremy C. Marwell

Jeremy C. Marwell
Matthew X. Etchemendy
James T. Dawson
Vinson & Elkins LLP
2200 Pennsylvania Avenue, NW
Suite 500 West
Washington, DC 20037
Phone: 202.639.6507
Email: jmarwell@velaw.com
Email: metchemendy@velaw.com
Email: jamesdawson@velaw.com

Matthew Eggerding
Mountain Valley Pipeline, LLC
by and through its operator,
EQM Gathering Opco, LLC
2200 Energy Drive
Canonsburg, PA 15317
Phone: 412.553.5786
Email: meggerding@equitransmidstream.com

Counsel for Mountain Valley Pipeline, LLC

/s/ Charlotte Taylor (by permission)

Charlotte Taylor
Stephen Petrany
Jones Day
51 Louisiana Ave. NW
Washington, DC 20001
Phone: 202.879.3939
Email: ctaylor@jonesday.com
Email: spetrany@jonesday.com

James Olson
Jones Day
717 Texas St. #3300
Houston, TX 77002
Phone: 832.239.3939
Email: jolson@jonesday.com

B. Craig Collins
Dominion Energy Services, Inc.
Mail Code C222
220 Operation Way
Cayce, SC 29033
Phone: 803.217.7513
Email: b.collins@dominionenergy.com

Counsel for Public Service Company of North Carolina, Inc.

CORPORATE DISCLOSURE STATEMENTS

1. Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Intervenor Mountain Valley Pipeline, LLC ("Mountain Valley") makes the following disclosures: Mountain Valley is a Delaware limited liability company to be engaged in the interstate transportation of natural gas. Mountain Valley has no parent companies. The following entities have an ownership stake of 10% or greater in Mountain Valley:

i. MVP Holdco, LLC has a 10% or greater ownership stake in Mountain Valley. MVP Holdco, LLC is an indirect, wholly owned subsidiary of Equitrans Midstream Corporation (NYSE: ETRN), a publicly held corporation.

ii. US Marcellus Gas Infrastructure, LLC has a 10% or greater ownership stake in Mountain Valley. US Marcellus Gas Infrastructure, LLC is an indirect, wholly owned subsidiary of NextEra Energy, Inc. (NYSE: NEE), a publicly held corporation.

iii. WGL Midstream, Inc. has a 10% or greater ownership stake in Mountain Valley. WGL Midstream, Inc. is an indirect, wholly owned subsidiary of AltaGas Ltd. (TSX: ALA), a publicly held corporation.[*]

[*] Con Edison Gas Pipeline and Storage, LLC, an indirect, wholly owned subsidiary of Consolidated Edison, Inc. (NYSE: ED), a publicly held corporation, has a 10% or greater ownership stake in Mountain Valley with respect to certain of its facilities, but does not have any ownership interest in the facilities that are the subject of this proceeding.

2. Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Intervenor Public Service Company of North Carolina, Inc., d/b/a Dominion Energy North Carolina ("Dominion") makes the following disclosures:

Dominion is a natural gas utility incorporated in South Carolina, with its principal place of business in Gastonia, North Carolina. It operates a natural gas pipeline system for the transportation, distribution, and sale of gas within a service territory covering parts of North Carolina.

Dominion is a wholly owned subsidiary of SCANA Corporation, which is wholly owned by Dominion Energy, Inc. (NYSE: D). No publicly held corporation owns more than 10% of the stock of Dominion Energy, Inc.

Date: July 12, 2021

Respectfully submitted,

/s/ Jeremy C. Marwell

Matthew Eggerding
Mountain Valley Pipeline, LLC
by and through its operator,
EQM Gathering Opco, LLC
2200 Energy Drive
Canonsburg, PA 15317
Phone: 412.553.5786
Email: meggerding@equitransmidstream.com

Jeremy C. Marwell
Matthew X. Etchemendy
James T. Dawson
Vinson & Elkins LLP
2200 Pennsylvania Avenue, NW
Suite 500 West
Washington, DC 20037
Phone: 202.639.6507
Email: jmarwell@velaw.com
Email: metchemendy@velaw.com
Email: jamesdawson@velaw.com

Counsel for Mountain Valley Pipeline, LLC

/s/ Charlotte Taylor (by permission)

B. Craig Collins
Dominion Energy Services, Inc.
Mail Code C222
220 Operation Way
Cayce, SC 29033
Phone: 803.217.7513
Email: b.collins@dominionenergy.com

Charlotte Taylor
Stephen Petrany
Jones Day
51 Louisiana Ave. NW
Washington, DC 20001
Phone: 202.879.3939
Email: ctaylor@jonesday.com
Email: spetrany@jonesday.com

James Olson
Jones Day
717 Texas St. #3300
Houston, TX 77002
Phone: 832.239.3939
Email: jolson@jonesday.com

Counsel for Public Service Company of North Carolina, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page(s)**

*** Authorities on which we chiefly rely are marked with asterisks.**

Cases—Continued: **Page(s)**

Cases—Continued: **Page(s)**

Administrative Cases:

Statutes and Regulations:

Statutes and Regulations—Continued: **Page(s)**

Other Authorities:

Other Authorities—Continued: **Page(s)**

GLOSSARY

As used herein,

FERC or **the Commission** means Federal Energy Regulatory Commission;

NEPA means National Environmental Policy Act;

P means the internal paragraph number within a FERC order;

R. means the Record Item Number in the Commission's Certified Index to the Record, filed on Dec. 7, 2020 (Doc. 1874648).

COUNTER-STATEMENT OF JURISDICTION

This Court has jurisdiction over the petition for review. *See* Pet'rs' Br. 1-2. However, this Court lacks jurisdiction over arguments not properly raised on rehearing by the party seeking to raise those arguments in this Court. *See Sierra Club v. FERC*, 827 F.3d 36, 50 (D.C. Cir. 2016); *ASARCO, Inc. v. FERC*, 777 F.2d 764, 773-74 (D.C. Cir. 1985).

STATEMENT OF THE ISSUES

Respondent-Intervenors adopt the statement of issues of Respondent Federal Energy Regulatory Commission ("FERC" or "Commission"). *See* FERC Br. 1-4.

STATUTES AND REGULATIONS

Except for provisions reproduced in the addendum to this brief, relevant statutes and regulations are attached to FERC's brief.

INTRODUCTION

The Southgate Project ("Project") is a $468-million natural gas pipeline project that will expand and improve access to natural gas in North Carolina and Virginia. Respondent-Intervenors Mountain Valley Pipeline, LLC ("Mountain Valley") and Public Service Company of North Carolina, Inc. ("Dominion") are, respectively, the Project's developer and primary shipper. The Project will serve the needs of Dominion's 600,000+ residential, commercial, and industrial end-use customers, who increasingly depend on natural gas for heating, electricity, and other

uses. The Southgate Project will allow Dominion to access supplies of natural gas through new interconnects with (1) Mountain Valley's "Mainline System"—a 303.5-mile interstate natural gas pipeline approved by the Commission in 2017, currently under construction—and (2) East Tennessee Natural Gas, LLC's pipeline system.

Petitioners are environmental advocacy organizations that oppose the Project. Most of the Petitioners have also pursued a relentless litigation campaign to delay the Mainline System, including an unsuccessful challenge to FERC's approval of the Mainline and five unsuccessful stay requests in this Court. In this case, Petitioners devote much of their brief to reworking arguments that this Court rejected years ago in upholding the Commission's Mainline authorization. Petitioners focus on discrete aspects of the Commission's decisionmaking on initial recourse rates and its analysis of aquatic impacts under the National Environmental Policy Act ("NEPA"). But the Commission exhaustively and cogently analyzed these issues. Petitioners' disagreement with the Commission's conclusions cannot overcome the deference to which the Commission is entitled on matters at the core of its administrative expertise.

Separately, Intervenors Monacan Indian Nation ("Monacans") and Sappony Tribe ("Sappony" and, collectively with Monacans, "Tribes") would raise wholly distinct challenges to the Commission's consultations under the National Historic

Preservation Act ("Preservation Act"). But the Tribes forfeited any right to review of their distinct arguments by choosing to intervene instead of petitioning for review. Even if this Court considers the Tribes' consultation challenges, their arguments fail.

STATEMENT OF THE CASE

I. The Southgate Project Will Serve Growing Need For Natural Gas In North Carolina.

The Project, approximately 75.1 miles of pipeline and associated facilities in Virginia and North Carolina, will satisfy growing demand for natural gas transportation capacity in North Carolina. *See Mountain Valley Pipeline, LLC*, 171 FERC ¶ 61,232, PP 1, 11 (2020) ("Certificate Order"), R.601, JA___, ___-___. The pipeline will extend from an interconnect approximately 0.1 mile upstream of the terminus of Mountain Valley's Mainline System, to Dominion's local distribution facilities. *Id.* P 11, JA___-___. Dominion has signed binding commitments for 80% of the Project's capacity, *id.* P 29, JA___, which is "necessary for [Dominion] to maintain service to its customers in coming years." Dominion Motion to Intervene and Comments 3 (Dec. 10, 2018), R.323, JA___.

II. After An Exhaustive Review, FERC Found That The Public Convenience And Necessity Required Approving The Project.

The Commission's review of the Project spanned over two years. On May 18, 2018, the Commission granted Mountain Valley's request for pre-filing review, initiating an open, public, iterative, and interactive data-submission and review

process between FERC, Mountain Valley, other interested parties (including Indian tribes), and the public. Certificate Order PP 69-77, JA___-___. On November 6, 2018, Mountain Valley formally applied to the Commission. *Id.* P 1, JA___. Pursuant to NEPA, the Commission prepared a comprehensive 416-page Environmental Impact Statement (over 1,000 pages with appendices) that exhaustively analyzed a wide range of potential environmental impacts. *See* Final Environmental Impact Statement (Feb. 14, 2020), R.566, JA___ ("EIS").

Pursuant to Section 106 of the Preservation Act, the Commission also took into account potential effects on historic properties, *see* 54 U.S.C. § 306108, consulting with the Virginia and North Carolina State Historic Preservation Officers, as well as a broad range of federally recognized and state-recognized tribes. *See* Certificate Order PP 112-24, JA___-___. The Section 106 process culminated in a Programmatic Agreement executed by FERC and the State Historic Preservation Officers, which lays out extensive procedures for the avoidance or treatment of historic properties and future consultations among the consulting parties. *See id.* P 114, JA___.

The Commission ultimately concluded that "the public convenience and necessity requires approval of Mountain Valley's Southgate Project." Certificate Order P 145, JA___; *cf.* 15 U.S.C. § 717f(e). As to rates, the Commission noted that Dominion (which has subscribed to 80% of the Project's capacity on a long-term

basis) will pay contractually agreed-upon negotiated rates, not Commission-determined recourse rates. Certificate Order PP 12, 67, JA___, ___. However, the Commission also determined, as it is required to do, the initial recourse rates available to future customers for open-access transportation service on the new Southgate facilities. *Id.* PP 53-64, JA___-___. FERC accepted Mountain Valley's proposal to base its initial recourse rates on a 50-50 debt-to-equity capital structure and 14% return on equity, but required Mountain Valley to lower its proposed depreciation rate. *Id.* PP 53-54, 64, JA___, ___.

Petitioners and the Tribes sought rehearing. *See* 15 U.S.C. § 717r(a). The Commission addressed and rejected their arguments in a rehearing order. *See Mountain Valley Pipeline, LLC*, 172 FERC ¶ 61,261 (2020) ("Reh'g Order"), R.628, JA___. Petitioners timely petitioned for review. *See* 15 U.S.C. § 717r(b). The Tribes never petitioned for review, but intervened in Petitioners' case. *See* Tribal Intervention Mot. (Nov. 13, 2020) (Doc. 1871080).

SUMMARY OF ARGUMENT

The Commission complied with the Natural Gas Act, NEPA, and the Preservation Act.

Petitioners' challenge to FERC's approval of a 14% return on equity for initial recourse rates largely repeats arguments this Court has already rejected. As to the determination that Mountain Valley should be treated as a new market entrant, that

determination was reasonable and consistent with Commission precedent. Petitioners' suggestion that the recourse rate is the "incentive" to build the Project ignores that the shipper subscribed for 80% of the Project's capacity, Dominion—a signatory to this brief—will pay agreed-upon, contractually negotiated rates, not the recourse rate.

With respect to NEPA, the Commission thoroughly analyzed aquatic impacts, including sedimentation, and reasonably explained its conclusion that mitigation measures will adequately avoid or minimize potential impacts. Petitioners' focus on sedimentation events during construction of the Mainline System—a different project, with a different right-of-way, involving different (steeper and more erosion-prone) terrain, during a different time period—fails. The Commission considered and reasonably rejected Petitioners' contrary arguments. Under NEPA, that is dispositive.

The Commission also reasonably considered the potential cumulative impacts. It concluded that the Southgate and Mainline projects are unlikely to have any significant cumulative impacts on aquatic resources because the crossing locations will be different and because the effects of the crossings were unlikely to overlap temporally. Petitioners disagree on this as well, but cannot establish that the Commission's analysis—which was based on its consideration of scientific evidence

concerning turbidity plume dispersal and other highly technical matters within its expertise—somehow fell short of the "hard look" NEPA requires.

This Court should not reach the merits of the Tribes' arguments. The Tribes' choice to intervene, not petition, is fatal to their effort to litigate issues wholly unrelated to those raised by Petitioners. Regardless, the Commission amply satisfied its consultation duties.

This Court should deny the petition for review.

ARGUMENT

I. Standard Of Review

Petitioners' Natural Gas Act claims are reviewed under the deferential arbitrary-and-capricious standard. *Minisink Residents for Envtl. Pres. & Safety v. FERC*, 762 F.3d 97, 105-06 (D.C. Cir. 2014). This Court asks whether FERC's decision-making was "reasoned, principled, and based upon the record," and the Commission's factual findings are "conclusive" if "supported by substantial evidence." *Id.* at 106, 108 (citations omitted). NEPA and Preservation Act claims are reviewed under similarly deferential standards. *See Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1308-09 (D.C. Cir. 2015); *United Keetoowah Band of Cherokee Indians in Okla. v. FCC*, 933 F.3d 728, 738 (D.C. Cir. 2019).

II. The Commission Appropriately Approved A Fourteen Percent Return On Equity For Initial Recourse Rates.

A. The Commission's Decision Has Ample Record Support.

Petitioners argue that the Commission did not sufficiently "scrutinize" the facts and overly relied on Commission precedent when it approved a 14% return on equity for initial recourse rates. Pet'rs' Br. 20-22.[1] This is a near-verbatim repetition of arguments this Court has already rejected. *See City of Oberlin v. FERC*, 937 F.3d 599, 608-10 (D.C. Cir. 2019). Indeed, this Court rejected the same argument, pressed by substantially the same Petitioners, with respect to Mountain Valley's Mainline System. *See Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199, at *1 (D.C. Cir. Feb. 19, 2019) (per curiam). Petitioners do not even acknowledge those decisions, never mind attempt to distinguish them.

Petitioners' broadside attack on the Commission's analysis is foreclosed by *City of Oberlin*. Here, as in *City of Oberlin*, 937 F.3d at 609, the Commission explained its established policy and responded to Petitioners' specific objections, *see* Reh'g Order PP 13-18, JA___-___, explained the nature of initial rates, as distinct from rates under Natural Gas Act Sections 4 and 5, *see* Certificate Order PP 62-63, JA___-___, and explained the different risks confronting the Project, particularly

[1] Return on equity is only one factor used to calculate cost-of-service rates; other factors include capital structure, cost of debt, and depreciation. *See* Certificate Order P 53.

due to the absence of an existing revenue base, *see* Certificate Order P 57, JA___. As in *City of Oberlin*, the Commission did not accept Mountain Valley's proposed rates without modification; notably, it rejected Mountain Valley's proposed 5% depreciation rate, requiring instead 2.5%. *Compare City of Oberlin*, 937 F.3d at 608-09, *with* Certificate Order PP 58-61, JA___-___.

Petitioners' cited cases applying the "just and reasonable" standard applicable under Natural Gas Act Sections 4 and 5, *see* Pet'rs' Br. 22, change nothing because they do not apply in Section 7 proceedings, as this Court has repeatedly explained. *See City of Oberlin*, 937 F.3d at 608 (citing cases); *accord* FERC Br. 5, 26.

B. The Commission Reasonably Treated Mountain Valley As A New Market Entrant, Not An Established Pipeline Operator.

Petitioners alternatively criticize the Commission for treating Mountain Valley similarly to an applicant proposing an initial greenfield system for purposes of establishing recourse rates. Pet'rs' Br. 22-25. Their arguments are unpersuasive, and the Commission reasonably rejected them.

Applying its existing precedent, *see* FERC Br. 26-29, the Commission correctly reasoned that "Mountain Valley's Southgate Project essentially is a greenfield pipeline because the Mainline System is still under construction and not in service, Mountain Valley does not have revenue from existing transportation services, and it does not have a proven track record." Reh'g Order P 14, JA___. "[W]ith respect to the Southgate Project, Mountain Valley faces a capital funding

outlook similar to other companies constructing new pipeline systems," and accordingly should be treated like "an applicant proposing its initial greenfield system," not a company expanding an already-operational system. Certificate Order P 57, JA___. As the Commission's brief explains in detail, this approach is consistent with FERC precedent. *See* FERC Br. 25-30.

Petitioners err by relying on Commission precedent granting lower initial recourse rates for expansions of existing, in-service pipeline systems. *See* Pet'rs' Br. 23 (citing *Cheyenne Connector, LLC*, 168 FERC ¶ 61,180, PP 51-52 (2019)). Those precedents addressed expansions of (i) *already operational* systems, with (ii) *existing revenue streams* and (iii) operational records. *See* Reh'g Order P 15. Mountain Valley has none of those things. Petitioners offer no response to the Commission's findings on this point.

Petitioners assert that "Mountain Valley's risk as a new market entrant" was accounted for when FERC allowed Mountain Valley a 14% return on equity for the Mainline System. Pet'r Br. 23-24. That is economic gibberish and nonresponsive to the Commission's finding that Mountain Valley faces similar risks ***as to the Southgate Project*** as new market entrants typically do. Mountain Valley's risk *with respect to the Mainline System* was "accounted for" in the Mainline System certificate order; its risk *with respect to the Southgate Project* (which it had not yet applied for when the Commission approved the Mainline) was not.

Petitioners next echo Commissioner Glick's argument that Mountain Valley has "since executed binding service contracts with shippers for the mainline system's full design capacity," which supposedly "provid[es] a level of revenue certainty that applicants for greenfield projects do not typically have." Pet'rs' Br. 24 (citation omitted). But although Mountain Valley has *service agreements* for the Mainline System, it lacks a *present revenue stream* or *operating record* because the Mainline is not fully constructed or operational. *See* Reh'g Order P 14, JA___.

Indeed, Mountain Valley secured binding "long-term precedent agreements for 100 percent of the [Mainline System's] capacity" *before* the Commission certificated the Mainline System. *Appalachian Voices*, 2019 WL 847199, at *1. Moreover, given the Commission's exacting scrutiny of project proposals, applicants for greenfield projects *do* "typically" (or at least commonly) have similarly high levels of subscribed capacity when the Commission grants initial recourse rates based on a 14% return on equity. *See, e.g.*, *Fla. Se. Connection, LLC*, 154 FERC ¶ 61,080, PP 87, 118 (2016) (93%), *vacated on other grounds sub nom. Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017); *MarkWest Pioneer, L.L.C.*, 125 FERC ¶ 61,165, PP 10, 27 (2008) (90%).

Petitioners' suggestion that Mountain Valley has identical "revenue certainty" as the owner of an operational pipeline is particularly remarkable given that, when the Southgate Project was certificated, Mainline construction was interrupted due to

Petitioners' seemingly indefatigable litigation campaign against Mountain Valley. *See* Certificate Order P 8, JA___. That litigation has caused billions of dollars of increased project development costs and ultimately required Mountain Valley to seek an extension of its original three-year construction deadline. *See* FERC Br. 28 n.5; *Mountain Valley Pipeline, LLC*, 173 FERC ¶ 61,026, PP 3-4 (2020). This history vividly illustrates the special "financial risk[s]" (Reh'g Order P 17, JA___ (citation omitted)) Mountain Valley faced as a new market entrant when the Southgate Project was certificated. Ironically, absent Petitioners' litigation campaign, the Southgate Project might well have been an expansion of an existing, in-service pipeline when certificated, because Mainline construction may have been completed.[2]

Finally, Petitioners suggest that the Project is being built due to "the incentives provided" by initial recourse rates based on a 14% return on equity. Pet'rs' Br. 24. Incorrect. The incentive to build the Project is overwhelmingly based on Dominion's subscription to 80% of its capacity under a long-term (20-year) agreement, under which Dominion will pay *negotiated* rates—i.e., not the recourse

[2] Petitioners may not blame delays on supposed "errors" by the federal permitting agencies they sued at literally every possible juncture to prevent the Mainline's timely completion. The fact remains that these delays reflect risks (i.e., litigation risk associated with the need to acquire necessary federal environmental permits for project construction) that are unique to new market entrants. Those risks remained very much in play when Southgate was certificated.

rate. *See* Certificate Order PP 12, 29, JA___, ___. Nor is this a case of a pipeline exercising market power over a captive customer; on the contrary, the Project will bring much-needed competition to the North Carolina market. *See id.* P 38, JA___.[3]

III. The Commission Fully Complied With NEPA.

A. The Commission's Analysis Of Sedimentation-Related Mitigation Was Reasonable And Complied With NEPA.

The Commission thoroughly analyzed aquatic impacts, including sedimentation and mitigation thereof. *See* FERC Br. 16-17, 33-37. That analysis amply satisfies NEPA's "hard look" requirement. *Id.* at 33. Initially, Petitioners half-heartedly suggest that FERC's mitigation analysis was too short or lacked sufficient detail. *See* Pet'rs' Br. 28-30. But the Commission's discussion was extraordinarily thorough; Petitioners identify no specific analytic gaps or errors in the discussion of aquatic impacts, sedimentation, or mitigation thereof. *See* FERC Br. 33-37.

Petitioners' real objection is *not* that the Commission failed to take a "hard look" at mitigation; rather, they simply disagree with FERC's assessment of the adequacy of chosen mitigation measures. But NEPA is a purely procedural statute;

[3] Petitioners complain that even though rates are subject to future reassessment, "the harm *to Petitioners' interests* will have largely already occurred" when the Project is built. Pet'rs' Br. 24 (emphasis added). In other words, they tacitly concede that their interest here is not actually about the initial recourse rate or any other rate-related matters; rather, they are simply litigating the issue in hopes of delaying a project they oppose on policy grounds.

it requires sufficient *discussion* of mitigation, but does not require FERC to adopt Petitioners' preferred mitigation measures—or any other substantive mitigation plan, for that matter. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352-53 (1989). In any event, NEPA determinations "requir[ing] a high level of technical expertise"—here, the adequacy of mitigation measures addressing forecasted levels of sedimentation—are "assigned to the special competency of the Commission." *Sierra Club*, 827 F.3d at 49 (internal quotation marks omitted). Petitioners cannot overcome the deference to which the Commission's determinations, informed by Commission staff's "decades of experiences on hundreds of projects," are owed. EIS, Appendix I.2 at I.2-2, JA___.

Petitioners believe FERC should have discounted the usefulness of the mitigation measures because of sedimentation events during Mainline construction. *See* Pet'rs' Br. 29-32. At the outset, Petitioners systematically overstate the Mainline sedimentation impacts. As FERC has explained in analyzing the same historical events on which Petitioners rely here, although there were "slightly different outcomes than those projected [before construction] . . . due to unpredictable rainfall events, the resulting impacts [were] not significant enough to warrant a supplemental [Environmental Impact Statement]" for the Mainline System. *Mountain Valley Pipeline, LLC*, 173 FERC ¶ 61,027, P 39 (2020). Mountain Valley addressed the referenced incidents, took corrective action, and has

continually improved its erosion and sedimentation control measures over the course of construction. *See Mountain Valley Pipeline, LLC*, 172 FERC ¶ 61,193, PP 22-23 (2020); *see also* EIS at 1-12, JA___. As for the state-agency notices of violation Petitioners cite, *see* Pet'rs' Br. 4-5, 35, those were settled consensually with state authorities. *Mountain Valley Pipeline, LLC*, 172 FERC ¶ 61,193, PP 25-26; *see also* Mountain Valley Pipeline, *Informational Statement: West Virginia Department of Environmental Protection – Consent Order No. 9925*, https://bit.ly/3v8K8OW (Feb. 2021). Petitioners cite nothing to contradict the Commission's determination—informed by years of extraordinarily close oversight of Mainline construction—that Mountain Valley has diligently addressed sedimentation-related issues and taken proper corrective action. *Cf. Mountain Valley Pipeline, LLC*, 172 FERC ¶ 61,193, PP 12, 22 (noting direct oversight by Commission compliance monitors).[4]

In any event, Petitioners err in attempting to turn this case into a (second) referendum on the Mainline System's sedimentation record. *Cf.* Pet'rs' Joint Opening Br. at 59-61, *Appalachian Voices v. FERC*, No. 17-1271 (D.C. Cir. Dec. 22, 2018), 2018 WL 6736254 (raising similar sedimentation-related arguments); *but*

[4] As for Petitioners' cherry-picked images of muddy water (Pet'rs' Br. 7-8), "[a] picture may be worth a thousand words in some contexts," but "cannot substitute for proper briefing." *Minisink*, 762 F.3d at 106 n.4. Images depicting opaque stormwater do not support Petitioners' editorializing about the alleged causes of such sedimentation or what constitutes proper operation of sediment control devices (Pet'rs' Br. 6), much less inferences about impacts along a 300+ mile pipeline route over several years.

see Appalachian Voices, 2019 WL 847199, at *2 (rejecting them). The Commission explained in detail why it did not "anticipate the Southgate Project would experience the same issues with erosion and sediment control" that occurred during Mainline System construction. EIS at 1-12, JA___; *see also* Reh'g Order P 28, JA___. That analysis is reasonable and dispositive here.

The Commission noted that sedimentation events during Mainline construction in 2018 were caused by record-breaking rainfall—including rain events exceeding 100-year records. EIS at 1-12, JA___. Critically, "the flatter terrain where the Southgate Project would be constructed" presents fewer risks. *Id.* Mountain Valley's erosion and sediment control measures will "be designed to handle storm events that are reasonably expected to occur during the period of construction," and Mountain Valley will "monitor weather conditions during construction and appropriately adjust erosion control measures as necessary" during "heavy precipitation events." *Id.* "FERC representatives [will] be on-site during construction" to "document the effectiveness of erosion control devices and verify that they are properly maintained." *Id.* at 1-12 to 1-13, JA___-___. Petitioners may substantively disagree with the Commission's choice of mitigation measures or its determination that Mainline System sedimentation events did not warrant different methods. But FERC's "judgment was not uninformed." *Citizens Against*

Burlington, Inc. v. Busey, 938 F.2d 190, 199 (D.C. Cir. 1991). Under NEPA, that is dispositive.

Petitioners assert that "failures along the Mainline continued to occur well past 2018." Pet'rs' Br. 34. But Petitioners do not dispute that the *sui generis* 2018 rains were a primary factor—indeed, *the* primary factor—behind the "slightly" greater-than-anticipated sedimentation impacts during Mainline System construction. *Mountain Valley Pipeline, LLC*, 173 FERC ¶ 61,027, P 39. Indeed, Petitioners themselves overwhelmingly (and tellingly) focus on 2018 events here. *See* Pet'rs' Br. 4-5; Pet'rs' Reh'g Request 38-40 (July 20, 2020), R.603, JA___-___. The Commission is well aware of the Mainline construction record, which it has continually and rigorously monitored, and it reasonably determined that impacts during Mainline System construction are a poor predictor of impacts during Southgate construction, largely due to the unprecedented 2018 rains.[5] As for the

[5] As to post-2018 events, the task of controlling sedimentation for the Mainline has been made more difficult by lengthy construction delays caused by Petitioners' and others' litigation campaign, which interrupted construction midstream, causing longer-than-expected reliance on temporary erosion control measures that are "not intended for long-term use." *Mountain Valley Pipeline, LLC*, 173 FERC ¶ 61,027, P 30. Indeed, the Commission recently reaffirmed that completing construction is the best way to minimize further sedimentation risks on the Mainline right-of-way, which is now 92% complete. *See id*. Predictably, Petitioners' reaction was to petition for review in this Court and immediately (albeit unsuccessfully) seek an "emergency" stay to stop that remedial work—a choice that speaks volumes about Petitioners' purported sedimentation concerns and their true objectives. *See generally Sierra Club v. FERC*, No. 20-1512 (D.C. Cir.).

Commission's *additional* observation that the Southgate Project's route has flatter and less sedimentation-prone terrain, *see* EIS at 1-12, JA___—which distinguishes it still further from the Mainline route—Petitioners offer no response, tacitly conceding the point. *Accord* FERC Br. 40-41.

Petitioners also cite an "expert" report submitted by Appalachian Voices. Pet'rs' Br. 31-32. Commission staff considered and disagreed with the views of that lone "Licensed Professional Geologist." *See* EIS, Appendix I.3 at I.3-172 to I.3-173, JA___-___. The Commission reasonably credited the judgment of its staff—which has "experience monitoring pipeline construction for thousands of projects spanning tens of thousands of miles across the United States," *Mountain Valley Pipeline, LLC*, 173 FERC ¶ 61,027, P 29—over the views of an opposition group's chosen expert; "evaluation of scientific data within [FERC's] technical expertise" receives "an extreme degree of deference." *Myersville*, 783 F.3d at 1308 (internal quotation marks omitted).

Petitioners question whether Mountain Valley's supplemental control measures will in fact exceed state standards. Pet'rs' Br. 32. The record forecloses that argument. *See* FERC Br. 37. Petitioners next question whether Mountain Valley is committed to complying with state regulations. Pet'rs' Br. 32-33. This argument was not raised on rehearing and is jurisdictionally forfeited. *See* 15 U.S.C. § 717r(b). Regardless, Mountain Valley stated it would seek state approval for

deviations from certain requirements and requests—as is typical in constructing a large project.

Petitioners also criticize Mountain Valley for seeking certain site-specific modifications to (*not* "violat[ions]" of) standard FERC procedures. Pet'rs' Br. 33-34. Again, this is commonplace in building a large project, where generally applicable measures do not always fit site-specific conditions. FERC staff *did* analyze the "impacts" of these variations (*contra* Pet'rs' Br. 33-34); it explained the justification for each modification—often to *minimize* potential environmental impacts that would be *greater* without modifications. *See* EIS, Appendices B.3, B.8, JA___-___, ___-___.

B. The Commission's Cumulative Impacts Analysis Was Reasonable.

Petitioners contend that the Commission "failed to rationally consider the cumulative aquatic impacts of the Project together with the impacts of other reasonably foreseeable actions, particularly the Mainline." Pet'rs' Br. 36. But the Commission extensively discussed cumulative impacts. *See* EIS at 4-49, 4-242 to 4-244, JA___, ___-___; Certificate Order PP 9, 91-94, JA___, ___-___; Reh'g Order PP 28-31, JA___-___. The Commission's conclusions, which were based on its analysis of scientific evidence concerning turbidity plume dispersal and other matters within its technical expertise, are entitled to an "extreme degree of deference." *Myersville*, 783 F.3d at 1308 (internal quotation marks omitted); *see*

FERC Br. 44-45, 49. Petitioners' complaints fall well short of establishing that FERC failed to take the required "hard look" at this issue. *Myersville*, 783 F.3d at 1324. Indeed, Petitioners' arguments largely ignore the Commission's extensive discussion of cumulative impacts, including turbidity and other aquatic impacts. *See* EIS at 2-242 to 2-243, JA___-___; FERC Br. 46-48.

Petitioners contend that the Commission "incorrectly assume[d] that the water quality impacts of both the Project and the Mainline will not substantially overlap in . . . space" because "sediment can travel and have adverse downstream impacts at much greater distances from the source than 3.5 miles." Pet'rs' Br. 37-38, 39-40. But the Commission acknowledged and disclosed that "[t]urbidity plumes may travel downstream for a few miles," EIS at 4-242, JA___, and that there could be "additive" impacts if "turbidity plumes settled within common stream segments," *id.* at 4-243, JA___. The Commission concluded, however, that the risk of additive effects was "unlikely" because of "the spatial separation" of the Mainline and Southgate projects. *Id.* at 4-243, JA___.

Petitioners cite supposed "broadly accepted science" which, on their account, suggests that sediment "***can***" travel "***up to*** hundreds of miles downstream." Pet'rs' Br. 38 (emphasis added). The "broadly accepted science" to which Petitioners refer appears to be a website cited in their rehearing request that is maintained by "Fondriest Environmental," a regional "distributor . . . of equipment for natural

resource professionals and outdoor enthusiasts." *Cf. Company*, Fondriest Environmental Products, https://bit.ly/3xtohT8 (last visited July 11, 2021); *see* R.603 at 43, JA___. That website does not actually say that sediment "can" travel hundreds of miles downstream—and, even if it did, this Court should not set aside the expert judgment of the Commission on the basis of representations appearing on the website of a private sales company.

Petitioners argue in passing that purported "cumulative effects" are "[o]f particular concern" because the Southgate and Mainline Projects are both upstream of the Kerr Reservoir. Pet'rs' Br. 39. But that Reservoir is over 30 miles away from both Projects and outside the affected HUC-10 watersheds. *See* FERC Br. 45-48 (explaining relevance of HUC-10 watersheds). Therefore, the Projects will have negligible, if any, cumulative impacts on sedimentation within the Kerr Reservoir. Petitioners cite a PowerPoint deck (R.603 Appendix B, JA___-___) as showing "an additional 1,039 tons of sediment per year" being deposited into the Roanoke River (Pet'rs' Br. 39), but it is unclear how this figure was derived, or why every grain of sediment deposited into the entire Roanoke River would be expected to end up in Roanoke's drinking water.

In short, Petitioners have offered no reason for this Court to displace the Commission's expert judgment that sediment plumes from pipeline construction would travel at most a few miles and then quickly disperse, and that sedimentation

would return to background levels in a matter of days. *See* Reh'g Order P 30, JA___; EIS at 4-242, JA___. Given that the Projects will only cross two of the same waterbodies—and that the crossings for one of these waterbodies would be ten miles apart—that conclusion was reasonable. *See* FERC Br. 46-47.

In any event, the Commission reasonably and independently concluded that "any cumulative impacts from upland construction of multiple projects occurring with a watershed would not likely be significant" because the Mainline and Southgate Projects were both "required . . . to install erosion and stormwater control devices to minimize runoff." EIS at 4-242 to 4-243, JA___-___. Petitioners offer no response to this reasoning, except to repeat the same flawed argument—debunked above—about the adequacy of erosion-control devices. *Cf.* Pet'rs' Br. 42.

Petitioners next attack "FERC's claim that impacts from the Project and Mainline construction will be distant in time." Pet'rs' Br. 40. Petitioners assert that "construction schedules for both projects" are not "set in stone," and say the Commission should have prohibited contemporaneous construction. *Id.* But NEPA requires only that the Commission consider impacts that are "reasonably foreseeable" and does not compel substantive outcomes. *See Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 763-64 (2004). As the Commission has explained, the information available ***at the time of its Orders*** suggested that overlapping construction was not reasonably foreseeable because the Mainline was then largely

completed and Southgate had not yet broken ground. *See* FERC Br. 50-51; *see also City of Boston Delegation v. FERC*, 897 F.3d 241, 253 (D.C. Cir. 2018) (the "adequacy of [an EIS is] judged by reference to the information available to the agency at the time of review"). Even today, there is no evidence that the Projects' construction schedules will overlap. Petitioners' theories to the contrary are based on speculation, and environmental permitting for both projects remains underway. In any event, even if the Projects' ***overall*** construction schedules did overlap, that would not necessarily apply to these specific stream crossings, which in any event are protected by erosion-control devices.

Petitioners also suggest that, even if construction does not occur at the same time, sediment can have "long-term adverse impacts" for waterbody beds. Pet'rs' Br. 40-41. But the fact that sedimentation can in some limited cases have long-term impacts does not mean sedimentation from this Project will. Here, the Commission reasonably concluded that it will not. *See* EIS at 4-242 to 4-243, JA___-___; Reh'g Order P 31, JA___.

In any event, NEPA simply required the Commission to take a "hard look" at cumulative impacts. It did. The Commission acknowledged and disclosed the possibility of "cumulative impacts on surface waters" and that "[s]edimentation impacts could be additive," but ultimately found—based on its assessment of available information and science—that cumulative impacts were unlikely to occur

and that, if they did occur, they were unlikely to be significant. EIS at 4-242 to 4-243, JA___-___. NEPA requires no more.

IV. The Tribes' Arguments Are Not Properly Before This Court And Lack Merit.

A. This Court Should Not Consider Arguments Raised Solely By An Intervenor.

This Court should not consider the Tribes' arguments because they elected to participate in this appeal only as Intervenors. *See* FERC Br. 52-53.[6]

"No objection to the order of the Commission shall be considered by the court [of appeals] unless such objection shall have been urged before the Commission in ***the application for rehearing*** unless there is reasonable ground for failure to do so." 15 U.S.C. § 717r(b) (emphasis added). The "[u]se of the definite article . . . ('in *the* application for rehearing,' instead of in *an* application for rehearing') makes it plain that what is referred to is the same application for rehearing mentioned earlier in subsection (b), which in turn (by reason of the same use of the definite article) clearly refers to the same application for rehearing mentioned in subsection (a), to wit, the

[6] The Tribes also "bear[] the burden of . . . establishing the elements of standing." *Arpaio v. Obama*, 797 F.3d 11, 19 (D.C. Cir. 2015). Although each Tribe offers a terse standing declaration referring generally to supposed injuries to cultural or historical interests, *see* Tribal Br., Add. 140-43, their assertions of injury are extraordinarily vague, calling into doubt whether they have met their burden. *See Swanson Grp. Mfg. LLC v. Jewell*, 790 F.3d 235, 242 (D.C. Cir. 2015) (standing claims insufficient where plaintiff alleged "economic loss and hardship," but otherwise specified "nothing about the nature" of injury).

application *of the party who seeks judicial review*." *ASARCO*, 777 F.2d at 773 (emphasis in original). Phrased differently, this Court's jurisdiction extends only to arguments raised in the rehearing requests of parties that petition for review. *See Process Gas Consumers Grp. v. FERC*, 912 F.2d 511, 514 (D.C. Cir. 1990). The Tribes chose not to petition for review, and the Preservation Act and Tribal-related arguments in their Intervenors' brief were not raised in the rehearing request of the Petitioners. This Court therefore lacks jurisdiction to consider the Tribes' arguments.[7]

This Court has sometimes recognized "discretion" to consider arguments raised only by intervenors. *Cf. Town of Weymouth v. FERC*, No. 17-1135, 2018 WL 6921213, at *1 (D.C. Cir. Dec. 27, 2018) (per curiam). Even assuming that approach is consistent with *ASARCO* and the Natural Gas Act, there is no basis to exercise such "discretion" here. After having sought rehearing of the Commission's order, the Tribes do not and cannot provide an explanation for their failure to petition for review. This case is unlike prior appeals where this Court has found an "extraordinary" circumstance justifying consideration of arguments raised only by

[7] This Court may consider arguments not raised in "the" rehearing request if there was a "reasonable ground" for the party's failure to do so. 15 U.S.C. § 717r(b). But this exception applies where a ***petitioner*** raises an argument on appeal that it reasonably failed to make on rehearing. *See Save Our Sebasticook v. FERC*, 431 F.3d 379, 382 (D.C. Cir. 2005). That provision does not authorize a party who has not sought judicial review to leverage intervenor status to raise arguments not pursued by any petitioner.

intervenors. *See, e.g.*, *Vill. of Bensenville v. FAA*, 457 F.3d 52, 61 (D.C. Cir. 2006) (noting that it may be appropriate to consider an argument raised only by an intervenor when the agency's decision "foreclose[d the intervenor] from petitioning for review and the issue raised logically precedes the issues in dispute between the principal parties"—two circumstances not present here).

B. The Commission Fully Complied With The Preservation Act.

In any event, the Tribes' arguments fail under the Preservation Act.

1. The Commission Complied With The Preservation Act's Consultation Requirements.

(a) Legal Background And Overview

Under Section 106 of the Preservation Act, the Commission must "take into account the effect of the undertaking on any historic property" listed in or found eligible for listing in the National Register of Historic Places. 54 U.S.C. § 306108; *see id.* § 300308. "The Section 106 process requires that an agency consider the impacts of its undertaking and consult various parties, not that it necessarily engage in any particular preservation activities." *United Keetoowah Band*, 933 F.3d at 734 (internal quotation marks omitted). The culmination of the Section 106 process is the "negotiat[ion] and execut[ion] [of] a Section 106 agreement document that sets out the measures the federal agency will implement to resolve . . . adverse effects through avoidance, minimization, or mitigation." Advisory Council on Historic

Preservation, *Guidance on Agreement Documents: Do You Need a Section 106 Agreement?*, https://bit.ly/3g7u1dd (last visited July 11, 2021).

During the Section 106 process, the Commission consults with the relevant State Historic Preservation Officers, here Virginia's and North Carolina's, 36 C.F.R. § 800.2(c)(1), as well as the Advisory Council on Historic Preservation ("Council") if it chooses to participate.[8] Interested "Indian tribes"—defined to include the Monacans (who are federally recognized), but not the non-federally-recognized Sappony—must also be consulted. *Id.* §§ 800.2(c)(2)(ii), 800.16(m).[9] This requires giving covered tribes a "reasonable opportunity" to articulate their concerns on potential impacts to listed or potentially eligible properties and participate in resolving adverse effects. *Id.* § 800.2(c)(2)(ii)(A). Additional parties (e.g., Native

[8] Here, the Council concluded that its participation was unnecessary under the relevant regulatory criteria (which generally relate to the importance/substantiality of the impacts, legal issues, and/or tribal interests at stake). *See* Council Letter (Dec. 10, 2019), R.541, JA___; 36 C.F.R. Part 800, Appx. A.

[9] Although the regulatory definition of "Indian tribe" may cover *some* entities other than federally recognized tribes (*viz.* Alaska Native Corporations), *see Yellen v. Confederated Tribes of the Chehalis Reservation*, No. 20-543, 2021 WL 2599432 (U.S. June 25, 2021), the Tribes do not argue that the non-federally-recognized Sappony could be construed as an "Indian tribe" under the regulations. *Accord Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1216 (9th Cir. 2008) (government-to-government consultation under Preservation Act not required because tribe "was not federally recognized"); *see also Yellen*, 2021 WL 2599432, at *7 (*Yellen* "does not open the door to [non-Alaska Native Corporation] Indian groups that have not been federally recognized becoming Indian tribes" for federal statutory purposes). Moreover, any such argument would be jurisdictionally forfeited for failure to raise it on rehearing. *See* 15 U.S.C. § 717r(b); Tribal Reh'g Request (July 20, 2020), R.604, JA___-___.

American organizations like the Sappony that fall outside the regulatory definition of "Indian tribes") may be "invite[d] . . . to participate . . . as the section 106 process moves forward." *Id.* § 800.3(f); *see id.* § 800.2(c)(5).

The implementing regulations encourage integrating the Section 106 process with the NEPA process. *See* 36 C.F.R. § 800.8(a); EIS at 4-154, JA___. The Commission's ordinary practice is to conduct much of its consultation through written communication on the record. *See* Reh'g Order P 48, JA___. Longstanding policy guidance contemplates using "environmental and decisional documents to communicate how tribal input has been considered." 18 C.F.R. § 2.1c(e).

Here, the Commission carried out its Section 106 duties diligently, consulting with the federally recognized Monacans and non-federally recognized Sappony (as well as other tribes) and the Virginia and North Carolina State Historic Preservation Officers. *See generally* Certificate Order PP 112-24, JA___-___; EIS at 4-155 to 4-160, JA___-___. "[P]reparing NEPA documents" was part of the Section 106 consultation process, as is "standard practice" for FERC. Reh'g Order P 48, JA___. FERC's consultation with the tribes was largely written, *see id.*, and FERC's consideration of tribal input was set forth, in part, through its environmental and decisional documents. *See*, *e.g.*, EIS at 4-158 to 4-160; *id.*, Appendix I.3 at I.3-62 to I.3-80, JA___-___; Certificate Order PP 112-24, JA___-___. The Section 106 process culminated in a final Programmatic Agreement agreed to and executed by

the Commission and the State Historic Preservation Officers. *See* Reh'g Order P 44, JA___-___.

The Tribes' criticisms of the Commission's consultation process are belied by the record, which demonstrates extensive consultation and ample opportunities for tribal participation. Indeed, in some instances the Tribes affirmatively chose *not* to participate meaningfully even when given the opportunity. *See, e.g.*, *infra* pp. 32-33. Moreover, despite asserting that they were not given sufficient opportunities to provide input, the Tribes tellingly never "identify any new information that [they] would have brought to [FERC's] attention" beyond what they already submitted. *Te-Moak Tribe of W. Shoshone v. U.S. Dep't of the Interior*, 608 F.3d 592, 609 (9th Cir. 2010).

(b) The Commission Consulted With Both Tribes.

FERC promptly invited the Monacans, as a federally recognized tribe, to consult on a government-to-government basis. *See* Certificate Order P 121, JA___; FERC Letter to Monacan Nation (Oct. 16, 2018), R.217, JA___. The non-federally-recognized Sappony were not required to be consulted. *See supra* pp. 27-28 & n.9. However, the Commission considered and responded to the Sappony's filings, ultimately determined that the Sappony should be a consulting party, and "invited [them] to be a concurring party to the programmatic agreement" "as a consulting

party." Reh'g Order P 46, JA___-___.[10] That is consistent with the Section 106 regulations, which state that the agency should "consider" requests to participate as consulting parties and identify parties that should be consulted "as the section 106 process moves forward." 36 C.F.R. § 800.3(f).

(c) The Commission's Extensive Consultation Gave The Tribes Ample Opportunities To Participate.

FERC engaged extensively with the Tribes throughout the Section 106 process. The Commission held an in-person meeting with the Monacans in January 2019. *See* Certificate Order P 121, JA___. Mountain Valley also provided cultural resource reports to the Tribes beginning in February 2019. *See id.*; Mountain Valley Response to Cultural Heritage Partners at 1 (Jan. 27, 2020), R.551, JA___. Although the Tribes complain without elaboration that they did not have adequate time to "provid[e] input" on cultural resources reports, Tribal Br. 14, they *in fact* commented on such reports. *See* Certificate Order P 121 & n.272, JA___; EIS at 4-159, JA___. The Tribes never explain how timing impeded their participation. *See also* Mountain

[10] The Sappony assert that FERC "[r]efused to respond to [its] requests to consult" and contend they lacked notice of FERC's consideration and ultimate decision to treat them as a consulting party. Tribal Br. 23-24; *see id.* at 11-12. Not so. FERC explicitly addressed the Sappony's consultation requests in the Environmental Impact Statement, *see* EIS at 4-159, JA___, and the Sappony received and reviewed the Programmatic Agreement formally listing them as a consulting party, *see* Reh'g Order P 46, JA___-___. (The Tribes note that the Programmatic Agreement initially misspelled "Sappony," *see* Tribal Br. 17, but that isolated typo was corrected. *See id.* at 20.)

Valley Response to Cultural Heritage Partners at 1-2, JA___-___ (inviting "additional comments and information," including "any information . . . [the Tribes' counsel] would like to see incorporated into the cultural resource reports," and inviting Monacan Nation to meet in person). The Tribes complain that they were asked to (and did) sign a nondisclosure agreement to review cultural resources reports. Tribal Br. 15. But nothing prohibited FERC or Mountain Valley from conditioning receipt of reports on a confidentiality agreement, a common practice for cultural resources reports to protect, among other things, the location of sensitive sites. *Cf.* 36 C.F.R. § 800.11(c); FERC, *Guidelines for Reporting on Cultural Resources Investigations for Natural Gas Projects* at 25-26 (July 2017), https://bit.ly/3xtGQak.

The Tribes claim lack of opportunity to participate in resolving adverse effects, propose alternatives or modifications to the Project, or propose modifications to the Programmatic Agreement. Tribal Br. 15-16. Again, not so. Notably, the Tribes had an opportunity to, and did, comment on the draft Environmental Impact Statement, *see* Certificate Order P 121, JA___—a critical opportunity to address Project alternatives consistent with the Section 106 regulations, given that analyzing alternatives is a core aspect of an Environmental

Impact Statement, *cf.* EIS at 3-1 to 3-45, JA___-___.[11] And contrary to the Tribes' assertion that FERC did not "respond to any of [their] comment letters," Tribal Br. 23, FERC devoted nearly 20 pages of the Environmental Impact Statement to line-by-line responses. *See* Reh'g Order P 46 & n.176, JA___; EIS, Appendix I.3 at I.3-62 to I.3-80, JA___-___.

The Tribes also had opportunity to comment on the draft Programmatic Agreement, and *in fact* filed comments on it. *See* Monacan Resp. to Draft Programmatic Agreement (Feb. 7, 2020), R.560, JA___; Sappony Resp. to Draft Programmatic Agreement (Feb. 7, 2020), R.561, JA___; Monacan Objection to Draft Programmatic Agreement (Jan. 16, 2020), R.549, JA___; Sappony Objection to Draft Programmatic Agreement (Jan. 16, 2020), R.548, JA___. Those comments only raised general procedural objections, not substantive input. In addition, the Tribes submitted comments on the final Programmatic Agreement through the Virginia State Historic Preservation Officer. *See* Certificate Order P 114, JA___; Virginia Department of Historic Resources Comments (Apr. 1, 2020), R.589, JA___. Even though those comments were late, FERC responded to them in detail. *See* Certificate Order P 114, JA___; FERC Letter to Virginia Department of Historic Resources, Enclosure 1 (Apr. 10, 2020), R.590, JA___-___. The Tribes complain

[11] The Tribes' comments focused largely on the Commission's background discussion of tribal "history and linguistic relationships," not concrete Project impacts. *See* EIS, Appendix I.3 at I.3-62 to I.3-80, JA___-___.

they "should not have had to send or receive information" through a third party. Tribal Br. 17. But they were invited to, and did, submit comments directly. Their choice to postpone submitting substantive comments until after the deadline passed (and through the Virginia State Historic Preservation Officer instead of to FERC directly) is not the Commission's fault.

The Tribes essentially ignore all the above consultation activities, wrongly attributing to the Commission (without citation) the "assertion that a single meeting with the Monacans' representatives" fulfilled its Section 106 duties. Tribal Br. 16; *see id.* at 21-22. But as the Commission explained, all of the above interactions were part of the consultation process. *See, e.g.*, Reh'g Order PP 46, 48, JA___-___. This is consistent with the Commission's longstanding policies on tribal consultation, *see supra* p. 28, as well as Preservation Act regulations—which do not limit consultation to any specific medium (e.g., written vs. in-person). *See* 36 C.F.R. § 800.16(f); *cf. United Keetoowah Band*, 933 F.3d at 750.

2. The Tribes' Criticisms Of The Programmatic Agreement Are Meritless.

The Section 106 process culminated with the execution of a Programmatic Agreement signed by FERC and the State Historic Preservation Officers. Insofar as the Tribes seek to challenge the substantive content of the Programmatic Agreement, their arguments are misplaced; it is axiomatic that the Preservation Act, like NEPA, is a purely *procedural* statute, does not require "any particular preservation

activities," *United Keetoowah Band*, 933 F.3d at 734 (internal quotation marks omitted), and does not require substantive agreement with consulting Tribes, *cf. Hoopa Valley Tribe v. Christie*, 812 F.2d 1097, 1103 (9th Cir. 1986) ("Consultation is not the same as obeying those who are consulted.").

The Tribes assert that the Programmatic Agreement "den[ies]" them "prospective[]" input on "each stage of the Section 106 analysis." Tribal Br. 18-19. This argument is based on a conceptual confusion: there is no "prospective" Section 106 process because execution and implementation of the Programmatic Agreement is *itself* the culmination of the Section 106 process and evidences FERC's compliance with that process. *See* FERC Br. 61; Advisory Council on Historic Preservation, *Guidance on Agreement Documents: Agreement Implementation*, https://bit.ly/3dsy9VN (last visited July 11, 2021).

Regardless, the Programmatic Agreement's prospective processes for minimizing and resolving potential adverse effects on eligible properties *do* call for extensive tribal involvement. The Programmatic Agreement notes the status of both the Monacans and the Sappony as consulting parties and invites both to sign as concurring parties. *See* Executed Final Programmatic Agreement at 3-4 (May 19, 2020), R.599, JA___-___. Although both Tribes declined to sign the Programmatic Agreement, *see* Reh'g Order P 44, JA___, Mountain Valley is still required to distribute all reports and plans to "applicable consulting Indian tribes[] and other

consulting parties," which have an opportunity to comment. Executed Final Programmatic Agreement at 10, JA___; *see id.* at 5, JA___. In other words, the Tribes can in fact participate prospectively in assessing and resolving effects on historic properties.

Finally, the Tribes' unnecessarily inflammatory assertion that they are "remov[ed] . . . from any input into how their ancestors' remains are treated" (Tribal Br. 19; *see also id.* at 30) is false. First, both Virginia and North Carolina have detailed legal requirements governing discoveries of human remains, which are referenced and incorporated in the Unanticipated Discovery Plan. *See* Unanticipated Discovery Plan at 4-5 (May 19, 2020), R.599, JA___-___. The Tribes ignore both states' built-in consultation processes regarding archaeological treatment/removal of human remains. *See* N.C. Gen. Stat. § 70-32 (tribal consultation for treatment and disposition of Native American remains); 17 Va. Admin. Code § 5-20-50 (public notice and comment requirements for applications for Permit for Archaeological Excavation of Human Remains). In addition, the Unanticipated Discovery Plan separately provides for tribal input for discoveries of Native American remains. *See* Unanticipated Discovery Plan at 5, JA___ ("If human remains are determined to be Native American, . . . [t]he Project will assist the FERC, the appropriate SHPO, and the Interested Tribes in their consultation to develop a plan of action."). To the extent the Tribes mean to suggest they should be consulted on the treatment/removal

of *any human remains discovered* (even remains not determined to be Native American), that would almost certainly violate state law. *See, e.g.*, N.C. Gen. Stat. §§ 70-29 to 70-30, 130A-383 (requiring, upon discovery of unmarked human remains, "immediate[]" notice to county medical examiner, who must determine "as soon as possible" whether remains are a potential criminal matter, "immediately proceed" with investigation if so, and "release the body to the next of kin" as appropriate).

3. The Commission Did Not Violate Any Background Fiduciary Or Trust Duties.

The Tribes attempt to supplement their consultation-related arguments with references to FERC's background "[d]uty of trust" or "fiduciary responsibility" to Indian tribes. Tribal Br. 3, 19-20, 22-23. But "[t]he trust obligations of the United States to the Indian tribes are established and governed by statute rather than the common law," and "[t]he Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 165, 177 (2011); *accord Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998). Thus, because FERC satisfied the Preservation Act and implementing regulations, it also satisfied any pertinent "trust" or "fiduciary" duties.

4. The Tribes' "Delegation" Arguments Fail.

The record belies the Tribes' delegation argument. *See* Tribal Br. 25-31. The Commission remained legally responsible for all findings and determinations, and Commission staff consulted directly with the Tribes. *See* FERC Br. 63-64. Although prepared by the project applicant, the Unanticipated Discovery Plan must be (and here was) approved and adopted by FERC. The regulations state that FERC "may use the services of applicants . . . to prepare information, analyses and recommendations." Reh'g Order P 51, JA___ (quoting 36 C.F.R. § 800.2(a)(3)). Nor does FERC "delegate" its Section 106 duties by allowing Mountain Valley to prepare plans subject to FERC's approval and oversight. *See id.*; *cf. EMR Network v. FCC*, 391 F.3d 269, 273 (D.C. Cir. 2004) (agency did not "improper[ly] delegat[e]" NEPA responsibilities by properly involving outside parties). The Tribes incorrectly assert that "FERC left it to Mountain Valley to file responses to the Tribe's comments." Tribal Br. 27. Both FERC *and* Mountain Valley communicated extensively with the Tribes. *See* EIS at 4-158 to 4-160, JA___-___; *id.*, Appendix E.3 at E.3-9, E.3-12, E.3-14, E.3-16 to E.3-17, JA___, ___, ___, ___-___; *see generally supra* pp. 29-33. But the responsibility under Section 106 ultimately lies with FERC.

The Tribes assert that Mountain Valley "on several instances" did not respond, or did not respond promptly enough, to various communications. Tribal

Br. 27-30. Notwithstanding the Tribes' undeveloped bullet-point complaints (some based on extra-record materials),[12] the record demonstrates that Mountain Valley extensively communicated with the Tribes. *See* EIS at 4-159 to 4-160, JA___-___; *id.*, Appendix E.3 at E.3-14, E.3-16 to E.3-17, JA___, ___-___; *see also* Mountain Valley Response to Cultural Heritage Partners at 1-2, JA___-___ (describing Mountain Valley's communications and offering to meet in person).

The Tribes assert that FERC did not comply with a "request . . . from Virginia's Department of Historical Resources to reopen consultation on the Unanticipated Discover[y] Plan." Tribal Br. 30 (internal quotation marks omitted). But FERC had no legal obligation to grant that eleventh-hour request (made in passing in the cover letter to the Department's transmittal of its signature to the final Programmatic Agreement).[13]

V. If The Court Grants Any Relief, It Should Remand Without Vacatur.

Petitioners' (and the Tribes') claims lack merit, and this Court should deny the petition for review in its entirety. But if the Court finds merit in any claims, the

[12] *See Minisink*, 762 F.3d at 115 n.13 (Court's review limited to "the record as it existed before the Commission at the time of its decision").

[13] The Tribes' residual NEPA arguments (Tribal Br. 31-32) are entirely derivative of their Preservation Act arguments, and therefore fail for the same reasons. *See* FERC Br. 64.

appropriate remedy, if any, would be remand without vacatur under *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*, 988 F.2d 146, 150-51 (D.C. Cir. 1993).

First, even if the Court finds aspects of FERC's analysis deficient, there is "a serious possibility that the Commission will be able to substantiate its decision on remand." *Allied-Signal*, 988 F.2d at 151. Petitioners assert that FERC based its conclusions on insufficient evidence or analysis—e.g., that it provided an insufficient rationale for using a 14% return on equity, or that FERC did not adequately account for alleged prior sedimentation events during Mainline construction. Even if those claims had merit, it would be eminently "plausible that FERC [could on remand] redress [a] failure" to adequately discuss those issues "while reaching the same result." *Black Oak Energy, LLC v. FERC*, 725 F.3d 230, 244 (D.C. Cir. 2013). Indeed, as to the return-on-equity issue, even if FERC were to adjust Mountain Valley's initial recourse rates on remand, the Commission would be free to reach the same bottom-line result—i.e., certificating the Project.[14]

Second, vacatur would have severe "disruptive consequences" to Mountain Valley, Dominion, and the gas-consuming public. *Allied-Signal*, 988 F.2d at 151.

[14] *Environmental Defense Fund v. FERC*, No. 20-1016, 2021 WL 2546672 (D.C. Cir. June 22, 2021), is not to the contrary. This is not a case where remand without vacatur would "give the Commission incentive" to "build[] first" and "review[] later." *Id.* at *15 (internal quotation marks omitted). Construction of the Southgate Project has not yet commenced, and cannot commence until "Mountain Valley receives the necessary federal permits for the Mainline System." Certificate Order P 9.

Vacatur would disrupt a critical, $468-million-dollar infrastructure project, *see* Certificate Order P 11, JA___—among other things, potentially delaying Mountain Valley's ability to secure additional needed environmental permits. The costs of such permitting delays are real and substantial: as noted above, vacaturs of various permits for the Mainline System have led to billions of dollars of increased costs and years of delay. *See supra* pp. 11-12. Moreover, Dominion entered into a long-term, firm contract for 80% of the Project's capacity. Reh'g Order P 11, JA___. Vacatur would risk interfering with that contract, precluding "voluntary transactions that [Respondent-Intervenors] find advantageous," *La. Fed. Land Bank Ass'n v. Farm Credit Admin.*, 336 F.3d 1075, 1085 (D.C. Cir. 2003), and harming Dominion. Any delay caused by vacatur would also harm the gas-consuming public: Dominion needs the capacity to support demand from its customers, and will face a capacity shortage without the Project. *See* Mountain Valley Reh'g Answer 6 (Aug. 10, 2020), R.610, JA___.

CONCLUSION

The petition for review should be denied.

Date: July 12, 2021

Respectfully submitted,

/s/ Jeremy C. Marwell

Jeremy C. Marwell
Matthew X. Etchemendy
James T. Dawson
Vinson & Elkins LLP
2200 Pennsylvania Avenue, NW
Suite 500 West
Washington, DC 20037
Phone: 202.639.6507
Email: jmarwell@velaw.com
Email: metchemendy@velaw.com
Email: jamesdawson@velaw.com

Matthew Eggerding
Mountain Valley Pipeline, LLC
by and through its operator,
EQM Gathering Opco, LLC
2200 Energy Drive
Canonsburg, PA 15317
Phone: 412.553.5786
Email: meggerding@equitransmidstream.com

Counsel for Mountain Valley Pipeline, LLC

/s/ Charlotte Taylor (by permission)

Charlotte Taylor
Stephen Petrany
Jones Day
51 Louisiana Ave. NW
Washington, DC 20001
Phone: 202.879.3939
Email: ctaylor@jonesday.com
Email: spetrany@jonesday.com

James Olson
Jones Day
717 Texas St. #3300
Houston, TX 77002
Phone: 832.239.3939
Email: jolson@jonesday.com

B. Craig Collins
Dominion Energy Services, Inc.
Mail Code C222
220 Operation Way
Cayce, SC 29033
Phone: 803.217.7513
Email: b.collins@dominionenergy.com

Counsel for Public Service Company of North Carolina, Inc.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of D.C. Cir. R. 32(e)(2)(B) because this brief contains 9,044 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and D.C. Cir. R. 32(e)(1).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.

Date: July 12, 2021

/s/ Jeremy C. Marwell

Jeremy C. Marwell
Vinson & Elkins LLP
2200 Pennsylvania Avenue, NW
Suite 500 West
Washington, DC 20037-1701
Phone: 202.639.6507
jmarwell@velaw.com

Counsel for Mountain Valley Pipeline, LLC

ADDENDUM

Statutes and Regulations

ADDENDUM TABLE OF CONTENTS

Page

Federal Statutes and Regulations:

State Statutes and Regulations:

§ 300304. Cultural park

In this division, the term ''cultural park'' means a definable area that—

(A) is distinguished by historic property, prehistoric property, and land related to that property; and

(B) constitutes an interpretive, educational, and recreational resource for the public at large.

(Pub. L. 113–287, § 3, Dec. 19, 2014, 128 Stat. 3188.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
300304	16 U.S.C. 470w(9).	Pub. L. 89–665, title III, § 301(9), as added Pub. L. 96–515, title V, § 501, Dec. 12, 1980, 94 Stat. 3001; Pub. L. 102–575, title XL, § 4019(a)(7), Oct. 30, 1992, 106 Stat. 4764.

§ 300305. Historic conservation district

In this division, the term ''historic conservation district'' means an area that contains—

(1) historic property;

(2) buildings having similar or related architectural characteristics;

(3) cultural cohesiveness; or

(4) any combination of features described in paragraphs (1) to (3).

(Pub. L. 113–287, § 3, Dec. 19, 2014, 128 Stat. 3188.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
300305	16 U.S.C. 470w(10).	Pub. L. 89–665, title III, § 301(10), as added Pub. L. 96–515, title V, § 501, Dec. 12, 1980, 94 Stat. 3001; Pub. L. 102–575, title XL, § 4019(a)(8), Oct. 30, 1992, 106 Stat. 4764.

§ 300306. Historic Preservation Fund

In this division, the term ''Historic Preservation Fund'' means the Historic Preservation Fund established under section 303101 of this title.

(Pub. L. 113–287, § 3, Dec. 19, 2014, 128 Stat. 3189.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
300306	no source.	

§ 300307. Historic preservation review commission

In this division, the term ''historic preservation review commission'' means a board, council, commission, or other similar collegial body—

(1) that is established by State or local legislation as provided in section 302503(a)(2) of this title; and

(2) the members of which are appointed by the chief elected official of a jurisdiction (unless State or local law provides for appointment by another official) from among—

(A) professionals in the disciplines of architecture, history, architectural history, planning, prehistoric and historic archeology, folklore, cultural anthropology, curation, conservation, and landscape architecture, or related disciplines, to the extent that those professionals are available in the community; and

(B) other individuals who have demonstrated special interest, experience, or knowledge in history, architecture, or related disciplines and will provide for an adequate and qualified commission.

(Pub. L. 113–287, § 3, Dec. 19, 2014, 128 Stat. 3189.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
300307	16 U.S.C. 470w(13).	Pub. L. 89–665, title III, § 301(13), as added Pub. L. 96–515, title V, § 501, Dec. 12, 1980, 94 Stat. 3002; Pub. L. 102–575, title XL, § 4019(a)(11), Oct. 30, 1992, 106 Stat. 4764.

§ 300308. Historic property

In this division, the term ''historic property'' means any prehistoric or historic district, site, building, structure, or object included on, or eligible for inclusion on, the National Register, including artifacts, records, and material remains relating to the district, site, building, structure, or object.

(Pub. L. 113–287, § 3, Dec. 19, 2014, 128 Stat. 3189.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
300308	16 U.S.C. 470w(5).	Pub. L. 89–665, title III, § 301(5), as added Pub. L. 96–515, title V, § 501, Dec. 12, 1980, 94 Stat. 3001; Pub. L. 102–575, title XL, § 4019(a)(4), Oct. 30, 1992, 106 Stat. 4764.

The words ''historic resource'' are omitted so that a uniform term is used throughout this division.

§ 300309. Indian tribe

In this division, the term ''Indian tribe'' means an Indian tribe, band, nation, or other organized group or community, including a Native village, Regional Corporation or Village Corporation (as those terms are defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602)), that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(Pub. L. 113–287, § 3, Dec. 19, 2014, 128 Stat. 3189.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
300309	16 U.S.C. 470w(4).	Pub. L. 89–665, title III, § 301(4), as added Pub. L. 96–515, title V, § 501, Dec. 12, 1980, 94 Stat. 3001; Pub. L. 102–575, title XL, § 4019(a)(3), Oct. 30, 1992, 106 Stat. 4763.

§ 300310. Local government

In this division, the term ''local government'' means a city, county, township, municipality,

Subpart B—The section 106 Process

§ 800.3 Initiation of the section 106 process.

(a) *Establish undertaking.* The agency official shall determine whether the proposed Federal action is an undertaking as defined in § 800.16(y) and, if so, whether it is a type of activity that has the potential to cause effects on historic properties.

(1) *No potential to cause effects.* If the undertaking is a type of activity that does not have the potential to cause effects on historic properties, assuming such historic properties were present, the agency official has no further obligations under section 106 or this part.

(2) *Program alternatives.* If the review of the undertaking is governed by a Federal agency program alternative established under § 800.14 or a programmatic agreement in existence before January 11, 2001, the agency official shall follow the program alternative.

(b) *Coordinate with other reviews.* The agency official should coordinate the steps of the section 106 process, as appropriate, with the overall planning schedule for the undertaking and with any reviews required under other authorities such as the National Environmental Policy Act, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, the Archeological Resources Protection Act, and agency-specific legislation, such as section 4(f) of the Department of Transportation Act. Where consistent with the procedures in this subpart, the agency official may use information developed for other reviews under Federal, State, or tribal law to meet the requirements of section 106.

(c) *Identify the appropriate SHPO and/or THPO.* As part of its initial planning, the agency official shall determine the appropriate SHPO or SHPOs to be involved in the section 106 process. The agency official shall also determine whether the undertaking may occur on or affect historic properties on any tribal lands and, if so, whether a THPO has assumed the duties of the SHPO. The agency official shall then initiate consultation with the appropriate officer or officers.

(1) *Tribal assumption of SHPO responsibilities.* Where an Indian tribe has assumed the section 106 responsibilities of the SHPO on tribal lands pursuant to section 101(d)(2) of the act, consultation for undertakings occurring on tribal land or for effects on tribal land is with the THPO for the Indian tribe in lieu of the SHPO. Section 101(d)(2)(D)(iii) of the act authorizes owners of properties on tribal lands which are neither owned by a member of the tribe nor held in trust by the Secretary for the benefit of the tribe to request the SHPO to participate in the section 106 process in addition to the THPO.

(2) *Undertakings involving more than one State.* If more than one State is involved in an undertaking, the involved SHPOs may agree to designate a lead SHPO to act on their behalf in the section 106 process, including taking actions that would conclude the section 106 process under this subpart.

(3) *Conducting consultation.* The agency official should consult with the SHPO/THPO in a manner appropriate to the agency planning process for the undertaking and to the nature of the undertaking and its effects on historic properties.

(4) *Failure of the SHPO/THPO to respond.* If the SHPO/THPO fails to respond within 30 days of receipt of a request for review of a finding or determination, the agency official may either proceed to the next step in the process based on the finding or determination or consult with the Council in lieu of the SHPO/THPO. If the SHPO/THPO re-enters the Section 106 process, the agency official shall continue the consultation without being required to reconsider previous findings or determinations.

(d) *Consultation on tribal lands.* Where the Indian tribe has not assumed the responsibilities of the SHPO on tribal lands, consultation with the Indian tribe regarding undertakings occurring on such tribe's lands or effects on such tribal lands shall be in addition to and on the same basis as consultation with the SHPO. If the SHPO has withdrawn from the process, the agency official may complete the section 106 process

with the Indian tribe and the Council, as appropriate. An Indian tribe may enter into an agreement with a SHPO or SHPOs specifying the SHPO's participation in the section 106 process for undertakings occurring on or affecting historic properties on tribal lands.

(e) *Plan to involve the public.* In consultation with the SHPO/THPO, the agency official shall plan for involving the public in the section 106 process. The agency official shall identify the appropriate points for seeking public input and for notifying the public of proposed actions, consistent with § 800.2(d).

(f) *Identify other consulting parties.* In consultation with the SHPO/THPO, the agency official shall identify any other parties entitled to be consulting parties and invite them to participate as such in the section 106 process. The agency official may invite others to participate as consulting parties as the section 106 process moves forward.

(1) *Involving local governments and applicants.* The agency official shall invite any local governments or applicants that are entitled to be consulting parties under § 800.2(c).

(2) *Involving Indian tribes and Native Hawaiian organizations.* The agency official shall make a reasonable and good faith effort to identify any Indian tribes or Native Hawaiian organizations that might attach religious and cultural significance to historic properties in the area of potential effects and invite them to be consulting parties. Such Indian tribe or Native Hawaiian organization that requests in writing to be a consulting party shall be one.

(3) *Requests to be consulting parties.* The agency official shall consider all written requests of individuals and organizations to participate as consulting parties and, in consultation with the SHPO/THPO and any Indian tribe upon whose tribal lands an undertaking occurs or affects historic properties, determine which should be consulting parties.

(g) *Expediting consultation.* A consultation by the agency official with the SHPO/THPO and other consulting parties may address multiple steps in §§ 800.3 through 800.6 where the agency official and the SHPO/THPO agree it is appropriate as long as the consulting parties and the public have an adequate opportunity to express their views as provided in § 800.2(d).

§ 800.4 Identification of historic properties.

(a) *Determine scope of identification efforts.* In consultation with the SHPO/THPO, the agency official shall:

(1) Determine and document the area of potential effects, as defined in § 800.16(d);

(2) Review existing information on historic properties within the area of potential effects, including any data concerning possible historic properties not yet identified;

(3) Seek information, as appropriate, from consulting parties, and other individuals and organizations likely to have knowledge of, or concerns with, historic properties in the area, and identify issues relating to the undertaking's potential effects on historic properties; and

(4) Gather information from any Indian tribe or Native Hawaiian organization identified pursuant to § 800.3(f) to assist in identifying properties, including those located off tribal lands, which may be of religious and cultural significance to them and may be eligible for the National Register, recognizing that an Indian tribe or Native Hawaiian organization may be reluctant to divulge specific information regarding the location, nature, and activities associated with such sites. The agency official should address concerns raised about confidentiality pursuant to § 800.11(c).

(b) *Identify historic properties.* Based on the information gathered under paragraph (a) of this section, and in consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that might attach religious and cultural significance to properties within the area of potential effects, the agency official shall take the steps necessary to identify historic properties within the area of potential effects.

(1) *Level of effort.* The agency official shall make a reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation,

(ii) Providing a copy of the summary to all consulting parties; and

(iii) Notifying the public and making the record available for public inspection.

§ 800.8 Coordination With the National Environmental Policy Act.

(a) *General principles*—(1) *Early coordination.* Federal agencies are encouraged to coordinate compliance with section 106 and the procedures in this part with any steps taken to meet the requirements of the National Environmental Policy Act (NEPA). Agencies should consider their section 106 responsibilities as early as possible in the NEPA process, and plan their public participation, analysis, and review in such a way that they can meet the purposes and requirements of both statutes in a timely and efficient manner. The determination of whether an undertaking is a ''major Federal action significantly affecting the quality of the human environment,'' and therefore requires preparation of an environmental impact statement (EIS) under NEPA, should include consideration of the undertaking's likely effects on historic properties. A finding of adverse effect on a historic property does not necessarily require an EIS under NEPA.

(2) *Consulting party roles.* SHPO/THPOs, Indian tribes, and Native Hawaiian organizations, other consulting parties, and organizations and individuals who may be concerned with the possible effects of an agency action on historic properties should be prepared to consult with agencies early in the NEPA process, when the purpose of and need for the proposed action as well as the widest possible range of alternatives are under consideration.

(3) *Inclusion of historic preservation issues.* Agency officials should ensure that preparation of an environmental assessment (EA) and finding of no significant impact (FONSI) or an EIS and record of decision (ROD) includes appropriate scoping, identification of historic properties, assessment of effects upon them, and consultation leading to resolution of any adverse effects.

(b) *Actions categorically excluded under NEPA.* If a project, activity or program is categorically excluded from NEPA review under an agency's NEPA procedures, the agency official shall determine if it still qualifies as an undertaking requiring review under section 106 pursuant to § 800.3(a). If so, the agency official shall proceed with section 106 review in accordance with the procedures in this subpart.

(c) *Use of the NEPA process for section 106 purposes.* An agency official may use the process and documentation required for the preparation of an EA/FONSI or an EIS/ROD to comply with section 106 in lieu of the procedures set forth in §§ 800.3 through 800.6 if the agency official has notified in advance the SHPO/THPO and the Council that it intends to do so and the following standards are met.

(1) *Standards for developing environmental documents to comply with Section 106.* During preparation of the EA or draft EIS (DEIS) the agency official shall:

(i) Identify consulting parties either pursuant to § 800.3(f) or through the NEPA scoping process with results consistent with § 800.3(f);

(ii) Identify historic properties and assess the effects of the undertaking on such properties in a manner consistent with the standards and criteria of §§ 800.4 through 800.5, provided that the scope and timing of these steps may be phased to reflect the agency official's consideration of project alternatives in the NEPA process and the effort is commensurate with the assessment of other environmental factors;

(iii) Consult regarding the effects of the undertaking on historic properties with the SHPO/THPO, Indian tribes, and Native Hawaiian organizations that might attach religious and cultural significance to affected historic properties, other consulting parties, and the Council, where appropriate, during NEPA scoping, environmental analysis, and the preparation of NEPA documents;

(iv) Involve the public in accordance with the agency's published NEPA procedures; and (v) Develop in consultation with identified consulting parties alternatives and proposed measures that might avoid, minimize or mitigate any adverse effects of the undertaking on historic properties and describe them in the EA or DEIS.

(2) *Review of environmental documents.* (i) The agency official shall submit the EA, DEIS, or EIS to the SHPO/THPO, Indian tribes, and Native Hawaiian organizations that might attach religious and cultural significance to affected historic properties, and other consulting parties prior to or when making the document available for public comment. If the document being prepared is a DEIS or EIS, the agency official shall also submit it to the Council.

(ii) Prior to or within the time allowed for public comment on the document, a SHPO/THPO, an Indian tribe or Native Hawaiian organization, another consulting party or the Council may object to the agency official that preparation of the EA, DEIS, or EIS has not met the standards set forth in paragraph (c)(1) of this section or that the substantive resolution of the effects on historic properties proposed in an EA, DEIS, or EIS is inadequate. If the agency official receives such an objection, the agency official shall refer the matter to the Council.

(3) *Resolution of objections.* Within 30 days of the agency official's referral of an objection under paragraph (c)(2)(ii) of this section, the Council shall review the objection and notify the agency as to its opinion on the objection.

(i) If the Council agrees with the objection:

(A) The Council shall provide the agency official and, if the Council determines the issue warrants it, the head of the agency with the Council's opinion regarding the objection. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part. The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall take into account the Council's opinion in reaching a final decision on the issue of the objection.

(B) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall prepare a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council's opinion, and provide it to the Council. The head of the agency may delegate his or her duties under this paragraph to the agency's senior Policy Official. If the agency official's initial decision regarding the matter that is the subject of the objection will be revised, the agency official shall proceed in accordance with the revised decision. If the final decision of the agency is to affirm the initial agency decision, once the summary of the final decision has been sent to the Council, the agency official shall continue its compliance with this section.

(ii) If the Council disagrees with the objection, the Council shall so notify the agency official, in which case the agency official shall continue its compliance with this section.

(iii) If the Council fails to respond to the objection within the 30 day period, the agency official shall continue its compliance with this section.

(4) *Approval of the undertaking.* If the agency official has found, during the preparation of an EA or EIS that the effects of an undertaking on historic properties are adverse, the agency official shall develop measures in the EA, DEIS, or EIS to avoid, minimize, or mitigate such effects in accordance with paragraph (c)(1)(v) of this section. The agency official's responsibilities under section 106 and the procedures in this subpart shall then be satisfied when either:

(i) A binding commitment to such proposed measures is incorporated in:

(A) The ROD, if such measures were proposed in a DEIS or EIS; or

(B) An MOA drafted in compliance with § 800.6(c); or

(ii) The Council has commented under § 800.7 and received the agency's response to such comments.

(5) *Modification of the undertaking.* If the undertaking is modified after approval of the FONSI or the ROD in a manner that changes the undertaking or alters its effects on historic properties, or if the agency official fails to ensure that the measures to avoid, minimize or mitigate adverse effects (as specified in either the FONSI or the ROD, or in the binding commitment adopted pursuant to paragraph (c)(4) of this section) are carried out, the agency official shall notify the Council and all consulting parties that supplemental environmental documents will be prepared in compliance with NEPA or that the procedures in §§ 800.3

through 800.6 will be followed as necessary.

[65 FR 77725, Dec. 12, 2000, as amended at 69 FR 40554, July 6, 2004]

§ 800.9 Council review of section 106 compliance.

(a) *Assessment of agency official compliance for individual undertakings.* The Council may provide to the agency official its advisory opinion regarding the substance of any finding, determination or decision or regarding the adequacy of the agency official's compliance with the procedures under this part. The Council may provide such advice at any time at the request of any individual, agency or organization or on its own initiative. The agency official shall consider the views of the Council in reaching a decision on the matter in question.

(b) *Agency foreclosure of the Council's opportunity to comment.* Where an agency official has failed to complete the requirements of section 106 in accordance with the procedures in this part prior to the approval of an undertaking, the Council's opportunity to comment may be foreclosed. The Council may review a case to determine whether a foreclosure has occurred. The Council shall notify the agency official and the agency's Federal preservation officer and allow 30 days for the agency official to provide information as to whether foreclosure has occurred. If the Council determines foreclosure has occurred, the Council shall transmit the determination to the agency official and the head of the agency. The Council shall also make the determination available to the public and any parties known to be interested in the undertaking and its effects upon historic properties.

(c) *Intentional adverse effects by applicants*—(1) *Agency responsibility.* Section 110(k) of the act prohibits a Federal agency from granting a loan, loan guarantee, permit, license or other assistance to an applicant who, with intent to avoid the requirements of section 106, has intentionally significantly adversely affected a historic property to which the grant would relate, or having legal power to prevent it, has allowed such significant adverse effect to occur, unless the agency, after consultation with the Council, determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant. Guidance issued by the Secretary pursuant to section 110 of the act governs its implementation.

(2) *Consultation with the Council.* When an agency official determines, based on the actions of an applicant, that section 110(k) is applicable and that circumstances may justify granting the assistance, the agency official shall notify the Council and provide documentation specifying the circumstances under which the adverse effects to the historic property occurred and the degree of damage to the integrity of the property. This documentation shall include any views obtained from the applicant, SHPO/THPO, an Indian tribe if the undertaking occurs on or affects historic properties on tribal lands, and other parties known to be interested in the undertaking.

(i) Within thirty days of receiving the agency official's notification, unless otherwise agreed to by the agency official, the Council shall provide the agency official with its opinion as to whether circumstances justify granting assistance to the applicant and any possible mitigation of the adverse effects.

(ii) The agency official shall consider the Council's opinion in making a decision on whether to grant assistance to the applicant, and shall notify the Council, the SHPO/THPO, and other parties known to be interested in the undertaking prior to granting the assistance.

(3) *Compliance with Section 106.* If an agency official, after consulting with the Council, determines to grant the assistance, the agency official shall comply with §§ 800.3 through 800.6 to take into account the effects of the undertaking on any historic properties.

(d) *Evaluation of Section 106 operations.* The Council may evaluate the operation of the section 106 process by periodic reviews of how participants have fulfilled their legal responsibilities and how effectively the outcomes reached advance the purposes of the act.

(1) *Information from participants.* Section 203 of the act authorizes the Council to obtain information from Federal agencies necessary to conduct evaluation of the section 106 process. The agency official shall make documentation of agency policies, operating procedures and actions taken to comply with section 106 available to the Council upon request. The Council may request available information and documentation from other participants in the section 106 process.

(2) *Improving the operation of section 106.* Based upon any evaluation of the section 106 process, the Council may make recommendations to participants, the heads of Federal agencies, and the Secretary of actions to improve the efficiency and effectiveness of the process. Where the Council determines that an agency official or a SHPO/THPO has failed to properly carry out the responsibilities assigned under the process in this part, the Council may participate in individual case reviews conducted under such process in addition to the SHPO/THPO for such period that it determines is necessary to improve performance or correct deficiencies. If the Council finds a pattern of failure by a Federal agency in carrying out its responsibilities under section 106, the Council may review the policies and programs of the agency related to historic preservation pursuant to section 202(a)(6) of the act and recommend methods to improve the effectiveness, coordination, and consistency of those policies and programs with section 106.

§ 800.10 Special requirements for protecting National Historic Landmarks.

(a) *Statutory requirement.* Section 110(f) of the act requires that the agency official, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to any National Historic Landmark that may be directly and adversely affected by an undertaking. When commenting on such undertakings, the Council shall use the process set forth in §§ 800.6 through 800.7 and give special consideration to protecting National Historic Landmarks as specified in this section.

(b) *Resolution of adverse effects.* The agency official shall request the Council to participate in any consultation to resolve adverse effects on National Historic Landmarks conducted under § 800.6.

(c) *Involvement of the Secretary.* The agency official shall notify the Secretary of any consultation involving a National Historic Landmark and invite the Secretary to participate in the consultation where there may be an adverse effect. The Council may request a report from the Secretary under section 213 of the act to assist in the consultation.

(d) *Report of outcome.* When the Council participates in consultation under this section, it shall report the outcome of the section 106 process, providing its written comments or any memoranda of agreement to which it is a signatory, to the Secretary and the head of the agency responsible for the undertaking.

§ 800.11 Documentation standards.

(a) *Adequacy of documentation.* The agency official shall ensure that a determination, finding, or agreement under the procedures in this subpart is supported by sufficient documentation to enable any reviewing parties to understand its basis. The agency official shall provide such documentation to the extent permitted by law and within available funds. When an agency official is conducting phased identification or evaluation under this subpart, the documentation standards regarding description of historic properties may be applied flexibly. If the Council, or the SHPO/THPO when the Council is not involved, determines the applicable documentation standards are not met, the Council or the SHPO/THPO, as appropriate, shall notify the agency official and specify the information needed to meet the standard. At the request of the agency official or any of the consulting parties, the Council shall review any disputes over whether documentation standards are met and provide its views to the agency official and the consulting parties.

(b) *Format.* The agency official may use documentation prepared to comply

with other laws to fulfill the requirements of the procedures in this subpart, if that documentation meets the standards of this section.

(c) *Confidentiality*—(1) *Authority to withhold information.* Section 304 of the act provides that the head of a Federal agency or other public official receiving grant assistance pursuant to the act, after consultation with the Secretary, shall withhold from public disclosure information about the location, character, or ownership of a historic property when disclosure may cause a significant invasion of privacy; risk harm to the historic property; or impede the use of a traditional religious site by practitioners. When the head of a Federal agency or other public official has determined that information should be withheld from the public pursuant to these criteria, the Secretary, in consultation with such Federal agency head or official, shall determine who may have access to the information for the purposes of carrying out the act.

(2) *Consultation with the Council.* When the information in question has been developed in the course of an agency's compliance with this part, the Secretary shall consult with the Council in reaching determinations on the withholding and release of information. The Federal agency shall provide the Council with available information, including views of the SHPO/THPO, Indian tribes and Native Hawaiian organizations, related to the confidentiality concern. The Council shall advise the Secretary and the Federal agency within 30 days of receipt of adequate documentation.

(3) *Other authorities affecting confidentiality.* Other Federal laws and program requirements may limit public access to information concerning an undertaking and its effects on historic properties. Where applicable, those authorities shall govern public access to information developed in the section 106 process and may authorize the agency official to protect the privacy of non-governmental applicants.

(d) *Finding of no historic properties affected.* Documentation shall include:

(1) A description of the undertaking, specifying the Federal involvement, and its area of potential effects, including photographs, maps, drawings, as necessary;

(2) A description of the steps taken to identify historic properties, including, as appropriate, efforts to seek information pursuant to § 800.4(b); and

(3) The basis for determining that no historic properties are present or affected.

(e) *Finding of no adverse effect or adverse effect.* Documentation shall include:

(1) A description of the undertaking, specifying the Federal involvement, and its area of potential effects, including photographs, maps, and drawings, as necessary;

(2) A description of the steps taken to identify historic properties;

(3) A description of the affected historic properties, including information on the characteristics that qualify them for the National Register;

(4) A description of the undertaking's effects on historic properties;

(5) An explanation of why the criteria of adverse effect were found applicable or inapplicable, including any conditions or future actions to avoid, minimize or mitigate adverse effects; and

(6) Copies or summaries of any views provided by consulting parties and the public.

(f) *Memorandum of agreement.* When a memorandum of agreement is filed with the Council, the documentation shall include, any substantive revisions or additions to the documentation provided the Council pursuant to § 800.6(a)(1), an evaluation of any measures considered to avoid or minimize the undertaking's adverse effects and a summary of the views of consulting parties and the public.

(g) *Requests for comment without a memorandum of agreement. Documentation shall include:*

(1) A description and evaluation of any alternatives or mitigation measures that the agency official proposes to resolve the undertaking's adverse effects;

(2) A description of any reasonable alternatives or mitigation measures that were considered but not chosen, and the reasons for their rejection;

(3) Copies or summaries of any views submitted to the agency official concerning the adverse effects of the undertaking on historic properties and alternatives to reduce or avoid those effects; and

(4) Any substantive revisions or additions to the documentation provided the Council pursuant to § 800.6(a)(1).

§ 800.12 Emergency situations.

(a) *Agency procedures.* The agency official, in consultation with the appropriate SHPOs/THPOs, affected Indian tribes and Native Hawaiian organizations, and the Council, is encouraged to develop procedures for taking historic properties into account during operations which respond to a disaster or emergency declared by the President, a tribal government, or the Governor of a State or which respond to other immediate threats to life or property. If approved by the Council, the procedures shall govern the agency's historic preservation responsibilities during any disaster or emergency in lieu of §§ 800.3 through 800.6.

(b) *Alternatives to agency procedures.* In the event an agency official proposes an emergency undertaking as an essential and immediate response to a disaster or emergency declared by the President, a tribal government, or the Governor of a State or another immediate threat to life or property, and the agency has not developed procedures pursuant to paragraph (a) of this section, the agency official may comply with section 106 by:

(1) Following a programmatic agreement developed pursuant to § 800.14(b) that contains specific provisions for dealing with historic properties in emergency situations; or

(2) Notifying the Council, the appropriate SHPO/THPO and any Indian tribe or Native Hawaiian organization that may attach religious and cultural significance to historic properties likely to be affected prior to the undertaking and affording them an opportunity to comment within seven days of notification. If the agency official determines that circumstances do not permit seven days for comment, the agency official shall notify the Council, the SHPO/THPO and the Indian tribe or Native Hawaiian organization and invite any comments within the time available.

(c) *Local governments responsible for section 106 compliance.* When a local government official serves as the agency official for section 106 compliance, paragraphs (a) and (b) of this section also apply to an imminent threat to public health or safety as a result of a natural disaster or emergency declared by a local government's chief executive officer or legislative body, provided that if the Council or SHPO/THPO objects to the proposed action within seven days, the agency official shall comply with §§ 800.3 through 800.6.

(d) *Applicability.* This section applies only to undertakings that will be implemented within 30 days after the disaster or emergency has been formally declared by the appropriate authority. An agency may request an extension of the period of applicability from the Council prior to the expiration of the 30 days. Immediate rescue and salvage operations conducted to preserve life or property are exempt from the provisions of section 106 and this part.

§ 800.13 Post-review discoveries.

(a) *Planning for subsequent discoveries*—(1) *Using a programmatic agreement.* An agency official may develop a programmatic agreement pursuant to § 800.14(b) to govern the actions to be taken when historic properties are discovered during the implementation of an undertaking.

(2) *Using agreement documents.* When the agency official's identification efforts in accordance with § 800.4 indicate that historic properties are likely to be discovered during implementation of an undertaking and no programmatic agreement has been developed pursuant to paragraph (a)(1) of this section, the agency official shall include in any finding of no adverse effect or memorandum of agreement a process to resolve any adverse effects upon such properties. Actions in conformance with the process satisfy the agency official's responsibilities under section 106 and this part.

(b) *Discoveries without prior planning.* If historic properties are discovered or unanticipated effects on historic properties found after the agency official has completed the section 106 process

carried out in a manner consistent with the program comment, the Council may withdraw the comment and the agency official shall comply with the requirements of §§800.3 through 800.6 for the individual undertakings.

(f) *Consultation with Indian tribes and Native Hawaiian organizations when developing program alternatives.* Whenever an agency official proposes a program alternative pursuant to paragraphs (a) through (e) of this section, the agency official shall ensure that development of the program alternative includes appropriate government-to-government consultation with affected Indian tribes and consultation with affected Native Hawaiian organizations.

(1) *Identifying affected Indian tribes and Native Hawaiian organizations.* If any undertaking covered by a proposed program alternative has the potential to affect historic properties on tribal lands, the agency official shall identify and consult with the Indian tribes having jurisdiction over such lands. If a proposed program alternative has the potential to affect historic properties of religious and cultural significance to an Indian tribe or a Native Hawaiian organization which are located off tribal lands, the agency official shall identify those Indian tribes and Native Hawaiian organizations that might attach religious and cultural significance to such properties and consult with them. When a proposed program alternative has nationwide applicability, the agency official shall identify an appropriate government to government consultation with Indian tribes and consult with Native Hawaiian organizations in accordance with existing Executive orders, Presidential memoranda, and applicable provisions of law.

(2) *Results of consultation.* The agency official shall provide summaries of the views, along with copies of any written comments, provided by affected Indian tribes and Native Hawaiian organizations to the Council as part of the documentation for the proposed program alternative. The agency official and the Council shall take those views into account in reaching a final decision on the proposed program alternative.

[65 FR 77725, Dec. 12, 2000, as amended at 69 FR 40554, July 6, 2004]

§ 800.15 Tribal, State, and local program alternatives. [Reserved]

§ 800.16 Definitions.

(a) *Act* means the National Historic Preservation Act of 1966, as amended, 16 U.S.C. 470–470w-6.

(b) *Agency* means agency as defined in 5 U.S.C. 551.

(c) *Approval of the expenditure of funds* means any final agency decision authorizing or permitting the expenditure of Federal funds or financial assistance on an undertaking, including any agency decision that may be subject to an administrative appeal.

(d) *Area of potential effects* means the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking.

(e) *Comment* means the findings and recommendations of the Council formally provided in writing to the head of a Federal agency under section 106.

(f) *Consultation* means the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process. The Secretary's ''Standards and Guidelines for Federal Agency Preservation Programs pursuant to the National Historic Preservation Act'' provide further guidance on consultation.

(g) *Council* means the Advisory Council on Historic Preservation or a Council member or employee designated to act for the Council.

(h) *Day* or *days* means calendar days.

(i) *Effect* means alteration to the characteristics of a historic property qualifying it for inclusion in or eligibility for the National Register.

(j) *Foreclosure* means an action taken by an agency official that effectively precludes the Council from providing comments which the agency official can meaningfully consider prior to the approval of the undertaking.

(k) *Head of the agency* means the chief official of the Federal agency responsible for all aspects of the agency's

actions. If a State, local, or tribal government has assumed or has been delegated responsibility for section 106 compliance, the head of that unit of government shall be considered the head of the agency.

(l)(1) *Historic property* means any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register criteria.

(2) The term *eligible for inclusion in the National Register* includes both properties formally determined as such in accordance with regulations of the Secretary of the Interior and all other properties that meet the National Register criteria.

(m) *Indian tribe* means an Indian tribe, band, nation, or other organized group or community, including a native village, regional corporation, or village corporation, as those terms are defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(n) *Local government* means a city, county, parish, township, municipality, borough, or other general purpose political subdivision of a State.

(o) *Memorandum of agreement* means the document that records the terms and conditions agreed upon to resolve the adverse effects of an undertaking upon historic properties.

(p) *National Historic Landmark* means a historic property that the Secretary of the Interior has designated a National Historic Landmark.

(q) *National Register* means the National Register of Historic Places maintained by the Secretary of the Interior.

(r) *National Register criteria* means the criteria established by the Secretary of the Interior for use in evaluating the eligibility of properties for the National Register (36 CFR part 60).

(s)(1) *Native Hawaiian organization* means any organization which serves and represents the interests of Native Hawaiians; has as a primary and stated purpose the provision of services to Native Hawaiians; and has demonstrated expertise in aspects of historic preservation that are significant to Native Hawaiians.

(2) *Native Hawaiian* means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.

(t) *Programmatic agreement* means a document that records the terms and conditions agreed upon to resolve the potential adverse effects of a Federal agency program, complex undertaking or other situations in accordance with § 800.14(b).

(u) *Secretary* means the Secretary of the Interior acting through the Director of the National Park Service except where otherwise specified.

(v) *State Historic Preservation Officer (SHPO)* means the official appointed or designated pursuant to section 101(b)(1) of the act to administer the State historic preservation program or a representative designated to act for the State historic preservation officer.

(w) *Tribal Historic Preservation Officer (THPO)* means the tribal official appointed by the tribe's chief governing authority or designated by a tribal ordinance or preservation program who has assumed the responsibilities of the SHPO for purposes of section 106 compliance on tribal lands in accordance with section 101(d)(2) of the act.

(x) *Tribal lands* means all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities.

(y) *Undertaking* means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval.

(z) *Senior policy official* means the senior policy level official designated

by the head of the agency pursuant to section 3(e) of Executive Order 13287.

[65 FR 77725, Dec. 12, 2000, as amended at 69 FR 40555, July 6, 2004]

APPENDIX A TO PART 800—CRITERIA FOR COUNCIL INVOLVEMENT IN REVIEWING INDIVIDUAL SECTION 106 CASES

(a) *Introduction.* This appendix sets forth the criteria that will be used by the Council to determine whether to enter an individual section 106 review that it normally would not be involved in.

(b) *General policy.* The Council may choose to exercise its authorities under the section 106 regulations to participate in an individual project pursuant to the following criteria. However, the Council will not always elect to participate even though one or more of the criteria may be met.

(c) *Specific criteria.* The Council is likely to enter the section 106 process at the steps specified in the regulations in this part when an undertaking:

(1) *Has substantial impacts on important historic properties.* This may include adverse effects on properties that possess a national level of significance or on properties that are of unusual or noteworthy importance or are a rare property type; or adverse effects to large numbers of historic properties, such as impacts to multiple properties within a historic district.

(2) *Presents important questions of policy or interpretation.* This may include questions about how the Council's regulations are being applied or interpreted, including possible foreclosure or anticipatory demolition situations; situations where the outcome will set a precedent affecting Council policies or program goals; or the development of programmatic agreements that alter the way the section 106 process is applied to a group or type of undertakings.

(3) *Has the potential for presenting procedural problems.* This may include cases with substantial public controversy that is related to historic preservation issues; with disputes among or about consulting parties which the Council's involvement could help resolve; that are involved or likely to be involved in litigation on the basis of section 106; or carried out by a Federal agency, in a State or locality, or on tribal lands where the Council has previously identified problems with section 106 compliance pursuant to § 800.9(d)(2).

(4) *Presents issues of concern to Indian tribes or Native Hawaiian organizations.* This may include cases where there have been concerns raised about the identification of, evaluation of or assessment of effects on historic properties to which an Indian tribe or Native Hawaiian organization attaches religious and cultural significance; where an Indian tribe or Native Hawaiian organization has requested Council involvement to assist in the resolution of adverse effects; or where there are questions relating to policy, interpretation or precedent under section 106 or its relation to other authorities, such as the Native American Graves Protection and Repatriation Act.

PART 801—HISTORIC PRESERVATION REQUIREMENTS OF THE URBAN DEVELOPMENT ACTION GRANT PROGRAM

Sec.

AUTHORITY: Pub. L. 89–665, 80 Stat. 915 (16 U.S.C. 470); Pub. L. 94–422, 90 Stat. 1320 (16 U.S.C. 470(i)); Pub. L. 96–399, 94 Stat. 1619 (42 U.S.C. 5320).

SOURCE: 46 FR 42428, Aug. 20, 1981, unless otherwise noted.

§ 801.1 Purpose and authorities.

(a) These regulations are required by section 110(c) of the Housing and Community Development Act of 1980 (HCDA) (42 U.S.C. 5320) and apply only to projects proposed to be funded by the Department of Housing and Urban Development (HUD) under the Urban Development Action Grant (UDAG) Program authorized by title I of the Housing and Community Development Act of 1974, as amended (42 U.S.C. 5301). These regulations establish an expedited process for obtaining the comments of the Council specifically for the UDAG program and, except as specifically provided, substitute for the Council's regulations for the ''Protection of Historic and Cultural Properties'' (36 CFR part 800).

§ 70-29. Discovery of remains and notification of authorities.

(a) Any person knowing or having reasonable grounds to believe that unmarked human burials or human skeletal remains are being disturbed, destroyed, defaced, mutilated, removed, or exposed, shall notify immediately the medical examiner of the county in which the remains are encountered.

(b) If the unmarked human burials or human skeletal remains are encountered as a result of construction or agricultural activities, disturbance of the remains shall cease immediately and shall not resume without authorization from either the county medical examiner or the State Archaeologist, under the provisions of G.S. 70-30(c) or 70-30(d).

(c) (1) If the unmarked human burials or human skeletal remains are encountered by a professional archaeologist, as a result of survey or test excavations, the remains may be excavated and other activities may resume after notification, by telephone or registered letter, is provided to the State Archaeologist. The treatment, analysis and disposition of the remains shall come under the provisions of G.S. 70-34 and 70-35.

(2) If a professional archaeologist directing long-term (research designed to continue for one or more field seasons of four or more weeks' duration) systematic archaeological research sponsored by any accredited college or university in North Carolina, as a part of his research, recovers Native American skeletal remains, he may be exempted from the provisions of G.S. 70-30, 70-31, 70-32, 70-33, 70-34 and 70-35(c) of this Article so long as he:

a. Notifies the Executive Director within five working days of the initial discovery of Native American skeletal remains;

b. Reports to the Executive Director, at agreed upon intervals, the status of the project;

c. Curates the skeletal remains prior to ultimate disposition; and

d. Conducts no destructive skeletal analysis without the express permission of the Executive Director.

Upon completion of the project fieldwork, the professional archaeologist, in consultation with the skeletal analyst and the Executive Director, shall determine the schedule for the completion of the skeletal analysis. In the event of a disagreement, the time for completion of the skeletal analysis shall not exceed four years. The Executive Director shall have authority concerning the ultimate disposition of the Native American skeletal remains after analysis is completed in accordance with G.S. 70-35(a) and 70-36(b) and (c).

(d) The State Archaeologist shall notify the Chief, Medical Examiner Section, Division of Health Services, Department of Health and Human Services, of any reported human skeletal remains discovered by a professional archaeologist. (1981, c. 853, s. 2; 1997-443, s. 11A.118(a); 2007-484, s. 10(b).)

§ 70-30. Jurisdiction over remains.

(a) Subsequent to notification of the discovery of an unmarked human burial or human skeletal remains, the medical examiner of the county in which the remains were encountered shall determine as soon as possible whether the remains are subject to the provisions of G.S. 130A-383.

(b) If the county medical examiner determines that the remains are subject to the provisions of G.S. 130A-383, the county medical examiner will immediately proceed with the investigation.

(c) If the county medical examiner determines that the remains are not subject to the provisions of G.S. 130A-383, the county medical examiner shall so notify the Chief Medical Examiner. The Chief Medical Examiner shall notify the State Archaeologist of the discovery of the human skeletal remains and the findings of the county medical examiner. The State Archaeologist shall immediately take charge of the remains.

(d) Subsequent to taking charge of the human skeletal remains, the State Archaeologist shall have 48 hours to make arrangements with the landowner for the protection or removal of the unmarked human burial or human skeletal remains. The State Archaeologist shall have no authority over the remains at the end of the 48-hour period and may not prohibit the resumption of the construction or agricultural activities without the permission of the landowner. (1981, c. 853, s. 2; 2007-484, ss. 10(c), 11(b).)

§ 70-32. Consultation with the Native American Community.

(a) If the professional archaeologist determines that the human skeletal remains are Native American, the State Archaeologist shall immediately notify the Executive Director of the North Carolina Commission of Indian Affairs. The Executive Director shall notify and consult with the Eastern Band of Cherokee or other appropriate tribal group or community.

(b) Within four weeks of the notification, the Executive Director shall communicate in writing to the State Archaeologist, the concerns of the Commission of Indian Affairs and an appropriate tribal group or community with regard to the treatment and ultimate disposition of the Native American skeletal remains.

(c) Within 90 days of receipt of the concerns of the Commission of Indian Affairs, the State Archaeologist and the Executive Director, with the approval of the principal tribal official of an appropriate tribe, shall prepare a written agreement concerning the treatment and ultimate disposition of the Native American skeletal remains. The written agreement shall include the following:

(1) Designation of a qualified skeletal analyst to work on the skeletal remains;

(2) The type of analysis and the specific period of time to be provided for analysis of the skeletal remains;

(3) The timetable for written progress reports and the final report concerning the skeletal analysis to be provided to the State Archaeologist and the Executive Director by the skeletal analyst; and

(4) A plan for the ultimate disposition of the Native American remains subsequent to the completion of adequate skeletal analysis.

If no agreement is reached within 90 days, the Archaeological Advisory Committee shall determine the terms of the agreement. (1981, c. 853, s. 2; 2007-484, s. 10(e).)

§ 130A-383. Medical examiner jurisdiction.

(a) Upon the death of any person resulting from violence, poisoning, accident, suicide or homicide; occurring suddenly when the deceased had been in apparent good health or when unattended by a physician; occurring in a jail, prison, correctional institution or in police custody; occurring in State facilities operated in accordance with Part 5 of Article 4 of Chapter 122C of the General Statutes; occurring pursuant to Article 19 of Chapter 15 of the General Statutes; or occurring under any suspicious, unusual or unnatural circumstance, the medical examiner of the county in which the body of the deceased is found shall be notified by a physician in attendance, hospital employee, law-enforcement officer, funeral home employee, emergency medical technician, relative or by any other person having suspicion of such a death. No person shall disturb the body at the scene of such a death until authorized by the medical examiner unless in the unavailability of the medical examiner it is determined by the appropriate law enforcement agency that the presence of the body at the scene would risk the integrity of the body or provide a hazard to the safety of others. For the limited purposes of this Part, expression of opinion that death has occurred may be made by a nurse, an emergency medical technician or any other competent person in the absence of a physician.

(b) The discovery of anatomical material suspected of being part of a human body shall be reported to the medical examiner of the county in which the material is found.

(c) Upon completion of the investigation and in accordance with the rules of the Commission, the medical examiner shall release the body to the next of kin or other interested person who will assume responsibility for final disposition. (1955, c. 972, s. 1; 1957, c. 1357, s. 1; 1963, c. 492, s. 4; 1967, c. 1154, s. 1; 1983, c. 891, s. 2; 1989, c. 353, s. 1; 2008-131, s. 2.)

17VAC5-20-50. Public comment.

A. Upon receiving notice from the director that the permit application is complete, the applicant shall arrange for public notification as deemed appropriate by the department.

B. In all cases, the applicant shall publish, or cause to be published, written notice in the following manners: notice in at least one local newspaper of general circulation in the area where the field investigation will occur; notice posted at the site of the graveyard or burial; notice to any historic preservation or other such commission, as well as area historical and genealogical societies; and notice of at least one public hearing. Each notice shall include:

1. The name and address of applicant;

2. A brief description of proposed field investigation;

3. A statement regarding the reason for the proposed relocation;

4. A statement informing the reader that the reader can request a public meeting;

5. A contact name, address, email address, and the phone number where the reader can get more information;

6. The street address of one or more locations in the project vicinity where a copy of the complete application can be viewed by members of the general public during regular business hours;

7. A statement that the complete application can also be reviewed and copied at the department or on the department's website;

8. A statement regarding the proposed disposition of any human remains and associated funerary objects recovered during the permitted recovery process. If any disposition other than reburial is proposed, the notice must specifically request public comment on this aspect of the application; and

9. The deadline for receipt of comments.

The notice shall be of a form approved by the director and shall invite interested persons to express their views on all aspects of the proposed field investigation to the director by a date certain prior to the issuance of the permit. Such notice shall be published once each week for four consecutive weeks.

C. The public notice requirement may be waived:

1. In cases where the applicant has demonstrated that, due to the rarity of the site or its

scientific or monetary value and where security is not possible, it is likely that looting or other damage to the burial or surrounding site would occur as a result of the public notice.

2. In the case of an emergency and if, in the opinion of the director, the severity of a demonstrated emergency is such that compliance with the above public notice requirements may result in vandalism, looting, or the loss of significant information, or that the publication of such notice may substantially increase the threat of such loss through vandalism, the director, in such cases, may issue a permit prior to completion of the public notice and comment requirements. The applicant shall provide for such public notice and comment as determined by the director to be appropriate under the circumstances.

D. In cases of marked burials where a permit is sought pursuant to a court order subject to § 57-38.1 or 57-39 of the Code of Virginia, and in accordance with § 10.1-2305 C of the Code of Virginia, the applicant shall provide evidence of a reasonable effort to identify and notify next of kin.

E. In addition to the notification described in subsection B of this section, in the case of both prehistoric and historic Native American burials, the department shall inform the appropriate leaders of state-recognized and federally recognized tribes.

F. The department shall maintain a list of individuals and organizations who have asked to be notified of permit actions. This list will be updated annually and notices sent to all parties currently listed. In all cases notification shall be sent to the appropriate local jurisdiction.

G. Prior to the issuance of a permit, the director may elect to hold a public meeting on the permit application. The purpose of the public meeting shall be to obtain public comment on the proposed field investigations. The director shall decide whether or not to hold a public meeting on a case-by-case basis, and will include any requests following from the public notice in such considerations.

Statutory Authority

§§ 10.1-2205 and 10.1-2305 of the Code of Virginia.

Historical Notes

Derived from VR390-01-02 § 5, eff. August 14, 1991; amended, Virginia Register Volume 32, Issue 25, eff. September 8, 2016; Errata, 33:2 VA.R. 298 September 19, 2016.

CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, I hereby certify that, on July 12, 2021, I electronically filed the foregoing *Joint Answering Brief for Respondent-Intervenors Mountain Valley Pipeline, LLC and Public Service Company of North Carolina, Inc.*, and the addendum thereto, with the Clerk of the Court for the U.S. Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system, and served copies of the foregoing via the Court's CM/ECF system on all ECF-registered counsel.

/s/ Jeremy C. Marwell

Jeremy C. Marwell
Vinson & Elkins LLP
2200 Pennsylvania Avenue, NW
Suite 500 West
Washington, DC 20037-1701
Phone: 202.639.6507
jmarwell@velaw.com