ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

Nos. 16-1329 and 16-1387

SIERRA CLUB, *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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January 31, 2017

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Respondent submits:

A. Parties:

To counsel's knowledge, the parties before this Court and before the Federal Energy Regulatory Commission in the underlying agency proceeding are as listed in the briefs of Petitioners.

B. Rulings Under Review:

1. Order Issuing Certificate And Approving Abandonment, *Fla. Se. Connection LLC, et al.*, FERC Docket No. CP14-554-000, 154 FERC ¶ 61,080 (Feb. 2, 2016) ("Certificate Order"), R. 1944, JA ____; and

2. Order On Rehearing, *Fla. Se. Connection LLC, et al.*, FERC Docket No. CP14-554-001, 156 FERC ¶ 61,160 (Sept. 7, 2016) ("Rehearing Order"), R. 2167, JA ____.

C. Related Cases:

In *Gulf Restoration Network v. U.S. Army Corps. of Engineers*, No. 16-15545 (11th Cir. Sept. 1, 2016), the Eleventh Circuit denied a stay of the Projects. In *Sierra Club, et al. v. FERC*, No. 16-1329 (D.C. Cir. Nov. 17, 2016), this Court denied a stay of the Projects.

Three other pending cases, fully briefed and awaiting argument, on review of FERC orders approving other natural gas pipeline projects, raise some of the same issues as those on review in this case: (1) *Delaware Riverkeeper v. FERC*, D.C. Cir. No. 16-1092 (Leidy Southeast pipeline project); (2) *City of Boston, et al. v. FERC*, D.C. Cir. No. 16-1081, *et al.* (Algonquin Incremental Market pipeline

project); and (3) *Catskill Mountainkeeper, et al. v. FERC*, 2d Cir. No. 16-345, *et al.* (Constitution pipeline project).

/s/ *Ross R. Fulton*
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January 31, 2017

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GLOSSARY

Term	Definition
Certificate Order	Order Issuing Certificate And Approving Abandonment, *Fla. Se. Connection, et al.*, FERC Docket No. CP14-554-000, 154 FERC ¶ 61,080 (Feb. 2, 2016), R. 1944, JA ____
Commission or FERC	Federal Energy Regulatory Commission
Environmental Statement or EIS	Final environmental impact statement issued on January 23, 2015, by FERC for the Florida Southeast, Hillabee Expansion, and Sabal Trail project proposals, R. 1925, JA ____
Florida Southeast	Florida Southeast Connection, LLC
GBA	Petitioners G.B.A. Associates and K. Gregory Isaacs in Case No. 16-1387
JA	Joint Appendix
NEPA	National Environmental Policy Act, 42 U.S.C. §§ 4321, *et seq.*
P	The internal paragraph number within a FERC order
R.	Item in the certified index to the record
Rehearing Order	Order On Rehearing, *Fla. Se. Connection, et al.*, FERC Docket No. CP14-554-001, 156 FERC ¶ 61,160 (Sept. 7, 2016), R. 2167, JA ____
Sabal Trail	Sabal Trail Transmission, LLC
Sabal Trail Project	The Project owned and operated by Sabal Trail
Sierra Club	Collectively, Petitioners Sierra Club, Flint Riverkeeper, and Chattahoochee Riverkeeper, in Case No. 16-1329
Southeast Market Projects or Projects	Florida Southeast, Hillabee Expansion, and Sabal Trail pipeline projects
Sunshine Act	Government in the Sunshine Act, 5 U.S.C. § 552b
Transcontinental	Transcontinental Gas Pipe Line Company, LLC

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BRIEF OF RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

The Federal Energy Regulatory Commission (Commission or FERC), after conducting an extensive environmental review including multiple opportunities for public comment, authorized three related applications to construct and operate natural gas pipeline and related facilities (collectively the Southeast Market Projects or Projects):

- Florida Southeast Connection, LLC (Florida Southeast) to build and operate the Florida Southeast Project;

- Transcontinental Gas Pipe Line Company, LLC (Transcontinental) to build and operate the Hillabee Expansion Project and lease that capacity to Sabal Trail Transmission, LLC (Sabal Trail); and

- Sabal Trail to build and operate the Sabal Trail Project.

The Commission found the Projects necessary to provide needed natural gas in the Southeast – primarily to supply power plants that will use the natural gas to displace higher-emissions coal – prevent regional supply disruption, and enhance market competition. The Commission's detailed environmental review considered the three Projects together. Before this Court are two appeals, filed by: (1) Sierra Club, Flint Riverkeeper, and Chattahoochee Riverkeeper (together, Sierra Club); and (2) G.B.A Associates and K. Gregory Isaacs (together, GBA). The questions presented by the appeals are:

1. Whether the Commission adequately balanced the impacts on landowners and surrounding communities with the need for the Projects to serve demand for natural gas in the Southeast – and appropriately approved Sabal Trail's initial rates – in compliance with its responsibilities under the Natural Gas Act;

2. Whether the Commission satisfied the procedural requirements of the National Environmental Policy Act, through a comprehensive review that evaluated the Projects' safety and proposed alternatives, as well as the Projects' impact on environmental justice communities and greenhouse gas emissions; and

3. Whether the Commission satisfied its duties under the Government in the Sunshine Act.

STATUTORY AND REGULATORY PROVISIONS

Pertinent statutes and regulations, as well as a map of the Projects, are contained in the Addendum to this brief.

INTRODUCTION

In the orders on review, the Commission issued three conditional certificates of public convenience and necessity under section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c), to the following companies:

- Florida Southeast to build and operate the Florida Southeast Project;
- Transcontinental to build and operate the Hillabee Expansion Project and lease that capacity to Sabal Trail; and
- Sabal Trail to build and operate the Sabal Trail Project.

See Fla. Se. Connection, et al., 154 FERC ¶ 61,080, P 4 (Feb. 2, 2016) (Certificate Order), R. 1944, JA ____, *on reh'g*, 156 FERC ¶ 61,160, P 1 (Sept. 7, 2016) (Rehearing Order), R. 2167, JA ____.[1] Although the three applications were for separate Projects, the Commission considered and addressed the Projects together as related proposals. *See* Certificate Order P 51, JA ____.

[1] "R." refers to a record item. "JA" refers to the Joint Appendix page number. "P" refers to the internal paragraph number within a FERC order. "Sierra Club Br." refers to the Sierra Club's opening brief (No. 16-1329). "GBA Br." refers to GBA's opening brief (No. 16-1387).

The challenged orders authorize Florida Southeast, Transcontinental, and Sabal Trail, upon satisfying necessary environmental conditions, to expand capacity at existing facilities and construct limited, new facilities to transport, in total, approximately 1.1 billion cubic feet of natural gas per day over 685.5 miles of transmission pipeline from Alabama, Georgia, and Florida to customers in Florida and the Southeast. *See id*. PP 1-4, JA ____-__.

The Commission found a "persuasive need" for the Projects to meet increased demand for domestic natural gas in the Southeast. *See id*. P 87, JA ____. The Commission engaged in a lengthy, detailed review of the Projects, culminating in a 477-page final environmental impact statement (Environmental Statement). The final orders reflect the Commission's consideration of all factors bearing upon the public interest, as required by Natural Gas Act section 7(e), 15 U.S.C. § 717f(e). The Commission determined that the Projects, upon the satisfaction of numerous environmental conditions and mitigation measures required in the orders, were consistent with the public convenience and necessity under section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c). *See* Certificate Order P 88, JA ____.

Petitioners participated throughout the Commission's certificate proceeding. Although the Commission Orders and Environmental Statement addressed numerous issues, Sierra Club and GBA raise a narrower set of challenges. They

focus on whether the Commission reasonably determined that the Sabal Trail Project is in the public convenience and necessity, and whether the Commission reasonably approved Sabal Trail's rate of return on equity under the Natural Gas Act. On the issue of public convenience and necessity, the Commission found, on balance, that the need for the Sabal Trail Project outweighs any unmitigated adverse effects, as power generators have contracted to use approximately 93 percent of the Project's capacity. *See id.* PP 6-7, JA ____-__; *see also id.* PP 62-88, JA ____-__. The Commission followed its past precedent in approving a 14 percent return on equity for Sabal Trail – while requiring Sabal Trail to redesign its hypothetical capital structure to include at least 50 percent debt. *See* Rehearing Order PP 18-25, JA ____-__.

Sierra Club and GBA also challenge discrete aspects of the Commission's National Environmental Policy Act analysis, objecting to the Commission's consideration of the safety of approved pipeline crossings, the adequacy of the Commission's analysis of alternative facility locations, and the Commission's analysis of the Projects' impact upon environmental justice communities and greenhouse gas emissions. The Commission seriously considered and carefully addressed numerous environmental issues. The Commission approved a route variation to limit the number of times the Sabal Trail Project crosses other pipelines by over one-third before finding the remaining crossings necessary to

reduce the impact upon residents and the environment. *See* Certificate Order PP 269-70, JA ____-__; Rehearing Order PP 76-78, JA ____-__; Envtl. Statement § 3.13, JA ____-__.

The Commission took the requisite hard look at alternatives, approving numerous variations and requiring additional changes. *See* Certificate Order PP 273-75, JA ____-__; Envtl. Statement §§ 4.0 – 4.4.2.4, JA ____-__. The Commission carefully addressed the Projects' impact upon environmental justice communities, finding the Projects will affect those communities, but that those effects would not be high and adverse or exceed the effects upon the general population. *See* Certificate Order PP 259-262, JA ____-__; Rehearing Order PP 74-75, JA ____-__; Envtl. Statement § 3.10.4, JA ____-__. And the Commission found that the Projects would not significantly contribute to the cumulative impacts of greenhouse gas emissions, given that the contracting power plants would use much of the natural gas to replace higher-emissions coal and that those power plants would be subject to emissions permitting requirements. *See* Rehearing Order PP 67-70, JA ____-__; Envtl. Statement § 3.14.4, JA ____-__.

Finally, GBA questions whether the Commission satisfied the Sunshine Act. But the Commission relied upon longstanding precedent that an agency may employ notational voting, and gave GBA (and Sierra Club) full and fair opportunity to comment and make objections. *See* Rehearing Order P 84, JA ____.

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY BACKGROUND

A. Natural Gas Act

The principal purpose of the Natural Gas Act is "to encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices." *Pub. Utils. Comm'n of Cal. v. FERC*, 900 F.2d 269, 281 (D.C. Cir. 1990) (quoting *NAACP v. FPC*, 425 U.S. 662, 670 (1976)). Natural Gas Act sections 1(b) and (c) grant the Commission jurisdiction over the transportation and wholesale sale of natural gas in interstate commerce. 15 U.S.C. §§ 717(b), (c). Before a company may construct a facility that transports natural gas in interstate commerce, it must obtain from the Commission a certificate of "public convenience and necessity" under Natural Gas Act section 7(c), 15 U.S.C. § 717f(c).

Under Natural Gas Act section 7(e), the Commission "shall issue" a certificate to any qualified applicant upon finding that the proposed construction and operation of the pipeline facility "is or will be required by the present or future public convenience and necessity." 15 U.S.C. § 717f(e). The Act empowers the Commission to "attach to the issuance of the certificate . . . such reasonable terms and conditions as the public convenience and necessity may require." *Id.*; *see, e.g., Atl. Refining Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 391-92 (1959) (noting the Commission's discretion to attach conditions to certificates as

necessary); *accord Myersville Citizens for a Rural Community, Inc. v. FERC*, 783 F.3d 1301, 1307-08 (D.C. Cir. 2015) (same). Section 7(h) of the NGA, 15 U.S.C. § 717f(h), provides a FERC-issued certificate holder the "right of eminent domain" to obtain the "necessary right-of-way to construct, operate, and maintain" the pipeline. *Id.*; *see also Alliance Pipeline L.P. v. 4.360 Acres of Land*, *More or Less*, 746 F.3d 362 (8th Cir. 2014) (rejecting several challenges to condemnation action brought by a pipeline).

Applicants seeking certification from the Commission must comply with extensive application requirements, including public notice and comment and environmental review proceedings (discussed below). *See generally* 18 C.F.R. §§ 157.5, 157.6. In 2002, the Commission developed and implemented, through a FERC staff guidance document, a new pre-filing process for builders of interstate natural gas projects. *See* Guidance: FERC Staff NEPA Pre-Filing Involvement in Natural Gas Projects (Oct. 23, 2002).[2] The Pre-Filing Guidance encourages pipeline project sponsors "to engage in early project-development involvement with the public and agencies, as contemplated by the National Environmental Policy Act (NEPA)." *Id.* at 1. In 2005, pursuant to the Energy Policy Act of 2005, the Commission developed rules for those using the pre-filing

[2] Available at https://www.fws.gov/habitatconservation/gas_prefiling_FERC_staff_NEPA_guidance_2004.pdf.

process. *See* 18 C.F.R. § 157.21(b). The rules codified the Pre-Filing Guidance Process and are designed such that a prospective applicant will engage FERC staff, federal and state agencies, tribal authorities, and the public in identifying potential issues and developing additional information before the prospective applicant submits a formal application.

Once an application is filed, the Commission has outlined the criteria it considers to balance the economic impacts of a proposed facility. *See Certification of New Interstate Nat'l Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (Sept. 15, 1999) ("Policy Statement"), *clarified*, 90 FERC ¶ 61,128 (Feb. 9, 2000), *further clarified*, 92 FERC ¶ 61,094 (July 28, 2000); *see generally Myersville*, 783 F.3d at 1309 (describing FERC's Policy Statement).

B. National Environmental Policy Act

The Commission's consideration of an application for a certificate of public convenience and necessity also triggers environmental review. The National Environmental Policy Act, 42 U.S.C. §§ 4321, *et seq.*, sets out procedures that federal agencies must follow to ensure that the environmental effects of proposed actions are "adequately identified and evaluated." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

"NEPA is a procedural statute; it 'does not mandate particular results, but simply prescribes the necessary process.'" *Minisink Residents for Envtl. Pres. and*

Safety v. FERC, 762 F.3d 97, 111 (D.C. Cir. 2014) (quoting *Robertson*, 490 U.S. at 350); *see also Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 768 (2004) ("'NEPA imposes only procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions.'") (quoting *Robertson*, 490 U.S. at 349-50). The statute requires the Commission to "identify the reasonable alternatives to the contemplated action," *Minisink*, 762 F.3d at 102, and take a "hard look" at "the environmental impact of its action[]." *Id.* at 111; *accord Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983) (same); *see also Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 503 (D.C. Cir. 2010) (NEPA ensures a "fully informed and well-considered decision, not necessarily the best decision").

Regulations implementing NEPA generally require agencies to consider the environmental effects of a proposed action by preparing either an environmental assessment or a more comprehensive environmental impact statement. *See* 40 C.F.R. § 1501.4. An agency must prepare an environmental impact statement when it determines that a proposed action may be a "major Federal action significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); *see EarthReports, Inc. v. FERC*, 828 F.3d 949, 953 (D.C. Cir. 2016) (NEPA requires federal agencies to include an environmental impact statement in

"every recommendation or report on proposals for . . . major Federal actions significantly affecting the quality of the human environment . . . .") (quotation omitted); *see also, e.g.*, *Sierra Club v. FERC*, 827 F.3d 36, 41 (D.C. Cir. 2016) (summarizing regulations governing agency's determination whether an environmental impact statement is needed).

An environmental impact statement must include a "'detailed statement . . . [on, *inter alia,*] the environmental impact of the proposed action,' 'any adverse environmental effects which cannot be avoided should the proposal be implemented,' and "'alternatives to the proposed action.'" *Ctr. for Bio. Diversity v. U.S. Dep't of Interior*, 563 F.3d 466, 474 (D.C. Cir. 2009) (quoting 42 U.S.C. §§ 4332(2)(C)(i)-(iii)).

II. FACTUAL BACKGROUND

A. The Southeast Market Projects

This case involves applications from Transcontinental, Florida Southeast, and Sabal Trail for certificates of public convenience and necessity under section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c). The applications concern three separate but connected natural gas transmission pipeline projects (collectively, the Southeast Market Projects or Projects) to transport natural gas to markets in the southeast United States. *See* Certificate Order P 4, JA ____; *see also* Addendum A (map of the Projects). The Projects will transport, in total, "up to approximately

1.1 billion cubic feet of natural gas per day" – approximately 1.1 million dekatherms – over 685.5 miles of transmission pipeline to customers in Florida and the Southeast. Certificate Order P 4, JA ____. The Projects are scheduled to be placed in service in May 2017. *See id.* PP 12, 20, 31, JA ____, ____, ____.

1. Hillabee Expansion Project

The upstream Hillabee Expansion Project consists of expanding approximately 43.5 miles of pipeline looping (placing new pipeline adjacent to existing pipeline) and related facilities on Transcontinental's existing system in Alabama. *See id.* PP 2, 11, JA ____, ____. Transcontinental applied to construct this expansion and then lease the created capacity to Sabal Trail. *See id.* P 2, JA ____. When complete, the Hillabee Expansion Project will transport up to 1,131,730 dekatherms of natural gas per day to its interconnection with the Sabal Trail Project in Tallapoosa County, Alabama. *See id.* PP 11, 36, JA ____, ____.

2. Sabal Trail Project

The Sabal Trail Project consists of over 515 miles of new pipeline and related facilities. *Id.* P 3, JA ____. The Sabal Trail Project will connect with the Hillabee Expansion Project in Tallapoosa County, Alabama to deliver gas to the Florida Southeast Project and other existing systems in Osceola County, Florida. *Id.* PP 3, 16, JA ____, ____. The Sabal Trail Project will transport up to 1,075,000 dekatherms of natural gas per day. *Id.* P 15, JA ____. Florida Power & Light and

Duke Energy Florida have contracted to use approximately 93 percent of the Sabal Trail Project's capacity. *Id.* P 81, JA ____.

3. Florida Southeast Project

The Florida Southeast Project consists of a new 126-mile pipeline and related facilities. *Id.* P 1, JA ____. The downstream project will interconnect with the Sabal Trail Project at a new Central Florida Hub, and transport up to 640,000 dekatherms per day to the Martin Clean Energy Center near Indiantown, Florida. *Id*. PP 1, 4, 29, JA ____, ____, ____. Florida Power & Light has contracted to use approximately 62 percent of the Florida Southeast Project's available capacity, with an option for the remaining capacity. *Id.* P 81, JA ____.

B. The Commission's Environmental Review

The Commission initiated its environmental review of the Projects in the fall of 2013 through its pre-filing process. *See* R. 1-615 (containing numerous comments from stakeholders in pre-filing period). Notice was published in the *Federal Register* on February 26, 2014, and sent to "more than 5,800 interested parties, including representatives of federal, state, and local agencies; elected officials; environmental and public interest groups; Native American tribes; potentially affected landowners; concerned citizens; and local libraries and newspapers." Certificate Order P 226, JA ____. The Commission also issued

additional, supplemental notices requesting comments on certain specific environmental matters. *See id.* PP 228-29, JA ____-__.

The Commission solicited comments from stakeholders in multiple open houses and public scoping meetings, and considered more than 1,100 letters and oral comments from 199 speakers. *See id.* Florida Southeast, Transcontinental, and Sabal Trail filed formal applications for their separate projects on September 26, November 18, and November 21, 2014, respectively. *See id.* PP 1-3, JA ____-__. Commission staff issued a draft environmental impact statement for the Projects on September 4, 2015 with cooperation from the U.S. Army Corps of Engineers, addressing the issues raised in public comments during the pre-filing process. *See id.* P 230, JA ____.

The Commission held ten public meetings to receive comments on the draft environmental impact statement. *Id.* P 231, JA ____. The Commission heard from approximately 154 speakers and received approximately 137 comments during the comment period. *Id.* The Commission also accepted and reviewed several comments after the close of the comment period. *See id.*

After considering all substantive comments on the Projects and alternatives, the Commission issued a detailed, 477-page (excluding appendices) final environmental impact statement (Environmental Statement). *See id.* P 232; Envtl. Statement, R. 1925, JA ____. The Environmental Statement concluded that the

Projects would have some adverse environmental impacts. *See* Envtl. Statement § 5.0, JA ____. But those impacts would be reduced to less-than-significant levels with the applicants' proposed impact avoidance and Commission-imposed mitigation measures. *Id.*; *see also* Certificate Order P 233, JA ____.

The Environmental Statement analyzed the Projects' impacts on the following resources: geology, soils, groundwater, surface water, wetlands, vegetation, fisheries, wildlife, special status species, land use, cultural resources, air quality, and noise, as well as pipeline integrity and public safety. *See* Envtl. Statement § 3.0, JA ____-__; *see also* Certificate Order PP 226-294 (discussing environmental review), JA ____-__. Where adverse impacts were identified, the Environmental Statement recommended mitigation measures that, if imposed, would reduce or resolve the identified impacts. *See* Envtl. Statement at 5-14 – 5-21, JA ____-__.

The Environmental Statement considered the Projects' potential impacts on socioeconomic factors, *see id.* § 3.10, JA ____-__, including impacts to environmental justice communities, *id.* § 3.10.4, JA ____-__. Although the Statement acknowledged that the Projects would have some effect on environmental justice groups, the Statement concluded that the Projects would not have a disproportionately high or adverse impact or exceed the impacts on the general population. *See id.* at 3-216 – 3-221, JA ____-__.

The Environmental Statement conducted a safety evaluation of all relevant impacts from the Project. *See id.* § 3.13, JA ____-__. The Statement explained that Sabal Trail ameliorated the concern about the Sabal Trail Project crossing existing pipelines by modifying its route to eliminate more than one-third of the originally proposed crossings, and agreeing to take specific design and construction measures for the remaining crossings. *Id.* at 3-282, JA ____.

The Environmental Statement considered alternatives to the Projects – including the no-action alternative, system alternatives, route alternatives and variations, and aboveground facilities – to determine whether the alternatives would be environmentally preferable, and technically and economically feasible. *See id.* at 4-1 – 4-61, JA ____-__. The Environmental Statement noted that the applicants considered 334 route variations, of which 229 were either adopted or otherwise addressed by adopting another route variation. *Id.* at 4-24, JA ____.

The Environmental Statement also addressed cumulative impacts from past, present, and reasonably foreseeable actions within the affected areas – including the cumulative impacts on climate change. *See id.* §§ 3.14 – 3.14.5, JA ____-__. The Statement acknowledged that the Projects would result in the distribution and consumption of about one million dekatherms of natural gas per day. *Id.* at 3-297, JA ____. But the Statement found that power plants would use a large portion of that gas to replace higher greenhouse gas emitting coal. *Id.* The Environmental

Statement concluded that the Projects would not significantly contribute to greenhouse gas cumulative impacts. *Id.* at 3-298, JA ____.

C. The Commission's Orders

On February 2, 2016, the Commission issued an order conditionally authorizing Transcontinental, Sabal Trail, and Florida Southeast to construct and operate the Projects subject to 27 environmental conditions and more than 28 rate conditions. Certificate Order PP 1-5, App. B (listing environmental conditions), JA ____-__, ____; *id.* PP 118-222 (requiring modifications to rates, terms, and conditions of service), JA ____-__. The Commission subsequently denied rehearing requests and requests for stay brought by Petitioners and others. Rehearing Order PP 1-2, JA ____-__.

The Commission undertook a step-by-step analysis to balance the public benefits of the proposed Projects against the potential adverse consequences on existing shippers, on other pipelines and their captive customers, and on landowners and surrounding communities. Certificate Order PP 62-75, JA ____-__. The Commission found that the applicants substantiated the need for the Projects. *Id.* PP 76-88, JA ____-__; Rehearing Order P 7, JA ____.

The Commission then balanced that demonstrated need against potential adverse impacts. *See* Certificate Order P 88, JA ____. The Commission found that each project's market benefits outweigh any adverse effects on other pipelines,

captive customers, landowners, and surrounding communities. *Id*. Consistent with the Certificate Policy Statement, and subject to its environmental review, the Commission determined that the Projects were required by the public convenience and necessity. *Id*.

The Commission next conducted a thorough environmental review of the Projects, taking into account the Environmental Statement and all public comments. *See id*. PP 226-94, JA ____-__. The Commission concurred with the Environmental Statement's finding that the Projects are an environmentally acceptable action if constructed and operated as described in the Statement. *Id.* P 292, JA ____. The Commission therefore adopted the Statement's recommended mitigation measures, with certain modifications, as conditions of the Certificate Order. *Id.*

The Commission also addressed the issue of the appropriate capital structure and return on equity to use in calculating Sabal Trail's initial rates. *See* Certificate Order PP 115-118, JA ____-__; Rehearing Order PP 15-25, JA ____-__. The Commission found that Sabal Trail's proposal to apply a 14 percent return on equity to a hypothetical capital structure consisting of 60 percent equity and 40 percent debt was not consistent with Commission policy. Certificate Order PP 117-18, JA ____-__; *see also* Rehearing Order P 22 (explaining that Sabal Trail does not have an actual capital structure because it is a new pipeline), JA ____. So

the Commission granted Sabal Trail's certificate on the condition that Sabal Trail's rates be calculated using a hypothetical capital structure containing at least 50 percent debt. Certificate Order P 118, JA ____; Rehearing Order P 18, JA ____.

SUMMARY OF ARGUMENT

Balancing the need to meet continuing demand for domestic natural gas with potential adverse impacts on landowners and surrounding communities is a challenging task, but one ultimately entrusted to the Commission by Congress. Here, the Commission satisfied all of its statutory responsibilities in conditionally approving the Southeast Market Projects.

The Commission's 477-page Environmental Impact Statement fully informed the Commission's decision-making. It allowed the Commission to balance environmental impacts against the public benefits of the Projects, which will add vital pipeline capacity to meet increasing demand for natural gas from Southeast consumers, protect against supply disruptions, increase competition, and permit Florida power plants to replace higher-emissions coal with cleaner natural gas.

The Commission satisfied its responsibilities under the National Environmental Policy Act, and developed a complete record on potential Project impacts to all impacted resource categories: geology; water resources; fisheries and wetlands; vegetation and wildlife; land use and recreation; socioeconomics;

cultural resources; air quality; noise; reliability and safety; and cumulative impacts. The Commission conducted a comprehensive review of the three related pipeline proposals.

Notwithstanding this extensive analysis, Sierra Club and GBA dispute the Commission's findings on discrete issues. But each of their objections effectively invites the Court to conduct a *de novo* review of the Projects' impacts. This is unnecessary and at odds with the Court's deferential review under both NEPA and the Natural Gas Act.

Sierra Club and GBA object to the Commission's Natural Gas Act analysis of the market need and appropriate return on equity for the Sabal Trail Project. Yet two contracts with power generators for a large portion of the capacity on the Sabal Trail Project adequately demonstrates market need. The Commission found that the Project would also protect against regional supply disruptions and enhance competition. And the Commission reasonably followed its policy and precedent in permitting Sabal Trail a 14 percent return on equity rate as a new pipeline – but only if Sabal Trail altered its hypothetical capital structure to include additional (at least 50 percent) debt.

GBA raises NEPA challenges to the Commission's comprehensive Environmental Statement, objecting to the Commission's safety and alternatives evaluation. But the Commission assessed both of these issues, in significant detail.

The Commission approved the removal of over one-third of the Sabal Trail Project's planned crossings of an existing pipeline. The Commission then found the remaining crossings necessary, as the crossings followed common industry practice and would reduce environmental impacts. The Commission also adequately considered proposed alternatives, assessing 12 major pipeline route alternatives and approving over 200 variations.

Sierra Club likewise objects to the Commission's NEPA assessment of the Projects' impacts on environmental justice communities and greenhouse gas emissions. But the Commission satisfied its obligation to consider the Projects' impacts on low income and/or minority groups. Although the Commission found some impacts, the Commission reasonably concluded that the Projects' effects would not be "high and adverse" on environmental justice communities – and would not disproportionately affect those communities compared to the general population.

The Commission also examined the Projects' greenhouse gas emissions. The Commission found that the Projects would not significantly contribute to the cumulative impact of such emissions, given that the power plants that have contracted for the Projects' capacity would use much of the delivered natural gas to replace the burning of higher-emissions coal. Those power plants would also have to comply with relevant permit processes that would limit any downstream effects.

The Commission reasonably did not attempt to quantify further the physical effects on the environment caused by the eventual emissions from burning the natural gas delivered by the Projects. The Commission found such an analysis would not meaningfully inform or improve the Commission's decision-making. In so doing, the Commission followed this Court's recent precedent upholding the Commission's determination that it need not engage in such a speculative analysis because there is no standard methodology for quantifying the downstream environmental effects of greenhouse gas emissions that result from a pipeline project. This Court has rejected multiple recent efforts to "flyspeck" the Commission's NEPA review by requiring discussion of impacts that are not caused by a project, or reasonably foreseeable, or by insisting on speculative analysis with tools not intended for this purpose.

Finally, GBA's objection to the Commission approving the Projects by sequential, notational voting under the Government in the Sunshine Act is unpersuasive. This Court has long held that such agency decision-making satisfies all transparency requirements. GBA – like Sierra Club and all parties commenting on the proposed Projects – received full and fair opportunity to participate and raise objections in the agency proceeding. No more is required.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews Commission orders approving Natural Gas Act certificate applications under the Administrative Procedure Act, overturning disputed orders only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see Minisink*, 762 F.3d at 105-06. The "scope of review under the 'arbitrary and capricious' standard is narrow." *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016) (quotation omitted). "A court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives." *Id.*

Because the grant or denial of a certificate of public convenience and necessity is "peculiarly within the discretion of the Commission," the Court does not "substitute its judgment for that of the Commission." *Myersville*, 783 F.3d at 1308; *Minisink*, 762 F.3d at 1309 (same). The Court only evaluates whether "'the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'" *Myersville*, 783 F.3d at 1308 (quoting *ExxonMobil Gas Mktg. Co. v. FERC*, 297 F.3d 1071, 1083 (D.C. Cir. 2002)); *see also Minisink*, 762 F.3d at 106 (the court considers only whether the Commission's decision was "'reasoned, principled, and based upon the record'") (quoting *Am. Gas. Ass'n v. FERC*, 593 F.3d 14, 19 (D.C. Cir. 2010)).

The Commission's findings of fact, if supported by substantial evidence, are conclusive. *See Myersville*, 783 F.3d at 1308 (quoting *B & J Oil & Gas v. FERC*, 353 F.3d 71, 76 (D.C. Cir. 2004)). Substantial evidence "requires more than a scintilla," but it "can be satisfied by something less than a preponderance of the evidence." *B & J Oil & Gas*, 353 F.3d at 77. Because of this, the possibility that different conclusions may be drawn from the same evidence does not prevent an agency's finding from being supported by substantial evidence. *See Ariz. Corp. Comm'n v. FERC*, 397 F.3d 952, 954 (D.C. Cir. 2005) ("'[T]he question . . . is not whether record evidence supports [petitioner's] version of events, but whether it supports FERC's.'") (quoting *Fla. Mun. Power Agency v. FERC*, 315 F.3d 362, 368 (D.C. Cir. 2003)). When considering the Commission's "evaluation of scientific data within its expertise," the Court affords the Commission "an extreme degree of deference." *Myersville*, 783 F.3d at 1308 (quotations omitted).

II. THE COMMISSION SATISFIED ALL NATURAL GAS ACT REQUIREMENTS

Consistent with its responsibilities under the Natural Gas Act (and the National Environmental Policy Act), the Commission was sensitive to all perspectives and responsive to all arguments, whether economic or environmental in nature. Sierra Club's and GBA's comments throughout the agency proceeding – like all commenter concerns – were considered as part of the Commission's public interest balance under Natural Gas Act section 7(c), 15 U.S.C. § 717f(c). *See*

Certificate Order PP 61-88 (balancing need for the Projects against identified potential adverse consequences), JA ____-__; Rehearing Order PP 4-7 (same), JA ____-__.

In the challenged orders, the Commission reasonably determined that the benefits of the Projects in meeting the need for increased transportation capacity in the Southeast outweigh the potential adverse impacts, subject to the environmental conditions imposed in the Certificate Order. *See* Rehearing Order PP 5-7, JA ____-__. In reaching this conclusion, the Commission fully satisfied its responsibilities under the Natural Gas Act.

A. The Commission Appropriately Balanced The Public Benefits Of The Projects With The Potential Adverse Effects

Section 7(e) of the Natural Gas Act grants the Commission exclusive authority to determine whether an application to construct natural gas facilities "is or will be required by the present or future public convenience and necessity." 15 U.S.C. § 717f(e). This statutory provision confers broad authority upon the Commission. *See FPC v. Transcon. Gas Pipeline Corp.*, 365 U.S. 1, 7 (1961) (Commission is "the guardian of the public interest," entrusted "with a wide range of discretionary authority"); *Columbia Gas Transmission Co. v. FERC*, 750 F.2d 105, 112 (D.C. Cir. 1984) (Commission vested with wide discretion to balance competing equities against the backdrop of the public interest).

The Commission's Certificate Policy Statement establishes the framework for balancing the public benefits against the potential economic adverse consequences of authorizing a new pipeline. *See* Certificate Order P 62 (citing *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227, *clarified*, 90 FERC ¶ 61,128 (2000), *clarified*, 92 FERC ¶ 61,094), JA ____; *see also Myersville*, 783 F.3d at 1309 (summarizing the Policy Statement criteria). Under the Policy Statement, the Commission first considers whether the project can proceed without subsidies from the applicant's existing customers. *See Myersville*, 783 F.3d at 1309. The applicant must demonstrate a market need for the project, such that the project can "stand on its own financially." *Id.* (quotation omitted).

The Commission next determines whether the applicant has made efforts to eliminate or minimize any adverse effects on existing customers, existing pipelines, or landowners and communities. *Id*. If there are residual adverse effects on these groups, "the Commission will evaluate the project by balancing the evidence of project benefits to be achieved against the residual adverse effects." Certificate Order P 63, JA ____. This evaluation "is essentially an economic test. Only where the benefits outweigh the adverse effects on economic interests will the Commission proceed to complete the environmental analysis where other interests are considered." *Id.*

1. The Commission Reasonably Found That The Need For The Sabal Trail Project Outweighed Any Adverse Effects

Here, the Commission properly exercised its discretion in evaluating and balancing relevant factors under its established framework. It found a need for the Projects and that the Projects' benefits outweigh any adverse effects. *See id.* PP 87-88, JA ____-__. GBA challenges this finding of need, specifically with respect to the Sabal Trail Project. GBA Br. 29.

But the Commission found the Sabal Trail Project warranted, based upon "significant evidence of demand." Rehearing Order P 5, JA ____. The Projects' purpose is to "transport price competitive natural gas from Alabama to Florida to help meet the growing demand for natural gas by the electric generation, distribution, and end use markets in Florida and the Southeast United States." Envtl. Statement at 1-2, JA ____. Florida Power & Light and Duke Energy Florida entered into long-term commitments for 93 percent of Sabal Trail's proposed capacity. Rehearing Order P 5 (citing Certificate Order PP 87-88, JA ____-__), JA ____; *see also* Certificate Order P 87 ("we find that the precedent agreements sufficiently demonstrate the need for the project") (citing Envtl. Statement at 4-1 – 4-2, JA ____-__), JA ____.

The Sabal Trail Project – and resulting commitments – arose from an order issued by the Florida Public Service Commission. Existing interstate pipelines serving Florida "are either fully or near fully subscribed." Certificate Order

P 74, JA ____. The Florida Public Service Commission's order thus directed Florida Power & Light to seek new pipeline proposals to "accommodate Florida's long-term natural gas needs." Rehearing Order P 5 (citing Certificate Order P 10 & n.6, JA ____), JA ____; *see also* Certificate Order P 85 (Florida Public Service Commission issued an order finding that Florida Power & Light had demonstrated a need for additional natural gas capacity) (citing Florida Southeast App. Ex. Z-1, R. 616, JA ____), JA ____.

The Commission next fully examined impacts on landowners and surrounding communities. The Commission noted that Sabal Trail took steps to reduce any adverse impacts on landowners. Rehearing Order P 6, JA ____. Sabal Trail adopted 229 route variations, Certificate Order P 71, JA ____, including one with regard to GBA's land "that closely follows property lines and reduce[s] impacts on [GBA's] future development opportunities." *Id.* P 72, JA ____; Envtl. Statement at 4-24 (same), JA ____. Approximately 60 percent of the pipeline is placed within existing rights-of-way. *See* Certificate Order P 70, JA ____. Based on these facts, the Commission found that Sabal Trail had taken "sufficient steps to minimize adverse economic impacts" on landowners. Compliance Order P 71, JA ____; Rehearing Order PP 6-7, JA ____-__. And the Commission determined that the benefits of the Sabal Trail Project specifically – and the Projects generally – outweighed any potential adverse impacts, subject to the

environmental conditions imposed in the Certificate Order. *See* Rehearing Order P 7, JA ____. The Commission reached a "well supported and thoroughly reasoned" finding under its "broad discretion" that the Projects were in the public convenience and necessity. *Myersville*, 783 F.3d at 1314-15; *see Ariz. Corp. Comm'n* , 397 F.3d at 954 (record evidence need only support FERC's conclusion).

2. The Commission Possessed Substantial Evidence For Its Determination

GBA responds that the Commission's finding of public need improperly relies upon "private profit motives." GBA Br. 28. But GBA cites no basis for its assertion. GBA also contends that the Commission must assess whether the Projects will provide gas to Georgia (where GBA operates). *Id.* Yet it cites no reason for why the Commission must make a state-specific determination. *See Sierrita Gas Pipeline, LLC*, 147 FERC ¶ 61,192, PP 36-37 (2014) (finding public convenience and necessity required interstate pipeline that was intended to deliver gas exclusively to Mexico).

Instead, the Commission determines need based upon capacity commitments. *See Myersville*, 783 F.3d at 1309-11 (holding that nothing in Commission precedent or policy required finding of need to be based on anything more than precedent agreements). In *Minisink*, this Court rejected a claim that the Commission violated its Policy Statement by determining the need for a project

based upon the project's contracts with shippers. 762 F.3d at 111 n.10. The Court found "nothing in the policy statement or in any precedent construing it to suggest that it requires, rather than permits, the Commission to assess a project's benefits by looking beyond the market need reflected by the applicant's existing contracts with shippers." *Id.* (contracts for a proposed pipeline's capacity "will always be important evidence of demand for the project"). The Commission found ample evidence of capacity commitments here. *See* Rehearing Order P 5, JA ____.

Nor is GBA's contention that the Commission made its determination based solely upon private motives accurate. The Commission also found that the Sabal Trail Project could deliver gas in the event of regional supply disruption and enhance market competition. *See id.* PP 5-6, JA ____-__; *see also* Certificate Order P 88, JA ____; Envtl. Statement at 5-1, JA ____. Due to its specific starting point in Alabama, the Projects will allow shippers "access to multiple, diverse, onshore and offshore natural gas supply areas." Envtl. Statement at 1-4, JA ____; *see generally Minisink*, 762 F.3d at 110 (finding "no basis" under the Court's "narrow standard of review" to "upset the Commission's application of its section 7 authority" on the Commission's finding of market demand).

GBA's argument that the Sabal Trail Project is "redundant as it largely parallels existing pipelines," GBA Br. 29, is easily dismissed. GBA identifies only

one existing pipeline, owned by Southern Natural, to support this contention. *See id.* at 26. The Southern Natural pipeline at issue is a smaller (10-inch diameter) pipeline ending in northern Florida. Envtl. Statement at 4-6, JA ____. The Sabal Trail Project mainline is a much larger (36-inch diameter) pipeline that ends in central Florida. *See* Compliance Order P 16, JA ____. As the Commission found, the Southern Natural pipeline is "operating at or near capacity and, therefore, [is] incapable of transporting the volumes of natural gas" that the Sabal Trail Project would ship. Envtl. Statement at 4-6, JA ____. The Commission also explained that using the Southern Natural pipeline "is not technically feasible without significant modifications and the construction of substantial new natural gas transmission infrastructure," which would be "analogous" to the three combined Projects at issue in this proceeding." *Id.*

GBA also raises concerns about the use of eminent domain. *See* GBA Br. 27-28. Although the Commission noted that Sabal Trail was able to reach easement agreements with some landowners, *see* Certificate Order P 71, JA ____, as the Commission describes, the agency does not control the right to eminent domain. *See* Rehearing Order P 87, JA ____. The Commission is entrusted with determining whether a natural gas infrastructure project application is in the public convenience and necessity. *See id.* The Natural Gas Act confers the rights of eminent domain to the certificate holder. *Id.* (citing 15 U.S.C. § 717f(h)).

Finally, GBA takes issue with the Projects' route through its property. *See* GBA Br. 26. But the Commission noted that, although the Sabal Trail project will traverse GBA's property, "Sabal Trail will closely follow property lines and reduce impacts on [GBA's] future activities." Certificate Order P 72, JA ____; *see also id.* n.43 (The Commission must "consider a landowner's preferences, not necessarily reach [a] preferred outcome.'") (citing *Impulsora Pipeline, LLC*, 153 FERC ¶ 61,204, P 12 (2015)), JA ____; *see generally Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 967 (D.C. Cir. 2000) (provided that adverse environmental effects are identified and evaluated, FERC may decide that other values outweigh the environmental costs).

B. The Commission Reasonably Approved Sabal Trail's Return On Equity While Reforming Sabal Trail's Capital Structure

Sierra Club raises a separate challenge, objecting to the Commission's decision to modify Sabal Trail's hypothetical capital structure in a manner that will lower rates for consumers. *See* Sierra Club Br. 38-43. Sierra Club prefers a different condition than the one the Commission imposed. *See id.* at 43 (arguing for a change to Sabal Trail's return on equity instead of its hypothetical capital structure). But Sierra Club ignores the Commission's longstanding policy in analyzing initial rates.

A pipeline's proposed rates are one of many factors that the Commission must weigh in determining whether issuance of a certificate is required by the

public convenience and necessity. *See Atl. Refining Co.*, 360 U.S. at 391. The Natural Gas Act grants the Commission the discretion to impose conditions on those rates as it deems necessary to protect the public interest. *Id.* at 391-92 (conditions imposed by the Commission ensure that the "the consuming public may be protected while the justness and reasonableness of the price fixed by the parties is being determined under other sections of the Act").

In its Natural Gas Act section 7 filing, Sabal Trail proposed a 14 percent return on equity. Certificate Order P 115, JA ____. Because Sabal Trail is a newly-formed pipeline that does not have an actual capital structure that can be used to calculate its rates, *see* Rehearing Order P 22, JA ____, Sabal Trail proposed to calculate its rates by applying that return to a hypothetical capital structure of 60 percent equity and 40 percent debt. *See* Sabal Trail App. 41-42, R. 748, JA ____-__.

The Commission concluded that Sabal Trail's proposed return on equity and capital structure "does not reflect current Commission policy." Certificate Order P 117, JA ____. The Commission explained that it has approved equity returns of 14 percent for new pipelines – like Sabal Trail – only where "the equity component of the capitalization is no more than 50 percent." *Id.* (citing *Bison Pipeline, LLC*, 131 FERC ¶ 61,013, P 24 (2010), *vacated in part*, 149 FERC ¶ 61,243 (2014); *MarkWest Pioneer, L.L.C.*, 125 FERC ¶ 61,165, P 27 (2008)). Consistent with that

policy, the Commission approved the 14 percent return on equity, but directed Sabal Trail to design its cost-based rates using a capital structure "that includes at least 50 percent debt." Certificate Order P 118, JA ____; *accord* Rehearing Order P 18, JA ____.

As the Commission explained, the rationale underlying this policy is that imputing a capitalization with more than 50 percent equity "is more costly to ratepayers, because equity financing is typically more costly than debt financing and the interest incurred on debt is tax deductible." Certificate Order P 117 (citing *MarkWest*, 125 FERC ¶ 61,165, P 17), JA ____. In applying its policy and modifying Sabal Trail's capital structure, the Commission protected consumers by ensuring that Sabal Trail's rates are in line with those of other new pipelines. *See* Certificate Order PP 117-118, JA ____-__; Rehearing Order PP 20, 25, JA ____, ____. After imposing these conditions, the Commission determined that Sabal Trail's rates are consistent with the public interest. *See* Certificate Order P 114, JA ____. The Commission's exercise of discretion in balancing the equities involved here is consistent with its authority under the Natural Gas Act. *See, e.g.*, *Atl. Refining Co.*, 360 U.S. at 392 ("Section 7 procedures in such situations thus act to hold the line awaiting adjudication of a just and reasonable rate. Thus the purpose of Congress to create a comprehensive and effective regulatory scheme is given full recognition.") (internal citation and quotations omitted).

Sierra Club raises two broad objections to the Commission's determination. Both lack merit.

1. The Commission Adequately Considered The Impact Of Modifying Sabal Trail's Capital Structure

Sierra Club first contends that the Commission assumed, without evidence, that Sabal Trail would be able to adopt a capital structure containing 50 percent equity and 50 percent debt. *See* Sierra Club Br. 39. Yet Sierra Club conflates two concepts. Whether a company is "able to adopt" a capital structure that matches the one it uses for ratemaking purposes is a different issue than how the capital structure on which the rates are designed impacts the company's rates. *See, e.g.*, *Commc'ns Satellite Corp. v. FCC*, 611 F.2d 883, 903, 909 (D.C. Cir. 1977) (utility is free to decide whether to modify its actual capital structure to match the hypothetical capital structure used to calculate its rates).

Nonetheless, the Commission explicitly considered – and rejected – the assertion that the Commission failed to consider the rate impact from its decision to modify Sabal Trail's hypothetical capital structure. *See* Rehearing Order P 24, JA ____. The Commission determined that the resulting rate would not be so low as to jeopardize the project, because Sabal Trail accepted the modification. "Presumably Sabal Trail is in the best position to know whether it will be able to finance the project given the conditions imposed in the certificate." *Id.* The Commission then rejected the notion that the resulting rate would remain too high,

explaining that Sabal Trail's return on equity and hypothetical capital structure, as modified, are consistent with that of similar projects involving new construction. *Id.* P 25, JA ____. The Commission also noted that the modified hypothetical capital structure, which will produce lower rates than Sabal Trail's initial proposal, is an estimate that helps ensure that the rates meet the public convenience and necessity standard – pending a later adjudication concerning their continued reasonableness. *See id.*

Although Sierra Club asserts that a 14 percent return on equity is "abnormally high," Sierra Club Br. 41, it provides no evidence supporting that assertion. Sierra Club's contention is belied by the Commission's finding that Sabal Trail is similar to other pipelines for which it has approved a 14 percent return on equity under section 7 of the Natural Gas Act. *See* Rehearing Order PP 18-21, JA ____-__; *see also* Certificate Order PP 115-118, JA ____-__.

Moreover, the decision to modify Sabal Trail's hypothetical capital structure, rather than its return on equity, was well within the Commission's discretion. This Court has long recognized that modifying the capital structure used to design rates is not only permissible – it is entrusted to the Commission to balance investor and consumer interests. *See Commc'ns Satellite*, 611 F.2d at 904 ("Perhaps the ultimate authority for imputing debt when necessary to protect rate-payers from excessive capital charges is the Supreme Court's statement in *Hope*

Natural Gas, that '[t]he rate-making process under the [Natural Gas] Act . . . involves a balancing of the investor and consumer interests.'") (quoting *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944)).

2. Sierra Club Misinterprets And Misapplies Court And Commission Precedent

Sierra Club also cites Court and Commission case law that allegedly supports its challenge to the Commission's hypothetical capital structure determination. But contrary to Sierra Club's claims, none of the cited precedent supports its position.

Sierra Club contends that this Court, in *North Carolina Util. Comm'n v. FERC*, 42 F.3d 659 (D.C. Cir. 1994), "rejected the use of hypothetical capital structures absent an adequate explanation from the Commission." Sierra Club Br. 40. But *North Carolina* supports the Commission's determination here. *North Carolina* involved a rate case under the (separate) section 4 of the Natural Gas Act, 15 U.S.C. § 717c. There, the pipeline proposed a return on equity by using its parent company's actual capital structure. 42 F.3d at 661-62. The Commission found that the parent's equity ratio was atypically low and would require granting an "anomalously high" return on equity. *Id.* at 662. The Commission therefore determined that the pipeline should instead use a hypothetical capital structure, and a return on equity at the top of a zone of reasonableness. *Id.*

On appeal, the Court remanded to the Commission for further explanation after finding that the Commission, without adequate justification, used the hypothetical capital structure "to *increase* the cost of capital to protect investors." *Id.* at 664 (emphasis in original). But the Court limited that decision, emphasizing that it had previously approved the use of hypothetical capital structures "to *reduce* the allowable cost of capital to protect consumers." *Id.* at 664 (citing *Commc'ns Satellite Corp.*, 611 F.2d 883) (emphasis in original). So too here, the Commission used a hypothetical capital structure to reduce the cost of capital until Sabal Trail's rates can be subjected to a full investigation under Section 4 of the Natural Gas Act. *See* Certificate Order P 117, JA ____; Rehearing Order PP 18, 20, 25, JA ____, ____, ____.

Sierra Club also cites Commission orders that it contends contradict the Commission's decision here, asserting there is "overwhelming precedent" that the Commission allows a 14 percent return on equity "only with much higher debt components of 70-80%." Sierra Club Br. 42-43. But the cited orders instead reaffirm the Commission's longstanding policy that allows new pipelines 14 percent returns on equity only where the proposed capital structure contains "no more than" 50 percent equity. *See* Certificate Order P 117 ("For new pipelines, the Commission has approved equity returns of 14 percent, but only where the equity component of capitalization is no more than 50 percent.") (citing *Bison*, 131 FERC

¶ 61,013, P 24; *MarkWest*, 125 FERC ¶ 61,165, P 27), JA ____; Rehearing Order P 21 (citing *MarkWest*, 125 FERC ¶ 61,165, PP 26-27; *Sierrita*, 147 FERC ¶ 61,192 (2014); *ETC Tiger Pipeline, LLC*, 131 FERC ¶ 61,010, PP 25-26 (2010)), JA ____. The Commission's directive here, requiring Sabal Trail to rework its capital structure to contain no more than 50 percent equity, while also approving a 14 percent return on equity, was thus "consistent with Commission precedent involving new pipelines." Rehearing Order P 18, JA ____.

In response, Sierra Club contends that the Commission typically chooses to reduce a pipeline's return on equity, rather than changing its capital structure. *See* Sierra Club Br. 41 (citing *Pine Needle LNG Co., LLC*, 77 FERC ¶ 61,229 (1996); *ETC Tiger*, 131 FERC ¶ 61,010; *Williams Nat. Gas Co.*, 77 FERC ¶ 61,277 (1996); *Panhandle E. Pipeline Co.*, 71 FERC ¶ 61,228 (1995)). Yet the orders cited by Sierra Club either support, or are distinguishable from, the Commission orders now on review. *See* Rehearing Order PP 18-21 (distinguishing these prior orders), JA ____-__.

Panhandle and *Williams* were both rate cases brought under section 4 of the Natural Gas Act – not section 7 certificate filings. *See* Rehearing Order n.44 (citing *Panhandle*, 71 FERC ¶ 61,228 at 61,822; *Williams*, 77 FERC ¶ 61,277 at 61,275), JA ____. And those orders both involved proposals to design a pipeline's rates using the company's actual, existing capital structure. *See Panhandle*, 71

FERC ¶ 61,228 at 61,827; *Williams*, 77 FERC ¶ 61,277 at 61,290. *Pine Needle* likewise did not involve a new pipeline. *Pine Needle*, 77 FERC ¶ 61,229 at 61,917 (involving a liquefied natural gas storage facility with an unusual risk profile, which the Commission determined warranted a case-specific adjustment to the return on equity); *accord* Rehearing Order P 19, JA ____.

And *ETC Tiger* is yet another example of the Commission's application of its policy of permitting a 14 percent return on equity with a 50 percent equity capital structure for new pipelines. *See* Rehearing Order P 20 (finding that the Commission's approach both here and in *ETC Tiger* followed the Commission's policy for setting return on equity in "new pipeline proceedings"), JA ____. In *ETC Tiger*, a new pipeline proposed to use a capital structure of 50 percent equity and earn a 15 percent return on equity. *See* 131 FERC ¶ 61,010, P 25. The Commission approved the proposed capital structure, but directed the pipeline to reduce its return to 14 percent. *Id.* P 26. While in *ETC Tiger* the return on equity was out of line with agency policy, in the present matter the capital structure was misaligned. So the Commission's decision to modify the capital structure on which Sabal Trail's rates are designed was consistent with its policy – after balancing the various factors involved in this proceeding. *See* Rehearing Order P 20, JA ____.

III. THE COMMISSION SATISFIED ITS NEPA ENVIRONMENTAL OBLIGATIONS

The Commission only reached its decision to approve the Projects after issuing a 477-page Final Environmental Impact Statement that considered numerous issues. *See EarthReports*, 828 F.3d at 953 (affirming FERC's NEPA determination after finding FERC considered "numerous public comments, including petitioners', and considered the direct, indirect, and cumulative impacts . . . ."). That environmental review included reviewing the three related Projects together. *See, e.g.*, *Myersville*, 783 F.3d at 1326-27; *Minisink*, 762 F.3d at 112-113.

Sierra Club and GBA raise four discrete National Environmental Policy Act-based arguments on appeal. GBA asks the Court to review whether the Commission sufficiently considered the safety of the Sabal Trail Project's pipeline crossings and whether the Commission inadequately considered alternatives to the Projects. Sierra Club objects to the Commission's findings that the Projects do not disproportionately affect environmental justice communities, and to the Commission's consideration of the Projects' impact on greenhouse gas emissions. All NEPA challenges should fail.

A. Standard Of Review

Commission action taken pursuant to the National Environmental Policy Act is entitled to a high degree of deference. *See Marsh v. Or. Nat. Res. Council*, 490

U.S. 360, 377-78 (1989); *see also EarthReports*, 828 F.3d at 954-55. The Court's role is to ensure that NEPA's procedural requirements have been satisfied. *See Nat'l Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323, 1327 (D.C. Cir. 2004) (the "'court's role is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious'") (quoting *Balt. Gas & Elec.*, 462 U.S. at 97-98).

When reviewing factual determinations by an agency under NEPA, a court "must generally be at its most deferential." *Balt. Gas & Elec. Co.,* 462 U.S. at 103; *see also Robertson*, 490 U.S. at 350-51 ("NEPA merely prohibits uninformed – rather than unwise – agency action"). If an agency's NEPA "decision is fully informed and well-considered, it is entitled to judicial deference and a reviewing court should not substitute its own policy judgment." *EarthReports*, 828 F.3d at 954-55. This Court evaluates agency compliance with NEPA under a "rule of reason" standard. *Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 75 (D.C. Cir. 2011) (citing *Nev. v. Dep't of Energy*, 457 F.3d 78, 93 (D.C. Cir. 2006)); *see also Myersville*, 783 F.3d at 1322 (declining to "flyspeck" an agency's environmental analysis, by looking for "any deficiency no matter how minor") (quoting *Nevada*, 457 F.3d at 93 and citing *Minisink*, 762 F.3d at 112); *accord Sierra Club*, 827 F.3d at 46 (same).

B. The Commission Reasonably Concluded That Sabal Trail Project Crossings Do Not Threaten Safety

GBA contends that the Commission's National Environmental Policy Act analysis failed to adequately address the "concerns of collocating pipes, crossing existing pipes, and damaging existing pipes." GBA Br. 22. But the Commission rejected this contention, finding that it "sufficiently considered" safety concerns regarding pipeline crossings. Rehearing Order P 77, JA ____.

Because the Sabal Trail Project would cross Southern Natural's existing pipeline, the Commission analyzed the risks associated with collocating those two pipelines. *See* Envtl. Statement at 3-282, JA ____. In response to concerns, Sabal Trail modified its proposed route and eliminated over one-third of its originally proposed crossings. *Id.* The Commission found the remaining crossings necessary to "'minimize impacts on residences, cultural resources, and other environmental resources and to add construction constraints (e.g., steep side slopes).'" Rehearing Order P 77 (quoting Envtl. Statement at 3-282 – 3-283, JA ____-__), JA ____; *accord* Certificate Order P 270, JA ____. As the Commission explained, locating pipelines together is "'common'" and is "'encouraged for a variety of reasons, including [the] minimization of environmental impacts.'" Rehearing Order P 77 (quoting Certificate Order P 269, JA ____), JA ____; *accord* Envtl. Statement at 3-282, JA ____.

The Commission continued that, although some existing pipeline rights-of-way may be used as a temporary workspace, the impacts of excavation will be minimal. *See* Certificate Order P 269, JA ____. Certificate holders will not typically operate heavy equipment over existing pipeline facilities and will generally install the new facilities at least 25 feet from existing pipelines. *Id.* The Commission further found that all pipelines must be constructed and operated in accordance with Department of Transportation standards. *See id.* P 269 (citing Envtl. Statement at 3-282, JA ____), JA ____; *see also* Envtl. Statement at 3-280 ("The [Department of Transportation] provides the minimum standards for operating and maintaining pipeline facilities . . . ."), JA ____. The Commission then required additional mitigation techniques "to reduce the impacts on existing rights-of-way and pipelines." Rehearing Order P 77, JA ____; *see Theodore Roosevelt Conservation P'Ship*, 616 F.3d at 517 (agency can fulfill its NEPA mandate when it adopts mitigation measures to reduce any environmental impacts).

Given these conditions, the Commission found the remaining crossings "sufficiently justified." Envtl. Statement at 3-282, JA ____; *see EarthReports*, 828 F.3d at 956 (petitioners failed to provide any affirmative reason to "doubt the reasonableness of the Commission's conclusion"). The Commission's reasoned analysis, based upon substantial evidence, is worthy of deference. *See Minisink*, 762 F.3d at 110-11 (affirming FERC's reasonable assessment of the evidence, and

FERC's conclusions from that evidence); *Murray Energy Corp. v. FERC*, 629 F.3d 231, 238 (D.C. Cir. 2011) (affirming the Commission's reasonable conclusion regarding the safety of a natural gas pipeline passing above a coal mine).

In response, GBA cites to commenter letters raising concerns regarding the safety of crossing pipelines. *See* GBA Br. 23. Yet the Commission considered and addressed those concerns. *See* Certificate Order PP 269-70 (responding to comments regarding pipeline crossings); Envtl. Statement at 3-282 (same), JA ____. It is the Commission that is entrusted to weigh competing views. *See Wisc. Valley Improvement Co. v. FERC*, 236 F.3d 738, 746-47 (D.C. Cir. 2001) (it is not the Court's "role to engage in de novo weighing of evidence"); *see also Myersville*, 783 F.3d at 1308 (FERC's evaluation of scientific data is afforded "an extreme degree of deference").

GBA also alleges that the Commission is simply "taking Sabal's word for it" with regard to the necessity of the remaining pipeline crossings. GBA Br. 24. But the Commission rejected this claim. In addition to finding a need for the crossings based on the independent review described above, the Commission emphasized that "active construction of the crossovers will be monitored in accordance with the Commission's compliance protocols in place for the project . . . ." Rehearing Order P 78, JA ____; *see U.S. Dept. of Interior v. FERC*, 952 F.2d 538, 546 (D.C. Cir. 1992) (affirming FERC's conditions, including ongoing monitoring). And the

Department of Transportation's Pipeline and Hazardous Materials Safety Administration will monitor and regulate all pipelines once the Projects are operational. *See* Rehearing Order P 78 (citing Certificate Order PP 269-270, JA ____-__; Envtl. Statement ES-5, JA ____), JA ____; *see generally Murray*, 629 F.3d at 240 (finding FERC reasonably took into account the safety views of other agencies).

C. The Commission Reasonably Considered Alternatives To The Projects

GBA also asserts that the Commission's consideration of alternatives to the Projects was inadequate. *See* GBA Br. 20-21. Sierra Club likewise takes issue with certain aspects of the Commission's alternative routes analysis. *See* Sierra Club Br. 19. But the Commission's consideration of alternatives was reasonable and entitled to deference. *See Myersville*, 783 F.3d at 1324 (deferring to FERC's consideration of alternatives).

Under the National Environmental Policy Act, a reasonable alternative is one that is "technically and economically practical or feasible and meets the purpose and need of the proposed action." 43 C.F.R. § 46.420(b); *see Myersville*, 783 F.3d at 1323 (an alternative is reasonable if it is "objectively feasible as well as reasonable in light of the agency's objectives") (quotations omitted). Yet NEPA does not compel a particular result with respect to an agency's consideration of alternatives. *See Myersville*, 783 F.3d at 1324 (finding that, even if an agency has

conceded that an alternative is environmentally superior, it need not choose the alternative) (citing *Robertson*, 490 U.S. at 350). The Commission's decision regarding alternatives is entitled to deference. *See Minisink*, 762 F.3d at 111 (FERC enjoys broad discretion in balancing competing interests and drawing administrative lines).

GBA provides no reason why the Commission's consideration was inadequate beyond a general statement that the Commission "erroneously limited the scope of its examination of alternatives to the" Projects. GBA Br. 21. In fact, the Environmental Statement evaluates numerous alternatives, "including the no-action alternative, system alternatives, major route alternatives, minor route variations, and aboveground facility site alternatives." Certificate Order P 273, (citing Envtl. Statement at 4.1 – 4.7, JA ____-__), JA ____. The Commission analyzed whether those alternatives "meet the stated project purpose, are technically and economically feasible, and offer a significant environmental advantage when compared to the proposed facilities." *Id.* The Commission's consideration was based upon project-specific information, the Commission's consultation with federal and state resource agencies, the numerous comments it received about possible alternatives, and the Commission's "expertise and experience regarding the siting, construction, and operation of natural gas

transmission facilities and their potential impact on the environment." Envtl. Statement at 4-1, JA ____.

The Environmental Statement evaluated 12 major pipeline route alternatives. *See* Certificate Order P 274 (noting that the Commission did not recommend any of the major alternatives) (citing Envtl. Statement at 4-8 – 4-24, JA ___-__), JA ____. Contrary to Sierra Club's claims, *see* Sierra Club Br. 19-20, the Commission considered the no action alternative and the Gulf of Mexico route that would avoid construction in Georgia. *See* Envtl. Statement at 4-3, 4-15, JA ____, ____.

Although the Commission found that the route around Georgia and through the Gulf of Mexico would offer environmental advantages, it determined that such a route would cost at least $2.2 billion more, rendering that alternative economically infeasible. *See id.* at 4-15, JA ____; *see also Robertson*, 490 U.S. at 350 ("If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained [by NEPA] from deciding that other values outweigh the environmental costs."). And the Commission found that the no-action alternative would not meet the stated purpose of the Projects, resulting in either inadequate fuel supply or the use of alternative transportation measures that would have comparable or greater environmental impacts. *See*

Envtl. Statement at 4-3, JA ____; *see generally Myersville,* 783 F.3d at 1312 (refusing petitioner's request to compare alternatives "in a vacuum").

The Commission approved the incorporation of 229 of over 300 proposed minor route variations to the Projects. *See* Certificate Order P 275 (citing Envtl. Statement at 4-24 and appendix D, table 4.3.2-1, JA ____, ____), JA ____. The Commission then required that Sabal Trail adopt two additional route variations. *See* Certificate Order P 275 (citing Envtl. Statement at 4-24 – 4-48, JA ____-__), JA ____. The Commission's thorough consideration of numerous alternatives – and its required variations – "discharge[s] the Commission's NEPA obligation." *Myersville*, 783 F.3d at 1323.

D. The Commission Reasonably Assessed The Projects' Effects On Environmental Justice Communities

Sierra Club raises a separate challenge, objecting to the Commission's finding that the "Project[s] will not disproportionately affect environmental justice communities." Sierra Club Br. 2. But Sierra Club misunderstands the Commission's conclusions. Although the Commission acknowledged that environmental justice populations would be affected by the Projects, it found that the Projects would not result in significant adverse impacts to either environmental justice populations or the general population – given the Commission's required avoidance, minimization, and mitigation measures. *See* Rehearing Order P 75 (citing Envtl. Statement at 3-215, JA ____), JA ____. The Commission's finding

was a reasonable discharge of its responsibility to take a "hard look." *See Sierra Club v. FERC*, 827 F.3d at 68 ("NEPA does not mandate any particular outcome") (citing *Minisink*, 762 F.3d at 111-12).

1. The Commission Reasonably Considered The Projects' Impact Under The EPA's Three-Step Guidance

Executive Order 12898 requires that specified federal agencies identify and address disproportionately higher and adverse human or environmental health effects on minorities and low-income populations, known as environmental justice communities. *See* Certificate Order P 260, JA ____. Although Executive Order 12898 does not apply to the Commission, *id.*, the Commission addressed the impact of the proposed Projects upon environmental justice communities. *See* Envtl. Statement at 3-214 – 3-218, JA ____-__; *see also Cmtys. Against Runway Expansion v. FAA*, 355 F.3d 678, 689 (D.C. Cir. 2004) (when an agency includes, as a matter of discretion, an environmental justice analysis in its NEPA evaluation, its analysis is subject to arbitrary and capricious review).

The Commission conducted its review based upon the Environmental Protection Agency's three-step guidance for examining environmental justice issues. *See* Envtl. Statement at 3-215, JA ____. The EPA instructs the responsible agency to consider:

- whether the project will be located within one-mile of minority and low-income populations;

- if the impacts from that project are "high and adverse;" and
- if the impacts fall disproportionately on environmental justice populations.

Rehearing Order P 75 (citing Envtl. Statement at 3-215, JA ____), JA ____.

The Commission first identified minority and low-income populations "using U.S. Bureau of Statistic's census tract data, which, per EPA guidance, is an acceptable source." *See* Envtl. Statement at 3-216 (citing EPA, *Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Environmental Analyses* (1998)[3]), JA ____; *see also* Rehearing Order P 75 (noting that FERC has previously used the census tract data to identify environmental justice communities) (citing *Dominion Cove LNG, LP*, 148 FERC ¶ 61,244, P 148 (2014)), JA ____. The Commission determined that 83.7 percent of the Projects' route would "cross or be within 1 mile of census tracts that are considered environmental justice populations." Envtl. Statement at 3-216, JA ____.

Next, the Commission considered whether the impacts would be "high and adverse" on environmental justice communities. *Id.* The Commission made this determination based upon the duration, intensity, and extent of the impacts. *Id.* The Commission acknowledged that environmental justice populations would be affected by the Projects. *See* Rehearing Order P 75 (citing Envtl. Statement at O-

[3] Available at https://www.epa.gov/communityhealth/guidance-incorporating-environmental-justice-concerns-epas-national-environmental.

288, JA ____), JA ____. But the Commission found those impacts would not be "high and adverse." Rehearing Order P 75, JA ____; *see* Envtl. Statement at 3-216, JA ____. Although the Commission found that "some long-term to permanent impacts would occur, meeting the duration criteria [], these impacts would not meet the intensity and/or extent criteria." Envtl. Statement at 3-216, JA ____.

The Commission noted that the Projects were routed to avoid and minimize the effects upon environmental communities. A majority of pipeline segments are placed within or next to existing rights-of-way. *See* Certificate Order PP 255, 262, JA ____, ____; *see also* Envtl. Statement at 3-215 (the Projects would not adversely affect air quality within environmental justice communities), JA ____. "Groundwater quality, property values, and other environmental resources would not be significantly affected." Rehearing Order P 75 (citing Envtl. Statement at O-166, JA ____), JA ____. And the Commission required additional mitigation measure to further reduce impacts. *See* Rehearing Order P 75 (citing Envtl. Statement at O-287, JA ____), JA ____.

The Commission next assessed whether the impacts would disproportionally fall on environmental justice communities. The Commission determined that the Projects "would not result in impacts disproportionately high and adverse for minority and low-income populations and appreciably exceed impacts on the

general population." Envtl. Statement at 3-217, JA ____. The Commission then compared the number of environmental justice communities affected by the Projects against those affected by proposed alternatives. *See* Rehearing Order P 75 (citing Envtl. Statement at 3-216, JA ____), JA ____. The Commission concluded that proposed alternatives would affect "a relatively similar percentage of environmental justice populations." Envtl. Statement at 3-217, JA ____.

Finally, the Commission addressed the effect of the Albany Compressor Station on Dougherty County, Georgia and the City of Albany. *Id.* 3-217 – 3-218, JA ____-__. The Albany Compressor Station would be more than one mile from the nearest environmental justice community. *Id.* 3-218, JA ____. The Commission found that the Compressor station buildings would not be visible from relevant public buildings or the nearest road. *Id.* Air quality modeling indicated that pollutants would be within EPA limits. *Id.* Eighty-three percent of the Sabal Trail pipeline in Georgia would be placed within an existing pipeline right-of-way, including 30 percent of the pipeline through Dougherty. *Id.* The areas not within an existing right-of-way were chosen to minimize impacts on residential development, including environmental justice communities. *Id.*

2. Sierra Club Misunderstands The Commission's Environmental Justice Review

Sierra Club raises four primary objections to the Commission's considered analysis. First, Sierra Club objects to the Commission's methodology, asserting

that the Commission improperly used census tract data to determine the location of environmental justice communities. *See* Sierra Club Br. 22. But the Commission reasonably used census tract data – based upon the EPA's guidance that census tract data provides an acceptable source for assessing environmental justice communities. *See* Rehearing Order P 75 (citing Envtl. Statement at 3-216, JA ____), JA ____; *see also EMR Network v. FCC*, 391 F.3d 269, 273 (D.C. Cir. 2004) (Commission can reasonably credit another federal agency's expertise to support its conclusion).

Sierra Club cites to the EPA's "caution" that the census tract information may need to be buttressed with additional sources, based upon the possibility of population distortion. Sierra Club Br. 22-23. But the Commission reasonably concluded that the use of the baseline census tract data was appropriate here "based on the confined and linear footprint of the project and the availability of consistent information along the entire pipeline route." Envtl. Statement at 3-216, JA ____.

The EPA's guidance leaves it to the agency to determine whether additional sources are necessary. And an agency's choice among "reasonable analytical methodologies" for an environmental justice community review "is entitled to deference from this court." *Cmtys. Against Runway Expansion*, 355 F.3d at 689; *see also Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 541 (8th Cir. 2003) (rejecting contention that agency should have used data "at a level

finer" than census tract data for assessing the impact on environmental justice populations because the suggested approach to use "a medley of assorted data" could "more fairly be characterized as arbitrary"); *cf. Sierra Club*, 827 F.3d at 50 (affirming FERC's determination to consider cumulative impacts within a county-wide – not nationwide – geographic locus).

Second, Sierra Club asserts that the Commission failed to compare the impact between environmental justice communities and the general population. Sierra Club Br. 17-18. But the Commission, following the EPA's guidance, considered whether the Projects' effects on environmental justice communities would "be meaningfully greater" than "on the general population." Envtl. Statement at 3-218, JA ____. And the Commission explicitly determined that the Projects' impacts on environmental justice groups would not "appreciably exceed impacts on the general population or other comparison group." *Id.* at 3-217, JA ____. As the Commission explained, the Environmental Statement found that the "potential impacts on water resources, land use, socioeconomics, and air quality and noise would be equally experienced by environmental justice populations as non-environmental justice populations." Rehearing Order P 75 (citing Envtl. Statement at 3-216, JA ____), JA ____.

So although the Commission acknowledged there would be some impacts on environmental justice communities, the Commission found that the Projects

impacts would not result in "high and adverse impacts on environmental resources and the environmental justice populations identified." Envtl. Statement at 3-216, JA ____. Instead, "[t]hese impacts as experienced by environmental justice populations would be the same as those experienced by non-environmental justice populations." *Id.*; *see id.* 3-217 (operating the Projects "would not result in significant adverse impacts on any population"), JA ____. Such an assessment satisfied the Commission's responsibility. *See Cmtys. Against Runway Expansion*, 355 F.3d at 689 (deferring to the agency's assessment of how environmental justice communities would be affected by noise from a project as compared to the relevant general population).

The Commission only then proceeded to compare the Projects' route against proposed alternatives, finding that "route alternatives would affect a relatively similar percentage of environmental justice populations." Envtl. Statement at 3-217, JA ____; *see id.* 3-218 ("EPA guidance also includes consideration of whether these impacts would appreciably exceed impacts (i.e., be meaningfully greater) on the general population or other comparison group (i.e., route alternatives)"), JA ___. The Commission's decision to compare (additionally) the Project route against proposed alternatives – and its finding that alternative routes would have comparable impacts – was reasonable. *See, e.g.*, *Cmtys. Against Runway Expansion*, 355 F.3d at 689 (rejecting claim that agency should have

compared environmental justice impacts across larger geographic area, finding agency's choice of methodology "reasonable and adequately explained," and "entitled to deference"); *see also Sierra Club*, 827 F.3d at 50 (affirming the Commission's decision regarding its methodology of conducting a county-wide cumulative impacts assessment); *Murray*, 629 F.3d at 238 (affirming FERC's conclusion regarding a natural gas pipeline's location).

Sierra Club contends that the Commission improperly considered alternatives that would have reduced the impact on environmental justice communities, wrongly stating that the Commission did not consider the "Gulf of Mexico" or the "no-action" alternative. Sierra Club Br. 19-20. But, as discussed (*see supra* at 48), the Commission adequately considered both alternatives. *See generally Myersville*, 783 F.3d at 1324 (finding that, even if an agency has conceded that an alternative is environmentally superior, it need not choose the alternative). And the Commission's purpose in considering the three Projects together was to assess the cumulative impacts of all three Projects – including on environmental justice communities. *Compare* Sierra Club Br. 21 (asserting FERC must consider cumulative impacts) *with* Envtl. Statement at 1-1 (announcing that the Environmental Statement was considering all three related Projects together), JA ____.

Third, Sierra Club objects to the Commission's finding that the impacts on air quality for environmental justice communities would be reduced to "'less than significant'" levels because the impacts upon air quality would remain within legally allowable standards. *See* Rehearing Order P 73 (quoting Envtl. Statement at O-288, JA ____), JA ____; *see also* Envtl. Statement at 3-218 ("[A]ir quality modeling indicates that the levels of criteria pollutants would not exceed EPA's limits, which are designed to protect the most sensitive populations."), JA ____. Sierra Club takes issue with the Commission relying upon the EPA's National Ambient Air Quality Standards to make this determination. *See* Sierra Club Br. 23. But the EPA has determined – pursuant to its responsibility under the Clean Air Act – the emissions limits necessary to protect human health and the public welfare. *See* Envtl. Statement at 3-234, JA ____.

Although Sierra Club may disagree with the air quality levels set by the EPA, *see* Sierra Club Br. 24, it is reasonable for the Commission to rely upon that expertise. *See* Rehearing Order P 73 (FERC may fulfill its NEPA obligation "to conduct an independent evaluation of environmental impacts by reviewing and relying on the information, data, and conclusions supplied by other federal or state agencies") (quotations omitted), JA ____; *see generally Grunewald v. Jarvis*, 776 F.3d 893, 903 (D.C. Cir. 2015) ("NEPA is 'not a suitable vehicle' for airing grievances about the substantive policies adopted by an agency, as 'NEPA was not

intended to resolve fundamental policy disputes.'") (quoting *Found. on Econ. Trends v. Lyng*, 817 F.2d 882, 886 (D.C. Cir. 1987)). And the Commission undertook its own air modeling analysis, finding that potential emissions from the Projects' compressor stations "are not likely to cause or significantly contribute to an exceedance" of the air quality standards. Rehearing Order P 73 (citing Certificate Order P 263, JA ____), JA ____; *see EarthReports*, 828 F.3d at 957 (affirming FERC's NEPA assessment where FERC relied upon another expert agency but then reached its own conclusion).

Finally, Sierra Club contends that the Commission failed to consider that environmental justice communities "are already overburdened." Sierra Club Br. 20. But the Commission undertook the study of the Projects' impact upon environmental justice communities for this very reason, seriously and carefully considering the Projects' effects upon environmental justice communities – both in Dougherty County, Georgia and more generally. *See* Envtl. Statement at 3-214 – 3-221, JA ____-__.

Sierra Club contends that since "83.7% of the Project is through environmental justice communities, the discriminatory impact appears on its face." Sierra Club Br. 18. Such an argument merely begs the question of whether the impact will be high and adverse. After thoroughly considering the impact upon environmental justice communities, the Commission acknowledged that the Project

would have some effects. *See* Rehearing Order P 75, JA ____. But it found that the Projects "would not result in any disproportionately high and adverse impacts on minority and/or low-income populations or appreciably exceed impacts on the general population or other comparison group." Envtl. Statement at 3-221, JA ____. Sierra Club provides no basis for why the Commission's analysis was inadequate. *See Minisink*, 762 F.3d at 111 (NEPA only prescribes the necessary process; it does not mandate particular results).

E. The Commission Reasonably Analyzed The Projects' Greenhouse Gas Emissions

The Commission also took a hard look at the Projects' potential impacts on climate change, finding that the Projects would not significantly contribute to the cumulative impacts of greenhouse gas emissions.

1. The Commission Reasonably Determined That The Projects' Would Not Significantly Contribute To Greenhouse Gas Cumulative Impacts

The Commission noted that greenhouse gas emissions are the primary cause of climate change. *See* Envtl. Statement at 3-297, JA ___. The Environmental Statement identifies climate change-related environmental effects in the Southeast region resulting from overall greenhouse gas emissions. *Id.* at 3-296 – 3-297, JA ____-__. The Commission then estimated that operation of the Projects would result in the distribution and consumption of approximately 1,000,000

dekatherms of natural gas, *id.* 3-297, JA ____, and quantified the greenhouse gas emissions associated with the Projects. *See id.* at 3-249 – 3-260, JA ____-__.

But the Commission found that the power plants receiving natural gas from the Projects are planning to use that natural gas to convert from burning coal to natural gas. *Id.* at 3-297, JA ____. Duke Energy plans to retire two coal-fired electric generation units when its new natural gas plant using capacity from the Projects becomes operational. *See id.* at 3-292, JA ___. Florida Power & Light intends to construct a new plant that will use natural gas delivered by the Projects as part of its "strategy to replace older, less efficient power plants with modern, more efficient natural gas-fired facilities." *Id.*

The Commission concluded that, because natural gas emits less carbon dioxide than coal, the Projects would likely reduce those power plants' emissions, "potentially offsetting some regional" carbon dioxide emissions. *Id.* And the Commission found that it could rely upon the plants being subject to federal and state air permitting processes for pertinent emissions and mitigation requirements and that these permitting bodies are best positioned to receive relevant air quality information. *See id.* at 3-298, JA ____; *accord* Rehearing Order P 70, JA ____. So the Commission concluded that the Projects "would not significantly contribute to" greenhouse gas cumulative impacts. Envtl. Statement at 3-298, JA ____; *see*

Myersville, 783 F.3d at 1308 (FERC's evaluation of scientific data is afforded "an extreme degree of deference").

Sierra Club argues that the Commission was required to go further, by quantifying the downstream effects of "greenhouse gas emissions and climate impacts from burning the natural gas that the Project will deliver to power plants." Sierra Club Br. 28. Sierra Club contends that the Commission should have used a methodology such as the Department of Energy's "Life Cycle Analysis" or the Council on Environmental Quality's "draft 2014 climate guidance" to estimate the environmental impact from those eventual emissions. *See id.*

But the Commission is not required to "'examine everything for which the [Projects] could conceivably be a but-for cause' in order to satisfy NEPA." *EarthReports*, 828 F.3d at 955 (quoting *Sierra Club*, 827 F.3d at 46). The Commission need only consider an effect that is "'sufficiently likely to occur [such] that a person of ordinary prudence would take it into account in reaching a decision.'" *Sierra Club*, 827 F.3d at 46 (finding that FERC was reasonable in not considering in its NEPA review how approving a pipeline would cause increased natural gas production because the linkage was too "attenuated") (quoting *City of Shoreacres v. Waterworth*, 420 F.3d 440, 453 (5th Cir. 2005)); *see also* 40 C.F.R. § 1508.8(b) (indirect impacts "are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable").

As the Commission has explained, the Council on Environmental Quality's 2014-draft climate guidance "emphasizes that agencies have the discretion to determine the type and level of analysis that is appropriate and that the investment of time and resources should be reasonably proportional to the importance of climate change-related considerations." *Constitution Pipeline Co. LLC*, 154 FERC ¶ 61,046, P 128 n.198 (2016) (citing 2014 CEQ draft guidance) (*appeal pending*, *Catskill Mountainkeeper, et al. v. FERC*, 2d Cir. No. 16-345, *et al.* (filed Feb. 5, 2016)). Exercising that discretion, the Commission determined that there is "no standard methodology to determine" how the Projects' "incremental contribution to [greenhouse gasses] would translate into physical effects on the environment." Envtl. Statement at 3-297, JA ____.

The Commission concluded that the use of a lifecycle analysis would force the Commission to "'engage in speculative analysis or provide information that will not meaningfully inform the decision-making process.'" Rehearing Order P 69 (quoting Envtl. Statement at 3-297, JA ____), JA ____. That is because the "environmental effects resulting from end use emissions from natural gas consumption are generally neither caused by a proposed pipeline (or other natural gas infrastructure) project nor are they reasonably foreseeable consequences of our approval of an infrastructure project, as contemplated by CEQ regulations." Rehearing Order P 63 (collecting cases), JA ____.

2. The Commission's Approach To Assessing Climate Change Is Consistent With Relevant Guidance And Precedent

The Commission's detailed explanation for its method to assess climate change is consistent with both the Council on Environmental Quality's draft and final climate guidance, and this Court's precedent.[4] Contrary to Sierra Club's contention, the issue is not the Commission's failure to show that "no tool exists" for measuring the environmental impact from eventual natural gas emissions or failing to choose such a tool. Sierra Club Br. 34. The Commission instead concluded that no such tool is accepted as the standard method for making such end-use measurements. So the Commission would be left engaging in speculative analysis.

The Commission's determination is consistent with this Court's precedent. In its recent *EarthReports* decision, this Court rejected a claim that the Commission impermissibly failed to use tools (such as those cited by Sierra Club) to determine the environmental effects of greenhouse gas emissions resulting from a natural gas infrastructure project. 828 F.3d at 956. The *EarthReports* Court instead upheld as reasonable the same conclusion that the Commission reached here – that the Commission need not attempt to quantify the downstream effects

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[4] *See* Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews at 1, n.3, Council on Environmental Quality (Aug. 1, 2016) (issued after the Commission's Certificate Order here).

from burning natural gas delivered by pipeline projects because "there is no standard methodology to determine how a project's incremental contribution to [emissions] would result in physical effects on the environment." *Id.* (quotation omitted).

Sierra Club attempts to distinguish *EarthReports* by confining it to the export of natural gas. *See* Sierra Club Br. 37. Yet the *EarthReports* Court specified that it was considering the same issue as here – the Commission's alleged failure to use an "analytical tool to analyze the environmental impacts of greenhouse gas emissions from the construction and operation" of natural gas facilities. 828 F.3d at 956. And the *EarthReports* Court found that the Commission reasonably declined to attempt what the Commission believed to be an "inadequately accurate" approach. *Id.*

Sierra Club also relies on *Center for Biological Diversity v. National Highway Traffic Safety Administration*, 538 F.3d 1172 (9th Cir. 2008), where the Ninth Circuit rebuked an agency for failing to account for the benefits of carbon emissions reduction – "whether quantitatively or qualitatively" – in the context of a cost-benefit analysis that extensively quantified the countervailing costs. 538 F.3d at 1200. But the Commission here accounted for greenhouse gas emissions both qualitatively and quantitatively – even though it ultimately concluded there was no appropriate methodology to gauge the significance of their impacts on the physical

environment. *See* Rehearing Order P 66 (citing Envtl. Statement at 3-233 – 3-260, JA ____-__), JA ____; *see also* Envtl. Statement at 3-297 (noting that greenhouse gas emissions will be offset by power plants switching from coal to natural gas), JA ____. As in *EarthReports*, this is a decision for the Commission to make. *See* 828 F.3d at 956.

In response, Sierra Club contends that "supplying natural gas to power plants for combustion is not just a foreseeable consequence of the Project; it is the primary objective." Sierra Club Br. 29. But as the Commission observed, even if it found a sufficient causal relationship between the Projects and eventual natural gas emissions, "'it would still be difficult to meaningfully consider those impacts, primarily because emission estimates would be largely influenced by assumptions rather than direct parameters about the project[s].'" Rehearing Order P 69 (quoting Envtl. Statement at 3-297, JA ____), JA ____.

The Commission would have to make predictions about future regional demand for electricity to determine how much natural gas will be used by the relevant power plants. *See, e.g.*, *South Coast Air Quality Mgmt. Dist. v. FERC*, 621 F.3d 1085, 1101 (9th Cir. 2010) (finding that FERC need not determine the downstream indirect emissions from the burning of natural gas transported by a pipeline because it was unknown how much gas the pipeline would actually carry, as that would be "determined based on its availability and the demand for the gas

by end users in Arizona and California"); *see also* Fla. Se. Connection, LLC, Response to Comments on the Draft EIS at 11 ("It is not possible to foresee the precise natural gas supplies that will be transported by the [Projects], as it is not possible to trace back each molecule of gas to its source."), R. 1864, JA ____.

Sierra Club's citation to *Mid States* is likewise inapposite. *See* Sierra Club Br. 32-33 (citing 345 F.3d 520). In *Mid States*, the Eighth Circuit found it "reasonably foreseeable" that approving a rail line with a more direct route from coal mines to power plants would increase the demand for coal and any adverse effects that result. 345 F.3d at 549. Here, by contrast (*see supra* at 61), a significant amount of the natural gas being delivered by the Projects is being used to displace the burning of higher-emissions coal. *See* Envtl. Statement at 3-292, JA ___. If the same amount of electricity is being produced, but it is being produced with lower-emissions natural gas, it will reduce – not increase – adverse effects. *See id.* 3-297 – 3-298, JA ____-__; *see also Sierra Club*, 827 F.3d at 46 (distinguishing *Mid States* because, in *Sierra Club*, the petitioner could not identify "any specific and causally linear indirect consequences that could reasonably be foreseen" between FERC authorizing the natural gas project at issue and that project's effect upon natural gas production).

Sierra Club responds that the Commission must "quantify the potential offset" from replacing coal with natural gas. Sierra Club Br. 35. But the

Commission explained that attempting to quantify future emissions by power plants – whether from coal or natural gas – would be speculative. *See* Envtl. Statement at 3-297, JA ____; *see also EarthReports*, 828 F.3d at 956 (affirming FERC's reasonable finding that there is no standard measure to determine how a project's incremental contribution to greenhouse gas emissions would result in physical effects on the environment). Nonetheless, the Commission reasonably found that the Department of Energy's Life Cycle Analysis concludes that lifecycle greenhouse gas emissions from electricity produced using natural gas are "significantly lower" than that of electricity produced from coal. Envtl. Statement at 3-298, JA ____; *accord* Rehearing Order P 66, JA ____. Sierra Club does not seriously contest that the replacement of coal by natural gas reduces greenhouse gas emissions. *See Myersville*, 783 F.3d at 1322, 1324 (declining to "flyspeck" an agency's environmental analysis, by looking for "any deficiency no matter how minor" and refusing to second-guess FERC where there was no evidence to the contrary).

In any event, the Commission determined that, to the extent future natural gas-fired power plants do not offset higher coal emissions from existing plants, the Commission could reasonably rely upon federal and state permit processes that would require the power plants at issue to meet emissions and mitigation requirements that limit the downstream greenhouse gas emissions from the

Projects. *See* Envtl. Statement at 3-298, JA ____. Sierra Club objects to the Commission's reliance upon these permitting requirements. *See* Sierra Club Br. 39.

But the Commission may rely upon the expertise of other agencies in reaching its NEPA conclusions. *See Murray*, 629 F.3d at 239 (noting the Commission should "'respect the views of . . . other agencies as to those problems' for which those other agencies 'are more directly responsible'"); *see also Half Moon Bay Fishermans' Mktg. Ass'n v. Carlucci*, 857 F.2d 505, 511 (9th Cir. 1988) (recognizing that cooperation between federal agencies "is precisely what NEPA's goal of reasoned and informed decision making is all about"). In *South Coast Air Quality Mgmt. Dist.*, the Ninth Circuit upheld the Commission's reliance upon the fact that the end-use of natural gas delivered on the North Baja pipeline would have to comply with California natural gas quality standards. *See* 621 F.3d at 1096 ("We cannot say that FERC's reliance on these previous state agency findings was in any way unreasonable or an abuse of discretion."). The Ninth Circuit held that, by relying on those state standards, the Commission "explicitly considered the environmental impact of downstream emissions and imposed what it reasonably believed to be effective measures to mitigate the impact." *Id.* at 1093-94.

So too here, the Commission reasonably concluded that it is appropriate to rely upon those power plant permits as "mitigation tools because an applicant must

meet certain threshold quality standards before a permit is issued." Rehearing Order P 70, JA ___. As the Commission found, the "permitting body is in the best position to receive all relevant information related to the permit." *Id.* Contrary to Sierra Club's contention, the Commission did not "forego analysis" (Sierra Club Br. 36) – it independently concluded that the Projects would not significantly contribute to the cumulative impacts of greenhouse gases based, in part, on the fact that power plants using natural gas delivered by the Projects would require permitting. *See* Rehearing Order P 70, JA ____; *EarthReports*, 828 F.3d at 957 (affirming FERC's NEPA assessment where FERC relied upon another expert agency but then reached its own conclusion).

IV. THE COMMISSION COMPLIED WITH THE SUNSHINE ACT

Finally, GBA contends that the Commission violated the Government in the Sunshine Act, 5 U.S.C. § 552b (Sunshine Act), by issuing the orders on review through sequential, notational voting, rather than at an open meeting. GBA Br. 11-12. This contention is contrary to all authority on the subject.

As this Court has long recognized, agencies commonly issue orders through two types of voting procedure: (1) voting at meetings that generally are open to the public (i.e., an "open meeting"); and (2) notational voting. *See, e.g.*, *Commc'ns Sys., Inc. v. FCC*, 595 F.2d 797, 801 (D.C. Cir. 1978) (finding notational voting consistent with the Sunshine Act and explaining that "[i]f all actions required

meetings, then the entire administrative process would be slowed perhaps to a standstill"). Notational voting, which the Commission uses to conduct much of its business, including issuance of the orders on review, "is a management device whereby the several members of a multi-member agency or commission vote individually and separately, as opposed to a vote taken at a meeting of the members of the agency." *R.R. Comm'n of Tex. v. U.S.*, 765 F.2d 221, 231 (D.C. Cir. 1985).

As this Court has repeatedly held, notational voting complies with the Sunshine Act. *See id.* at 230 ("The Sunshine Act does not require that meetings be held in order to conduct agency business; rather that statute requires only that, if meetings are held, they be open to the public (subject to various enumerated exceptions not relevant here)."); *see also Common Cause v. NRC*, 674 F.2d 921, 935 n.42 (D.C. Cir. 1982) ("The Sunshine Act does not . . . prevent agencies from making decisions by sequential, notational voting rather than by gathering at a meeting for deliberation and decision.") (citation omitted); *see generally AMREP Corp. v. FTC*, 768 F.2d 1171, 1178-79 (10th Cir. 1985) (same). Although GBA contends that there is "a presumption in controversial cases that agencies should hold public meetings whenever practicable," GBA Br. 19, it cites no precedent in support of that proposition – nor could it. *See R.R. Comm'n of Tex.*, 765 F.2d at 230 (rejecting argument that notational voting is limited to non-controversial

cases); *see generally Pac. Legal Found. v. CEQ*, 636 F.2d 1259, 1266 (D.C. Cir. 1980) ("The Sunshine Act does not require an agency to hold meetings in order to function . . . . Congress intended to permit agencies to consider and act on agency business by circulating written proposals for sequential approval by individual agency members without formal meetings.") (citations omitted).

The Commission conducted its notational vote in this case after issuing numerous public notices, holding dozens of public scoping meetings, and receiving more than 1,000 written comments during the pre-filing and post-filing stages of the proceeding. *See* Certificate Order P 44 (noting additional public notice of, and comments received in response to, the Natural Gas Act filings in this proceeding), JA ____. GBA participated throughout the proceedings. *See, e.g.*, Envtl. Statement Appendix O at 568-73 (transcript of oral comments on behalf of GBA at public scoping meeting), JA ____-__; GBA Associates March 23, 2015 Comments, (noting that GBA met with Sabal Trail to discuss their concerns with the Sabal Trail Project), R. 1030, JA ____.

The Commission responded to GBA's concerns, *see* Certificate Order PP 57-60, 72, JA ____-____, ____; Rehearing Order PP 4-7, 76-78, 83-84, JA ____-____, ____-____, and conditionally authorized the Sabal Trail Project in part because the route was modified to lessen the impact on GBA's property. *See* Certificate Order P 72, JA ____. GBA was not prejudiced by the Commission's

decision to take that action through notational voting. *See R.R. Comm'n of Tex.*, 765 F.2d at 231 ("[w]hile the outcome of the [agency's] voting . . . is plainly serious for [petitioner], it is difficult to see how the failure to take that vote in an open meeting worked any prejudice to the [petitioner]."). Further, even assuming *arguendo* that the Commission violated the Sunshine Act by not issuing the orders on review at an open meeting, such a violation would not warrant setting aside the Commission's orders. *See id.* (explaining that, even if an agency violates the Sunshine Act, additional transparency, such as the release of agency transcripts – rather than vacating the agency's order – is the normal remedy for such a violation) (citing *Pan Am. World Airways, Inc. v. Civil Aeronautics Bd.*, 684 F.2d 31, 36 (D.C. Cir. 1982)).

CONCLUSION

For the foregoing reasons, the petitions for review should be denied, and the Commission's orders should be affirmed in all respects.

Respectfully submitted,

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Commission
Washington, D.C.

January 31, 2017

Sierra Club, et al. v. FERC **Docket No. CP14-554**
Nos. 16-1329 and 16-1387 (consolidated)

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), Circuit Rule 32(e), and this Court's November 17, 2016 Order modifying the briefing format, I certify that this final brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 15,932 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

I further certify that this brief complies with the 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 Times New Roman 14-point font using Microsoft Word 2013.

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January 31, 2017

ADDENDUM
SOUTHEAST MARKET
PROJECTS MAP
&
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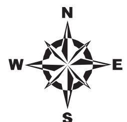

For Environmental Review Purposes Only

Figure 1-1
Southeast Market Pipelines Project Overview

Proposed New/Modified Compressor Station
Proposed Hillabee Expansion Project
Proposed Sabal Trail Project
Proposed Florida Southeast Connection Project

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Date: (8/12/2015)

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injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392; Pub. L. 94–574, § 1, Oct. 21, 1976, 90 Stat. 2721.)

HISTORICAL AND REVISION NOTES

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

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

AMENDMENTS

1976—Pub. L. 94–574 removed the defense of sovereign immunity as a bar to judicial review of Federal administrative action otherwise subject to judicial review.

§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392; Pub. L. 94–574, § 1, Oct. 21, 1976, 90 Stat. 2721.)

HISTORICAL AND REVISION NOTES

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

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

AMENDMENTS

1976—Pub. L. 94–574 provided that if no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer as defendant.

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

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

HISTORICAL AND REVISION NOTES

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

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

§ 705. Relief pending review

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

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

HISTORICAL AND REVISION NOTES

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

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

§ 706. Scope of review

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

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

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

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

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

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

(D) without observance of procedure required by law;

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

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

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

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

HISTORICAL AND REVISION NOTES

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

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

ABBREVIATION OF RECORD

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

CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

Sec.
801. Congressional review.
802. Congressional disapproval procedure.
803. Special rule on statutory, regulatory, and judicial deadlines.
804. Definitions.
805. Judicial review.
806. Applicability; severability.
807. Exemption for monetary policy.
808. Effective date of certain rules.

§ 801. Congressional review

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

(i) a copy of the rule;

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

(iii) the proposed effective date of the rule.

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

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

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

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

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

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

(2)(A) The Comptroller General shall provide a report on each major rule to the committees of jurisdiction in each House of the Congress by the end of 15 calendar days after the submission or publication date as provided in section 802(b)(2). The report of the Comptroller General shall include an assessment of the agency's compliance with procedural steps required by paragraph (1)(B).

(B) Federal agencies shall cooperate with the Comptroller General by providing information relevant to the Comptroller General's report under subparagraph (A).

(3) A major rule relating to a report submitted under paragraph (1) shall take effect on the latest of—

(A) the later of the date occurring 60 days after the date on which—

(i) the Congress receives the report submitted under paragraph (1); or

(ii) the rule is published in the Federal Register, if so published;

(B) if the Congress passes a joint resolution of disapproval described in section 802 relating to the rule, and the President signs a veto of such resolution, the earlier date—

(i) on which either House of Congress votes and fails to override the veto of the President; or

(ii) occurring 30 session days after the date on which the Congress received the veto and objections of the President; or

(C) the date the rule would have otherwise taken effect, if not for this section (unless a joint resolution of disapproval under section 802 is enacted).

(4) Except for a major rule, a rule shall take effect as otherwise provided by law after submission to Congress under paragraph (1).

(5) Notwithstanding paragraph (3), the effective date of a rule shall not be delayed by operation of this chapter beyond the date on which either House of Congress votes to reject a joint resolution of disapproval under section 802.

(b)(1) A rule shall not take effect (or continue), if the Congress enacts a joint resolution of disapproval, described under section 802, of the rule.

(2) A rule that does not take effect (or does not continue) under paragraph (1) may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.

(c)(1) Notwithstanding any other provision of this section (except subject to paragraph (3)), a rule that would not take effect by reason of subsection (a)(3) may take effect, if the President makes a determination under paragraph (2) and submits written notice of such determination to the Congress.

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have a copy made of all or any portion thereof, and to correct or amend such records;

''(4) collect, maintain, use, or disseminate any record of identifiable personal information in a manner that assures that such action is for a necessary and lawful purpose, that the information is current and accurate for its intended use, and that adequate safeguards are provided to prevent misuse of such information;

''(5) permit exemptions from the requirements with respect to records provided in this Act only in those cases where there is an important public policy need for such exemption as has been determined by spe-cific statutory authority; and

''(6) be subject to civil suit for any damages which occur as a result of willful or intentional action which violates any individual's rights under this Act.''

PRIVACY PROTECTION STUDY COMMISSION

Pub. L. 93–579, § 5, Dec. 31, 1974, 88 Stat. 1905, as amended by Pub. L. 95–38, June 1, 1977, 91 Stat. 179, which established the Privacy Protection Study Commission and provided that the Commission study data banks, automated data processing programs and information systems of governmental, regional and private organizations to determine standards and procedures in force for protection of personal information, that the Commission report to the President and Congress the extent to which requirements and principles of section 552a of title 5 should be applied to the information practices of those organizations, and that it make other legislative recommendations to protect the privacy of individuals while meeting the legitimate informational needs of government and society, ceased to exist on September 30, 1977, pursuant to section 5(g) of Pub. L. 93–579.

GUIDELINES AND REGULATIONS FOR MAINTENANCE OF PRIVACY AND PROTECTION OF RECORDS OF INDIVIDUALS

Pub. L. 93–579, § 6, Dec. 31, 1974, 88 Stat. 1909, which provided that the Office of Management and Budget shall develop guidelines and regulations for use of agencies in implementing provisions of this section and provide continuing assistance to and oversight of the implementation of the provisions of such section by agencies, was repealed by Pub. L. 100–503, § 6(c), Oct. 18, 1988, 102 Stat. 2513.

DISCLOSURE OF SOCIAL SECURITY NUMBER

Pub. L. 93–579, § 7, Dec. 31, 1974, 88 Stat. 1909, provided that:

''(a)(1) It shall be unlawful for any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number.

''(2) the [The] provisions of paragraph (1) of this subsection shall not apply with respect to—

''(A) any disclosure which is required by Federal statute, or

''(B) the disclosure of a social security number to any Federal, State, or local agency maintaining a system of records in existence and operating before January 1, 1975, if such disclosure was required under statute or regulation adopted prior to such date to verify the identity of an individual.

''(b) Any Federal, State, or local government agency which requests an individual to disclose his social secu-rity account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solic-ited, and what uses will be made of it.''

AUTHORIZATION OF APPROPRIATIONS TO PRIVACY PROTECTION STUDY COMMISSION

Pub. L. 93–579, § 9, Dec. 31, 1974, 88 Stat. 1910, as amended by Pub. L. 94–394, Sept. 3, 1976, 90 Stat. 1198, authorized appropriations for the period beginning July 1, 1975, and ending on September 30, 1977.

EX. ORD. NO. 9397. NUMBERING SYSTEM FOR FEDERAL ACCOUNTS RELATING TO INDIVIDUAL PERSONS

Ex. Ord. No. 9397, Nov. 22, 1943, 8 F.R. 16095, as amend-ed by Ex. Ord. No. 13478, § 2, Nov. 18, 2008, 73 F.R. 70239, provided:

WHEREAS certain Federal agencies from time to time require in the administration of their activities a system of numerical identification of accounts of individual persons; and

WHEREAS some seventy million persons have heretofore been assigned account numbers pursuant to the Social Security Act; and

WHEREAS a large percentage of Federal employees have already been assigned account numbers pursuant to the Social Security Act; and

WHEREAS it is desirable in the interest of economy and orderly administration that the Federal Government move towards the use of a single, unduplicated numerical identification system of accounts and avoid the unnecessary establishment of additional systems:

NOW, THEREFORE, by virtue of the authority vested in me as President of the United States, it is hereby ordered as follows:

1. Hereafter any Federal department, establishment, or agency may, whenever the head thereof finds it ad-visable to establish a new system of permanent account numbers pertaining to individual persons, utilize the Social Security Act account numbers assigned pursu-ant to title 20, section 422.103 of the Code of Federal Regulations and pursuant to paragraph 2 of this order.

2. The Social Security Administration shall provide for the assignment of an account number to each person who is required by any Federal agency to have such a number but who has not previously been assigned such number by the Administration. The Administration may accomplish this purpose by (a) assigning such numbers to individual persons, (b) assigning blocks of numbers to Federal agencies for reassignment to individual persons, or (c) making such other arrangements for the assignment of numbers as it may deem appropriate.

3. The Social Security Administration shall furnish, upon request of any Federal agency utilizing the nu-merical identification system of accounts provided for in this order, the account number pertaining to any person with whom such agency has an account or the name and other identifying data pertaining to any ac-count number of any such person.

4. The Social Security Administration and each Federal agency shall maintain the confidential character of information relating to individual persons obtained pursuant to the provisions of this order.

5. There shall be transferred to the Social Security Administration, from time to time, such amounts as the Director of the Office of Management and Budget shall determine to be required for reimbursement by any Federal agency for the services rendered by the Administration pursuant to the provisions of this order.

6. This order shall be implemented in accordance with applicable law and subject to the availability of appropriations.

7. This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity, by any party against the United States, its departments, agencies, instrumental-ities, or entities, its officers, employees, or agents, or any other person.

8. This order shall be published in the Federal Register.

CLASSIFIED NATIONAL SECURITY INFORMATION

For provisions relating to a response to a request for information under this section when the fact of its existence or nonexistence is itself classified or when it was originally classified by another agency, see Ex. Ord. No. 13526, § 3.6, Dec. 29, 2009, 75 F.R. 718, set out as a note under section 3161 of Title 50, War and National Defense.

§ 552b. Open meetings

(a) For purposes of this section—

(1) the term "agency" means any agency, as defined in section 552(e)[1] of this title, headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of the agency;

(2) the term "meeting" means the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business, but does not include deliberations required or permitted by subsection (d) or (e); and

(3) the term "member" means an individual who belongs to a collegial body heading an agency.

(b) Members shall not jointly conduct or dispose of agency business other than in accordance with this section. Except as provided in subsection (c), every portion of every meeting of an agency shall be open to public observation.

(c) Except in a case where the agency finds that the public interest requires otherwise, the second sentence of subsection (b) shall not apply to any portion of an agency meeting, and the requirements of subsections (d) and (e) shall not apply to any information pertaining to such meeting otherwise required by this section to be disclosed to the public, where the agency properly determines that such portion or portions of its meeting or the disclosure of such information is likely to—

(1) disclose matters that are (A) specifically authorized under criteria established by an Executive order to be kept secret in the interests of national defense or foreign policy and (B) in fact properly classified pursuant to such Executive order;

(2) relate solely to the internal personnel rules and practices of an agency;

(3) disclose matters specifically exempted from disclosure by statute (other than section 552 of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) involve accusing any person of a crime, or formally censuring any person;

(6) disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;

(7) disclose investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records, but only to the extent that the production of such records or information would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) disclose information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;

(9) disclose information the premature disclosure of which would—

(A) in the case of an agency which regulates currencies, securities, commodities, or financial institutions, be likely to (i) lead to significant financial speculation in currencies, securities, or commodities, or (ii) significantly endanger the stability of any financial institution; or

(B) in the case of any agency, be likely to significantly frustrate implementation of a proposed agency action,

except that subparagraph (B) shall not apply in any instance where the agency has already disclosed to the public the content or nature of its proposed action, or where the agency is required by law to make such disclosure on its own initiative prior to taking final agency action on such proposal; or

(10) specifically concern the agency's issuance of a subpena, or the agency's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in section 554 of this title or otherwise involving a determination on the record after opportunity for a hearing.

(d)(1) Action under subsection (c) shall be taken only when a majority of the entire membership of the agency (as defined in subsection (a)(1)) votes to take such action. A separate vote of the agency members shall be taken with respect to each agency meeting a portion or portions of which are proposed to be closed to the public pursuant to subsection (c), or with respect to any information which is proposed to be withheld under subsection (c). A single vote may be taken with respect to a series of meetings, a portion or portions of which are proposed to be closed to the public, or with respect to any information concerning such series of meetings, so long as each meeting in such series involves the same particular matters and is scheduled to be held no more than thirty days after the initial meeting in such series. The vote of each agency member participating in such vote shall be recorded and no proxies shall be allowed.

(2) Whenever any person whose interests may be directly affected by a portion of a meeting requests that the agency close such portion to the public for any of the reasons referred to in paragraph (5), (6), or (7) of subsection (c), the agency, upon request of any one of its members, shall

[1] See References in Text note below.

vote by recorded vote whether to close such meeting.

(3) Within one day of any vote taken pursuant to paragraph (1) or (2), the agency shall make publicly available a written copy of such vote reflecting the vote of each member on the question. If a portion of a meeting is to be closed to the public, the agency shall, within one day of the vote taken pursuant to paragraph (1) or (2) of this subsection, make publicly available a full written explanation of its action closing the portion together with a list of all persons expected to attend the meeting and their affiliation.

(4) Any agency, a majority of whose meetings may properly be closed to the public pursuant to paragraph (4), (8), (9)(A), or (10) of subsection (c), or any combination thereof, may provide by regulation for the closing of such meetings or portions thereof in the event that a majority of the members of the agency votes by recorded vote at the beginning of such meeting, or portion thereof, to close the exempt portion or portions of the meeting, and a copy of such vote, reflecting the vote of each member on the question, is made available to the public. The provisions of paragraphs (1), (2), and (3) of this subsection and subsection (e) shall not apply to any portion of a meeting to which such regulations apply: *Provided*, That the agency shall, except to the extent that such information is exempt from disclosure under the provisions of subsection (c), provide the public with public announcement of the time, place, and subject matter of the meeting and of each portion thereof at the earliest practicable time.

(e)(1) In the case of each meeting, the agency shall make public announcement, at least one week before the meeting, of the time, place, and subject matter of the meeting, whether it is to be open or closed to the public, and the name and phone number of the official designated by the agency to respond to requests for information about the meeting. Such announcement shall be made unless a majority of the members of the agency determines by a recorded vote that agency business requires that such meeting be called at an earlier date, in which case the agency shall make public announcement of the time, place, and subject matter of such meeting, and whether open or closed to the public, at the earliest practicable time.

(2) The time or place of a meeting may be changed following the public announcement required by paragraph (1) only if the agency publicly announces such change at the earliest practicable time. The subject matter of a meeting, or the determination of the agency to open or close a meeting, or portion of a meeting, to the public, may be changed following the public announcement required by this subsection only if (A) a majority of the entire membership of the agency determines by a recorded vote that agency business so requires and that no earlier announcement of the change was possible, and (B) the agency publicly announces such change and the vote of each member upon such change at the earliest practicable time.

(3) Immediately following each public announcement required by this subsection, notice of the time, place, and subject matter of a meeting, whether the meeting is open or closed, any change in one of the preceding, and the name and phone number of the official designated by the agency to respond to requests for information about the meeting, shall also be submitted for publication in the Federal Register.

(f)(1) For every meeting closed pursuant to paragraphs (1) through (10) of subsection (c), the General Counsel or chief legal officer of the agency shall publicly certify that, in his or her opinion, the meeting may be closed to the public and shall state each relevant exemptive provision. A copy of such certification, together with a statement from the presiding officer of the meeting setting forth the time and place of the meeting, and the persons present, shall be retained by the agency. The agency shall maintain a complete transcript or electronic recording adequate to record fully the proceedings of each meeting, or portion of a meeting, closed to the public, except that in the case of a meeting, or portion of a meeting, closed to the public pursuant to paragraph (8), (9)(A), or (10) of subsection (c), the agency shall maintain either such a transcript or recording, or a set of minutes. Such minutes shall fully and clearly describe all matters discussed and shall provide a full and accurate summary of any actions taken, and the reasons therefor, including a description of each of the views expressed on any item and the record of any rollcall vote (reflecting the vote of each member on the question). All documents considered in connection with any action shall be identified in such minutes.

(2) The agency shall make promptly available to the public, in a place easily accessible to the public, the transcript, electronic recording, or minutes (as required by paragraph (1)) of the discussion of any item on the agenda, or of any item of the testimony of any witness received at the meeting, except for such item or items of such discussion or testimony as the agency determines to contain information which may be withheld under subsection (c). Copies of such transcript, or minutes, or a transcription of such recording disclosing the identity of each speaker, shall be furnished to any person at the actual cost of duplication or transcription. The agency shall maintain a complete verbatim copy of the transcript, a complete copy of the minutes, or a complete electronic recording of each meeting, or portion of a meeting, closed to the public, for a period of at least two years after such meeting, or until one year after the conclusion of any agency proceeding with respect to which the meeting or portion was held, whichever occurs later.

(g) Each agency subject to the requirements of this section shall, within 180 days after the date of enactment of this section, following consultation with the Office of the Chairman of the Administrative Conference of the United States and published notice in the Federal Register of at least thirty days and opportunity for written comment by any person, promulgate regulations to implement the requirements of subsections (b) through (f) of this section. Any person may bring a proceeding in the United States District Court for the District of Columbia to require an agency to promulgate such regulations if such agency has not promulgated such regulations

within the time period specified herein. Subject to any limitations of time provided by law, any person may bring a proceeding in the United States Court of Appeals for the District of Columbia to set aside agency regulations issued pursuant to this subsection that are not in accord with the requirements of subsections (b) through (f) of this section and to require the promulgation of regulations that are in accord with such subsections.

(h)(1) The district courts of the United States shall have jurisdiction to enforce the requirements of subsections (b) through (f) of this section by declaratory judgment, injunctive relief, or other relief as may be appropriate. Such actions may be brought by any person against an agency prior to, or within sixty days after, the meeting out of which the violation of this section arises, except that if public announcement of such meeting is not initially provided by the agency in accordance with the requirements of this section, such action may be instituted pursuant to this section at any time prior to sixty days after any public announcement of such meeting. Such actions may be brought in the district court of the United States for the district in which the agency meeting is held or in which the agency in question has its headquarters, or in the District Court for the District of Columbia. In such actions a defendant shall serve his answer within thirty days after the service of the complaint. The burden is on the defendant to sustain his action. In deciding such cases the court may examine in camera any portion of the transcript, electronic recording, or minutes of a meeting closed to the public, and may take such additional evidence as it deems necessary. The court, having due regard for orderly administration and the public interest, as well as the interests of the parties, may grant such equitable relief as it deems appropriate, including granting an injunction against future violations of this section or ordering the agency to make available to the public such portion of the transcript, recording, or minutes of a meeting as is not authorized to be withheld under subsection (c) of this section.

(2) Any Federal court otherwise authorized by law to review agency action may, at the application of any person properly participating in the proceeding pursuant to other applicable law, inquire into violations by the agency of the requirements of this section and afford such relief as it deems appropriate. Nothing in this section authorizes any Federal court having jurisdiction solely on the basis of paragraph (1) to set aside, enjoin, or invalidate any agency action (other than an action to close a meeting or to withhold information under this section) taken or discussed at any agency meeting out of which the violation of this section arose.

(i) The court may assess against any party reasonable attorney fees and other litigation costs reasonably incurred by any other party who substantially prevails in any action brought in accordance with the provisions of subsection (g) or (h) of this section, except that costs may be assessed against the plaintiff only where the court finds that the suit was initiated by the plaintiff primarily for frivolous or dilatory purposes. In the case of assessment of costs against an agency, the costs may be assessed by the court against the United States.

(j) Each agency subject to the requirements of this section shall annually report to the Congress regarding the following:

(1) The changes in the policies and procedures of the agency under this section that have occurred during the preceding 1-year period.

(2) A tabulation of the number of meetings held, the exemptions applied to close meetings, and the days of public notice provided to close meetings.

(3) A brief description of litigation or formal complaints concerning the implementation of this section by the agency.

(4) A brief explanation of any changes in law that have affected the responsibilities of the agency under this section.

(k) Nothing herein expands or limits the present rights of any person under section 552 of this title, except that the exemptions set forth in subsection (c) of this section shall govern in the case of any request made pursuant to section 552 to copy or inspect the transcripts, recordings, or minutes described in subsection (f) of this section. The requirements of chapter 33 of title 44, United States Code, shall not apply to the transcripts, recordings, and minutes described in subsection (f) of this section.

(*l*) This section does not constitute authority to withhold any information from Congress, and does not authorize the closing of any agency meeting or portion thereof required by any other provision of law to be open.

(m) Nothing in this section authorizes any agency to withhold from any individual any record, including transcripts, recordings, or minutes required by this section, which is otherwise accessible to such individual under section 552a of this title.

(Added Pub. L. 94–409, § 3(a), Sept. 13, 1976, 90 Stat. 1241; amended Pub. L. 104–66, title III, § 3002, Dec. 21, 1995, 109 Stat. 734.)

References in Text

Section 552(e) of this title, referred to in subsec. (a)(1), was redesignated section 552(f) of this title by section 1802(b) of Pub. L. 99–570.

180 days after the date of enactment of this section, referred to in subsec. (g), means 180 days after the date of enactment of Pub. L. 94–409, which was approved Sept. 13, 1976.

Amendments

1995—Subsec. (j). Pub. L. 104–66 amended subsec. (j) generally. Prior to amendment, subsec. (j) read as follows: ''Each agency subject to the requirements of this section shall annually report to Congress regarding its compliance with such requirements, including a tabulation of the total number of agency meetings open to the public, the total number of meetings closed to the public, the reasons for closing such meetings, and a description of any litigation brought against the agency under this section, including any costs assessed against the agency in such litigation (whether or not paid by the agency).''

Effective Date

Pub. L. 94–409, § 6, Sept. 13, 1976, 90 Stat. 1248, provided that:

''(a) Except as provided in subsection (b) of this section, the provisions of this Act [see Short Title note set

out below] shall take effect 180 days after the date of its enactment [Sept. 13, 1976].

''(b) Subsection (g) of section 552b of title 5, United States Code, as added by section 3(a) of this Act, shall take effect upon enactment [Sept. 13, 1976].''

SHORT TITLE OF 1976 AMENDMENT

Pub. L. 94–409, §1, Sept. 13, 1976, 90 Stat. 1241, provided: ''That this Act [enacting this section, amending sections 551, 552, 556, and 557 of this title, section 10 of Pub. L. 92–463, set out in the Appendix to this title, and section 410 of Title 39, and enacting provisions set out as notes under this section] may be cited as the 'Government in the Sunshine Act'.''

TERMINATION OF REPORTING REQUIREMENTS

For termination, effective May 15, 2000, of provisions of law requiring submittal to Congress of any annual, semiannual, or other regular periodic report listed in House Document No. 103–7 (in which the report required by subsec. (j) of this section is listed on page 151), see section 3003 of Pub. L. 104–66, as amended, set out as a note under section 1113 of Title 31, Money and Finance.

TERMINATION OF ADMINISTRATIVE CONFERENCE OF UNITED STATES

For termination of Administrative Conference of United States, see provision of title IV of Pub. L. 104–52, set out as a note preceding section 591 of this title.

DECLARATION OF POLICY AND STATEMENT OF PURPOSE

Pub. L. 94–409, §2, Sept. 13, 1976, 90 Stat. 1241, provided that: ''It is hereby declared to be the policy of the United States that the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government. It is the purpose of this Act [see Short Title note set out above] to provide the public with such information while protecting the rights of individuals and the ability of the Government to carry out its responsibilities.''

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 383.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
....	5 U.S.C. 1003.	June 11, 1946, ch. 324, §4, 60 Stat. 238.

In subsection (a)(1), the words ''or naval'' are omitted as included in ''military''.

In subsection (b), the word ''when'' is substituted for ''in any situation in which''.

In subsection (c), the words ''for oral presentation'' are substituted for ''to present the same orally in any manner''. The words ''sections 556 and 557 of this title apply instead of this subsection'' are substituted for ''the requirements of sections 1006 and 1007 of this title shall apply in place of the provisions of this subsection''.

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

CODIFICATION

Section 553 of former Title 5, Executive Departments and Government Officers and Employees, was transferred to section 2245 of Title 7, Agriculture.

EXECUTIVE ORDER NO. 12044

Ex. Ord. No. 12044, Mar. 23, 1978, 43 F.R. 12661, as amended by Ex. Ord. No. 12221, June 27, 1980, 45 F.R. 44249, which related to the improvement of Federal regulations, was revoked by Ex. Ord. No. 12291, Feb. 17, 1981, 46 F.R. 13193, formerly set out as a note under section 601 of this title.

§ 554. Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

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Congress shall consider the amount of any funds received by the Commission in addition to those funds appropriated to it by the Congress.

(Pub. L. 86–380, § 9, as added Pub. L. 89–733, § 6, Nov. 2, 1966, 80 Stat. 1162.)

CODIFICATION

Section was formerly classified to section 2379 of Title 5 prior to the general revision and enactment of Title 5, Government Organization and Employees, by Pub. L. 89–554, § 1, Sept. 6, 1966, 80 Stat. 378.

CHAPTER 54—CABINET COMMITTEE ON OPPORTUNITIES FOR SPANISH-SPEAKING PEOPLE

§§ 4301 to 4312. Omitted

CODIFICATION

Sections 4301 to 4312 of this title, Pub. L. 91–181, §§ 1–12, Dec. 30, 1969, 83 Stat. 838, were omitted pursuant to section 4312 of this title which provided that Pub. L. 91–181 shall expire five years after Dec. 30, 1969.

Section 4301, Pub. L. 91–181, § 1, Dec. 30, 1969, 83 Stat. 838, related to Congressional declaration of purpose.

Section 4302, Pub. L. 91–181, § 2, Dec. 30, 1969, 83 Stat. 838, related to establishment of Cabinet Committee on Opportunities for Spanish-Speaking People, its composition, appointment of Chairman.

Section 4303, Pub. L. 91–181, § 3, Dec. 30, 1969, 83 Stat. 838, related to functions of Committee.

Section 4304, Pub. L. 91–181, § 4, Dec. 30, 1969, 83 Stat. 839, related to administrative powers of the Committee.

Section 4305, Pub. L. 91–181, § 5, Dec. 30, 1969, 83 Stat. 839, related to utilization of services and facilities of governmental agencies.

Section 4306, Pub. L. 91–181, § 6, Dec. 30, 1969, 83 Stat. 839, related to compensation of personnel and transfer of personnel from other Federal departments and agencies.

Section 4307, Pub. L. 91–181, § 7, Dec. 30, 1969, 83 Stat. 839, related to establishment of an Advisory Council on Spanish-Speaking Americans.

Section 4308, Pub. L. 91–181, § 8, Dec. 30, 1969, 83 Stat. 840, related to nonimpairment of existing powers of other Federal departments and agencies.

Section 4309, Pub. L. 91–181, § 9, Dec. 30, 1969, 93 Stat. 840, related to restrictions on political activities of Committee and Advisory Council.

Section 4310, Pub. L. 91–181, § 10, Dec. 30, 1969, 83 Stat. 840; Pub. L. 92–122, Aug. 16, 1971, 85 Stat. 342, related to authorization of appropriations.

Section 4311, Pub. L. 91–181, § 11, Dec. 30, 1969, 83 Stat. 840, related to submission of reports to the President and Congress.

Section 4312, Pub. L. 91–181, § 12, Dec. 30, 1969, 83 Stat. 840, provided that this chapter shall expire five years after Dec. 30, 1969.

CHAPTER 55—NATIONAL ENVIRONMENTAL POLICY

Sec.
4321. Congressional declaration of purpose.

SUBCHAPTER I—POLICIES AND GOALS

4331. Congressional declaration of national environmental policy.
4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts.
4332a. Accelerated decisionmaking in environmental reviews.
4333. Conformity of administrative procedures to national environmental policy.
4334. Other statutory obligations of agencies.
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SUBCHAPTER II—COUNCIL ON ENVIRONMENTAL QUALITY

4341. Omitted.
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4343. Employment of personnel, experts and consultants.
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SUBCHAPTER III—MISCELLANEOUS PROVISIONS

4361, 4361a. Repealed.
4361b. Implementation by Administrator of Environmental Protection Agency of recommendations of "CHESS" Investigative Report; waiver; inclusion of status of implementation requirements in annual revisions of plan for research, development, and demonstration.
4361c. Staff management.
4362. Interagency cooperation on prevention of environmental cancer and heart and lung disease.
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4363. Continuing and long-term environmental research and development.
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4364. Expenditure of funds for research and development related to regulatory program activities.
4365. Science Advisory Board.
4366. Identification and coordination of research, development, and demonstration activities.
4366a. Omitted.
4367. Reporting requirements of financial interests of officers and employees of Environmental Protection Agency.
4368. Grants to qualified citizens groups.
4368a. Utilization of talents of older Americans in projects of pollution prevention, abatement, and control.
4368b. General assistance program.
4369. Miscellaneous reports.
4369a. Reports on environmental research and development activities of Agency.
4370. Reimbursement for use of facilities.
4370a. Assistant Administrators of Environmental Protection Agency; appointment; duties.
4370b. Availability of fees and charges to carry out Agency programs.
4370c. Environmental Protection Agency fees.
4370d. Percentage of Federal funding for organizations owned by socially and economically disadvantaged individuals.
4370e. Working capital fund in Treasury.
4370f. Availability of funds after expiration of period for liquidating obligations.
4370g. Availability of funds for uniforms and certain services.
4370h. Availability of funds for facilities.

§ 4321. Congressional declaration of purpose

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will pre-

vent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

(Pub. L. 91–190, §2, Jan. 1, 1970, 83 Stat. 852.)

SHORT TITLE

Section 1 Pub. L. 91–190 provided: ''That this Act [enacting this chapter] may be cited as the 'National Environmental Policy Act of 1969'.''

TRANSFER OF FUNCTIONS

Enforcement functions of Secretary or other official in Department of the Interior related to compliance with system activities requiring coordination and approval under this chapter, and enforcement functions of Secretary or other official in Department of Agriculture, insofar as they involve lands and programs under jurisdiction of that Department, related to compliance with this chapter with respect to pre-construction, construction, and initial operation of transportation system for Canadian and Alaskan natural gas transferred to Federal Inspector, Office of Federal Inspector for Alaska Natural Gas Transportation System, until first anniversary of date of initial operation of Alaska Natural Gas Transportation System, see Reorg. Plan No. 1 of 1979, §§102(e), (f), 203(a), 44 F.R. 33663, 33666, 93 Stat. 1373, 1376, effective July 1, 1979, set out in the Appendix to Title 5, Government Organization and Employees. Office of Federal Inspector for the Alaska Natural Gas Transportation System abolished and functions and authority vested in Inspector transferred to Secretary of Energy by section 3012(b) of Pub. L. 102–486, set out as an Abolition of Office of Federal Inspector note under section 719e of Title 15, Commerce and Trade. Functions and authority vested in Secretary of Energy subsequently transferred to Federal Coordinator for Alaska Natural Gas Transportation Projects by section 720d(f) of Title 15.

EMERGENCY PREPAREDNESS FUNCTIONS

For assignment of certain emergency preparedness functions to Administrator of Environmental Protection Agency, see Parts 1, 2, and 16 of Ex. Ord. No. 12656, Nov. 18, 1988, 53 F.R. 47491, set out as a note under section 5195 of this title.

ENVIRONMENTAL PROTECTION AGENCY HEADQUARTERS

Pub. L. 112–237, §2, Dec. 28, 2012, 126 Stat. 1628, provided that:

''(a) *Redesignation*.—The Environmental Protection Agency Headquarters located at 1200 Pennsylvania Avenue N.W. in Washington, D.C., known as the Ariel Rios Building, shall be known and redesignated as the 'William Jefferson Clinton Federal Building'.

''(b) *References*.—Any reference in a law, map, regulation, document, paper, or other record of the United States to the Environmental Protection Agency Headquarters referred to in subsection (a) shall be deemed to be a reference to the 'William Jefferson Clinton Federal Building'.''

MODIFICATION OR REPLACEMENT OF EXECUTIVE ORDER NO. 13423

Pub. L. 111–117, div. C, title VII, §742(b), Dec. 16, 2009, 123 Stat. 3216, provided that: ''Hereafter, the President may modify or replace Executive Order No. 13423 [set out as a note under this section] if the President determines that a revised or new executive order will achieve equal or better environmental or energy efficiency results.''

Pub. L. 111–8, div. D, title VII, §748, Mar. 11, 2009, 123 Stat. 693, which provided that Ex. Ord. No. 13423 (set out as a note under this section) would remain in effect on and after Mar. 11, 2009, except as otherwise provided by law after Mar. 11, 2009, was repealed by Pub. L. 111–117, div. C, title VII, §742(a), Dec. 16, 2009, 123 Stat. 3216.

NECESSITY OF MILITARY LOW-LEVEL FLIGHT TRAINING TO PROTECT NATIONAL SECURITY AND ENHANCE MILITARY READINESS

Pub. L. 106–398, §1 [[div. A], title III, §317], Oct. 30, 2000, 114 Stat. 1654, 1654A–57, provided that: ''Nothing in the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) or the regulations implementing such law shall require the Secretary of Defense or the Secretary of a military department to prepare a programmatic, nation-wide environmental impact statement for low-level flight training as a precondition to the use by the Armed Forces of an airspace for the performance of low-level training flights.''

POLLUTION PROSECUTION

Pub. L. 101–593, title II, Nov. 16, 1990, 104 Stat. 2962, provided that:

''SEC. 201. SHORT TITLE.

''This title may be cited as the 'Pollution Prosecution Act of 1990'.

''SEC. 202. EPA OFFICE OF CRIMINAL INVESTIGATION.

''(a) The Administrator of the Environmental Protection Agency (hereinafter referred to as the 'Administrator') shall increase the number of criminal investigators assigned to the Office of Criminal Investigations by such numbers as may be necessary to assure that the number of criminal investigators assigned to the office—

''(1) for the period October 1, 1991, through September 30, 1992, is not less than 72;

''(2) for the period October 1, 1992, through September 30, 1993, is not less than 110;

''(3) for the period October 1, 1993, through September 30, 1994, is not less than 123;

''(4) for the period October 1, 1994, through September 30, 1995, is not less than 160;

''(5) beginning October 1, 1995, is not less than 200.

''(b) For fiscal year 1991 and in each of the following 4 fiscal years, the Administrator shall, during each such fiscal year, provide increasing numbers of additional support staff to the Office of Criminal Investigations.

''(c) The head of the Office of Criminal Investigations shall be a position in the competitive service as defined in 2102 of title 5 U.S.C. or a career reserve [reserved] position as defined in 3132(A) [3132(a)] of title 5 U.S.C. and the head of such office shall report directly, without intervening review or approval, to the Assistant Administrator for Enforcement.

''SEC. 203. CIVIL INVESTIGATORS.

''The Administrator, as soon as practicable following the date of the enactment of this Act [Nov. 16, 1990], but no later than September 30, 1991, shall increase by fifty the number of civil investigators assigned to assist the Office of Enforcement in developing and prosecuting civil and administrative actions and carrying out its other functions.

''SEC. 204. NATIONAL TRAINING INSTITUTE.

''The Administrator shall, as soon as practicable but no later than September 30, 1991 establish within the Office of Enforcement the National Enforcement Training Institute. It shall be the function of the Institute, among others, to train Federal, State, and local lawyers, inspectors, civil and criminal investigators, and technical experts in the enforcement of the Nation's environmental laws.

''SEC. 205. AUTHORIZATION.

''For the purposes of carrying out the provisions of this Act [probably should be ''this title''], there is authorized to be appropriated to the Environmental Protection Agency $13,000,000 for fiscal year 1991, $18,000,000

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maintain, wherever possible, an environment which supports diversity and variety of individual choice;

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

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

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

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

COMMISSION ON POPULATION GROWTH AND THE AMERICAN FUTURE

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

EXECUTIVE ORDER NO. 11507

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

EXECUTIVE ORDER NO. 11752

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

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

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

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

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

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

(i) the environmental impact of the proposed action,

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

(iii) alternatives to the proposed action,

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

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

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

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

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

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

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717e. Ascertainment of cost of property.
717f. Construction, extension, or abandonment of facilities.
717g. Accounts; records; memoranda.
717h. Rates of depreciation.
717i. Periodic and special reports.
717j. State compacts for conservation, transportation, etc., of natural gas.
717k. Officials dealing in securities.
717*l*. Complaints.
717m. Investigations by Commission.
717n. Process coordination; hearings; rules of procedure.
717*o*. Administrative powers of Commission; rules, regulations, and orders.
717p. Joint boards.
717q. Appointment of officers and employees.
717r. Rehearing and review.
717s. Enforcement of chapter.
717t. General penalties.
717t–1. Civil penalty authority.
717t–2. Natural gas market transparency rules.
717u. Jurisdiction of offenses; enforcement of liabilities and duties.
717v. Separability.
717w. Short title.
717x. Conserved natural gas.
717y. Voluntary conversion of natural gas users to heavy fuel oil.
717z. Emergency conversion of utilities and other facilities.

§ 717. Regulation of natural gas companies

(a) Necessity of regulation in public interest

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

(b) Transactions to which provisions of chapter applicable

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

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

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

(d) Vehicular natural gas jurisdiction

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

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

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

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

AMENDMENTS

2005—Subsec. (b). Pub. L. 109–58 inserted "and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation," after "such transportation or sale,".

1992—Subsec. (d). Pub. L. 102–486 added subsec. (d).

1954—Subsec. (c). Act Mar. 27, 1954, added subsec. (c).

TERMINATION OF FEDERAL POWER COMMISSION; TRANSFER OF FUNCTIONS

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

STATE LAWS AND REGULATIONS

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

"(1) in closed containers; or

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

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

EMERGENCY NATURAL GAS ACT OF 1977

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

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therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation and the fair value of such property.

(b) Inventory of property; statements of costs

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

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

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

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

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

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

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

(c) Certificate of public convenience and necessity

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

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

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

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

(B) natural gas produced by such person.

(d) Application for certificate of public convenience and necessity

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

(e) Granting of certificate of public convenience and necessity

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

have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

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

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

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

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

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

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

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

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

AMENDMENTS

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

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

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

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

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

EFFECTIVE DATE OF 1988 AMENDMENT

Pub. L. 100–474, §3, Oct. 6, 1988, 102 Stat. 2302, provided that: ‘‘The provisions of this Act [amending this sec-tion and enacting provisions set out as a note under section 717w of this title] shall become effective one hundred and twenty days after the date of enactment [Oct. 6, 1988].’’

TRANSFER OF FUNCTIONS

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

§ 717g. Accounts; records; memoranda

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

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

(b) Access to and inspection of accounts and records

The Commission shall at all times have access to and the right to inspect and examine all ac-

Subpart C [Reserved]

Subpart D—Exemption of Natural Gas Service for Drilling, Testing, or Purging from Certificate Requirements

157.53 Testing.

Subpart E [Reserved]

Subpart F—Interstate Pipeline Blanket Certificates and Authorization Under Section 7 of the Natural Gas Act for Certain Transactions and Abandonment

157.201 Applicability.
157.202 Definitions.
157.203 Blanket certification.
157.204 Application procedure.
157.205 Notice procedure.
157.206 Standard conditions.
157.207 General reporting requirements.
157.208 Construction, acquisition, operation, replacement, and miscellaneous rearrangement of facilities.
157.209 Temporary compression facilities.
157.210 Mainline natural gas facilities.
157.211 Delivery points.
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157.213 Underground storage field facilities.
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157.215 Underground storage testing and development.
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157.217 Changes in rate schedules.
157.218 Changes in customer name.
APPENDIX I TO SUBPART F—PROCEDURES FOR COMPLIANCE WITH THE ENDANGERED SPECIES ACT OF 1973 UNDER §157.206(b)(3)(i)
APPENDIX II TO SUBPART F—PROCEDURES FOR COMPLIANCE WITH THE NATIONAL HISTORIC PRESERVATION ACT OF 1966 UNDER §157.206(b)(3)(ii)

Subpart G—Natural Gas Producer Blanket Authorization for Sales and Abandonment [Reserved]

AUTHORITY: 15 U.S.C. 717–717z.

Subpart A—Applications for Certificates of Public Convenience and Necessity and for Orders Permitting and Approving Abandonment under Section 7 of the Natural Gas Act, as Amended, Concerning Any Operation, Sales, Service, Construction, Extension, Acquisition or Abandonment

§157.1 Definitions.

For the purposes of this part—

For the purposes of §157.21 of this part, *Director* means the Director of the Commission's Office of Energy Projects.

Indian tribe means, in reference to a proposal or application for a certificate or abandonment, an Indian tribe which is recognized by treaty with the United States, by federal statute, or by the U.S. Department of the Interior in its periodic listing of tribal governments in the FEDERAL REGISTER in accordance with 25 CFR 83.6(b), and whose legal rights as a tribe may be affected by the proposed construction, operation or abandonment of facilities or services (as where the construction or operation of the proposed facilities could interfere with the tribe's hunting or fishing rights or where the proposed facilities would be located within the tribe's reservation).

Resource agency means a Federal, state, or interstate agency exercising administration over the areas of recreation, fish and wildlife, water resource management, or cultural or other relevant resources of the state or states in which the facilities or services for which a certificate or abandonment is proposed are or will be located.

[Order 608, 64 FR 51220, Sept. 22, 1999, as amended by Order 665, 70 FR 60440, Oct. 18, 2005]

§ 157.5 Purpose and intent of rules.

(a) Applications under section 7 of the Natural Gas Act shall set forth all information necessary to advise the

Commission fully concerning the operation, sales, service, construction, extension, or acquisition for which a certificate is requested or the abandonment for which permission and approval is requested. Some applications may be of such character that an abbreviated application may be justified under the provisions of § 157.7. Applications for permission and approval to abandon pursuant to section 7(b) of the Act shall conform to § 157.18 and to such other requirements of this part as may be pertinent. However, every applicant shall file all pertinent data and information necessary for a full and complete understanding of the proposed project, including its effect upon applicant's present and future operations and whether, and at what docket, applicant has previously applied for authorization to serve any portion of the market contemplated by the proposed project and the nature and disposition of such other project.

(b) Every requirement of this part shall be considered as a forthright obligation of the applicant which can only be avoided by a definite and positive showing that the information or data called for by the applicable rules is not necessary for the consideration and ultimate determination of the application.

(c) This part will be strictly applied to all applications as submitted and the burden of adequate presentation in intelligible form as well as justification for omitted data or information rests with the applicant.

[17 FR 7386, Aug. 14, 1952, as amended by Order 280, 29 FR 4876, Apr. 7, 1964]

§ 157.6 Applications; general requirements.

(a) *Applicable rules*—(1) *Submission required to be furnished by applicant under this subpart.* Applications, amendments thereto, and all exhibits and other submissions required to be furnished by an applicant to the Commission under this subpart must be submitted in an original and 7 conformed copies. To the extent that data required under this subpart has been provided to the Commission, this data need not be duplicated. The applicant must, however, include a statement identifying the forms and records containing the required information and when that form or record was submitted.

(2) *Maps and diagrams.* An applicant required to submit a map or diagram under this subpart must submit one paper copy of the map or diagram.

(3) The following must be submitted in electronic format as prescribed by the Commission:

(i) Applications filed under this part 157 and all attached exhibits;

(ii) Applications covering acquisitions and all attached exhibits;

(iii) Applications for temporary certificates and all attached exhibits;

(iv) Applications to abandon facilities or services and all attached exhibits;

(v) The progress reports required under § 157.20(c) and (d);

(vi) Applications submitted under subpart E of this part and all attached exhibits;

(vii) Applications submitted under subpart F of this part and all attached exhibits;

(viii) Requests for authorization under the notice procedures established in § 157.205 and all attached exhibits;

(ix) The annual report required by § 157.207;

(x) The report required under § 157.214 when storage capacity is increased;

(xi) Amendments to any of the foregoing.

(4) All filings must be signed in compliance with the following.

(i) The signature on a filing constitutes a certification that: The signer has read the filing signed and knows the contents of the paper copies and electronic filing; the paper copies contain the same information as contained in the electronic filing; the contents as stated in the copies and in the electronic filing are true to the best knowledge and belief of the signer; and the signer possesses full power and authority to sign the filing.

(ii) A filing must be signed by one of the following:

(A) The person on behalf of whom the filing is made;

(B) An officer, agent, or employee of the governmental authority, agency, or instrumentality on behalf of which the filing is made; or,

(C) A representative qualified to practice before the Commission under

§ 385.2101 of this chapter who possesses authority to sign.

(5) *Other requirements.* Applications under section 7 of the Natural Gas Act must conform to the requirements of §§ 157.5 through 157.14. Amendments to or withdrawals of applications must conform to the requirements of §§ 385.215 and 385.216 of this chapter. If the application involves an acquisition of facilities, it must conform to the additional requirements prescribed in §§ 157.15 and 157.16. If the application involves an abandonment of facilities or service, it must conform to the additional requirements prescribed in § 157.18.

(b) *General content of application.* Each application filed other than an application for permission and approval to abandon pursuant to section 7(b) shall set forth the following information:

(1) The exact legal name of applicant; its principal place of business; whether an individual, partnership, corporation, or otherwise; State under the laws of which organized or authorized; and the name, title, and mailing address of the person or persons to whom communications concerning the application are to be addressed.

(2) The facts relied upon by applicant to show that the proposed service, sale, operation, construction, extension, or acquisition is or will be required by the present or future public convenience and necessity.

(3) A concise description of applicant's existing operations.

(4) A concise description of the proposed service, sale, operation, construction, extension, or acquisition, including the proposed dates for the beginning and completion of construction, the commencement of operations and of acquisition, where involved.

(5) A full statement as to whether any other application to supplement or effectuate applicant's proposals must be or is to be filed by applicant, any of applicant's customers, or any other person, with any other Federal, State, or other regulatory body; and if so, the nature and status of each such application.

(6) A table of contents which shall list all exhibits and documents filed in compliance with §§ 157.5 through 157.18, as well as all other documents and exhibits otherwise filed, identifying them by their appropriate titles and alphabetical letter designations. The alphabetical letter designations specified in §§ 157.14, 157.16, and 157.18 must be strictly adhered to and extra exhibits submitted at the volition of applicant shall be designated in sequence under the letter Z (Z1, Z2, Z3, etc.).

(7) A form of notice of the application suitable for publication in the FEDERAL REGISTER in accordance with the specifications in § 385.203(d) of this chapter.

(8) For applications to construct new facilities, detailed cost-of-service data supporting the cost of the expansion project, a detailed study showing the revenue responsibility for each firm rate schedule under the pipeline's currently effective rate design and under the pipeline's proposed rates, a detailed rate impact analysis by rate schedule (including by zone, if applicable), and an analysis reflecting the impact of the fuel usage resulting from the proposed expansion project (including by zone, if applicable).

(c) *Requests for shortened procedure.* If shortened procedure is desired a request therefor shall be made in conformity with § 385.802 of this chapter and may be included in the application or filed separately.

(d) *Landowner notification.* (1) For all applications filed under this subpart which include construction of facilities or abandonment of facilities (except for abandonment by sale or transfer where the easement will continue to be used for transportation of natural gas), the applicant shall make a good faith effort to notify all affected landowners and towns, communities, and local, state and federal governments and agencies involved in the project:

(i) By certified or first class mail, sent within 3 business days following the date the Commission issues a notice of the application; or

(ii) By hand, within the same time period; and

(iii) By publishing notice twice of the filing of the application, no later than 14 days after the date that a docket number is assigned to the application, in a daily or weekly newspaper of general circulation in each county in which the project is located.

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(2) All affected landowners includes owners of property interests, as noted in the most recent county/city tax records as receiving the tax notice, whose property:

(i) Is directly affected (*i.e.*, crossed or used) by the proposed activity, including all facility sites (including compressor stations, well sites, and all above-ground facilities), rights of way, access roads, pipe and contractor yards, and temporary workspace;

(ii) Abuts either side of an existing right-of-way or facility site owned in fee by any utility company, or abuts the edge of a proposed facility site or right-of-way which runs along a property line in the area in which the facilities would be constructed, or contains a residence within 50 feet of the proposed construction work area;

(iii) Is within one-half mile of proposed compressors or their enclosures or LNG facilities; or

(iv) Is within the area of proposed new storage fields or proposed expansions of storage fields, including any applicable buffer zone.

(3) The notice shall include:

(i) The docket number of the filing;

(ii) The most recent edition of the Commission's pamphlet that explains the Commission's certificate process and addresses the basic concerns of landowners. Except: pipelines are not required to include the pamphlet in notifications of abandonments or in the published newspaper notice. Instead, they should provide the title of the pamphlet and indicate its availability at the Commission's Internet address;

(iii) A description of the applicant and the proposed project, its location (including a general location map), its purpose, and the timing of the project;

(iv) A general description of what the applicant will need from the landowner if the project is approved, and how the landowner may contact the applicant, including a local or toll-free phone number and a name of a specific person to contact who is knowledgeable about the project;

(v) A brief summary of what rights the landowner has at the Commission and in proceedings under the eminent domain rules of the relevant state. Except: pipelines are not required to include this information in the published newspaper notice. Instead, the newspaper notice should provide the Commission's Internet address and the telephone number for the Commission's Office of External Affairs; and

(vi) Information on how the landowner can get a copy of the application from the company or the location(s) where a copy of the application may be found as specified in § 157.10.

(vii) A copy of the Commission's notice of application, specifically stating the date by which timely motions to intervene are due, together with the Commission's information sheet on how to intervene in Commission proceedings. Except: pipelines are not required to include the notice of application and information sheet in the published newspaper notice. Instead, the newspaper notice should indicate that a separate notice is to be mailed to affected landowners and governmental entities.

(4) If the notice is returned as undeliverable, the applicant will make a reasonable attempt to find the correct address and notify the landowner.

(5) Within 30 days of the date the application was filed, applicant shall file an updated list of affected landowners, including information concerning notices that were returned as undeliverable.

(6) If paragraph (d)(3) of this section requires an applicant to reveal Critical Energy Infrastructure Information (CEII), as defined by § 388.113(c) of this chapter, to any person, the applicant shall follow the procedures set out in § 157.10(d).

[17 FR 7386, Aug. 14, 1952]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 157.6, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.fdsys.gov*.

§ 157.7 Abbreviated applications.

(a) *General.* When the operations sales, service, construction, extensions, acquisitions or abandonment proposed by an application do not require all the data and information specified by this part to disclose fully the nature and extent of the proposed undertaking, an abbreviated application may be filed in the manner prescribed in § 385.2011 of this chapter, provided it contains all

statement showing, on the basis of all costs incurred to that date and estimated to be incurred for final completion of the project, the cost of constructing authorized facilities, such total costs to be classified according to the estimates submitted in the certificate proceeding and compared therewith and any significant differences explained.

(d) With respect to an acquisition authorized by the certificate, applicant must file with the Commission, in writing and under oath, an original and four conformed copies as prescribed in §385.2011 of this chapter the following:

(1) Within 10 days after acquisition and the beginning of authorized operations, notice of the dates of acquisition and the beginning of operations; and

(2) Within 10 days after authorized facilities have been constructed and within 10 days after such facilities have been placed in service or any authorized operation, sale, or service has commenced, notice of the date of such completion, placement, and commencement, and

(e) The certificate issued to applicant is not transferable in any manner and shall be effective only so long as applicant continues the operations authorized by the order issuing such certificate and in accordance with the provisions of the Natural Gas Act, as well as applicable rules, regulations, and orders of the Commission.

(f) In the interest of safety and reliability of service, facilities authorized by the certificate shall not be operated at pressures exceeding the maximum operating pressure set forth in Exhibit G-II to the application as it may be amended prior to issuance of the certificate. In the event the applicant thereafter wishes to change such maximum operating pressure it shall file an appropriate petition for amendment of the certificate. Such petition shall include the reasons for the proposed change. Nothing contained herein authorizes a natural gas company to operate any facility at a pressure above the maximum prescribed by state law, if such law requires a lower pressure than authorized hereby.

(Sec. 20, 52 Stat. 832; 15 U.S.C. 717s)

[17 FR 7389, Aug. 14, 1952, as amended by Order 280, 29 FR 4879, Apr. 7, 1964; Order 317, 31 FR 432, Jan. 13, 1966; Order 324, 31 FR 9348, July 8, 1966; Order 493, 53 FR 15030, Apr. 27, 1988; Order 493–B, 53 FR 49653, Dec. 9, 1988; Order 603, 64 FR 26606, May 14, 1999]

§ 157.21 Pre-filing procedures and review process for LNG terminal facilities and other natural gas facilities prior to filing of applications.

(a) *LNG terminal facilities and related jurisdictional natural gas facilities.* A prospective applicant for authorization to site, construct and operate facilities included within the definition of ''LNG terminal,'' as defined in §153.2(d), and any prospective applicant for related jurisdictional natural gas facilities must comply with this section's pre-filing procedures and review process. These mandatory pre-filing procedures also shall apply when the Director finds in accordance with paragraph (e)(2) of this section that prospective modifications to an existing LNG terminal are modifications that involve significant state and local safety considerations that have not been previously addressed. Examples of such modifications include, but are not limited to, the addition of LNG storage tanks; increasing throughput requiring additional tanker arrivals or the use of larger vessels; or changing the purpose of the facility from peaking to base load. When a prospective applicant is required by this paragraph to comply with this section's pre-filing procedures:

(1) The prospective applicant must make a filing containing the material identified in paragraph (d) of this section and concurrently file a Letter of Intent pursuant to 33 CFR 127.007, and a Preliminary Waterway Suitability Assessment (WSA) with the U.S. Coast Guard (Captain of the Port/Federal Maritime Security Coordinator). The latest information concerning the documents to be filed with the Coast Guard should be requested from the U.S. Coast Guard. For modifications to an existing or approved LNG terminal, this requirement can be satisfied by the prospective applicant's certifying

that the U.S. Coast Guard did not require such information.

(2) An application:

(i) Shall not be filed until at least 180 days after the date that the Director issues notice pursuant to paragraph (e) of this section of the commencement of the prospective applicant's pre-filing process; and

(ii) Shall contain all the information specified by the Commission staff after reviewing the draft materials filed by the prospective applicant during the pre-filing process, including required environmental material in accordance with the provisions of part 380 of this chapter, ''Regulations Implementing the National Environmental Policy Act.''

(3) The prospective applicant must provide sufficient information for the pre-filing review of any pipeline or other natural gas facilities, including facilities not subject to the Commission's Natural Gas Act jurisdiction, which are necessary to transport regassified LNG from the subject LNG terminal facilities to the existing natural gas pipeline infrastructure.

(b) *Other natural gas facilities.* When a prospective applicant for authorization for natural gas facilities is not required by paragraph (a) of this section to comply with this section's pre-filing procedures, the prospective applicant may file a request seeking approval to use the pre-filing procedures.

(1) A request to use the pre-filing procedures must contain the material identified in paragraph (d) of this section unless otherwise specified by the Director as a result of the Initial Consultation required pursuant to paragraph (c) of this subsection; and

(2) If a prospective applicant for non-LNG terminal facilities is approved to use this section's pre-filing procedures:

(i) The application will normally not be filed until at least 180 days after the date that the Director issues notice pursuant to paragraph (e)(3) of this section approving the prospective applicant's request to use the pre-filing procedures under this section and commencing the prospective applicant's pre-filing process. However, a prospective applicant approved by the Director pursuant to paragraph (e)(3) of this section to undertake the pre-filing process is not prohibited from filing an application at an earlier date, if necessary; and

(ii) The application shall contain all the information specified by the Commission staff after reviewing the draft materials filed by the prospective applicant during the pre-filing process, including required environmental material in accordance with the provisions of part 380 of this chapter, ''Regulations Implementing the National Environmental Policy Act.''

(c) *Initial consultation.* A prospective applicant required or potentially required or requesting to use the pre-filing process must first consult with the Director on the nature of the project, the content of the pre-filing request, and the status of the prospective applicant's progress toward obtaining the information required for the pre-filing request described in paragraph (d) of this section. This consultation will also include discussion of the specifications for the applicant's solicitation for prospective third-party contractors to prepare the environmental documentation for the project, and whether a third-party contractor is likely to be needed for the project.

(d) *Contents of the initial filing.* A prospective applicant's initial filing pursuant to paragraph (a)(1) of the section for LNG terminal facilities and related jurisdictional natural gas facilities or paragraph (b)(1) of this section for other natural gas facilities shall include the following information:

(1) A description of the schedule desired for the project including the expected application filing date and the desired date for Commission approval.

(2) For LNG terminal facilities, a description of the zoning and availability of the proposed site and marine facility location.

(3) For natural gas facilities other than LNG terminal facilities and related jurisdictional natural gas facilities, an explanation of why the prospective applicant is requesting to use the pre-filing process under this section.

(4) A detailed description of the project, including location maps and plot plans to scale showing all major plant components, that will serve as

§ 1501.2 Apply NEPA early in the process.

Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts. Each agency shall:

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

(b) Identify environmental effects and values in adequate detail so they can be compared to economic and technical analyses. Environmental documents and appropriate analyses shall be circulated and reviewed at the same time as other planning documents.

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

(d) Provide for cases where actions are planned by private applicants or other non-Federal entities before Federal involvement so that:

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

(2) The Federal agency consults early with appropriate State and local agencies and Indian tribes and with interested private persons and organizations when its own involvement is reasonably foreseeable.

(3) The Federal agency commences its NEPA process at the earliest possible time.

§ 1501.3 When to prepare an environmental assessment.

(a) Agencies shall prepare an environmental assessment (§ 1508.9) when necessary under the procedures adopted by individual agencies to supplement these regulations as described in § 1507.3. An assessment is not necessary if the agency has decided to prepare an environmental impact statement.

(b) Agencies may prepare an environmental assessment on any action at any time in order to assist agency planning and decisionmaking.

§ 1501.4 Whether to prepare an environmental impact statement.

In determining whether to prepare an environmental impact statement the Federal agency shall:

(a) Determine under its procedures supplementing these regulations (described in § 1507.3) whether the proposal is one which:

(1) Normally requires an environmental impact statement, or

(2) Normally does not require either an environmental impact statement or an environmental assessment (categorical exclusion).

(b) If the proposed action is not covered by paragraph (a) of this section, prepare an environmental assessment (§ 1508.9). The agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments required by § 1508.9(a)(1).

(c) Based on the environmental assessment make its determination whether to prepare an environmental impact statement.

(d) Commence the scoping process (§ 1501.7), if the agency will prepare an environmental impact statement.

(e) Prepare a finding of no significant impact (§ 1508.13), if the agency determines on the basis of the environmental assessment not to prepare a statement.

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

(2) In certain limited circumstances, which the agency may cover in its procedures under § 1507.3, the agency shall make the finding of no significant impact available for public review (including State and areawide clearinghouses) for 30 days before the agency makes its final determination whether to prepare an environmental impact statement and before the action may begin. The circumstances are:

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

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

§ 1501.5 Lead agencies.

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

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

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

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

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

(1) Magnitude of agency's involvement.

(2) Project approval/disapproval authority.

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

(4) Duration of agency's involvement.

(5) Sequence of agency's involvement.

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

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

A copy of the request shall be transmitted to each potential lead agency. The request shall consist of:

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

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

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

[43 FR 55992, Nov. 29, 1978; 44 FR 873, Jan. 3, 1979]

§ 1501.6 Cooperating agencies.

The purpose of this section is to emphasize agency cooperation early in the NEPA process. Upon request of the lead agency, any other Federal agency which has jurisdiction by law shall be a cooperating agency. In addition any other Federal agency which has special expertise with respect to any environmental issue, which should be addressed in the statement may be a cooperating agency upon request of the lead agency. An agency may request the lead agency to designate it a cooperating agency.

(a) The lead agency shall:

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

(2) Use the environmental analysis and proposals of cooperating agencies with jurisdiction by law or special expertise, to the maximum extent possible consistent with its responsibility as lead agency.

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

(b) Each cooperating agency shall:

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

§ 1508.6 Council.

Council means the Council on Environmental Quality established by title II of the Act.

§ 1508.7 Cumulative impact.

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

§ 1508.8 Effects.

Effects include:

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

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

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

§ 1508.9 Environmental assessment.

Environmental assessment:

(a) Means a concise public document for which a Federal agency is responsible that serves to:

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

(2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.

(3) Facilitate preparation of a statement when one is necessary.

(b) Shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

§ 1508.10 Environmental document.

Environmental document includes the documents specified in § 1508.9 (environmental assessment), § 1508.11 (environmental impact statement), § 1508.13 (finding of no significant impact), and § 1508.22 (notice of intent).

§ 1508.11 Environmental impact statement.

Environmental impact statement means a detailed written statement as required by section 102(2)(C) of the Act.

§ 1508.12 Federal agency.

Federal agency means all agencies of the Federal Government. It does not mean the Congress, the Judiciary, or the President, including the performance of staff functions for the President in his Executive Office. It also includes for purposes of these regulations States and units of general local government and Indian tribes assuming NEPA responsibilities under section 104(h) of the Housing and Community Development Act of 1974.

§ 1508.13 Finding of no significant impact.

Finding of no significant impact means a document by a Federal agency briefly presenting the reasons why an action, not otherwise excluded (§ 1508.4), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents re-lated to it (§ 1501.7(a)(5)). If the assess-ment is included, the finding need not

§ 46.415 Environmental impact statement content, alternatives, circulation and filing requirements.

The Responsible Official may use any environmental impact statement format and design as long as the statement is in accordance with 40 CFR 1502.10.

(a) *Contents.* The environmental impact statement shall disclose:

(1) A statement of the purpose and need for the action;

(2) A description of the proposed action;

(3) The environmental impact of the proposed action;

(4) A brief description of the affected environment;

(5) Any adverse environmental effects which cannot be avoided should the proposal be implemented;

(6) Alternatives to the proposed action;

(7) The relationship between local short-term uses of the human environment and the maintenance and enhancement of long-term productivity;

(8) Any irreversible or irretrievable commitments of resources which would be involved in the proposed action should it be implemented; and

(9) The process used to coordinate with other Federal agencies, State, tribal and local governments, and persons or organizations who may be interested or affected, and the results thereof.

(b) *Alternatives.* The environmental impact statement shall document the examination of the range of alternatives (paragraph 46.420(c)). The range of alternatives includes those reasonable alternatives (paragraph 46.420(b)) that meet the purpose and need of the proposed action, and address one or more significant issues (40 CFR 1501.7(a)(2–3)) related to the proposed action. Since an alternative may be developed to address more than one significant issue, no specific number of alternatives is required or prescribed. In addition to the requirements in 40 CFR 1502.14, the Responsible Official has an option to use the following procedures to develop and analyze alternatives.

(1) The analysis of the effects of the no-action alternative may be documented by contrasting the current condition and expected future condition should the proposed action not be undertaken with the impacts of the proposed action and any reasonable alternatives.

(2) The Responsible Official may collaborate with those persons or organization that may be interested or affected to modify a proposed action and alternative(s) under consideration prior to issuing a draft environmental impact statement. In such cases the Responsible Official may consider these modifications as alternatives considered. Before engaging in any collaborative processes, the Responsible Official must consider the Federal Advisory Committee Act (FACA) implications of such processes.

(3) A proposed action or alternative(s) may include adaptive management strategies allowing for adjustment of the action during implementation. If the adjustments to an action are clearly articulated and pre-specified in the description of the alternative and fully analyzed, then the action may be adjusted during implementation without the need for further analysis. Adaptive management includes a monitoring component, approved adaptive actions that may be taken, and environmental effects analysis for the adaptive actions approved.

(c) *Circulating and filing draft and final environmental impact statements.* (1) The draft and final environmental impact statements shall be filed with the Environmental Protection Agency's Office of Federal Activities in Washington, DC (40 CFR 1506.9).

(2) Requirements at 40 CFR 1506.9 ''Filing requirements,'' 40 CFR 1506.10 ''Timing of agency action,'' 40 CFR 1502.9 ''Draft, final, and supplemental statements,'' and 40 CFR 1502.19 ''Circulation of the environmental impact statement'' shall only apply to draft, final, and supplemental environmental impact statements that are filed with EPA.

§ 46.420 Terms used in an environmental impact statement.

The following terms are commonly used to describe concepts or activities in an environmental impact statement:

(a) *Statement of purpose and need.* In accordance with 40 CFR 1502.13, the statement of purpose and need briefly

indicates the underlying purpose and need to which the bureau is responding.

(1) In some instances it may be appropriate for the bureau to describe its ''purpose'' and its ''need'' as distinct aspects. The ''need'' for the action may be described as the underlying problem or opportunity to which the agency is responding with the action. The ''purpose'' may refer to the goal or objective that the bureau is trying to achieve, and should be stated to the extent possible, in terms of desired outcomes.

(2) When a bureau is asked to approve an application or permit, the bureau should consider the needs and goals of the parties involved in the application or permit as well as the public interest. The needs and goals of the parties involved in the application or permit may be described as background information. However, this description must not be confused with the bureau's purpose and need for action. It is the bureau's purpose and need for action that will determine the range of alternatives and provide a basis for the selection of an alternative in a decision.

(b) *Reasonable alternatives*. In addition to the requirements of 40 CFR 1502.14, this term includes alternatives that are technically and economically practical or feasible and meet the purpose and need of the proposed action.

(c) *Range of alternatives*. This term includes all reasonable alternatives, or when there are potentially a very large number of alternatives then a reasonable number of examples covering the full spectrum of reasonable alternatives, each of which must be rigorously explored and objectively evaluated, as well as those other alternatives that are eliminated from detailed study with a brief discussion of the reasons for eliminating them. 40 CFR 1502.14. The Responsible Official must not consider alternatives beyond the range of alternatives discussed in the relevant environmental documents, but may select elements from several alternatives discussed. Moreover, the Responsible Official must, in fact, consider all the alternatives discussed in an environmental impact statement. 40 CFR 1505.1 (e).

(d) *Preferred alternative*. This term refers to the alternative which the bureau believes would best accomplish the purpose and need of the proposed action while fulfilling its statutory mission and responsibilities, giving consideration to economic, environmental, technical, and other factors. It may or may not be the same as the bureau's proposed action, the non-Federal entity's proposal or the environmentally preferable alternative.

§46.425 Identification of the preferred alternative in an environmental impact statement.

(a) Unless another law prohibits the expression of a preference, the draft environmental impact statement should identify the bureau's preferred alternative or alternatives, if one or more exists.

(b) Unless another law prohibits the expression of a preference, the final environmental impact statement must identify the bureau's preferred alternative.

§46.430 Environmental review and consultation requirements.

(a) Any environmental impact statement that also addresses other environmental review and consultation requirements must clearly identify and discuss all the associated analyses, studies, or surveys relied upon by the bureau as a part of that review and consultation. The environmental impact statement must include these associated analyses, studies, or surveys, either in the text or in an appendix or indicate where such analysis, studies or surveys may be readily accessed by the public.

(b) The draft environmental impact statement must list all Federal permits, licenses, or approvals that must be obtained to implement the proposal. The environmental analyses for these related permits, licenses, and approvals should be integrated and performed concurrently. The bureau, however, need not unreasonably delay its NEPA analysis in order to integrate another agency's analyses. The bureau may complete the NEPA analysis before all approvals by other agencies are in place.

Sierra Club v. FERC, et al. **Docket No. CP14-554**
D.C. Cir. Nos. 16-1329 and
16-1387

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 31st day of January 2017, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system, as indicated below:

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