ORAL ARGUMENT NOT YET SCHEDULED

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

Nos. 17-1271, *et al.* (consolidated)

APPALACHIAN VOICES, *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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November 20, 2018

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties:

The parties and intervenors before this Court and before the Federal Energy Regulatory Commission in the underlying docket are as stated in the Petitioners' Joint Opening Brief.

B. Rulings Under Review:

1. *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 (2017) (Certificate Order), JA ___; and

2. *Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197 (2018) (Rehearing Order), JA ___.

C. Related Cases:

This case has not been before this Court or any other court. Petitioners Bold Alliance, Bold Education Fund, Jerry and Jerolyn Deplanes, and Karoly Givens (and others) recently filed a notice of appeal (D.C. Cir. No. 18-5322) of the district court's September 27, 2018 ruling in *Bold Alliance et al. v. FERC*, Case No. 17-CV-01822 (RJJ), which dismissed for lack of subject matter jurisdiction various claims challenging the Mountain Valley Pipeline project and a separate natural gas pipeline project. In *Berkley v. Mountain Valley Pipeline, LLC*, 896 F.3d 624 (4th Cir. 2018), *cert. petition pending*, the Fourth Circuit affirmed the district court's dismissal for lack of subject matter jurisdiction of claims brought by landowners

along the path of the Mountain Valley Pipeline project challenging the constitutionality of various provisions of the Natural Gas Act.

In addition, petitions for review concerning the Mountain Valley Pipeline project, but not involving the Commission, are currently pending before, or have been recently resolved by, the Fourth Circuit in Docket Nos. 18-1173 and 18-1757 (Army Corps of Engineers determinations); 17-2399, 18-1012, 18-1019 and 18-1036 (Forest Service and Bureau of Land Management determinations); 17-1714 (West Virginia water quality certification); and 17-2406 and 17-2433 (Virginia water quality certification).

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Advisory Council	Advisory Council on Historic Preservation
Amicus Br.	Corrected Brief Of Amicus Curiae Niskanen Center In Support Of Petitioners
Br.	Petitioners' Joint Opening Brief
Certificate Order	*Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 (2017), JA ___
Commission or FERC	Federal Energy Regulatory Commission
Environmental Impact Statement or EIS	Environmental Impact Statement for the Mountain Valley Project, issued June 2017
Mountain Valley	Mountain Valley Pipeline, LLC
NEPA	National Environmental Policy Act
NGA	Natural Gas Act
NHPA	National Historic Preservation Act
2018 Notice of Inquiry	*Certification of New Interstate Natural Gas Facilities*, 163 FERC ¶ 61,042 (2018)
Petitioners	Appalachian Voices, Chesapeake Climate Action Network, Sierra Club, West Virginia Rivers Coalition, Wild Virginia, Blue Ridge Environmental Defense League, Preserve Montgomery County, VA, Inc., Elizabeth Reynolds, Michael Reynolds, Steven Vance, Ben Rhodd, Preserve Craig, Inc., Protect Our Water, Heritage, Rights, and Indian Creek Watershed Association, Greater Newport Rural Historic District Committee, Jerry and Jerolyn Deplanes, Karolyn Givens, Frances Collins, Michael Williams, Miller Williams, Tony Williams, Bold Alliance and Bold Education Fund

Policy Statement	*Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000)
Project	Mountain Valley Pipeline Project
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BRIEF OF RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

In this proceeding, the Federal Energy Regulatory Commission (FERC or Commission) issued a certificate of "public convenience and necessity" under section 7(c) of the Natural Gas Act (NGA), 15 U.S.C. § 717f(c), to Mountain Valley Pipeline, LLC (Mountain Valley). That certificate conditionally authorized Mountain Valley to construct and operate a new natural gas pipeline in West Virginia and Virginia. *See Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 (2017) (Certificate Order), JA ___, *on reh'g*, 163 FERC ¶ 61,197 (2018) (Rehearing Order), JA ___.

The Mountain Valley Pipeline project (Project), a new 303 mile-long pipeline, would provide additional transportation capacity from West Virginia to Virginia, enhancing the pipeline grid by connecting sources of natural gas to markets in the Northeast, Mid-Atlantic, and Southeast regions and making reliable natural gas service available to end users. The new capacity is fully subscribed under long-term precedent agreements with shippers.

In its Environmental Impact Statement (EIS), the Commission determined that the Project may result in some adverse environmental impacts on specific resources. Most would be temporary or short-term. Others would be reduced to less-than-significant levels by the implementation of appropriate mitigation measures. Ultimately, upon balancing the evidence of public benefits against the potential adverse economic effects of the Project and findings regarding environmental impacts, the Commission determined the Project would serve the public interest.

In Petitioners' Joint Opening Brief (Br.),[1] Petitioners question whether the Commission reasonably issued the certificate of public convenience and necessity based on:

[1] *See* Br. at 3-7 (listing 16 issues). Petitioners are Appalachian Voices, Chesapeake Climate Action Network, Sierra Club, West Virginia Rivers Coalition, Wild Virginia, Blue Ridge Environmental Defense League, Preserve Montgomery County, VA, Inc., Elizabeth Reynolds, Michael Reynolds, Steven Vance, Ben Rhodd, Preserve Craig, Inc., Protect Our Water, Heritage, Rights, and Indian Creek

(1) **public benefit**, where the Project is fully subscribed under binding, 20-year contracts with affiliated shippers that demonstrate market need, and will add infrastructure to an underdeveloped area, and Mountain Valley sufficiently minimized adverse economic impacts on landowners and communities;

(2) **initial recourse rates**, calculated with a return on equity of 14 percent and a capital structure of 50 percent debt and 50 percent equity, consistent with that applied to similarly-situated new companies constructing new major pipelines;

(3) **environmental review**, and other appropriate mitigation, in the Environmental Impact Statement and the Commission's orders, of greenhouse gas emissions, surface water impacts from sedimentation and erosion, groundwater impacts from construction in areas with karst features, cultural attachment, and alternative routes; and

(4) **consultation** with relevant parties regarding the avoidance or mitigation of impacts to historic properties under the National Historic Preservation Act (NHPA).

Watershed Association, Greater Newport Rural Historic District Committee, Jerry and Jerolyn Deplanes, Karolyn Givens, Frances Collins, Michael Williams, Miller Williams, Tony Williams, Bold Alliance, and Bold Education Fund.

Petitioners also question whether Mountain Valley may exercise eminent domain authority based on the Certificate Order and under the Natural Gas Act.

STATUTORY AND REGULATORY PROVISIONS

Pertinent statutes and regulations are contained in the Addendum.

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY BACKGROUND

A. Natural Gas Act

The Natural Gas Act is designed "'to encourage the orderly development of plentiful supplies of … natural gas at reasonable prices.'" *Pub. Utils. Comm'n v. FERC*, 900 F.2d 269, 281 (D.C. Cir. 1990) (quoting *NAACP v. FPC*, 425 U.S. 662, 670 (1976)). To that end, sections 1(b) and (c) grant the Commission jurisdiction over the transportation and wholesale sale of natural gas in interstate commerce. 15 U.S.C. §§ 717(b), (c). Before a company may construct a natural gas pipeline, it must obtain from the Commission a "certificate of public convenience and necessity" under NGA section 7(c), 15 U.S.C. § 717f(c), and "comply with all other federal, state, and local regulations not preempted by the NGA." *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 240 (D.C. Cir. 2013).

Under section 7(e), the Commission shall issue a certificate to any qualified applicant upon finding that the proposed construction and operation of the pipeline facility "is or will be required by the present or future public convenience and necessity." 15 U.S. C. § 717f(e). 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.*

B. National Environmental Policy Act

The Commission's consideration of an application for a certificate of public convenience and necessity triggers the National Environmental Policy Act (NEPA). *See* 42 U.S.C. §§ 4321, *et seq.* NEPA sets out procedures to be followed by federal agencies to ensure that the environmental effects of proposed actions are "adequately identified and evaluated." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). "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." *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 756-57 (2004). Accordingly, an agency must "take a 'hard look' at the environmental consequences before taking a major action." *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983).

NEPA's implementing regulations require agencies to consider the environmental effects of a proposed action by preparing either an Environmental Assessment, if supported by a finding of no significant impact, or a more comprehensive Environmental Impact Statement. *See* 40 C.F.R. § 1501.4.

C. National Historic Preservation Act

Under NHPA section 106, 54 U.S.C. § 306108, federal agencies must consider the effects of their "undertakings" on historic properties listed or eligible for listing in the National Register of Historic Places.[2] The Advisory Council on Historic Preservation's (Advisory Council) implementing regulations establish a procedure for compliance with section 106: (1) a determination of whether the proposed undertaking could affect historic properties, (2) an identification of potentially affected properties, (3) an assessment of whether there will be adverse effects on those properties, and (4) a resolution of effects. *See* 36 C.F.R. §§ 800.3-800.6. The agency must consult with state and tribal historic preservation officers and other interested parties to consider ways to resolve those effects. *Id.* The consulting parties may enter into an agreement documenting the resolution of adverse effects and compliance with Section 106. *Id.* § 800.6(c).

Section 106 does not require federal agencies to engage in any particular preservation activities. It only requires agencies to consult with the Advisory Council and other relevant parties and consider the impacts of their undertakings. *See Davis v. Latschar*, 202 F.3d 359, 370 (D.C. Cir. 2000).

[2] "Undertaking" includes "a project, activity, or program … requiring a Federal permit, license, or approval …." 54 U.S.C. § 300320.

II. THE COMMISSION'S REVIEW OF THE PROJECT

A. The Environmental Review

The Project is intended to provide up to 2 million dekatherms per day of firm transportation from West Virginia to Virginia (with each dekatherm roughly equivalent to 1,000 cubic feet of gas). Certificate Order P 7, JA ___. It will serve natural gas demand in the Northeast, Mid-Atlantic, and Southeast regions by connecting sources of natural gas to markets in those areas. *Id*. PP 29, 62, JA ___, ___. Mountain Valley executed long-term contracts (precedent agreements) for 100 percent of the capacity provided by the Project. *Id*. P 9, JA ____.

The Commission's pre-filing review of the Project began in April 2015 with the publication in the Federal Register of a notice of intent to prepare an Environmental Impact Statement. The notice was mailed to 2846 entities, including federal, state, and local government representatives and agencies; elected officials; regional environmental groups and non-governmental organizations; Indian tribes and Native Americans; affected property owners; other interested entities; and local libraries and newspapers. *Id*. P 122, JA ____. The notice invited written comments on the environmental issues to be examined and listed the date and location of six public scoping meetings. *Id*. In response, the Commission received over 1000 comment letters, and 169 people presented oral comments at the public scoping meetings. *Id*. P 123, JA ___.

Commission staff issued a draft Environmental Impact Statement in September 2016, which addressed the issues raised during the scoping period. *Id.* P 127, JA ___. Subsequently, Commission staff held seven public comment sessions in the Project area, where over 260 speakers provided oral comments and the Commission received 1237 written comments. *Id.*

Commission staff issued the final Environmental Impact Statement in June 2017, which addressed timely comments on the draft Environmental Impact Statement. *Id.* P 129, JA ____. The final Environmental Impact Statement, like the draft, was widely distributed to the Commission's environmental mailing list, as well as newly-identified affected landowners and any additional entities that commented on the draft. *Id.* The Environmental Impact Statement addressed geological hazards such as landslides, earthquakes and karst terrain; water resources including wells, streams and wetlands; forested habitat; wildlife and threatened, endangered, and other special status species; land use, recreational areas, and visual resources; socioeconomic issues such as property values, environmental justice, tourism and housing; cultural resources; air quality and noise impacts; safety; cumulative impacts; and alternatives. *Id.*

The Environmental Impact Statement concluded that construction and operation of the Project may result in some adverse environmental impacts on specific resources. *Id.* P 130, JA ____. Most impacts would be temporary or

short-term, except forest clearing impacts which necessarily would be long-term and significant. *Id*. For the other resources, mitigation measures would reduce impacts to less-than-significant levels. *Id*.

B. The Certificate Order

On October 23, 2017, the Commission issued a conditional certificate of public convenience and necessity to Mountain Valley. Certificate Order P 3, JA ___. (One Commissioner dissented on certain issues.) The Commission applied the criteria set forth in its Policy Statement[3] to determine whether there is a need for the pipeline and whether it would serve the public interest. *Id.* PP 30-31, JA ___-___. The Commission found a market need for the Project, as evidenced by precedent agreements for 100 percent of the pipeline's capacity. *Id.* PP 41, 55, JA ___, ___. The Commission accepted Mountain Valley's proposed return on equity of 14 percent for its initial recourse rates, but required that Mountain Valley reduce the equity component of its capitalization to 50 percent, consistent with Commission policy and the risks facing new companies constructing major new pipelines. *Id*. PP 79, 82, JA ___, ___.

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[3] *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) (Policy Statement). The Commission recently issued a Notice of Inquiry regarding potential revisions to its approach under its currently effective Certificate Policy Statement. *Certification of New Interstate Natural Gas Facilities*, 163 FERC ¶ 61,042 (2018) (2018 Notice of Inquiry).

The Commission's environmental review considered the Environmental Impact Statement and all comments and other information in the record. *Id.* PP 307, 310, JA ___, ___. The Commission found that the Project, if constructed and operated as described in the Environmental Impact Statement and in compliance with the environmental conditions imposed by the Certificate Order, is an environmentally acceptable action. *Id*. P 308, JA ___.

The Commission explained that, because Mountain Valley had been denied access to certain areas, the National Historic Preservation Act review process could not be completed prior to issuance of the Certificate Order, which confers eminent domain authority under the Natural Gas Act. In order to protect project lands, the Commission barred construction until NHPA consultation was completed. *Id*. P 269, JA ___.

Ultimately, the Commission determined that the Project, with appropriate environmental conditions and mitigation measures, is required by the public convenience and necessity. *Id*. P 308, JA ___.

C. The Rehearing Order

In the Rehearing Order, the Commission denied or dismissed all requests for rehearing. Rehearing Order P 5, JA ___. (Two Commissioners dissented on certain issues.) As relevant here, the Commission rejected arguments that the Commission: wrongfully denied late interventions (*id*. PP 9-14, JA ___-___);

erred in finding a need for the Project (*id*. PP 34-51, JA ___-___); erred in approving a 14 percent return on equity for initial recourse rates (*id*. PP 52-60, JA ___-___); erred in granting Mountain Valley eminent domain authority (*id*. PP 63-92, JA ___-___); and violated section 4(f) of the Department of Transportation Act (*id*. PP 93-94, JA ___-___). The Commission also rejected arguments that its environmental analysis inadequately addressed: alternatives to the pipeline (*id*. PP 131-58, JA ___-___); impacts on surface water and groundwater (*id*. PP 163-205, JA ___-___); historic and cultural resources (*id*. PP 248-267, JA ___-___); and the Project's downstream greenhouse gas emissions (*id*. PP 268-309, JA ___-___).

SUMMARY OF ARGUMENT

The Commission satisfied all of its statutory responsibilities in approving the Project. Under the Natural Gas Act, Congress entrusted the Commission with broad power to balance the many competing interests and determine whether a natural gas certificate application is in the "public convenience and necessity." Here, consistent with agency policy and court precedent, the Commission reasonably found that the Mountain Valley Project, if constructed and operated in accord with numerous mitigation measures, advances the public interest.

There is a market need for the Project as demonstrated by long-term contracts for 100 percent of pipeline capacity. That the contracts are with

Mountain Valley affiliates does not undermine this finding; the Commission reasonably concluded that affiliates would not have entered into long-term binding contracts without a legitimate business need for the capacity. The Project also will add infrastructure to an underdeveloped area, permit producers to access new markets, and benefit end users by improving grid reliability. Because Mountain Valley sufficiently minimized adverse economic impacts on landowners and communities, the Commission reasonably determined that the Project's public benefits outweighed its adverse economic effects.

The Commission accepted Mountain Valley's proposed 14 percent return on equity for its initial recourse rates, upon requiring Mountain Valley to reduce the equity component of its capitalization from 60 to 50 percent. Reviewing the proposed initial rates under the "public interest" standard of Natural Gas Act section 7, not the "just and reasonable" standard of sections 4 and 5, the Commission reasonably found this return commensurate with that awarded to similarly-situated companies and reflective of the risk to new companies of building major new pipelines.

Petitioners' contentions that Mountain Valley could not exercise eminent domain authority have no merit. First, the Commission's public convenience and necessity finding was not based on Mountain Valley having all necessary permits, but on its determination that the Project's benefits outweighed its adverse effects.

And, consistent with this Court's precedent, that finding satisfies the Takings Clause's public use requirement. The Commission also reasonably determined that the Natural Gas Act's broad conditioning authority provision permits it to approve projects contingent upon the applicant obtaining other necessary authorizations. Such a certificate, like other conditioned certificates, provides the holder with eminent domain authority.

In addition, due process was satisfied here. While not required, a pre-deprivation hearing was provided. The Certificate Order considered and responded to the parties' arguments, and this Court considered Petitioners' motions and petition for a writ of mandamus seeking a stay of the Certificate Order. Furthermore, consistent with Congress' design, eminent domain appropriately proceeded before this Court's review of the claims on appeal here. Natural Gas Act section 7(h) provides a certificate holder with eminent domain authority, and section 19(c) specifically provides that neither a request for Commission rehearing nor a petition for judicial review stays the Commission's order. Furthermore, courts have uniformly found that the Commission may issue tolling orders to extend the time for it to address the merits of rehearing requests, even if eminent domain proceedings have begun.

The Commission's decision that the Project was an environmentally acceptable action was informed and reasoned. The Environmental Impact

Statement fully identifies, describes, and analyzes the Project's potential impacts on, as relevant here, greenhouse gas emissions, surface water, groundwater, and cultural attachment; it also considers alternative routes and recommends appropriate mitigation measures to address identified adverse impacts. With potential adverse impacts effectively mitigated to the greatest extent practicable, the Commission was justified in concluding, after balancing pipeline benefits and impacts, that the Project advances the public interest.

Finally, the Commission fulfilled its obligations under the National Historic Preservation Act. The Commission engaged in extensive outreach to and consultations with state historic preservation officers, interested Indian tribes, government agencies, the Advisory Council, and the public regarding potential impacts on historic properties. Throughout this process, the Commission reasonably exercised its discretion in resolving requests for consulting party status and offered numerous avenues for public input.

Because some landowners barred Mountain Valley from entering their property to complete necessary surveys, the consultation process could not be completed without the eminent domain authority conferred by the Certificate Order. Accordingly, consistent with this Court's precedent, the Commission conditioned its approval of the Project upon, and barred any construction until, successful completion of the consultation process. Two months after the

Certificate Order, the Commission concluded the consultation process with the execution of a programmatic agreement with the Advisory Council and others to address the Project's impacts on historic properties.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews Commission actions under the Administrative Procedure Act's narrow "arbitrary and capricious" standard. 5 U.S.C. § 706(2)(A). Under that standard, the question is not "whether a regulatory decision is the best one possible or even whether it is better than the alternatives." *FERC v. Elec. Power Supply Ass'n*, 136 S.Ct. 760, 782 (2016). Rather, the court must uphold the Commission's determination "if the agency has examined the relevant considerations and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." *Id.* (internal quotations omitted). Because the grant or denial of a section 7 certificate is within the Commission's discretion, the Court does not substitute its judgment for that of the Commission. *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1308 (D.C. Cir. 2015). The Court evaluates only whether the Commission considered relevant factors and whether there was a clear error of judgment. *Id.*

The arbitrary and capricious standard also applies to challenges under the NEPA. *Nevada v. Dep't of Energy*, 457 F.3d 78, 87 (D.C. Cir. 2006). "[T]he

court's role is 'simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious.'" *Nat'l Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323, 1327 (D.C. Cir. 2004) (quoting *Balt. Gas & Elec.*, 462 U.S. at 97-98).

Agency actions taken pursuant to NEPA are entitled to a high degree of deference. *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 377-78 (1989). This Court evaluates agency compliance with NEPA under a "rule of reason" standard. *Minisink Residents for Envtl. Pres. & Safety v. FERC*, 762 F.3d 97, 112 (D.C. Cir. 2014). This Court has consistently declined to "flyspeck" the Commission's environmental analysis. *City of Boston Delegation v. FERC*, 897 F.3d 241, 251 (D.C. Cir. 2018). "[A]s long as the agency's decision is fully informed and well-considered, it is entitled to judicial deference and a reviewing court should not substitute its own policy judgment." *Nat. Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288, 294 (D.C. Cir. 1988) (internal quotations omitted).

II. THE COMMISSION REASONABLY FOUND THE PROJECT TO BE REQUIRED BY THE PUBLIC CONVENIENCE AND NECESSITY.

Section 7(e) of the Natural Gas Act grants the Commission broad authority to determine whether a proposed natural gas facility "is or will be required by the present or future public convenience and necessity." 15 U.S.C. § 717f(e); *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 Corp. 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 "public convenience and necessity" analysis under section 7(e) has two components. *Sierra Club v. FERC*, 867 F.3d 1357, 1379 (D.C. Cir. 2017). First, the applicant must show that it is prepared to financially support the project without subsidization from existing customers. Certificate Order P 31, JA ___. Here, Mountain Valley is a new pipeline with no existing customers, so there is no risk of subsidization. *Id*. P 32, JA ___.

Second, the applicant must make efforts to eliminate or minimize any adverse economic effects the project might have on existing pipelines in the market and their customers, or landowners and communities affected by the construction. *Id*. P 31, JA ___. If there are residual adverse economic effects following mitigation efforts, the Commission balances the project's public benefits against those residual effects. *Id*. Only if the public benefits outweigh the adverse economic effects will the Commission proceed to its environmental analysis. *Id*.

In 1999, the Commission modified its prior requirement that a proposed project have contractual commitments for at least 25 percent of its capacity, as that bright-line test failed to account for other public benefits that a project may

provide. *See* Policy Statement at 61,743-45. Evidence of public benefits may include "meeting unserved demand, eliminating bottlenecks, access to new supplies, lower costs to consumers, providing new interconnects that improve the interstate grid, providing competitive alternatives, increasing electric reliability, or advancing clean air objectives." *Id.* at 61,748.

A. The Commission Reasonably Found Market Need For The Project Based On Precedent Agreements.

The Commission reasonably determined that Mountain Valley's long-term (20-year) precedent agreements for 100 percent of the proposed capacity demonstrated that additional gas will be needed in the markets served by the Project. Certificate Order P 41, JA ___. While the Policy Statement broadened the types of evidence an applicant may submit to show a project's public benefits, it did not compel any additional showing beyond precedent agreements. *Id*. P 40, JA ___. *See also* Rehearing Order P 36, JA ___.

This Court has recognized that nothing in the Policy Statement "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." *Minisink*, 762 F.3d at 111 n.10. *See also Sierra Club*, 867 F.3d at 1379 (affirming Commission reliance on preconstruction contracts for 93 percent of project capacity to demonstrate market need)); *Twp. of Bordentown v. FERC*, 903 F.3d 234, 263 (3d Cir. 2018) ("As numerous courts have reiterated, FERC need not

'look[] beyond the market need reflected by the applicant's existing contracts with shippers.'") (quoting *Myersville*, 783 F.3d at 1311).

The purpose of the Policy Statement was not, therefore, "to reduce FERC's reliance on precedent agreements – especially affiliate agreements." Br. at 26. Rather, the Policy Statement permits applicants to provide other evidence of public benefit to support an application in the absence of precedent agreements. Rehearing Order PP 35-36, JA ___-___.

Nor does the Policy Statement require enhanced scrutiny of precedent agreements with affiliates. *See* Rehearing Order P 36 n.82, JA ___. Indeed, the policy adopted therein "is less focused on whether the contracts are with affiliated or unaffiliated shippers." *Id*. The "new focus" is the impact of the project on the relevant interests balanced against project benefits. Policy Statement at 61,748-49. The Commission's primary concern regarding precedent agreements with affiliated shippers is whether there may have been undue discrimination against non-affiliated shippers. Rehearing Order P 37, JA ___. No such allegation has been made here. Certificate Order P 45, JA ___.

In Petitioners' view, Mountain Valley's affiliate contracts "invite self-dealing to create the appearance of market demand for capacity on a pipeline despite the lack of identified end users for the gas." Br. at 26. The Commission found, however, that affiliation with a project sponsor does not lessen a shipper's

need for new capacity and its contractual obligation to pay for such service. Rehearing Order P 37, JA ___. "'[A]s long as the precedent agreements are long-term and binding, [the Commission] do[es] not distinguish between pipelines' precedent agreements with affiliates or independent marketers in establishing the market need ….'" Certificate Order n.55, JA ___ (quoting *Millennium Pipeline Co., L.P.*, 100 FERC ¶ 61,277 P 57 (2002)).

Three of the five Project shippers are producers and marketers who will be competing in the interstate market to sell their gas, with no guarantee that they will recover the costs of their capacity commitment. *Id*. P 82, JA ___. Because those shippers are fully at risk for the cost of their capacity, the Commission concluded that they would not have entered into the precedent agreements absent a need to move their product to market. Rehearing Order P 40, JA ___. Such shippers presumably have made a positive assessment of the potential for selling gas in markets served by the Project or through interconnects with other pipelines and have made a business decision to subscribe to the capacity on the basis of that assessment. *Id*. P 43, JA ___. *See, e.g.*, *Bordentown*, 903 F.3d at 262 ("A contract for a pipeline's capacity is a useful indicator of need because it reflects a 'business decision' that such a need exists. If there were no objective market demand for the additional gas, no rational company would spend money to secure the excess capacity.").

While marketers or producers are not end users (Br. at 27), that does not make the Project's market demand speculative. Rehearing Order P 43, JA ___. Due to the development of the interstate pipeline grid, many projects are now designed to move new gas supplies to market centers or pools (*id*.), "which may not correspond to a defined market or end use." 2018 Notice of Inquiry P 22. And local distribution companies are now increasingly purchasing gas supplies further downstream at market area pooling points or their citygates. *Id*. Here, Mountain Valley will transport natural gas from production areas to the pipeline's terminus at Transco Station 165, a pooling point and gas trading hub for the mid-Atlantic market, from which shippers can access east coast markets. EIS at 1-8, 2-3, JA ___, ___.

This Court has affirmed the Commission's disinclination to look behind precedent agreements to judge shipper needs where end users for a substantial portion of contracted capacity are unknown. *Myersville*, 783 F.3d at 1311. *See* Rehearing Order P 36, JA ___. As affirmed in *Myersville*, the Commission has found that, since the advent of service unbundling and open-access transportation, it is often impossible to determine who will be the ultimate consumers of gas transported under any particular agreement. *Dominion Transmission, Inc*., 141 FERC ¶ 61,240 P 66 (2012).

The remaining two shippers on Mountain Valley, contracting for roughly 13 percent of pipeline capacity, are public utilities providing local distribution service. Certificate Order PP 10, 292 n.286, JA ___, ___. Petitioners assert that those utilities will pass through inflated rates to their captive customers under the precedent agreements. Br. at 29-30. The utilities' state regulators, however, will review the prudence of the contracts before the cost can be recovered in the utilities' retail rates. Rehearing Order P 40, JA ___; Certificate Order P 53, JA ___.[4] *See, e.g., Tenn. Gas Pipeline Co. v. FERC*, 824 F.2d 78, 83-84 (D.C. Cir. 1987) (approval of rates in NGA section 7 certification proceeding does not foreclose later prudence review). And "any attempt by the Commission to look behind the precedent agreements in this proceeding might infringe upon the role of state regulators in determining the prudence of expenditures by the utilities that they regulate." Certificate Order P 53, JA ___. Should the utilities fail to obtain state approval for their contracts, Mountain Valley may be unable to recover its costs, as it is at risk for costs associated with any unsubscribed capacity. Rehearing Order PP 40-41, JA ___.

[4] Section III below addresses Petitioners' argument that the rates are inflated.

B. Petitioners' Market Studies Do Not Undermine Reliance on The Precedent Agreements.

The market studies cited by Petitioners do not undermine the finding of market need based on Mountain Valley's precedent agreements. *See* Br. at 28-30. First, because it is Commission policy not to look behind precedent agreements (Rehearing Order P 36, JA ___), this Court has affirmed Commission orders declining to consider market studies proffered to contradict market need evidenced by such agreements. *See Myersville*, 783 F.3d at 1311.

Second, the Commission reasonably concluded that the precedent agreements, reflecting actual demand, were better evidence of need in the Project markets than the theoretical projections in Petitioners' market studies. Certificate Order P 41, JA ___. Long-term projections of future demand often change and are influenced by a variety of factors, including economic growth, the cost of natural gas, environmental regulations, and legislative and regulatory decisions by the federal government and individual states. Rehearing Order P 46, JA ___. Given this considerable uncertainty, the Commission primarily relies on precedent agreements in evaluating market need for individual projects. Certificate Order P 42, JA ___.

Furthermore, the Commission found the market studies at issue to be unpersuasive. The Synapse Study (Br. at 28), regarding expected future demand in the Virginia-Carolinas region, "makes an unlikely assumption that all gas is flowed

by primary customers along their contracted paths." Rehearing Order P 47, JA ___. The study's demand projection fails to consider the use of regional pipeline capacity by shippers outside of Virginia and the Carolinas through interruptible service or capacity release. Certificate Order n.47, JA ___.

The Institute for Energy Economics and Financial Analysis study (Br. at 30) speaks in generalities and does not assess the Project markets. Rehearing Order P 47, JA ___. Nonetheless, the study suggests that pipelines like Mountain Valley may aid in delivering lower-priced natural gas to higher-priced markets, which would serve the public interest. *Id*.

C. The Commission Made Additional Supporting Public Benefit Findings.

Petitioners argue that the Commission's benefit analysis rests entirely on precedent agreements and disregards other public benefits referenced in the Policy Statement. Br. at 23-25. While the market demand evidenced by the precedent agreements sufficiently demonstrates public benefit as discussed above, the Commission nevertheless made additional findings of public benefits. *See* Certificate Order PP 41, 55, 62, JA ___, ___, ___.

Here, the Project will connect sources of natural gas in the Appalachian Basin to markets in the Northeast, Mid-Atlantic, and Southeast regions, permitting upstream natural gas producers to access additional markets for their product and serving natural gas demand in those markets. *Id*. The Project will add

infrastructure to an underdeveloped area, thereby alleviating some of the constraints on Appalachian natural gas production. *See* EIS at 1-8, JA ___. The Commission found that this new infrastructure will benefit end users by enhancing the reliability of the pipeline grid. Certificate Order PP 41, 55, JA ___, ___. *See also* Policy Statement at 61,748 (discussing examples of public benefits).

D. The Commission Reasonably Balanced Public Benefits With Adverse Economic Consequences To Landowners.

After the pipeline applicant has made efforts to eliminate or minimize any adverse economic effects on existing customers, existing pipelines, and landowners and communities, the Commission balances any residual potential adverse economic effects against a project's public benefits. Policy Statement at 61,745-46, 61,748-50; *see also Myersville*, 783 F.3d at 1309. This balancing, which precedes the environmental analysis, largely focuses on economic interests such as landowners' property rights. Policy Statement at 61,749. Only when the public benefits outweigh the adverse effects on economic interests will the Commission complete the environmental analysis. *Id*. at 61,745. *See also* Rehearing Order P 50, JA ___.

Petitioners assert that the Commission failed to properly balance the adverse impacts of eminent domain against project benefits. Br. at 31. The Commission, however, reasonably found that Mountain Valley had taken sufficient steps to minimize adverse impacts and that, on balance, the Project's public benefits

outweighed the adverse economic effects on landowners. Certificate Order P 57, 64, JA ___; Rehearing Order PP 49, 98, JA ___, ___.

"Economic impacts on landowners and surrounding communities can be, and often are, mitigated, for example, through alternative routing of the proposed rights-of-way, co-location with existing utility corridors and negotiating the purchase of rights-of-way." 2018 Notice of Inquiry P 30. Here, to reduce adverse impacts to landowners and communities, avoid sensitive environmental resources and avoid steep terrain, Mountain Valley incorporated over 11 major route variations and 571 minor route variations during pre-filing, and another 2 major route variations and 130 additional minor variations in post-application filings. Rehearing Order P 49, JA ___ (citing EIS at ES-3 and 3-17, JA ___, ___); Certificate Order P 57, JA ___. Additionally, approximately 30 percent of Mountain Valley's rights-of-way would be adjacent to existing pipeline, roadway, railway, or utility rights-of-way. Rehearing Order P 49, JA ___ (citing EIS at 2-10, JA ___).

The Commission urges companies to negotiate easement agreements with private landowners prior to construction. *Id*. Mountain Valley committed to make good faith efforts to negotiate with landowners, and resort to the use of eminent domain only when necessary. *Id*.; Certificate Order P 57, JA ___. Mountain Valley ultimately obtained about 85 percent of the properties needed for pipeline

construction by agreement. *See Mountain Valley Pipeline, LLC v. Easements to Construct, Operate, and Maintain a Natural Gas Pipeline*, 2018 WL 648376 at **1, 12 (W.D. Va. Jan. 31, 2018), *appeal pending*, No. 18-1159 (4th Cir. Feb. 8, 2018).

Contrary to Petitioners' argument (Br. at 30-33), the Commission's analysis followed its "sliding scale approach," under which the negotiated acquisition of rights-of-way could lessen the required showing of public benefits. *See* Policy Statement at 61,749. The Commission has recognized that, "[i]n most cases, it will not be possible to acquire all necessary right-of-way by negotiation." *Id*. To counterbalance these impacts, evidence of market demand is necessary, but under the "sliding scale approach the benefits needed to be shown would be less than in a case where no land rights had been previously acquired by negotiation." *Id*. For instance, for purposes of the Policy Statement analysis, precedent agreements for most of the new capacity "would be strong evidence of market demand and potential public benefits that could outweigh the inability to negotiate right-of-way agreements with some landowners." *Id*.

Here, the Commission recognized that Mountain Valley had been unable to reach agreement with many landowners. *See* Certificate Order P 57, JA ___. Nevertheless, consistent with the Policy Statement, the Commission found that Mountain Valley had taken sufficient steps to minimize landowner impacts –

including acquiring as much right-of-way as possible by agreement – and that such economic impacts were outweighed by the Project's public benefits. *Id*. P 64, JA ___; Rehearing Order PP 49, 98, JA ___, ___. The Commission has broad discretion to balance competing equities in determining the public interest and reasonably exercised that discretion here. *See Bordentown*, 903 F.3d at 263 (FERC is afforded broad discretion in balancing public benefits against adverse economic effects). *Minisink*, 762 F.3d at 111 (same).

III. THE COMMISSION REASONABLY APPROVED MOUNTAIN VALLEY'S RETURN ON EQUITY.

Section 7 of the Natural Gas Act authorizes the Commission to attach to a certificates "such reasonable terms and conditions as the public convenience and necessity may require." 15 U.S.C. § 717f(e). Under that authority, FERC employs a "public interest" standard to determine the initial rates that a pipeline may charge for newly-certificated service, which is less exacting that the "just and reasonable" standard of NGA sections 4 and 5. *See Atl. Ref. Co. v. Pub. Serv. Comm'n*, 360 U.S. 378, 390-91 (1959); *Mo. Pub. Serv. Comm'n v. FERC*, 337 F.3d 1066, 1068, 1070 (D.C. Cir. 2003). The initial section 7 rates are "a temporary mechanism to protect the public interest until the regular rate setting provisions of the NGA come into play." *Mo. Pub. Serv. Comm'n v. FERC*, 601 F.3d 581, 583 (D.C. Cir. 2010) (internal quotation omitted). The delay inherent in determining just and reasonable rates under sections 4 and 5, 15 U.S.C. §§ 717c, 717d, makes that standard

inappropriate for regulating initial rates under section 7. *Consumer Fed'n of Am. v. FPC*, 515 F.2d 347, 356 n.56 (D.C. Cir. 1975) (citing *United Gas Improvement Co. v. Callery Properties, Inc.*, 382 U.S. 223, 227-28 (1965) (affirming Commission certification under section 7 of producer sales at the same "in-line" price levels as approved in other contemporaneous certificate proceedings)).

Mountain Valley proposed initial rates based on a capital structure of 40 percent debt and 60 percent equity, with a return on equity of 14 percent. Certificate Order P 79, JA ___. Under Commission policy, however, a return on equity of 14 percent is appropriate only where the equity component of the capitalization is not more than 50 percent, because equity financing is typically more costly than debt financing and therefore more costly to ratepayers. *Id.* P 80 (citing *Fla. Se. Connection, LLC*, 154 FERC ¶ 61,080, *on reh'g*, 156 FERC ¶ 61,160 (2016), *vacated and remanded on other grounds*, *Sierra Club*, 867 F.3d at 1377 (affirming approval of 14 percent return on equity based on a 50-50 debt equity structure); and *Mark West Pioneer, L.L.C.*, 125 FERC ¶ 61,165 (2008)).

Petitioners argue that the Commission approved the 14 percent return on equity based on "blind reliance on precedent." Br. at 33. To the contrary, the Commission's decision reflects the risk Mountain Valley faces as a new market entrant constructing a new pipeline system. Certificate Order P 82, JA ___.

The return on equity underlying an initial rate reflects the pipeline's risks in

recovering the capital invested in an approved and constructed project. Rehearing Order P 56, JA ___. Approving equity returns of up to 14 percent with an equity capitalization of no more than 50 percent provides an appropriate incentive for new pipeline companies to enter the market and reflects the fact that projects undertaken by a new entrant face higher business risks than those undertaken by established pipelines, which have existing customers and financial relationships. Certificate Order P 82, JA ___ (citing *Rate Regulation of Certain Natural Gas Storage Facilities*, Order No. 678, FERC Stats. & Regs. ¶ 31,220 P 127 (2006)). By contrast, new entrants building new pipelines do not have an existing customer base or pipeline system to leverage and may be constructing a significantly larger amount of facilities than existing pipelines typically do in incremental expansion projects. Rehearing Order PP 53, 56, JA ___, ___. Commission policy thus requires existing pipelines that provide incremental services through an expansion to use the return on equity underlying their existing system rates and last approved in a NGA section 4 rate case proceeding when designing the incremental rates. *Id.* P 53, JA ___. This tends to yield a return below 14 percent, reflecting the lower risk. *Id.*

Petitioners argue that the Commission has not established Mountain Valley's "true risk" in calculating the return on equity. Br. at 36. But this proceeding only involved an initial rate to "hold the line" until just and reasonable rates can be

determined. Rehearing Order PP 59-60, JA ___-__. As a new pipeline company, Mountain Valley's proposed initial rates are based on estimates of its costs and revenues that necessarily are unsupported by any operating history. Certificate Order P 83, JA ___. Because actual costs associated with constructing the pipeline and providing service may increase or decrease, it is reasonable to review the initial rates once the pipeline has an operating history. *Id.*

To ensure this review, the Commission required Mountain Valley to file a cost and revenue study at the end of its first three years of actual operation. *See id.*; Rehearing Order P 54, JA ___. The three-year report will allow the Commission and the public to review Mountain Valley's estimates underlying Mountain Valley's initial rates, to determine whether Mountain Valley is over-recovering its cost of service and whether the Commission should establish just and reasonable rates under NGA section 5. Certificate Order P 83, JA ___. Alternatively, Mountain Valley may elect to make an earlier NGA section 4 filing to revise its initial rates. *Id.* Accordingly, the Commission reasonably concluded that Mountain Valley's initial rates will "'ensure that the consuming public may be protected'" until just and reasonable rates can be determined under sections 4 and 5 of the NGA. Rehearing Order P 60, JA ___ (quoting *Atl. Ref.*, 360 U.S. at 392).

While the Commission approved the 14 percent return on equity, it required Mountain Valley to lower the equity portion of its capital structure from 60 to 50

percent, which reduces the overall rate, and treats Mountain Valley the same as other new pipelines. Rehearing Order PP 53, 59, JA ___, ___. Returns approved for other utilities, such as electric utilities and local distribution companies, are not relevant because these companies are inherently less risky than new pipelines proposed by a new natural gas pipeline company. Rehearing Order P 57, JA ___; Certificate Order P 82, JA ___. While Petitioners make passing reference to the low cost of debt (Br. at 36), debt financing rates are not a proxy for the return on equity, and Petitioners make no effort to demonstrate otherwise. *See Atl. Coast Pipeline, LLC*, 164 FERC ¶ 61,100 P 70 (2018). Due to the large amount of capital required, most new companies building new pipelines obtain some level of debt financing, so Mountain Valley is no different in that regard. Rehearing Order P 56, JA ___.

Petitioners complain that subsequent, more exacting section 4 or 5 rate review is ineffective because the purportedly excessive rate of return will already have incentivized construction of an unnecessary pipeline. Br. at 36-37. But as explained in section II above, the Commission conducts an independent public interest determination of the need for the pipeline. Here, the Commission was satisfied that there is demand for the Project. Rehearing Order P 58, JA ___.

IV. MOUNTAIN VALLEY APPROPRIATELY EXERCISED EMINENT DOMAIN BASED ON THE CERTIFICATE.

Petitioners acknowledge that NGA section 7(h), 15 U.S.C. § 717f(h), provides the holder of a FERC-issued certificate of public convenience and necessity authority to obtain property needed to construct or operate the project through eminent domain. Br. at 38. Petitioners contend, nonetheless, that Mountain Valley does not have eminent domain authority here. None of the arguments in support of this contention has merit.

A. The Public Convenience And Necessity Finding Was Premised On The Balancing Of Project Benefits And Adverse Impacts, Not On Mountain Valley Having All Necessary Permits.

Petitioners first argue that Mountain Valley does not have eminent domain authority because the Commission's public convenience and necessity finding was premised on Mountain Valley having all necessary permits. Br. at 38-39. But the Commission determined that the Project is required by the public convenience and necessity because its benefits outweigh its adverse effects. Rehearing Order PP 66, 82, 135, 285, 286, JA ___, ___, ___, ___; Certificate Order PP 60, 62, 64, 70, JA ___, ___, ___, ___; *see also supra* pp. 25-28. Whether Mountain Valley had all necessary authorizations was not a factor in this analysis. *See* Rehearing Order P 66, JA ___ (explaining that once a natural gas company obtains a certificate of public convenience and necessity it may exercise eminent domain regardless of the status of other authorizations for the project); *id.* P 114, JA ___ (finding that

Mountain Valley had provided sufficient information for the Commission to issue a certificate of public convenience and necessity). Such authorizations and permits are, of course, prerequisites to construction of the Project. *Id*. P 72, JA ___; *see also* Certificate Order P 187, JA ___. Thus, the Commission prohibited Mountain Valley from commencing construction prior to obtaining all permits and satisfying all environmental conditions. Rehearing Order P 72, JA ___. *See also, e.g.*, R. 5910, JA ___-___ (FERC notice permitting specific construction to begin where, among other things, the Commission confirmed Mountain Valley had received all relevant federal authorizations); R. 5928, JA ___-___ (same).

B. The Public Convenience And Necessity Finding Satisfies The Takings Clause's Public Use Showing.

Bold Alliance and Bold Education Fund (Bold Petitioners) further claim that Mountain Valley could not exercise eminent domain because, without all necessary permits, the Project lacks a public use. Br. at 44-45. But this ignores the Commission's determination, consistent with this Court's precedent, that a public convenience and necessity finding under the Natural Gas Act satisfies the Takings Clause's public use showing. Certificate Order PP 60-62, JA ___-___ (citing, *e.g.*, *Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 973 (D.C. Cir. 2000) (finding that public convenience and necessity determination establishes that a project serves a public purpose)); Rehearing Order PP 65-68, JA ___-___.

In the Natural Gas Act, Congress declared that the transportation and sale of natural gas in interstate commerce for ultimate distribution to the public is in the public interest. Certificate Order P 61, JA ___ (citing 15 U.S.C. § 717(a)). A certificate holder is authorized, pursuant to NGA section 7(h), 15 U.S.C. § 717f(h), to acquire property necessary to construct the certificated facilities by exercising eminent domain. *Id*. PP 59-60, JA ___-___. Neither Congress nor any court has indicated that anything beyond the Commission's public convenience and necessity finding is necessary to trigger eminent domain rights. *Id*. P 60, JA ___; Rehearing Order P 65, JA ___; *see also, e.g.*, *Del. Riverkeeper Network v. FERC*, 895 F.3d 102, 110 (D.C. Cir. 2018) ("Once FERC issues a certificate of public convenience and necessity, the pipeline company may acquire the necessary rights-of-way through eminent domain."); *Bordentown*, 903 F.3d at 265 (NGA section 7(h) "affords certificate holders the right to condemn such property, and contains no condition precedent other than that a certificate is issued and that the certificate holder is unable to 'acquire [the right of way] by contract'").

C. Eminent Domain Authority Applies To Certificates Conditioned On Obtaining Other Authorizations.

Petitioners also argue that Congress did not intend for eminent domain to apply to certificates conditioned on the holder obtaining other permits and authorizations. Br. at 39-42. The Commission reasonably found otherwise.

Courts have consistently upheld the Commission's practice of issuing certificates conditioned on the holder obtaining other authorizations or permits. Rehearing Order P 81, JA ___ (citing cases). And NGA section 7(e) does not restrict the Commission's conditioning authority to "limitations," as Petitioners contend (Br. at 40-41). *Id.* Rather, that provision broadly states that: "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." 15 U.S.C. § 717f(e), *see also, e.g.*, *Panhandle E. Pipe Line Co. v. FERC*, 613 F.2d 1120, 1128 (D.C. Cir. 1979) ("The actual language of [NGA] section 7(e) is broad indeed.").

There is no support for Petitioners' contention that the Commission's conditioning authority is restricted to "limitations." Br. at 40-41. "The NGA simply does not contain a provision limiting the exercise of eminent domain when conditions have not been met, and '[c]ourts have repeatedly rejected similar arguments that a pipeline company cannot exercise eminent domain because a FERC Order is conditioned.'" *Mountain Valley Pipeline, LLC v. Simmons*, 307 F. Supp. 3d 506, 518-19 (N.D. W. Va. 2018), *appeal pending*, No. 18-1165 (4th Cir. Feb. 12, 2018) (quoting *Transcon. Gas Pipe Line Co, LLC v. Permanent Easement for 2.14 Acres*, No. 17-715, 2017 WL 3624250, at *6 (E.D. Pa. Aug. 23, 2017), *appeal pending*, No. 17-3076 (3d Cir. Sept. 20, 2017)). The Commission's

reasonable interpretation of this statutory provision, which it administers, is due deference and should be upheld. *See, e.g., Del. Riverkeeper Network v. FERC*, 857 F.3d 388, 395-96 (D.C. Cir. 2017) (affirming FERC-issued pipeline certificate contingent on subsequent receipt of necessary Clean Water Act permit).

The cases Petitioners cite in support of their "limiting" conditions interpretation do not help them. Br. at 40-41. *Atlantic Refining*, 360 U.S. at 391, recognizes that section 7(e) "authorize[s] the Commission to condition certificates in such manner as the public convenience and necessity may require," and shows that the Commission's authority to condition certificates as required by the public convenience and necessity is as broad as its authority to evaluate the public convenience and necessity. *See* Rehearing Order P 82, JA ___. The conditions the Commission set here limit Mountain Valley's activities as necessary to ensure that the Project is consistent with the public convenience and necessity. *Id.*

The other cases Petitioners cite (Br. at 41) do not support their interpretation either. *See* Rehearing Order n.218, JA ___. *Panhandle*, 613 F.2d at 1129, held that section 7(e)'s conditioning power "does not extend to adjusting previously approved rates for services not before the Commission in the relevant certificate proceeding." And *Northern Natural Gas Co. v. FERC*, 827 F.2d 779, 792-93 (D.C. Cir. 1987), likewise held that "the Commission does not have authority

under [Natural Gas Act] section 7 to compel flow-through of revenues to customers of services not under consideration in that proceeding for certification."

D. Eminent Domain Courts, Not The Commission, Have Jurisdiction To Address Just Compensation Matters.

Petitioners also contend, without citing any authority, that the Commission should have determined whether Mountain Valley would be able to pay just compensation in an eminent domain proceeding. Br. at 42-44. But courts, not the Commission, have jurisdiction regarding eminent domain matters, including compensation issues. *See* 15 U.S.C. § 717f(h); Rehearing Order P 76, JA ___; Certificate Order P 60, JA ___; *see also, e.g.*, *Mountain Valley Pipeline, LLC v. Easement to Construct, Operate and Maintain a 42-Inch Gas Transmission Line*, No. 17-4214, 2018 WL 1004745, at *11-12 (S.D. W. Va. Feb. 21, 2018), *appeal pending*, No. 18-1329 (4th Cir. Mar. 26, 2018) (district court would ensure that just compensation will be paid before possession through eminent domain). Any complaints Petitioners have regarding the courts' actions on eminent domain matters (Br. at 43-44) are properly raised in appeals of those actions, not on review of the Commission's orders.

E. Due Process Was Satisfied Here

1. Although Not Required, A Pre-Deprivation Hearing Was Provided Here.

Bold Petitioners assert that they were denied a pre-deprivation hearing because the Commission purportedly failed to consider their unspecified arguments

before issuing the Certificate Order. Br. at 45-46; *see also* Amicus Br. at 5-9. In the takings context, however, there is no right to a pre-deprivation hearing. *Del. Riverkeeper*, 895 F.3d at 111.

In any event, the Certificate Order addressed the assertions raised by Bold Petitioners and others. For example, in response to Bold Petitioners' claim that it would be unconstitutional for Mountain Valley to exercise eminent domain because the Project would not serve a public purpose, the Certificate Order explained that the Commission's public convenience and necessity determination satisfies the Takings Clause's public use requirement. *See* Certificate Order PP 58-63, JA ___-___. Moreover, Petitioners had the opportunity to, and did, file motions and a petition for a writ of mandamus with this Court to stay the Certificate Order. The Court found that none of the numerous issues raised by Petitioners warranted a stay. *See Appalachian Voices v. FERC*, No. 17-1271, *et al.* (D.C. Cir. Feb. 2 and Aug. 30, 2018). *See also Bold Alliance v. FERC*, No. 18-1533 (4th Cir. June 7, 2018) (denying motion for stay pending agency rehearing of FERC notices to proceed with Project construction).

2. Eminent Domain Appropriately Proceeded Before Court Review Of The Certificate Orders.

Bold Petitioners further assert that Petitioners were denied due process because eminent domain hearings proceeded before this Court reviewed Petitioners' claims on appeal here. Br. at 45-46; *see also* Amicus Br. at 8-22. But

Congress designed the Natural Gas Act to produce that default outcome. *See Simmons*, 307 F. Supp. 3d at 516 (NGA "allows natural-gas companies to exercise the power of eminent domain upon receipt of a Certificate rather than after the Certificate has been subject to judicial review"). NGA section 7(h), 15 U.S.C. § 717f(h), provides the holder of a certificate of public convenience and necessity eminent domain authority, and section 19(c), *id*. § 717r(c), specifically provides that neither the filing of an application for Commission rehearing nor a petition for judicial review stays the effectiveness of the Commission's order unless the Commission or court specifically orders otherwise. *See, e.g., Jupiter Corp. v. FPC*, 424 F.2d 783, 791 (D.C. Cir. 1969) (NGA "provides that orders of the Commission shall not be stayed pending appeal unless the reviewing court grants a stay").

Furthermore, this Court and others have uniformly determined that the Commission's "use of tolling orders is permissible under the Natural Gas Act, which requires only that the Commission 'act upon' a rehearing request within 30 days, 15 U.S.C. § 717r(a), not that it finally dispose of it." *Del. Riverkeeper*, 895 F.3d at 113. *See also Cal. Co. v. FPC*, 411 F.2d 720, 721 (D.C. Cir. 1969); *Berkley v. Mountain Valley Pipeline, LLC*, 896 F.3d 624, 631 (4th Cir. 2018); *Coalition to Reroute Nexus v. FERC*, No. 17-4302 (6th Cir. Mar. 15, 2018);

Kokajko v. FERC, 837 F.2d 524, 525 (1st Cir. 1988); *Gen. Am. Oil Co. v. FPC*, 409 F.2d 597, 599 (5th Cir. 1969).

Section 19(a), 15 U.S.C. § 717r(a), provides that, "[u]nless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied." Amicus argues that this reflects Congress's intent to ensure quick judicial review. Amicus Br. at 15-16. But this Court long ago affirmed the Commission's determination that this language was intended to permit the Commission to deny rehearing requests by silence. *Cal. Co.*, 411 F.2d at 721-22. The Court was "reluctant to impute to Congress a purpose to limit the Commission to 30 days' consideration of applications for rehearing, irrespective of the complexity of the issues involved, with jurisdiction then passing to the courts to review a decision which at that moment would profitably remain under active consideration by the agency." *Id.* at 722. Here, the tolling order was issued so the Commission could carefully consider the numerous issues raised on rehearing. Rehearing Order P 79, JA ___.

Next, Amicus asserts that tolling orders provide the Commission with unlimited time to consider matters on rehearing. Amicus Br. at 11. But if parties believe the Commission is taking too long, they can raise that concern to the Court of Appeals in a petition for a writ of mandamus under the All Writs Act, 28 U.S.C. § 1651(a). *See Telecomm. Research and Action Ctr. v. FCC*, 750 F.2d 70, 75-76

(D.C. Cir. 1984) ("a Circuit Court may resolve claims of unreasonable delay in order to protect its future jurisdiction."); *Coalition to Reroute Nexus v. FERC*, No. 17-4302 (6th Cir. Mar. 15, 2018) (denying writ of mandamus alleging delay in FERC rehearing process).

Amicus also contends that the Commission did not, and could not, address Petitioners' just compensation, conditional certificate, and tolling order claims and, therefore, that judicial review need not await Commission rehearing.[5] Amicus Br. 13-14, 18-22. But the Rehearing Order addressed each of these claims. *See* Rehearing Order P 76 (interpreting NGA section 7(h) in addressing just compensation issue), JA ___; *id*. PP 81-82 (interpreting NGA section 7(e) addressing Commission's conditioning authority), JA ___; *id*. P 78-79 (addressing use of tolling orders and timing of eminent domain proceedings), JA ___. *See also supra* pp. 33-41.

Petitioners had notice of and participated in the certificate proceeding, and had the opportunity to seek judicial review of the Commission's orders. Rehearing

[5] Although Amicus cites pages 45-46 of Petitioners' brief as raising a tolling order issue, those pages do not mention tolling orders. Tolling orders are mentioned only in the background of Petitioners' Brief at 2, 10, which explains that some petitioners considered the Certificate Order to be a final, reviewable order because they believed the Commission's Secretary did not have authority to issue the tolling order. Amicus raises a different contention – that issuing the tolling order violated due process because it delayed court review of issues the Commission did not and could not address. Amicus Br. at 12-22.

Order P 78, JA ___. While that review might not have occurred as quickly as Bold Petitioners and Amicus would prefer, the Commission appropriately issued the tolling order to ensure that it had sufficient time to carefully consider the numerous issues raised on rehearing. *See id.* P 79, JA ___.

The Commission's statutory interpretations and findings regarding these issues fall squarely within its jurisdiction and expertise. *See* Certificate Order n.78, JA ___; Rehearing Order n.177, JA ___; *see also Del. Riverkeeper*, 857 F.3d at 395-96 (court defers to Commission's reasonable interpretation of Natural Gas Act). And even if Petitioners' claims involved challenges to the constitutionality of the Natural Gas Act itself, Petitioners still needed to present those claims to the Commission before they could raise them to this Court. Indeed, the Fourth Circuit, affirming the district court's dismissal of a collateral objection to the Project on constitutional grounds, explained that Congress "intended those claims to be brought under the statutory review scheme established by the Natural Gas Act." *Berkley*, 896 F.3d at 633. *See also Jarkesy v. SEC*, 803 F.3d 9, 18 (D.C. Cir. 2015) ("[S]o long as a court can eventually pass upon the challenge, limits on an agency's own ability to make definitive pronouncements about a statute's constitutionality do not preclude requiring the challenge to go through the administrative route."). As the Supreme Court has recognized, there are many

threshold questions that may accompany a constitutional claim to which an agency can apply its expertise. *Elgin v. Dep't of Treasury*, 567 U.S. 1, 22 (2012).

V. THE COMMISSION'S ENVIRONMENTAL REVIEW FULLY COMPLIED WITH NEPA.

The Environmental Impact Statement addressed all substantive issues raised during the scoping period, including geological hazards such as landslides, earthquakes and karst terrain; water resources including wells, streams, and wetlands; forested habitat; wildlife and threatened, endangered, and other special status species; land use, recreational areas, and visual resources; socioeconomic issues such as property values, environmental justice, tourism, and housing; cultural resources; air quality and noise impacts; safety; cumulative impacts; and alternatives. Certificate Order P 129, JA ___. That analysis concluded that construction and operation of the Project may result in some adverse environmental impacts on specific resources. *Id*. P 130, JA ____. While the impacts on most environmental resources would be temporary or short-term, the impacts of forest clearing would be long-term and significant. *Id*. For the other resources, impacts will be reduced to less-than-significant levels with the implementation of mitigation measures. *Id*. *See also* Rehearing Order P 98, JA ___; EIS at 5-1, JA ___. Based on the Environmental Impact Statement and the full record in the proceeding, the Commission found that the Project, if constructed and operated as described in the Environmental Impact Statement, is an

environmentally acceptable action. Certificate Order P 308, JA ___.

Petitioners challenge the Commission's findings regarding greenhouse gas emissions, the mitigation of surface water impacts from sedimentation and erosion, the mitigation of groundwater impacts from pipeline construction in areas with karst features, and cultural attachment, as well as its consideration of alternative routes. Br. at 46-74. Each of these issues was fully evaluated in the Environmental Impact Statement, and therefore Petitioners fail to demonstrate that the Commission fell short of NEPA's "hard look" requirement. *See Balt. Gas & Elec.*, 462 U.S. at 97 (agency took a "hard look" where it adequately considered and disclosed the environmental impact of its actions). While Petitioners disagree with the Environmental Impact Statement's conclusions and analysis of environmental impacts, those disagreements do not show that the Commission's decision-making process was uninformed, much less arbitrary and capricious. Rehearing Order P 117, JA ___. And to the extent Petitioners disagree with the Commission's choice of methodology, this Court affords "'an extreme degree of deference'" to FERC's evaluation of scientific data within its technical expertise. *Del. Riverkeeper*, 857 F.3d at 396 (quoting *Myersville*, 783 F.3d at 1308).

A. The Commission Reasonably Analyzed Downstream Greenhouse Gas Emissions.

The Environmental Impact Statement presented the direct and indirect greenhouse gas emissions associated with the construction and operation of the

Project and the potential climate change impacts of such emissions. *See* EIS at 4-484 to 4-518, 4-619, JA ___-___, ___. Using a method developed by the Environmental Protection Agency, the Environmental Impact Statement also estimated that the greenhouse gas emissions associated with the end-use combustion of the Project's full design capacity would amount to roughly 48 million metric tons per year. *See* EIS at 4-620, JA ___.[6] This estimate was conservative, as it did not account for the fact that gas transported by the Project could displace other fuels, like coal, thereby potentially offsetting some regional greenhouse gas emissions, or displace gas that would otherwise be transported via different means, which would result in no change in downstream emissions. Certificate Order P 293, JA ___. In an effort to add context to these emissions, the Commission examined both regional and national greenhouse gas emissions and determined that combustion of all the gas transported by the Project would, at most, increase greenhouse gas emissions regionally by two percent and nationally by one percent. *See* EIS at 4-617 to 4-618, JA ___-___; Certificate Order P 294, JA ___. *See also Sierra Club*, 867 F.3d at 1374 ("Quantification would permit the agency to compare" project emissions to "total emission from the state or the

[6] The Environmental Impact Statement determined that, if the pipeline's maximum capacity (2.4 billion cubic feet per day) were transported 365 days a year and then burned, downstream emissions would amount to approximately 48 million metric tons per year of carbon dioxide equivalent. EIS at 4-620, JA ___.

region, or to regional or national emissions-control goals").

The Environmental Impact Statement qualitatively described how greenhouse gases occur in the atmosphere and how they induce global climate change. *See* EIS at 4-488, JA ___. The Commission also described the potential cumulative impacts of climate change in the Project markets. *See id*. at 4-618, JA ___; Rehearing Order P 273, JA ___; Certificate Order PP 292-95, JA ___-___. But because the Project's incremental, climate change-related impacts on the environment cannot determined, the Commission could not assess whether the Project's contribution to cumulative impacts on climate change would be significant. Certificate Order P 295, JA __. *See WildEarth Guardians v. Jewell*, 738 F.3d 298, 320 (D.C. Cir. 2013) (rejecting challenge to EIS that did not specify global impacts that would result from additional emissions).

This analysis went beyond that which is required by NEPA because the downstream use of natural gas was not a "reasonably foreseeable" impact, nor "casually connected" to the Project, as those terms are defined for NEPA purposes. Rehearing Order P 271, JA ___. Nonetheless, the Commission at the time provided such additional information to the public.

Petitioners raise a series of arguments in an effort to establish that NEPA requires a more in-depth downstream emissions analysis. None has merit.

1. End-use Greenhouse Gas Emissions Are Not An Indirect Impact Of The Project.

NEPA requires agencies to consider indirect impacts that are "caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8(b). To determine whether an effect is "reasonably foreseeable," the agency must engage in "reasonable forecasting and speculation,' with *reasonable* being the operative word." *Sierra Club v. Dep't of Energy*, 867 F.3d 189, 198 (D.C. Cir. 2017) (citation omitted).

Relying primarily upon *Sierra Club v. FERC* – which held that emissions from specifically-identified existing and planned power plants to be served by a pipeline were an indirect effect of that project – Petitioners claim that the downstream emissions stemming from the gas to be transported by the Project are an indirect effect. Br. at 48-49. But as the Commission explained, the end users of the gas at issue in *Sierra Club v. FERC* were known. That is not the case here.

In this case, "it is unknown where and how the transported gas will be used and there is no identifiable end use." *See* Rehearing Order P 304, JA ___. "[T]he ultimate destination" of the vast majority of the gas "will be determined by price differentials in the Northeast, Mid-Atlantic, and Southeast markets and, thus, is unknown." Certificate Order n.286, JA ___. The Commission thus lacked "meaningful information about the downstream use of the gas; *i.e.*, information about future power plants, storage facilities, or distribution networks" that will

make use of Project gas. Rehearing Order P 303, JA ___. Nor is there "information as to the extent such consumption will represent incremental consumption above existing levels, as opposed to substitution for existing sources of supply." *Id.* n.814, JA ___.

Petitioners contend that the Commission's observation that the Project could result in no change to greenhouse gas emissions if it displaces gas that would have been transported by other means lacks "support in the record". Br. at 53 (citing Certificate Order P 293, JA ___).[7] But that is the point. The Commission cannot determine with any degree of specificity where Project gas will be transported and how it will be used. Accordingly, the Commission reasonably concluded "that ultimate end-use combustion of the gas transported by the Projects is [not] reasonably foreseeable." Rehearing Order P 303, JA __.[8] *See Sierra Club*, 867 F.3d at 1374 (acknowledging that "in some cases quantification may not be feasible").[9] Nor is such end use sufficiently casually connected to the Project to be

[7] Petitioners also characterize this observation as "irrational," but offer no explanation to support this claim. Br. at 53.

[8] Due to lack of reasonable foreseeability, the Commission also concluded that downstream emissions were not a cumulative impact of the Project. *See, e.g.*, Rehearing Order PP 301-306, JA ___-___.

[9] *See also Coal. for Responsible Growth & Res. Conservation v. FERC*, 485 F. App'x 472, 474 (2d Cir. 2012) (cumulative impact analysis sufficient where it included a short summary discussion of upstream shale gas production activities); *Sierra Club v. Dep't of Energy*, 867 F.3d at 202 (DOE's generalized discussion of

an indirect impact. As the Commission has observed, "end-use consumption of natural gas will likely occur regardless of the Commission's approval of the" Project. *Dominion Transmission, Inc.*, 163 FERC ¶ 61,128, P 41 (2018) (cited in Rehearing Order n.740, JA ___).

Moreover, the fundamental directive from *Sierra Club* was to "estimate[] the amount of power-plant carbon emissions that the pipelines will make possible." 867 F.3d at 1371. The Environmental Impact Statement did just that by calculating the greenhouse gas emissions associated with the combustion of the full design capacity of the pipeline. *See* EIS at 4-620, JA ___; Certificate Order P 293, JA ___.

2. The Commission Reasonably Determined That It Could Not Assess The Significance Of Downstream Emissions.

Petitioners contend that the Commission was required to discuss the "significance" – *i.e.*, the context and intensity – of the downstream emissions. Br. at 51-52. But again, because such emissions are not properly characterized as indirect impacts, the NEPA analysis called for by Petitioners was not required.

Moreover, there is no tool available to meaningfully assess the Project's "incremental physical impacts on the environment caused by climate change."

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impacts associated with non-conventional natural gas production fulfills its obligations under NEPA; DOE need not make specific projections about environmental impacts stemming from specific levels of export-induced gas production).

Certificate Order P 295, JA ___. Nor is there any widely accepted standard for ascribing significance to a given volume of greenhouse gas emissions. *See* Rehearing Order P 292, JA ___. Without an appropriate standard to use as a comparative benchmark, the Commission determined it would be inappropriate to ascribe significance to a given rate or volume of greenhouse gas emissions. *Id*.

In any event, the *Sierra Club* court explained that quantifying downstream emissions would "permit the [Commission] to compare the emissions from [the project] to emissions from other projects, to total emissions from the state or the region, or to regional or national emissions-control goals." 867 F.3d at 1374. According to the court, this comparative analysis is the means to describe the significance of the downstream emissions because it would allow the Commission to "engage in 'informed decision making' with respect to the greenhouse gas effects of this project." *Id*. Here, the Commission did just that by comparing the downstream emissions with those from regional and national greenhouse gas emissions. *See* Certificate Order P 294, JA ___.

3. The Commission Reasonably Declined To Utilize The Social Cost Of Carbon Tool.

Petitioners take issue with the Commission's decision not to assess significance with the Social Cost of Carbon tool, which attempts to calculate the

cost today of future climate change damage.[10] Petitioners contend this decision was "not due to any alleged deficiency in the tool," but rather the Commission's rejection of the *Sierra Club* court's determination that FERC is the legally-relevant cause of downstream emissions. Br. at 54-55. That is incorrect. In the underlying orders, the Commission extensively discussed why it believes the Social Cost of Carbon tool is not appropriate for use in project-level NEPA reviews. *See* Certificate Order P 296, JA ___; Rehearing Order PP 275-297, JA ___-___.

With respect to the tool itself, the Commission found that "no consensus exists on the appropriate [discount] rate to use for analyses spanning multiple generations and consequently, significant variation in output can result." Certificate Order P 296 (internal quotations omitted), JA __. *See also* Rehearing Order PP 290-91, JA ___-___. Moreover, while the tool can be used to monetize emissions, "there are no established criteria identifying the monetized values that are to be considered significant for NEPA reviews." Certificate Order P 296, JA __. There is thus "no basis to designate a particular dollar figure calculated from the Social Cost of Carbon tool as 'significant.'" Rehearing Order P 294, JA ___. Using local or state greenhouse gas emission inventories as a benchmark for significance is also problematic. Two projects of equal capacity could result in

[10] The tool assigns a series of annual costs per metric ton of emissions discounted to a present-day value. Rehearing Order P 277, JA ___.

vastly different percentage increases depending on whether the project serves a single state (and thus impacts one inventory) or multiple states (and thus multiple inventories). *Id*. P 293, JA ___. *See EarthReports, Inc. v. FERC*, 828 F.3d 949, 956 (D.C. Cir. 2016) (accepting Commission's rejection of the Social Cost of Carbon based in part on the difficulty of determining significance).

Apart from shortcomings in the tool, the Commission explained that Council on Environmental Quality regulations state that "agencies 'should not' display a monetary cost-benefit analysis when there are important qualitative considerations." Rehearing Order P 283, JA ___ (citing 40 C.F.R. § 1502.23). The siting of natural gas infrastructure "necessarily involves making qualitative judgments between different resources as to which there is no agreed-upon quantitative value." *Id*., JA ___. In addition to quantifying the Project's negative impacts, the Commission would also have to calculate the Project's benefits, "including, but not limited to, replacement of coal and oil by natural gas, a task no easier than calculating costs." *Id*. P 284, JA ___.

4. The Commission Reasonably Declined To Consider Downstream Emissions In Its Public Interest Analysis.

Petitioners criticize the Commission for failing to consider the greenhouse gas effects of downstream emissions when evaluating whether the Project is in the public interest under the Natural Gas Act. Br. at 55-56. This argument, however,

is based on the faulty premise that downstream greenhouse gas emissions are an indirect impact of the Project, which feeds into other pipelines rather than serving discrete end users. As the Commission explained, downstream emissions will not "vary regardless of the project's routing or location," and any conditions the Commission could impose on construction will not "affect the end-use-related [greenhouse gas] emissions." Rehearing Order P 309, JA ___. To decline to authorize a project based on end-use greenhouse gas emissions "would rest on a finding not 'that the pipeline would be too harmful to the environment,' but rather that the end use of the gas would be too harmful to the environment." *Id*. (quoting *Sierra Club v. FERC*, 867 F.3d at 1357). The Commission believed that this national policy question is not appropriate for resolution in the case-by-case infrastructure review process under the Natural Gas Act. *Id*.

5. The Commission Reasonably Analyzed The No Action Alternative.

Petitioners also contend there is no support for the Commission's observation that the no-action alternative would not decrease the consumption of natural gas or reduce greenhouse gas emissions. Br. at 53. But as the Commission explained, Project shippers executed "long-term contracts with substantial financial obligations that reflect need for natural gas supplies." Rehearing Order P 300, JA ___. If the Project were not constructed (*i.e*., the no action alternative), that demand for natural gas supplies would have to be satisfied by other means, such as

by "subscribing to other expansions of existing transportation systems or seeking the construction of other new facilities." *Id*. While there may be differences in the greenhouse gas emissions from the construction and operation of the specific type of infrastructure used to transport gas to satisfy the existing demand, the end use emissions associated with any of these alternatives would be the same. *Id*.

Petitioners do not take issue with any aspect of this analysis. They simply cite a Tenth Circuit decision criticizing the Bureau of Land Management for assuming that, if certain coal mining leases were not approved, the same amount of coal would be sourced from elsewhere. *See WildEarth Guardians v. Bureau of Land Management*, 870 F.3d 1222, 1228 (10th Cir. 2017). In that case, however, the court found that the Bureau's assumption was "contrary to basic supply and demand principles," *id*. at 1236, and contradicted by the very report upon which the assumption was based. *Id*. at 1234 ("BLM did not acknowledge portions of EIA's 2008 Energy Outlook which contradict its conclusion"). Here, the Commission cited to record evidence supporting its determination that Project shippers would likely obtain alternative sources of fuel. The Commission's decision was thus not based on an unsupported assumption, and Petitioners have not shown that it contradicts basic economic principles.

B. The Commission Reasonably Found No Significant Impact On Surface Water From Erosion And Sedimentation.

1. The Commission Reasonably Determined That Required Mitigation Would Adequately Protect Surface Water.

The Commission's environmental review examined potential effects on waterbodies during construction and operation of the Project due to erosion and sedimentation. EIS at 4-143 to 4-149, JA ___, ___; Certificate Order P 185, JA ___. The Environmental Impact Statement concluded that no long-term or significant impacts on surface waters are anticipated because the pipeline would (a) not permanently affect designated water uses, (b) bury the pipeline beneath the bed of all waterbodies, (c) implement erosion and sedimentation controls, (d) adhere to crossing guidelines in their procedures, and (e) restore streambanks and streambed contours as close as practical to pre-construction conditions. Certificate Order P 185, JA ___; EIS at 4-149, JA ___.

Specifically as to erosion and sedimentation, Mountain Valley agreed to follow best management practices based on, among other things, the Commission's May 2013 *Upland Erosion Control, Revegetation and Maintenance Plan* and *Wetland and Waterbody Construction and Mitigation Procedures*,[11] and on Mountain Valley's February 2016 *Erosion and Sediment Control Plan*, JA ___-

[11] These Commission plans are available at http://www.ferc.gov/industries/gas/enviro/guidelines.asp.

___, and its March 2017 *Landslide Mitigation Plan*, JA ___-__.[12] *See* EIS at 2-30 to 2-34, JA ___-___, 4-81, JA ___. These plans provide for erosion control devices and other baseline mitigation measures that will limit sedimentation and runoff from all work areas. Certificate Order P 176, JA ___. Commission staff reviewed these plans and determined that they will provide acceptable protection of surface waterbodies. Certificate Order PP 146, 185 JA ___, ___ (citing EIS at 4-149, JA ___); Rehearing Order PP 176-177, JA ___-___.

Petitioners assert that the Commission's conclusion that these measures would successfully mitigate erosion and sedimentation was unsupported. Br. at 58-61. The Commission's conclusion reasonably was based on its staff's experience with pipeline construction and Mountain Valley's commitment to cross waterbodies via dry-ditch methods, adherence to the Commission's plans and procedures, and use of extensive monitoring and compliance programs. Certificate Order PP 176-177, JA ___-__; Rehearing Order P 177, JA ___.

The Commission's plans and procedures were developed in consultation with multiple state agencies across the country and updated based on field experience gained from pipeline construction and compliance inspections conducted over the last 25 years. Rehearing Order P 187, JA ___. Based on that

[12] These plans are included in the Commission record. *Erosion and Sediment Control Plan*, JA ___-___; *Landslide Mitigation Plan*, JA ___-___.

experience, these measures are an effective means to mitigate the impacts of the construction and operation of the Project. *Id*.

In particular, the use of a dry open-cut technique to cross waterbodies will limit downstream sedimentation and turbidity during construction and therefore limit the potential impacts on aquatic resources. EIS at 4-217, JA ___. The Environmental Impact Statement concluded that dry open-cut waterbody crossings result in temporary (less than 4 days) and localized (for a distance of only a few hundred feet of the crossing) increases in turbidity downstream of construction. Certificate Order P 185, JA ___. The magnitude of this increase is minimal compared to increased turbidity associated with natural runoff events. *Id*. The Environmental Impact Statement discussed two peer-reviewed scientific studies, including one prepared by the U.S. Geological Survey, that support the conclusion that the dry-ditch methods will result in minor, short-term, and localized increases in sedimentation. *Id*. P 175, JA ___; EIS at 4-217, JA ___. *See City of Boston*, 897 F.3d at 255 (affirming Commission's reliance on conclusions of another expert agency).

Further, during construction and restoration, Mountain Valley must employ environmental inspectors to ensure compliance with the construction standards and other certificate conditions. Rehearing Order P 188, JA ___ (citing EIS at 2-38, JA ___). *See also* EIS at 2-51, JA ___ (describing procedures for compliance

monitoring and quality control). In addition, Mountain Valley agreed to fund a third-party compliance monitoring program during the construction phase of the Project. Rehearing Order n.521, JA ___. Under this program, a contractor is selected by, managed by, and reports solely to Commission staff to provide environmental compliance monitoring services. *Id*. The compliance monitor provides daily reports to the Commission-staff project manager on compliance issues. *Id*. Moreover, FERC staff conducts periodic compliance inspections during all phases of construction and throughout restoration. *Id*.

Courts have found mitigation measures sufficient when based on agency assessments or studies or when they are likely to be adequately policed, such as when they are included as mandatory conditions imposed on pipelines. Rehearing Order P 188, JA ___ (citing *Nat'l Audubon Soc. v. Hoffman*, 132 F.3d 7, 17 (2d Cir. 1997); and *Abenaki Nation of Mississquoi v. Hughes*, 805 F. Supp. 234, 239 n.9 (D. Vt. 1992), *aff'd*, 990 F.2d 729 (2d Cir. 1993)). *See also Bordentown*, 903 F.3d at 259 (upholding FERC mitigation measures based, in part, on agency oversight and reporting requirements). Here, the Commission reasonably concluded that the erosion and sedimentation mitigation measures met this standard.

2. Petitioners Fail To Demonstrate That The Commission Erred In Finding The Mitigation Measures Adequate.

Petitioners assert that the Fourth Circuit identified "flaws" in the Environmental Impact Statement's sedimentation and erosion analysis that renders FERC's conclusions regarding sedimentation mitigation arbitrary and capricious. Br. at 61-62 (citing *Sierra Club, Inc. v. U.S. Forest Service*, 897 F.3d 582, 591-96 (4th Cir. 2018)). The Fourth Circuit's *Sierra Club* decision does not support Petitioners' claims.

Sierra Club, as relevant here, concerned the Environmental Impact Statement's reliance on the *Hydrologic Analysis of Sedimentation* that Mountain Valley prepared at the request of the Forest Service to analyze the pipeline's erosion and sedimentation impacts on the Jefferson National Forest. *Id*. at 591-92; *Hydrologic Analysis of Sedimentation*, EIS Appendix O-3, JA ___-__. That analysis showed that strict adherence to the Commission's plans and procedures during construction would reduce sedimentation impacts to below a level of significance. Rehearing Order P 191, JA ___.

Petitioners' arguments focus upon the *Hydrologic Analysis* finding that erosion and sediment control practices for the Project would produce 79 percent containment. Br. at 61-62. In comments on the Environmental Impact Statement, the Forest Service asserted that the 79 percent containment figure was overstated

because it failed to account for improper implementation of mitigation measures in the field. *Sierra Club*, 897 F.3d at 592. Nevertheless, the Forest Service issued its Rule of Decision permitting pipeline construction without explaining how this concern had been resolved. *Id*. at 596. The *Sierra Club* court remanded the Rule of Decision for the Forest Service to provide the missing explanation. *Id*.

Here, in contrast, the Commission explained why the Forest Service's comment did not undermine the Commission's conclusions about the impacts of sedimentation and erosion over the pipeline route. Rehearing Order P 176, JA ___. As the Commission found, the Forest Service's generalized concerns with the efficacy of implementation in the field did not address the adequacy of the Commission's mitigation measures but rather were compliance concerns. *Id*. P 192, JA ___. Again, the Commission's plans and procedures are based on over 25 years of inspection experience, are mandatory, and are closely monitored. *Id*. P 193, JA ___. Environmental inspectors are required during construction to ensure compliance with all mitigation measures and alert the Commission to any potential compliance issue. Certificate Order, App. C, Condition 7, JA ___. The Commission found these measures sufficient to mitigate sedimentation impacts. Rehearing Order P 177, JA ___.

Petitioners also claim that the Commission failed to consider a study they submitted, which found that "in 'high risk' areas, *i.e*. those with steep slopes and

highly erodible soils," sedimentation would increase by 15 percent due to the permanent land cover change from upland forest to herbaceous cover. Br. at 63. Rejecting this argument, the Commission found that both the Certificate Order and the Environmental Impact Statement addressed the potential for sedimentation from steep slopes in the analysis of landslide risk. Rehearing Order P 201, JA ___ (citing Certificate Order P 146, JA ___; EIS at 4-52, JA ___). The Commission's *Upland Erosion Control, Revegetation and Maintenance Plan* is specifically designed to mitigate aquatic impacts from upland construction. *Id*. (citing EIS at 4-81, JA ___). Mountain Valley must comply with its *Landslide Mitigation Plan*, to which the Commission added additional measures, including a more robust monitoring program and construction measures to be used when crossing steep slopes. *Id*. (citing Certificate Order P 145, JA ___).

The mandatory *Erosion and Sedimentation Plan* requires Mountain Valley to use certain measures (such as compaction, benching, toe keys and slope drains) and long-term erosion control mediums (such as Flexterra, Earthguard, erosion control fabric or a stabilization mat) to ensure stability and revegetate steep slopes. *Id*. (citing, *inter alia*, Mountain Valley's February 2016 Erosion and Sediment Control Plan, JA ___-___). Temporary sediment barriers (such as silt fence and straw/hay bales) that are installed immediately after disturbance of a waterbody or adjacent upland during construction will be replaced by permanent erosion control

devices (such as installing trench breakers and slope breakers) where revegetation has not stabilized the disturbed area. *See* EIS at 2-42, 2-49, 4-81, JA ___, ___, ___.

Petitioners also point to post-record[13] instances where Mountain Valley was cited by other agencies for noncompliance with permit requirements. Br. at 59-60 & n.20. Such citations do not establish that the Commission unreasonably determined that its plans and procedures – developed through extensive experience with pipeline construction across the country – would adequately mitigate erosion and sediment impacts. "[I]nstances of non-compliance do not support a conclusion that there are pervasive flaws in the required mitigation measures." Rehearing Order P 190, JA ___. Further, it was not expected that the measures would eliminate all sedimentation and erosion impacts of the Project, but rather reduce sedimentation into streams and the potential for slope failures. *See* Certificate

[13] Petitioners attempt to justify consideration of these post-record incidents with a citation to *Amoco Oil Co. v. EPA*, 501 F.2d 722, 729 n.10 (D.C. Cir. 1974), which permitted consideration of post-decision Congressional testimony in support of agency predictions where the agency subsequently reaffirmed its predictions. *Amoco* cautioned against consideration of subsequent events that did not inform the agency decision-making under review, particularly where the information on such events has not been subject to proceedings before the agency to assure its accuracy and completeness. *Id.* In *Defenders of Wildlife v. Gutierrez*, 532 F.3d 913, 919-20 (D.C. Cir. 2008), this Court affirmed that "[w]e are bound on review to the record before the agency at the time it made its decision," and found the exception to this rule in *Amoco* to be "quite narrow" and based on the particular circumstances of the Congressional testimony.

Order P 146, JA ___. The Commission's experience confirms that when correctly implemented, the Commission's plans and procedures provide adequate erosion control and protection of aquatic resources. Rehearing Order P 190, JA ___. The Commission takes matters of non-compliance seriously and relies on its monitoring and enforcement programs to ensure that non-compliance issues will be appropriately addressed and any impacts remediated. *Id*.

C. The Commission Reasonably Found No Significant Impact On Groundwater Resources In Areas With Karst Features.

Karst features, such as sinkholes, caves, and caverns, form as a result of the long-term action of groundwater on subsurface soluble carbonate rocks (*e.g.*, limestone and dolostone). Certificate Order P 151, JA ___. Mature karst systems constitute a subsurface interconnected flow system that may allow for the rapid transport of contaminates including sediment over large distances and can impact groundwater users (wells and springs) over a large area. EIS at 4-63, JA ___.

Because karst features provide a direct connection to groundwater, there is a potential for pipeline construction to increase turbidity in groundwater due to runoff of sediment into karst features. Certificate Order P 171, JA ___. To minimize such potential impacts, Mountain Valley will implement the erosion control measures outlined in the Commission's *Upland Erosion Control, Revegetation and Maintenance Plan* and Mountain Valley's *Karst-Specific Erosion and Sediment Control Plan*, JA ___-___. Certificate Order P 171, JA ___.

Petitioners argue that the Commission lacked a sufficient basis to conclude that the impacts of pipeline construction on groundwater in areas with karst features would be adequately mitigated. Br. at 65. They complain that Mountain Valley's *Karst-Specific Erosion and Sediment Control Plan* lists mitigation "objectives" to be achieved with best management practices, but fails to specify exactly what actions will be taken to achieve those objectives. Br. at 65-66. Petitioners make a similar complaint about Mountain Valley's *General Blasting Plan*, which includes mitigation procedures to be used if blasting is required in the vicinity of karst structures. Br. at 67-68.

Initially, Mountain Valley has developed project-specific plans. *See* EIS at 4-59 to 4-60, JA ___ (listing some of the best management practice objectives in the *Karst-Specific Plan*, such as "installing a double line of sediment control fencing and straw bales up gradient of karst features"); *id*. at 4-60 (listing certain karst mitigation procedures in the *General Blasting Plan* such as "using low force charges designed to only affect the rock to be removed").

Petitioners also fail to mention other mitigation procedures that are designed to assure that the mitigation objectives are achieved. During construction, pursuant to Mountain Valley's *Karst Mitigation Plan* (JA ___-___), Mountain Valley will deploy a Karst Specialist Team – comprised of professional geologists having direct work experience with karst hydrology and geomorphic processes, or persons

working under the direction of such geologists – to inspect karst features and assess the risk for impacting groundwater quality, as well as to provide recommendations for karst feature stabilization and mitigation. EIS at 4-105, JA ___; *Karst Mitigation Plan* at 7, JA ___. The Karst Specialist Team has over 70 years of combined direct field experience evaluating karst features in the vicinity of the pipeline and will be on-site during construction activities within karst terrain. *Id*. at 7, 9, JA ___, ____. They will observe construction activities to assist in limiting potential negative impacts, and to inspect, assess and if necessary mitigate karst features that are encountered or formed during construction in conjunction with recommendations from appropriate state agencies. *Id*.

The *Karst Mitigation Plan* outlines inspection criteria for karst features identified during construction in proximity to the right-of-way. Certificate Order P 155, JA ___; Rehearing Order P 184, JA ___. If a karst feature is identified, the Karst Specialist Team will conduct a weekly Level 1 inspection and document soil subsidence, rock collapse, sediment filling, swallets (underground springs), springs, seeps, caves, voids and morphology. Certificate Order P 155, JA ___; Rehearing Order P 184, JA ___; *Karst Mitigation Plan* at 10-11, JA ___-___.

If the weekly inspection identifies any changes, the Karst Specialist Team will then conduct more in-depth inspections. Certificate Order P 155, JA ___; Rehearing Order P 184, JA ___; *Karst Mitigation Plan* at 12-13, JA ___-__. If a

feature is found to have a direct connection to a subterranean environment or groundwater flow system, Mountain Valley will work with the Karst Specialist Team and appropriate state agencies to develop mitigation measures. Certificate Order P 155, JA ___; Rehearing Order P 184, JA ___; *Karst Mitigation Plan* at 12, JA ___.

As an example, the majority of karst features along the proposed pipeline route are sinkholes. Rehearing Order P 183, JA ___. Under Mountain Valley's *Karst Mitigation Plan*, mitigation of a sinkhole would involve reverse gradient backfilling of the sinkhole to stabilize the sinkhole, while maintaining the sinkhole's groundwater recharge function. EIS at 4-59, JA ___. If larger or more continuous karst features or a cave is identified during construction, the karst inspector would coordinate with the appropriate state agencies regarding mitigation and/or avoidance of the discovered feature. *Id.*

To assure that groundwater protection is in fact achieved, Mountain Valley is further required to offer pre- and post-construction water testing to landowners. Rehearing Order P 196, JA ___; Certificate Order P 172, JA ___; *id.* Appendix C, Condition 21, JA ___, ___. These measures ensure that any adverse Project effects on private wells or other sources of potable water in the area will be fully mitigated. Rehearing Order P 196, JA ___. In addition to post-construction monitoring, Mountain Valley is required to compensate landowners for damages to

the quantity or quality of domestic water supplies and to repair or replace water systems. Rehearing Order P 196, JA ___; Certificate Order P 172, JA ___.[14]

The Commission reasonably concluded that these mitigation measures would adequately minimize groundwater impacts from Project construction in areas with karst features. Certificate Order PP 153, 177, JA ___, ___. While Petitioners would have this Court require a completed, detailed plan of action in advance of Commission action, NEPA imposes no such requirement. Mitigation need only "be discussed in sufficient detail to ensure the environmental consequences have been fairly evaluated." *Methow Valley*, 490 U.S. at 352. NEPA does not require that "a complete mitigation plan be actually formulated and adopted." *Id*. Indeed, "it would be inconsistent with NEPA's reliance on procedural mechanisms – as opposed to substantive, result-based standards – to demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act." *Id*. at 353. *See also Theodore Roosevelt Conserv. P'ship v. Salazar*, 616 F.3d 497, 517 (D.C. Cir. 2010) (NEPA does not require a "detailed, unchangeable mitigation plan" but rather permits adaptable mitigation plan, based on specified performance goals, that would monitor the development's

[14] Unlike the mitigation measures "to be determined" and lacking immediate meaning in *American Rivers v. FERC*, 895 F.3d 32, 54 (D.C. Cir. 2018), here the mitigation measures must be implemented and followed prior to pipeline construction and operation. *See, e.g.*, Certificate Order, App. C, Conditions 12, 21, JA ___, ___.

effects on the environment and mitigate those effects as necessary); *Pub. Utils. Comm'n*, 900 F.2d at 282-83 (Commission's deferral of decision on specific mitigation measures until construction started was "both eminently reasonable and embraced in the procedures promulgated under NEPA"); *Mayo v. Reynolds*, 875 F.3d 11, 21 (D.C. Cir. 2017) (NEPA imposes no duty to include in every EIS a detailed explanation of specific mitigation measures).

D. The Commission Reasonably Found No Significant Impact On Cultural Attachment.

Although not required by any federal laws or regulations relating to historic preservation and cultural resources management, the Environmental Impact Statement analyzed "cultural attachment" – *i.e.*, how a group of people relate to its surrounding environment over time, which may include traditions, attitudes, practices and stories – to identify potential impacts to the tangible and intangible values of culture associated with the physical environment. EIS at 4-470, 4-474, JA ___, ___. Here, the Project route would avoid areas of high cultural attachment intensity, and cross a region with moderate or low cultural attachment intensity. EIS at 4-474, JA ___. Staff's analysis, conducted by professional anthropologists, concluded that the Project should not have significant long-term adverse impacts on cultural attachment to the land. Rehearing Order P 267, JA ___ (citing EIS at 4-476, JA ___).

Petitioners take issue with Commission's analysis of cultural attachment in the Peters Mountain area which, in part, forms the borders between West Virginia and Virginia. Br. at 69-74. That portion of the pipeline route, however, consists only of six miles of underground pipeline; no above-ground facilities will be built in the area. EIS at 4-475, JA ___. After installation, the right-of-way would be restored to its original condition, with only the 50-foot-wide permanent operational easement being kept clear of trees in forested areas. *Id*. Three of the six miles of underground pipeline would be placed adjacent to existing power line rights-of-way. *Id*. The viewshed of Peters Mountain is not pristine, including existing utilities and other infrastructure. *Id*. Therefore, staff concluded that the Project would not significantly alter the visual character of Peters Mountain. *Id*.

No Peters Mountain residents would be separated from their land; Mountain Valley purchased no homes in the area and access to all properties would be maintained. *Id*. at 4-476, JA ___. No buildings outside of the permanent 50-foot-wide operational easement would be removed. *Id*. The Project therefore would not affect land ownership, tenure, or sense of homeplace within the Peters Mountain community. *Id*. Likewise, the Project would not result in changes to the culture, belief systems, or traditional practices associated with the Peters Mountain community. *Id*. After pipeline installation and restoration, citizens could continue

to farm, gather plants, collect firewood, trade, share water and food, and hunt as they always have. *Id.*

While Petitioners express concern about damage to wells and springs (Br. at 72), staff concluded that project-specific construction techniques and mitigation plans, as discussed above in section V.B (surface water) and V.C (groundwater) above, would minimize impacts on water resources. *Id*. Wells or springs that supply domestic water affected by construction would be repaired or replaced. *Id*. Thus, staff reasonably concluded that construction and operation of the Mountain Valley pipeline would not have long-term significant adverse effects on cultural attachment because, *inter alia*, impacts on the Peters Mountain water resources will be reduced or mitigated though measures implemented by Mountain Valley. *Id*. at 4-477, JA ___.

E. The Commission Reasonably Rejected Hybrid Alternative 1A.

In fulfilling its obligation to consider reasonable alternatives to the proposed pipeline route, the Commission considered major route alternatives that would increase the potential for co-location with existing powerlines or pipelines, or other proposed pipelines. *See* EIS at 3-20, JA ___. This analysis included Petitioners' preferred Hybrid Alternative 1A (Br. at 73-74). *See* Certificate Order P 306, JA ___; EIS at 3-20, 3-25, JA ___, ___.

The Hybrid 1A Alternative would follow the northern half of Mountain Valley's proposed route and the southern half of an alternative route which would be substantially co-located with existing overhead electric transmission lines. EIS at 3-25, JA ___. The Environmental Impact Statement concluded that this alternative would have certain environmental advantages, such as avoiding the Slussers Chapel conservation site and known karst features, affecting 1.8 fewer miles of the Jefferson National Forest, 68 fewer springs and wells, 11.3 miles fewer of forested lands, and about 5 miles fewer of areas with landslide potential. *Id*. The Hybrid 1A Alternative would only cross one historic district (as opposed to five districts crossed by the proposed route) and would be more co-located with existing corridors by almost 52 miles. *Id*.

But the Hybrid 1A Alternative would also have environmental disadvantages. *Id*. It would increase the length of the pipeline by 6 miles, thereby increasing the area of overall project disturbance by at least 138 acres, affecting 28 more landowners, and crossing 22 more perennial streams and two more major waterbodies. *Id*. Further, the Hybrid 1A Alternative would cross about 0.4 more miles of wetlands and affect about 335 more acres of agricultural land. *Id*. Finally, the alternative would cross 12.2 more miles of steep slopes and 19 more miles of side slopes compared to the proposed route, presenting substantially more obstacles to safe construction, increasing extra workspace requirements, and

potentially affecting worksite stability during construction and after restoration. *Id*.

Overall, the Environmental Impact Statement analysis concluded that the land requirements and resource impacts associated with the Hybrid 1A Alternative would not be significantly different than the proposed route. *Id*. The Commission recognized the benefits of the Hybrid 1A Alternative cited by Petitioners (Br. at 74), but reasonably concluded that it did not provide a environmental advantage over the proposed route sufficient to justify affecting additional landowners and therefore did not accept the proposed alternative. Certificate Order P 306, JA ___; Rehearing Order P 151, JA ___.

The Commission enjoys broad discretion in evaluating alternatives and utilizing its expertise to balance competing interests. *Minisink*, 762 F.3d at 111. *See also Myersville*, 783 F.3d at 1324 (deferring to agency's rejection of a pipeline loop alternative that would eliminate the emissions associated with the proposed compressor station but would disturb more land). Indeed, "[e]ven if an agency has conceded that an alternative is environmentally superior, it nevertheless may be entitled under the circumstances not to choose that alternative." *Myersville*, 783 F.3d at 1324. That the Commission reasonably exercised its considerable discretion here is further demonstrated by the Fourth Circuit's affirmance of the Bureau of Land Management's rejection of Hybrid 1A Alternative as a superior

route through the Jefferson National Forest. *Sierra Club*, 897 F.3d at 597. The court noted that, notwithstanding the Hybrid 1A Alternative's co-location benefits, it would also increase the length of the pipeline by six miles, affect 28 more landowners and cross 22 more perennial streams and two more major waterbodies. *Id*.

VI. THE COMMISSION COMPLIED WITH THE NATIONAL HISTORIC PRESERVATION ACT.

Section 106 of the National Historic Preservation Act requires that, "prior to the issuance of any license," the Commission take into account the effect of its authorizations on historic properties and afford the Advisory Council a reasonable opportunity to comment. 54 U.S.C. § 306108. Section 106's implementing regulations specifically identify certain "consulting parties" – relevant state historic preservation officers, tribal historic preservation officers, and local government officials – to be included in the review process. 36 C.F.R. § 800.2(c). Agencies are also vested with discretion to designate individuals and organizations as consulting parties if they have a "demonstrated interest" in the project by virtue "of their legal or economic relation to the undertaking." *Id*. § 800.2(c)(5) (those "with a demonstrated interest in the undertaking *may participate* as consulting parties") (emphasis added). In addition, agencies are encouraged to make use of their existing NEPA procedures to solicit and consider the views of the public. *Id*. § 800.2(d)(3). The Act's "mandate is essentially procedural" and imposes no

substantive standards on agencies. *City of Alexandria v. Slater*, 198 F.3d 862, 871 (D.C. Cir. 1999) (internal quotations omitted).

In order to implement a particular program to identify and resolve any adverse effects to historic properties, agencies and the Advisory Council may negotiate a programmatic agreement. 36 C.F.R. § 800.14(b). Such an agreement binds the agency and "satisfies the agency's section 106 responsibilities for all individual undertakings of the program covered by the agreement until it expires or is terminated by the agency." *Id.* § 800.14(b)(2)(iii).

A. There Was An Extensive Consultation Process Regarding Impacts To Historic Resources.

In this case, Commission staff consulted with the West Virginia and Virginia State Historic Preservation Officers, interested Indian tribes, government agencies, and the public regarding the Project's potential impacts on historic properties. *See, e.g.*, Rehearing Order P 260, JA ___; EIS at 4-402, JA ___. Throughout this process, Mountain Valley assisted FERC staff by providing data, analyses, and recommendations in accordance with the regulations of the Advisory Council and the Commission. *See* EIS at 4-403, JA ___; 36 C.F.R. § 800.2(a)(3); 18 C.F.R. § 380.12.

The consultation process could not be completed prior to issuance of the Certificate Order because Mountain Valley was unable to survey and evaluate certain tracts where it was denied access. After the Certificate Order was issued,

Mountain Valley was able to utilize eminent domain proceedings to gain access to such lands. *See* Rehearing Order P 251, JA ____; Certificate Order P 269, JA ___. In order to protect lands prior to the completion of consultations, the Commission imposed Environmental Condition 15, which restricts construction until after all additional required surveys and evaluations are completed, survey and evaluation reports and treatment plans have been reviewed by the Advisory Council and appropriate consulting parties, and the Commission has provided written notice to proceed. Certificate Order, App. C, Condition 15, JA __-__.

The section 106 process culminated in December 2017 (two months after the Certificate Order) when the Commission executed a programmatic agreement with the Advisory Council, State Historic Preservation Offices of West Virginia and Virginia, Forest Service, Bureau of Land Management, and the National Park Service. *See* Rehearing Order P 251, JA __. The document sets forth the parties' agreement as to those sites that will not be adversely affected and the process for developing treatment plans to resolve adverse effects at sites that could not be avoided. *See* Programmatic Agreement (R. 5865) at 8-14, JA ___-___. *See also* C.F.R. § 800.14(b)(2)(iii) (compliance with programmatic agreement satisfies the agency's section 106 responsibilities).

B. The Issuance Of A Conditional Certificate Does Not Violate The National Historic Preservation Act.

Petitioners' primary contention is that issuance of the Certificate Order "prior to the completion of the Section 106 process … violates the plain language" of the National Historic Preservation Act. Br. at 78. This Court, however, has previously upheld conditional licensing under the Act.

In *City of Grapevine v. Dep't of Transp.*, 17 F.3d 1502 (D.C. Cir. 1994), the Court rejected the contention that the Federal Aviation Administration (FAA) violated the National Historic Preservation Act by approving the construction of an airport runway conditioned on the successful completion of the section 106 review process. The Court found that conditional approval preserved the FAA's ability to withdraw its support "should the section 106 process later turn up a significant adverse effect." *Id.* at 1509. "[B]ecause the FAA's approval … was expressly conditioned upon completion of the § 106 process," the Court found "no violation of the NHPA." *Id.* This Court has similarly upheld the Commission's practice of conditional approvals in analogous circumstances. *See, e.g.*, *Del. Riverkeeper*, 857 F.3d at 399 (upholding approval conditioned on applicant obtaining Clean Water Act certification); *Myersville*, 783 F.3d at 1315, 1317-21 (upholding approval conditioned upon applicant obtaining Clean Air Act permit).

1. Petitioners' Efforts To Distinguish *City of Grapevine* Are Unavailing.

Petitioners argue that *City of Grapevine* does not control here because, in that case, the FAA retained the authority to deny use of the runway based on the results of the section 106 consultation process. Br. at 83. But here too, the Commission prohibited any construction until all necessary "evaluation reports and treatment plans have been reviewed by the appropriate consulting parties, the Advisory Council on Historic Preservation has had an opportunity to comment, and the Commission has provided written notification to proceed." Certificate Order P 269, JA ___.

Petitioners also contend that this case is distinguishable because the Commission "continued to authorize piecemeal construction without any comprehensive revaluation upon completion of the required Section 106 reviews and consultations." Br. at 84. But again, the Commission prohibited any construction until completion of the necessary consultation process. *See* Certificate Order, Appendix C, Condition 15 (applicant "**shall not begin construction**" until completion of section 106 process) (emphasis in original), JA ___.

Petitioners (at 78) also point to *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520 (8th Cir. 2003), where the Eighth Circuit remanded a license conditioned on undefined future mitigation measures that was issued before

a programmatic agreement was in place. *Id*. at 554. *Mid States*, however, did not involve a condition expressly precluding construction like Environmental Condition 15. Moreover, as the Commission explained, "the Advisory Council's regulations permit an agency granting project approval to 'defer final identification and evaluation of historic properties if it is specifically provided for in a programmatic agreement executed pursuant to § 800.14(b)." Rehearing Order P 250 (citing 36 C.F.R. § 800.4(b)(2)), JA ___.

2. The Commission's Conditional Approval Did Not Preclude Consideration Of Alternatives.

Petitioners argue that the Commission's conditional approval "foreclosed" the ability of FERC and consulting parties to consider means to avoid, minimize, or mitigate adverse effects on historic properties. Br. at 80-81, 84. That is incorrect. Following the Certificate Order, the Commission continued discussions with the consulting parties and ultimately executed the Programmatic Agreement, which sets forth the process to develop site-specific treatment plans to mitigate impacts to historic properties. *See* Rehearing Order P 251, JA ____; Programmatic Agreement at 10-12, JA ___-___.

Nonetheless, Petitioners allege that the Commission "did not engage in 'consultation' to resolve adverse effects" and "ignored" requests from consulting parties. Br. 81. The record belies Petitioners' unsupported assertion. For example, during the consultation process, the treatment plan for the Greater

Newport Rural Historic District was "substantially revised in response to the feedback received from [the Virginia Department of Historic Resources], Giles County, the Greater Newport Rural Historic Committee, the Advisory Council on Historic Preservation, Shannon Lucas, Clarence and Karolyn Givens, Jerry and Jerolyn Deplazes, and Michael Williams." R. 5964 (Revised Greater Newport Treatment Plan) at 1, JA ___. *See also* R. 5970 (Revised Bent Mountain Treatment Plan) at 1, JA ___. The fact that Petitioners' preferred mitigation measures were not adopted does not mean that consultation did not occur.

Moreover, Petitioners' fundamental position is that the Commission should have avoided the historic districts by adopting the Hybrid 1A Alternative. *See* Br. at 73-74, 92-94. That alternative was given extensive consideration and rejected *before* issuance of the conditional approval. *See* EIS at 3-25 to 3-28, JA ___-___. Certificate Order P 306, JA ___. *See also supra* pp. 71-74.

C. The Commission Reasonably Consulted With Native American Tribes.

Section 101 of the National Historic Preservation Act directs agencies to "consult with any Indian tribe … that attaches religious and cultural significance" to property that may be affected by a federal project. 54 U.S.C. § 302706(b). The Act's implementing regulations require agencies "to make a reasonable and good faith effort to identify" any such tribes. 36 C.F.R. § 800.2(c)(2)(ii)(A).

Petitioners claim that the Commission violated the Act by failing to consult with Petitioners Steven Vance and Ben Rhodd, the Tribal Historic Preservation Officers of the Rosebud Sioux Tribe and Cheyenne River Sioux Tribe. Br. at 85. The Tribes, whose present day tribal lands are in the midwestern and western regions of the United States, indicate that they have cultural ties to the Project area. Br. at 86.

As explained below, the Court lacks jurisdiction to consider this claim. Moreover, the record demonstrates that the Commission reasonably carried out its obligations under the National Historic Preservation Act.

1. The Preservation Officers Are Not Proper Parties To This Appeal.

Under NGA section 19(b), 15 U.S.C. § 717r(b), only "parties" to FERC proceedings may seek judicial review. In this case, the Preservation Officers did not seek to intervene in the FERC proceedings until May 2018 – nearly seven months after issuance of the Certificate Order and five months after they claim to have become aware of the Project. *See* Rehearing Order P 13, JA ____. The Commission denied late intervention, finding that it would "delay, prejudice, and place additional burdens on the Commission and the certificate holder." *Id*. P 14, JA ___. Because the Preservation Officers were not parties to the proceeding below, they cannot seek judicial review. *Ala. Mun. Distrib. Grp. v. FERC*, 300 F.3d 877, 878 (D.C. Cir. 2002) ("a litigant seeking judicial review of a FERC order

must have been a party to the proceeding before the Commission and must have applied for agency rehearing"). Moreover, they did not seek rehearing of the Commission's ruling and are therefore separately barred from pressing any claim in this Court. *See* 15 U.S.C. § 717r(a) ("No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.").[15]

2. No Petitioner Challenged The Commission's Tribal Consultation In A Timely-Filed Request For Rehearing.

No Petitioner raised any issues regarding the Preservation Officers' participation in the consultation process in a timely-filed request for rehearing. Certain petitioners did seek rehearing of an April 6, 2018 letter from a FERC staff member (R. 6111, JA ___-___) that responded to comments submitted by the Preservation Officers. That letter, however, was "not a final decision or order;" it did "not impose any new obligation, deny any new right, or change any legal

[15] Even if the Preservation Officers had sought rehearing and thus could pursue an appeal, they could only seek review of the Commission's decision to deny them party status. *See Pub. Serv. Comm'n v. FPC*, 284 F.2d 200, 204 (D.C. Cir. 1960) ("would-be intervenor is a party to a proceeding in a limited sense, restricted to the proceedings upon the application for intervention"); *see also New Energy Capital Partners, LLC v. FERC*, 671 Fed. Appx. 802, 804 (D.C. Cir. 2016) (same). Although Petitioners reference the Commission's denial of the Preservation Officers' motion to intervene, they do not challenge that ruling. *See* Br. at 88-89.

relationship." *Mountain Valley Pipeline, LLC*, 164 FERC ¶ 61,086, P 15 (2018).[16] The letter merely responded to the Preservation Officers' concerns by "describ[ing] the steps that have already been taken by the Commission in compliance with" the National Historic Preservation Act. *Id*. If any of the Petitioners wanted to take issue with the Commission's tribal outreach, they "should have done so in response to the Certificate Order or other final order related to the section 106 process." *Id*. *See also* Rehearing Order P 15 (request for rehearing of April 6 letter was filed beyond the statutory 30-day deadline for rehearing of Certificate Order), JA ____.

3. The Commission Reasonably Declined To Reopen Consultations.

In any event, the record establishes that the Commission made "a reasonable and good faith effort to identify" any Indian tribes that attach religious and cultural significance to properties that may be affected by the Project. 36 C.F.R. § 800.2(c)(2)(ii)(A). In order to identify tribes that historically used or occupied the Project area, the Commission reviewed ethnographic sources, such as the Handbook of North American Indians, and other data. *See* EIS at 4-424, JA ___. The Commission also contacted Native American organizations and state-recognized tribes. The Commission's efforts identified 32 potentially-interested

[16] No Petitioner has sought review of this August 3, 2018 order. *See* Br. at v.

Indian tribes or organizations (*id*. at Table 4.10.5-1, JA ___) and distributed Project-related materials to them. In a separate effort, Mountain Valley reached out to 39 tribes (most of which were also contacted by FERC) and informed them about the Project and requested comments. *See id*. at 4-428, JA ___.

The Commission's outreach did not include the Sioux tribes represented by the Preservation Officers because FERC staff found no documentation that they ever occupied, or had a historical interest in, the Project area. *See* R. 6111 at 1, JA ___. Petitioners note that the Project area was formerly occupied by the Tutelo tribe, whose historic language shares a similarity with the ancient Siouan language. Br. at 86. *See also* R. 6205 at Ex. 2 (discussing linguistic links between Tutelo and Sioux), JA ___. But the fact that the language of the Tribes' ancestors may have been present in the Project area does not establish that the Commission's outreach was unreasonable – a conclusion with which the Advisory Council agrees.

a. The Advisory Council Found That The Commission Undertook Reasonable And Good Faith Efforts To Identify And Consult With Interested Tribes.

In a March 30, 2018 letter in response to the Preservation Officers' indication of interest in the Project, the Advisory Council found that the Commission had made a " reasonable and good faith effort to identify, and consult with, relevant tribes." *See* R. 6115 at 2, JA ____. The Advisory Council further explained that, with the execution of the Programmatic Agreement, "[t]he Section

106 review process was formally completed." *Id.* Where, as here, new stakeholders emerge, "a federal agency is not obligated to restart the [NHPA] Section 106 review or reconsider previously finalized findings or determinations." *Id.*[17]

b. The Preservation Officers Have Been Invited To Share Pertinent Information.

The fact that the Preservation Officers were not consulting parties in the section 106 process does not mean that they cannot convey information to the Commission. In response to the Preservation Officers' indication that they had information about potential cultural resources, FERC staff asked them to submit detailed information expeditiously. *See* R. 6111 (FERC letter dated April 6, 2018) at 2, JA ____.

D. The Commission Reasonably Resolved Requests For "Consulting Party" Status.

The National Historic Preservation Act's regulations vest federal agencies with the discretion to designate entities as "consulting parties" for the section 106 review process if they establish a "legal or economic relation to" or "concern with" a project's impact on historic properties. 36 C.F.R. § 800.2(c)(5)). Such a

[17] Petitioners claim that the Advisory Council only addressed the Commission's obligations under NHPA section 106, and not section 101. Br. at 87 n.33. That is a distinction without difference. The requirements of section 101 apply to an agency "carrying out its responsibilities under section" 106. 54 U.S.C. § 302706(b).

designation entitles entities to participate in the agency's identification and resolution of an adverse effects. *See, e.g.*, 36 C.F.R. §§ 800.4(d)(1); 800.5(c), 800.6(a). It does not, however, "confer any substantive rights." Rehearing Order P 257, JA ___.

1. The Commission Reasonably Denied Blue Ridge Environmental Defense League's Request.

Petitioners argue that the Commission "arbitrarily refused to grant consulting party status" to the Blue Ridge Environmental Defense League (Blue Ridge). Br. at 91. That is incorrect. The Commission found that Blue Ridge had failed to establish the requisite "legal or economic relation to the undertaking or affected properties." *See* Rehearing Order P 254 (citing 36 C.F.R. § 800.2(c)(5)), JA ___. *See also* R. 4894, JA ___. Blue Ridge does not mention or challenge this ruling. *See, e.g., Corson and Gruman Co. v. NLRB*, 899 F.2d 47, 50 (D.C. Cir. 1990) ("the Company never raised this issue in its opening brief before us and therefore waived the argument in this court").

Petitioners also alleged that the Commission "forced" Blue Ridge and others to choose between being a section 106 consulting party or an intervenor. Br. at 91. Again, the Commission rejected Blue Ridge's request for consulting party status; it did not force Blue Ridge to choose between being a consulting party or an intervenor. Rehearing Order P 257, JA ___. To be sure, during the review process, FERC staff advised some individuals that they could not both be an

intervenor and a consulting party. *See* R. 5796 at Ex. A, JA ___. But FERC staff subsequently corrected its position and, in the Rehearing Order, the Commission expressly found that "participants should be able to avail themselves of party status in both proceedings." Rehearing Order P 257, JA ___. Petitioners have not identified any party who was affected by FERC staff's actions. *See* Br. at 90-91.[18]

2. There Is No Merit To The Claims Of The Newport Petitioners.

In February 2016, the Commission denied the request for the Greater Newport Rural Historic District Committee (Newport Historic District) for consulting party status and explained that the Commission's existing procedures provide the District with "opportunities to comment on cultural resources information." *See* R. 2713, JA ___-___. In April 2016, the Commission also denied requests for consulting party status from Jerry and Jerolyn Deplanes, Karolyn Givens, Frances Collins, Michael Williams, Miller Williams, and Tony Williams (Individual Newport Petitioners) because they had not established a

[18] The cited email was sent to Anita Puckett who was an intervenor (Certificate Order, App. A, JA ___). Ms. Puckett's organization, Preserve Montgomery County, was denied consulting party status because it "did not demonstrate a direct legal or economic relationship to the undertaking." EIS at 4-410 to 4-111, JA ___-___. Nonetheless, Ms. Puckett was engaged in the section 106 consultation process. *See*, *e.g.*, EIS at 4-411, JA ___; R. 5942 (Revised North Fork Treatment Plan) at 21, JA ___ ("Ms. Hahn … had communicated with landowners within the district and … all had declined to meet with Mountain Valley to discuss potential mitigation strategies. Anita Puckett, a representative from Preserve Montgomery, confirmed this stance.").

direct legal or economic relationship with the Project. *See* Rehearing Order P 12, JA ___. In May 2017, after consultations with the Advisory Council, Commission staff reconsidered its position and granted the Individual Newport Petitioners' request to be consulting parties. *Id.* The Newport Historic District and Individual Newport Petitioners contend that the Commission's actions have denied them their "right" to participate as consulting parties. Br. 91.

a. The Court Lacks Jurisdiction To Consider The Individual Newport Petitioners' Claims.

The Individual Newport Petitioners were not parties to the proceedings below. In the Rehearing Order, the Commission denied their request for late intervention, finding that they had failed to establish the requisite good cause. Rehearing Order PP 11-12, JA ___-___. The Individual Newport Petitioners did not seek rehearing of this decision and Petitioners' opening brief does not mention – much less challenge – this ruling. *See World Wide Minerals, Ltd. v. Republic of Kaz.*, 296 F.3d 1154, 1160 (D.C. Cir. 2002) ("a party waives its right to challenge a ruling … if it fails to make that challenge in its opening brief"). Because the Individual Newport Petitioners were not parties to the proceeding below, they may not press any claim in this Court. *See* 15 U.S.C. § 717r(b); *Process Gas Consumers Grp. v. FERC*, 912 F.2d 511, 514 (D.C. Cir. 1990) ("a litigant seeking review must have participated in the proceedings before the agency").

b. The Newport Historic District Does Not Challenge The Commission's Denial Of Its Request For Consulting Party Status.

Petitioners make no effort to explain why they believe the Commission erred in denying the Newport Historic District's request for consulting party status. *See* Br. at 91-92. And the gist of Petitioners' argument appears to be aimed at the prejudice purportedly suffered by the Individual Newport Petitioners, who were ultimately granted consulting party status. *See* Br. at 92 ("the Newport Petitioners have never been consulted on any Section 106 issues – even after being granted consulting party status"). Accordingly, any issues relating to the Commission's denial of the Newport Historic District's request for consulting party status are not properly before this Court. *See Wash. Legal Clinic for the Homeless v. Barry*, 107 F.3d 32, 39 (D.C. Cir. 1997) ("Because the District raises this issue in such a cursory fashion, we decline to resolve it.").

c. The Newport Historic District And The Newport Individual Petitioners Had Ample Opportunity To Comment On Historic Resources.

The Newport Historic District and the Newport Individual Petitioners contend that they were excluded from consultations relating to the Environmental Impact Statement, cultural resource reports, and alternative routes. Br. at 92-93. The record reveals, however, that there was ample opportunity for comment on all of these issues. Mountain Valley filed its historic and cultural resource reports as

"public" information, and those reports were available for review and comment by any interested parties. *See* Rehearing Order P 260, JA ___. Likewise, the Commission's draft and final Environmental Impact Statements, which analyzed route alternatives and impacts to historic properties, were also available for review and comment. Indeed, the Newport Historic District and the Individual Newport Petitioners submitted numerous comments regarding historic resources, route alternatives, the Programmatic Agreement, and treatment plans for historic resources.[19]

The fundamental complaint appears to be that these filings and comments were exchanged under standard FERC procedures, rather than under the rubric of the National Historic Preservation Act. But the Advisory Council "encourages"

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[19] *See* Mar. 4, 2016 Newport Historic District Comment (R. 2733) (commenting on cultural resource reports); May 16, 2016 Newport Historic District Comment (R. 2850) (commenting on architectural surveys); Mar. 7, 2017 Newport Historic District Comment (R. 4971) (commenting on draft EIS and Hybrid Alternative 1A); May 10, 2017 Newport Historic District Comment (R. 5237) (commenting on draft EIS and Hybrid Alternative 1A); Sept. 1, 2017 Newport Historic District Comment (R. 5702) (commenting on Hybrid Alternative 1A); Nov. 2, 2017 Individual Newport Petitioners Comment (R. 5785) (seeking additional time to comment on Notification of Adverse Effect and draft Programmatic Agreement); Nov. 3, 2017 Individual Newport Petitioners Comments (R. 5787) (initial comments on draft Programmatic Agreement); Dec. 27, 2017 Individual Newport Petitioners Comment (R. 5879) (additional comments on Programmatic Agreement); Jan. 4, 2018 Individual Newport Petitioners Comment (R. 5883) (commenting on treatment plans); Feb. 22, 2018 Newport Historic District Comment (R. 5984) (commenting on treatment plans); Feb. 23, 2018 Individual Newport Petitioners Comment (R. 5988) (amended comments on treatment plans).

agencies "to use to the extent possible existing agency procedures and mechanisms to fulfill the consultation requirements of section 106." 36 C.F.R. § 800.2(a)(4). The Newport Historic District and the Individual Newport Petitioners do not contend they were denied any pertinent information and the record establishes that they had ample opportunity to share their views regarding the Project's impacts. *See, e.g.*, *Mid States*, 345 F.3d at 553 ("since the public was encouraged to comment on all aspects of the DEIS, we cannot say that there was an insufficient opportunity for public comment under the NHPA").

E. The Commission Properly Identified The Area Of Potential Effect.

Some of Mountain Valley's easement agreements reference a right-of-way for two pipelines. This language is intended to allow Mountain Valley to avoid having to renegotiate its existing easements should it ever decide to seek approval to co-locate a section of a new pipeline within an existing easements. *See* R. 5922 (Revised Big Stony Creek Treatment Plan) at 10, JA ___. Seizing on this language, Petitioners claim that the Commission's analysis of potential impacts to historic resources was faulty because it only considered one pipeline. Br. at 93. True, the Commission had only a single pipeline proposal before it. Any future pipeline in the same area, should it ever materialize, will be appropriately scrutinized.

VII. THE REQUIREMENTS OF SECTION 4(f) OF THE DEPARTMENT OF TRANSPORTATION ACT DO NOT APPLY.

Section 4(f) of the Department of Transportation Act establishes a national policy that "special effort should be made to preserve the natural beauty of … historic sites," 49 U.S.C. § 303(a), and directs the Secretary of Transportation to approve transportation projects making use of historic sites only if there is no prudent or feasible alternative and the project includes all possible planning to minimize harm from the use. 49 U.S.C. § 303(c). Petitioners allege that the Project is subject to the Act because it is a transportation activity "controlled by the Department of Transportation," and that the Commission failed to "objectively evaluate whether there are feasible and prudent alternatives" that would avoid historic districts. Br. at 94. Petitioners are wrong.

The Natural Gas Act vests FERC with "exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300-01 (1988).[20] While the Natural Gas Pipeline Safety Act authorizes the Transportation Secretary to establish safety regulations for natural gas transportation facilities, the Act "does

[20] *See also Wash. Gas Light Co. v. Prince George's Cty. Council*, 711 F.3d 412, 423 (4th Cir. 2013) ("the NGA gives FERC jurisdiction over the siting of natural gas facilities"); *Nat'l Fuel Gas Supply Corp. v. Pub. Serv. Comm'n*, 894 F.2d 571, 579 (2d Cir. 1990) ("Congress placed authority regarding the location of interstate pipelines … in the FERC").

not authorize the Secretary of Transportation to prescribe the location or routing of a pipeline facility." 49 § U.S.C. § 60104(e). The Commission thus reasonably concluded that the requirements of section 4(f) of the Transportation Act are not implicated by the Project. *See* Rehearing Order P 94, JA ___. Petitioners do not reference or challenge this conclusion.

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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November 20, 2018

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) and Circuit Rule 32(e) and this Court's Order of August 30, 2018, I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), as modified in this Court's order to 21,500 words, because this brief contains 20,771 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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November 20, 2018

ADDENDUM

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REGULATIONS

(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

§ 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—

AMENDMENTS

2005—Pub. L. 109–2, §3(b), Feb. 18, 2005, 119 Stat. 9, added item for chapter 114.

CHAPTER 111—GENERAL PROVISIONS

AMENDMENTS

1994—Pub. L. 103–465, title III, §321(b)(1)(B), Dec. 8, 1994, 108 Stat. 4946, added item 1659.

1990—Pub. L. 101–650, title III, §313(b), Dec. 1, 1990, 104 Stat. 5115, added item 1658.

1984—Pub. L. 98–620, title IV, §401(b), Nov. 8, 1984, 98 Stat. 3357, added item 1657.

§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

(June 25, 1948, ch. 646, 62 Stat. 944; May 24, 1949, ch. 139, §90, 63 Stat. 102.)

HISTORICAL AND REVISION NOTES

1948 ACT

Based on title 28, U.S.C., 1940 ed., §§342, 376, 377 (Mar. 3, 1911, ch. 231, §§234, 261, 262, 36 Stat. 1156, 1162).

Section consolidates sections 342, 376, and 377 of title 28, U.S.C., 1940 ed., with necessary changes in phraseology.

Such section 342 provided:

''The Supreme Court shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction; and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States, or to persons holding office under the authority of the United States, where a State, or an ambassador, or other public minister, or a consul, or vice consul is a party.''

Such section 376 provided:

''Writs of ne exeat may be granted by any justice of the Supreme Court, in cases where they might be granted by the Supreme Court; and by any district judge, in cases where they might be granted by the district court of which he is a judge. But no writ of ne exeat shall be granted unless a suit in equity is commenced, and satisfactory proof is made to the court or judge granting the same that the defendant designs quickly to depart from the United States.''

Such section 377 provided:

''The Supreme Court and the district courts shall have power to issue writs of scire facias. The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.''

The special provisions of section 342 of title 28, U.S.C., 1940 ed., with reference to writs of prohibition and mandamus, admiralty courts and other courts and officers of the United States were omitted as unnecessary in view of the revised section.

The revised section extends the power to issue writs in aid of jurisdiction, to all courts established by Act of Congress, thus making explicit the right to exercise powers implied from the creation of such courts.

The provisions of section 376 of title 28, U.S.C., 1940 ed., with respect to the powers of a justice or judge in issuing writs of ne exeat were changed and made the basis of subsection (b) of the revised section but the conditions and limitations on the writ of ne exeat were omitted as merely confirmatory of well-settled principles of law.

The provision in section 377 of title 28, U.S.C., 1940 ed., authorizing issuance of writs of scire facias, was omitted in view of rule 81(b) of the Federal Rules of Civil Procedure abolishing such writ. The revised section is expressive of the construction recently placed upon such section by the Supreme Court in *U.S. Alkali Export Assn. v. U.S.*, 65 S.Ct. 1120, 325 U.S. 196, 89 L.Ed. 1554, and *De Beers Consol. Mines v. U.S.*, 65 S.Ct. 1130, 325 U.S. 212, 89 L.Ed. 1566.

1949 ACT

This section corrects a grammatical error in subsection (a) of section 1651 of title 28, U.S.C.

AMENDMENTS

1949—Subsec. (a). Act May 24, 1949, inserted ''and'' after ''jurisdictions''.

WRIT OF ERROR

Act Jan. 31, 1928, ch. 14, §2, 45 Stat. 54, as amended Apr. 26, 1928, ch. 440, 45 Stat. 466; June 25, 1948, ch. 646, §23, 62 Stat. 990, provided that: ''All Acts of Congress referring to writs of error shall be construed as amended to the extent necessary to substitute appeal for writ of error.''

§ 1652. State laws as rules of decision

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

(June 25, 1948, ch. 646, 62 Stat. 944.)

HISTORICAL REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §725 (R.S. §721).

''Civil actions'' was substituted for ''trials at common law'' to clarify the meaning of the Rules of Decision Act in the light of the Federal Rules of Civil Procedure. Such Act has been held to apply to suits in equity.

Changes were made in phraseology.

SEC. 5. *Preservation of Authority*. Nothing in this order shall be construed to impair or otherwise affect the functions of the Director of the Office of Management and Budget relating to budget, administrative, and legislative proposals.

SEC. 6. *Judicial Review*. This order is intended only to improve the internal management of the Federal Government and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its departments, agencies, instrumentalities or entities, its officers or employees, or any other person.

GEORGE W. BUSH.

§ 302. Policy standards for transportation

(a) The Secretary of Transportation is governed by the transportation policy of sections 10101 and 13101 of this title in addition to other laws.

(b) This subtitle and chapters 221 and 315 of this title do not authorize, without appropriate action by Congress, the adoption, revision, or implementation of a transportation policy or investment standards or criteria.

(c) The Secretary shall consider the needs—

(1) for effectiveness and safety in transportation systems; and

(2) of national defense.

(d)(1) It is the policy of the United States to promote the construction and commercialization of high-speed ground transportation systems by—

(A) conducting economic and technological research;

(B) demonstrating advancements in high-speed ground transportation technologies;

(C) establishing a comprehensive policy for the development of such systems and the effective integration of the various high-speed ground transportation technologies; and

(D) minimizing the long-term risks of investors.

(2) It is the policy of the United States to establish in the shortest time practicable a United States designed and constructed magnetic levitation transportation technology capable of operating along Federal-aid highway rights-of-way, as part of a national transportation system of the United States.

(e) INTERMODAL TRANSPORTATION.—It is the policy of the United States Government to encourage and promote development of a national intermodal transportation system in the United States to move people and goods in an energy-efficient manner, provide the foundation for improved productivity growth, strengthen the Nation's ability to compete in the global economy, and obtain the optimum yield from the Nation's transportation resources.

(Pub. L. 97–449, § 1(b), Jan. 12, 1983, 96 Stat. 2419; Pub. L. 98–216, § 2(2), Feb. 14, 1984, 98 Stat. 5; Pub. L. 102–240, title I, § 1036(a), title V, § 5001, Dec. 18, 1991, 105 Stat. 1978, 2158; Pub. L. 103–272, § 5(m)(6), July 5, 1994, 108 Stat. 1375; Pub. L. 104–88, title III, § 308(a), Dec. 29, 1995, 109 Stat. 946.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
302(a)	49:1653(b)(1).	Oct. 15, 1966, Pub. L. 89–670, § 4(b), 80 Stat. 933.

HISTORICAL AND REVISION NOTES—CONTINUED

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
302(b)	49:1653(b)(2).	
302(c)	49:1653(b)(3).	

In subsection (a), the words ''In carrying out his duties and responsibilities under this chapter'' before ''Secretary of Transportation'' are omitted as surplus. The words ''the transportation policy of sections 10101 and 10101a of this title in addition to other laws'' are substituted for ''all applicable statutes including the policy standards set forth in the Federal Aviation Act of 1958, as amended [49 U.S.C. 1301 et seq.]; the national transportation policy of the Interstate Commerce Act, as amended; title 23, relating to Federal-aid highways; and title 14, titles 52 and 53 of the Revised Statutes, the Act of April 25, 1940, as amended, and the Act of September 2, 1958, as amended, relating to the United States Coast Guard'' because each of the omitted laws is now applicable to the Secretary of Transportation and the Department of Transportation as the result of the restatement of those laws, and the Secretary is therefore bound to follow those laws by their own terms.

In subsection (c), the words ''In exercising the functions, powers, and duties conferred on and transferred to the Secretary by this chapter'' before ''Secretary'' are omitted as surplus. The word ''consider'' is substituted for ''give full consideration to'' to eliminate surplus words. The words ''for operational continuity of the functions transferred'' after ''the needs'' are omitted as executed.

AMENDMENTS

1995—Subsec. (a). Pub. L. 104–88 substituted ''13101'' for ''10101a''.

1994—Subsec. (b). Pub. L. 103–272 substituted ''This subtitle and chapters 221 and 315 of this title'' for ''Subtitle I and chapter 31 of subtitle II of this title and the Department of Transportation Act (49 App. U.S.C. 1651 et seq.)''.

1991—Subsec. (d). Pub. L. 102–240, § 1036(a), added subsec. (d).

Subsec. (e). Pub. L. 102–240, § 5001, added subsec. (e).

1984—Subsec. (b). Pub. L. 98–216 substituted ''49 App. U.S.C.'' for ''49 U.S.C.''.

EFFECTIVE DATE OF 1995 AMENDMENT

Amendment by Pub. L. 104–88 effective Jan. 1, 1996, see section 2 of Pub. L. 104–88, set out as an Effective Date note under section 1301 of this title.

EFFECTIVE DATE OF 1991 AMENDMENT

Amendment by section 1036(a) of Pub. L. 102–240 effective Dec. 18, 1991, and applicable to funds authorized to be appropriated or made available after Sept. 30, 1991, and, with certain exceptions, not applicable to funds appropriated or made available on or before Sept. 30, 1991, see section 1100 of Pub. L. 102–240, set out as a note under section 104 of Title 23, Highways.

§ 303. Policy on lands, wildlife and waterfowl refuges, and historic sites

(a) It is the policy of the United States Government that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites.

(b) The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States, in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of lands crossed by transportation activities or facilities.

(c) APPROVAL OF PROGRAMS AND PROJECTS.—Subject to subsections (d) and (h), the Secretary may approve a transportation program or project (other than any project for a park road or parkway under section 204[1] of title 23) requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an historic site of national, State, or local significance (as determined by the Federal, State, or local officials having jurisdiction over the park, area, refuge, or site) only if—

(1) there is no prudent and feasible alternative to using that land; and

(2) the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use.

(d) DE MINIMIS IMPACTS.—

(1) REQUIREMENTS.—

(A) REQUIREMENTS FOR HISTORIC SITES.—The requirements of this section shall be considered to be satisfied with respect to an area described in paragraph (2) if the Secretary determines, in accordance with this subsection, that a transportation program or project will have a de minimis impact on the area.

(B) REQUIREMENTS FOR PARKS, RECREATION AREAS, AND WILDLIFE OR WATERFOWL REFUGES.—The requirements of subsection (c)(1) shall be considered to be satisfied with respect to an area described in paragraph (3) if the Secretary determines, in accordance with this subsection, that a transportation program or project will have a de minimis impact on the area. The requirements of subsection (c)(2) with respect to an area described in paragraph (3) shall not include an alternatives analysis.

(C) CRITERIA.—In making any determination under this subsection, the Secretary shall consider to be part of a transportation program or project any avoidance, minimization, mitigation, or enhancement measures that are required to be implemented as a condition of approval of the transportation program or project.

(2) HISTORIC SITES.—With respect to historic sites, the Secretary may make a finding of de minimis impact only if—

(A) the Secretary has determined, in accordance with the consultation process required under section 306108 of title 54, United States Code,[2] that—

(i) the transportation program or project will have no adverse effect on the historic site; or

(ii) there will be no historic properties affected by the transportation program or project;

(B) the finding of the Secretary has received written concurrence from the applicable State historic preservation officer or tribal historic preservation officer (and from the Advisory Council on Historic Preservation if the Council is participating in the consultation process); and

(C) the finding of the Secretary has been developed in consultation with parties consulting as part of the process referred to in subparagraph (A).

(3) PARKS, RECREATION AREAS, AND WILDLIFE OR WATERFOWL REFUGES.—With respect to parks, recreation areas, or wildlife or waterfowl refuges, the Secretary may make a finding of de minimis impact only if—

(A) the Secretary has determined, after public notice and opportunity for public review and comment, that the transportation program or project will not adversely affect the activities, features, and attributes of the park, recreation area, or wildlife or waterfowl refuge eligible for protection under this section; and

(B) the finding of the Secretary has received concurrence from the officials with jurisdiction over the park, recreation area, or wildlife or waterfowl refuge.

(e) SATISFACTION OF REQUIREMENTS FOR CERTAIN HISTORIC SITES.—

(1) IN GENERAL.—The Secretary shall—

(A) align, to the maximum extent practicable, the requirements of this section with the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and section 306108 of title 54, including implementing regulations; and

(B) not later than 90 days after the date of enactment of this subsection, coordinate with the Secretary of the Interior and the Executive Director of the Advisory Council on Historic Preservation (referred to in this subsection as the ''Council'') to establish procedures to satisfy the requirements described in subparagraph (A) (including regulations).

(2) AVOIDANCE ALTERNATIVE ANALYSIS.—

(A) IN GENERAL.—If, in an analysis required under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), the Secretary determines that there is no feasible or prudent alternative to avoid use of a historic site, the Secretary may—

(i) include the determination of the Secretary in the analysis required under that Act;

(ii) provide a notice of the determination to—

(I) each applicable State historic preservation officer and tribal historic preservation officer;

(II) the Council, if the Council is participating in the consultation process under section 306108 of title 54; and

(III) the Secretary of the Interior; and

(iii) request from the applicable preservation officer, the Council, and the Secretary of the Interior a concurrence that the determination is sufficient to satisfy subsection (c)(1).

(B) CONCURRENCE.—If the applicable preservation officer, the Council, and the Secretary of the Interior each provide a concurrence requested under subparagraph (A)(iii),

[1] See References in Text note below.

[2] So in original. The words '', United States Code'' probably should not appear.

no further analysis under subsection (c)(1) shall be required.

(C) PUBLICATION.—A notice of a determination, together with each relevant concurrence to that determination, under subparagraph (A) shall—

(i) be included in the record of decision or finding of no significant impact of the Secretary; and

(ii) be posted on an appropriate Federal website by not later than 3 days after the date of receipt by the Secretary of all concurrences requested under subparagraph (A)(iii).

(3) ALIGNING HISTORICAL REVIEWS.—

(A) IN GENERAL.—If the Secretary, the applicable preservation officer, the Council, and the Secretary of the Interior concur that no feasible and prudent alternative exists as described in paragraph (2), the Secretary may provide to the applicable preservation officer, the Council, and the Secretary of the Interior notice of the intent of the Secretary to satisfy subsection (c)(2) through the consultation requirements of section 306108 of title 54.

(B) SATISFACTION OF CONDITIONS.—To satisfy subsection (c)(2), the applicable preservation officer, the Council, and the Secretary of the Interior shall concur in the treatment of the applicable historic site described in the memorandum of agreement or programmatic agreement developed under section 306108 of title 54.

(f) REFERENCES TO PAST TRANSPORTATION ENVIRONMENTAL AUTHORITIES.—

(1) SECTION 4(F) REQUIREMENTS.—The requirements of this section are commonly referred to as section 4(f) requirements (see section 4(f) of the Department of Transportation Act (Public Law 89–670; 80 Stat. 934) as in effect before the repeal of that section).

(2) SECTION 106 REQUIREMENTS.—The requirements of section 306108 of title 54 are commonly referred to as section 106 requirements (see section 106 of the National Historic Preservation Act of 1966 (Public Law 89–665; 80 Stat. 917) as in effect before the repeal of that section).

(g) BRIDGE EXEMPTION FROM CONSIDERATION.—A common post-1945 concrete or steel bridge or culvert (as described in 77 Fed. Reg. 68790) that is exempt from individual review under section 306108 of title 54 shall be exempt from consideration under this section.

(h) RAIL AND TRANSIT.—

(1) IN GENERAL.—Improvements to, or the maintenance, rehabilitation, or operation of, railroad or rail transit lines or elements thereof that are in use or were historically used for the transportation of goods or passengers shall not be considered a use of a historic site under subsection (c), regardless of whether the railroad or rail transit line or element thereof is listed on, or eligible for listing on, the National Register of Historic Places.

(2) EXCEPTIONS.—

(A) IN GENERAL.—Paragraph (1) shall not apply to—

(i) stations; or

(ii) bridges or tunnels located on—

(I) railroad lines that have been abandoned; or

(II) transit lines that are not in use.

(B) CLARIFICATION WITH RESPECT TO CERTAIN BRIDGES AND TUNNELS.—The bridges and tunnels referred to in subparagraph (A)(ii) do not include bridges or tunnels located on railroad or transit lines—

(i) over which service has been discontinued; or

(ii) that have been railbanked or otherwise reserved for the transportation of goods or passengers.

(Pub. L. 97–449, § 1(b), Jan. 12, 1983, 96 Stat. 2419; Pub. L. 100–17, title I, § 133(d), Apr. 2, 1987, 101 Stat. 173; Pub. L. 109–59, title VI, § 6009(a)(2), Aug. 10, 2005, 119 Stat. 1875; Pub. L. 113–287, § 5(p), Dec. 19, 2014, 128 Stat. 3272; Pub. L. 114–94, div. A, title I, §§ 1301(b), 1302(b), 1303(b), title XI, § 11502(b), Dec. 4, 2015, 129 Stat. 1376, 1378, 1690.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
303(a)	49:1651(b)(2).	Oct. 15, 1966, Pub. L. 89–670, § 2(b)(2), 80 Stat. 931.
	49:1653(f) (1st sentence).	Oct. 15, 1966, Pub. L. 89–670, § 4(f), 80 Stat. 934; restated Aug. 23, 1968, Pub. L. 90–495, § 18(b), 82 Stat. 824.
303(b)	49:1653(f) (2d sentence).	
303(c)	49:1653(f) (less 1st, 2d sentences).	

In subsection (a), the words ''hereby declared to be'' before ''the policy'' are omitted as surplus. The words ''of the United States Government'' are substituted for ''national'' for clarity and consistency.

In subsection (b), the words ''crossed by transportation activities or facilities'' are substituted for ''traversed'' for clarity.

In subsection (c), before clause (1), the words ''After August 23, 1968'' after ''Secretary'' are omitted as executed. The word ''transportation'' is inserted before ''program'' for clarity. In clause (2), the words ''or project'' are added for consistency.

REFERENCES IN TEXT

Section 204 of title 23, referred to in subsec. (c), was repealed and a new section 204 enacted by Pub. L. 112–141, div. A, title I, § 1119(a), July 6, 2012, 126 Stat. 473, 489.

The National Environmental Policy Act of 1969, referred to in subsec. (e)(1)(A), (2)(A), is Pub. L. 91–190, Jan. 1, 1970, 83 Stat. 852, which is classified generally to chapter 55 (§ 4321 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of Title 42 and Tables.

The date of enactment of this subsection, referred to in subsec. (e)(1)(B), is the date of enactment of Pub. L. 114–94, which was approved Dec. 4, 2015.

AMENDMENTS

2015—Subsec. (c). Pub. L. 114–94, § 11502(b)(1), substituted ''subsections (d) and (h)'' for ''subsection (d)''.

Subsec. (e). Pub. L. 114–94, § 1301(b), added subsec. (e).

Subsec. (f). Pub. L. 114–94, § 1302(b), added subsec. (f).

Subsec. (g). Pub. L. 114–94, § 1303(b), added subsec. (g).

Subsec. (h). Pub. L. 114–94, § 11502(b)(2), added subsec. (h).

2014—Subsec. (d)(2)(A). Pub. L. 113–287 substituted ''section 306108 of title 54, United States Code'' for ''section 106 of the National Historic Preservation Act (16 U.S.C. 470f)'' in introductory provisions.

DELEGATION OF FUNCTIONS

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

CHAPTER 15B—NATURAL GAS

§ 717. Regulation of natural gas companies

(a) Necessity of regulation in public interest

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

(b) Transactions to which provisions of chapter applicable

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

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

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

(d) Vehicular natural gas jurisdiction

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

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

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

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

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, regu-

(d) Inspections

The State commission of the State in which an LNG terminal is located may, after the terminal is operational, conduct safety inspections in conformance with Federal regulations and guidelines with respect to the LNG terminal upon written notice to the Commission. The State commission may notify the Commission of any alleged safety violations. The Commission shall transmit information regarding such allegations to the appropriate Federal agency, which shall take appropriate action and notify the State commission.

(e) Emergency Response Plan

(1) In any order authorizing an LNG terminal the Commission shall require the LNG terminal operator to develop an Emergency Response Plan. The Emergency Response Plan shall be prepared in consultation with the United States Coast Guard and State and local agencies and be approved by the Commission prior to any final approval to begin construction. The Plan shall include a cost-sharing plan.

(2) A cost-sharing plan developed under paragraph (1) shall include a description of any direct cost reimbursements that the applicant agrees to provide to any State and local agencies with responsibility for security and safety—

(A) at the LNG terminal; and

(B) in proximity to vessels that serve the facility.

(June 21, 1938, ch. 556, § 3A, as added Pub. L. 109–58, title III, § 311(d), Aug. 8, 2005, 119 Stat. 687.)

REFERENCES IN TEXT

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

§ 717c. Rates and charges

(a) Just and reasonable rates and charges

All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

(b) Undue preferences and unreasonable rates and charges prohibited

No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Filing of rates and charges with Commission; public inspection of schedules

Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Changes in rates and charges; notice to Commission

Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Authority of Commission to hold hearings concerning new schedule of rates

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase,

specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(f) Storage services

(1) In exercising its authority under this chapter or the Natural Gas Policy Act of 1978 (15 U.S.C. 3301 et seq.), the Commission may authorize a natural gas company (or any person that will be a natural gas company on completion of any proposed construction) to provide storage and storage-related services at market-based rates for new storage capacity related to a specific facility placed in service after August 8, 2005, notwithstanding the fact that the company is unable to demonstrate that the company lacks market power, if the Commission determines that—

(A) market-based rates are in the public interest and necessary to encourage the construction of the storage capacity in the area needing storage services; and

(B) customers are adequately protected.

(2) The Commission shall ensure that reasonable terms and conditions are in place to protect consumers.

(3) If the Commission authorizes a natural gas company to charge market-based rates under this subsection, the Commission shall review periodically whether the market-based rate is just, reasonable, and not unduly discriminatory or preferential.

(June 21, 1938, ch. 556, §4, 52 Stat. 822; Pub. L. 87–454, May 21, 1962, 76 Stat. 72; Pub. L. 109–58, title III, §312, Aug. 8, 2005, 119 Stat. 688.)

REFERENCES IN TEXT

The Natural Gas Policy Act of 1978, referred to in subsec. (f)(1), is Pub. L. 95–621, Nov. 9, 1978, 92 Stat. 3350, as amended, which is classified generally to chapter 60 (§3301 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 3301 of this title and Tables.

AMENDMENTS

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

1962—Subsec. (e). Pub. L. 87–454 inserted ''or gas distributing company'' after ''State commission'', and struck out proviso which denied authority to the Commission to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only.

ADVANCE RECOVERY OF EXPENSES INCURRED BY NATURAL GAS COMPANIES FOR NATURAL GAS RESEARCH, DEVELOPMENT, AND DEMONSTRATION PROJECTS

Pub. L. 102–104, title III, Aug. 17, 1991, 105 Stat. 531, authorized Federal Energy Regulatory Commission, pursuant to this section, to allow recovery, in advance, of expenses by natural-gas companies for research, development and demonstration activities by Gas Research Institute for projects on use of natural gas in motor vehicles and on use of natural gas to control emissions from combustion of other fuels, subject to Commission finding that benefits, including environmental benefits, to both existing and future ratepayers resulting from such activities exceed all direct costs to both existing and future ratepayers, prior to repeal by Pub. L. 102–486, title IV, §408(c), Oct. 24, 1992, 106 Stat. 2882.

§ 717c–1. Prohibition on market manipulation

It shall be unlawful for any entity, directly or indirectly, to use or employ, in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance (as those terms are used in section 78j(b) of this title) in contravention of such rules and regulations as the Commission may prescribe as necessary in the public interest or for the protection of natural gas ratepayers. Nothing in this section shall be construed to create a private right of action.

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

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

(a) Decreases in rates

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

(b) Costs of production and transportation

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

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

§ 717e. Ascertainment of cost of property

(a) Cost of property

The Commission may investigate and ascertain the actual legitimate cost of the property

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

(b) Inventory of property; statements of costs

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

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

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

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

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

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

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

(c) Certificate of public convenience and necessity

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

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

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

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

(B) natural gas produced by such person.

(d) Application for certificate of public convenience and necessity

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

(e) Granting of certificate of public convenience and necessity

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

cation 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. (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 section 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-

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

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

(c) Information and reports available to State commissions

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

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

§ 717q. Appointment of officers and employees

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

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

CODIFICATION

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

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

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

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

AMENDMENTS

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

REPEALS

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

§ 717r. Rehearing and review

(a) Application for rehearing; time

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

(b) Review of Commission order

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with

it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which is supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission order

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

(d) Judicial review

(1) In general

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

(2) Agency delay

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

(3) Court action

If the Court finds that such order or action is inconsistent with the Federal law governing such permit and would prevent the construction, expansion, or operation of the facility subject to section 717b of this title or section 717f of this title, the Court shall remand the proceeding to the agency to take appropriate action consistent with the order of the Court. If the Court remands the order or action to the Federal or State agency, the Court shall set a reasonable schedule and deadline for the agency to act on remand.

(4) Commission action

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

(5) Expedited review

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

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

REFERENCES IN TEXT

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

CODIFICATION

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

AMENDMENTS

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

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

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

CHANGE OF NAME

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

§ 302705. Agreement for review under tribal historic preservation regulations

The Council may enter into an agreement with an Indian tribe to permit undertakings on tribal land to be reviewed under tribal historic preservation regulations in place of review under regulations promulgated by the Council to govern compliance with section 306108 of this title, if the Council, after consultation with the Indian tribe and appropriate State Historic Preservation Officers, determines that the tribal preservation regulations will afford historic property consideration equivalent to that afforded by the Council's regulations.

(Pub. L. 113–287, § 3, Dec. 19, 2014, 128 Stat. 3201.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
302705	16 U.S.C. 470a(d)(5).	Pub. L. 89–665, title I, § 101(d)(5), as added Pub. L. 102–575, title XL, § 4006(a)(2), Oct. 30, 1992, 106 Stat. 4757.

§ 302706. Eligibility for inclusion on National Register

(a) IN GENERAL.—Property of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register.

(b) CONSULTATION.—In carrying out its responsibilities under section 306108 of this title, a Federal agency shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to property described in subsection (a).

(c) HAWAII.—In carrying out responsibilities under section 302303 of this title, the State Historic Preservation Officer for Hawaii shall—

(1) consult with Native Hawaiian organizations in assessing the cultural significance of any property in determining whether to nominate the property to the National Register;

(2) consult with Native Hawaiian organizations in developing the cultural component of a preservation program or plan for the property; and

(3) enter into a memorandum of understanding or agreement with Native Hawaiian organizations for the assessment of the cultural significance of a property in determining whether to nominate the property to the National Register and to carry out the cultural component of the preservation program or plan.

(Pub. L. 113–287, § 3, Dec. 19, 2014, 128 Stat. 3201.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
302706	16 U.S.C. 470a(d)(6).	Pub. L. 89–665, title I, § 101(d)(6), as added Pub. L. 102–575, title XL, § 4006(a)(2), Oct. 30, 1992, 106 Stat. 4757.

CHAPTER 3029—GRANTS

Sec.

§ 302901. Awarding of grants and availability of grant funds

(a) IN GENERAL.—No grant may be made under this division unless application for the grant is submitted to the Secretary in accordance with regulations and procedures prescribed by the Secretary.

(b) GRANT NOT TREATED AS TAXABLE INCOME.—No grant made pursuant to this division shall be treated as taxable income for purposes of the Internal Revenue Code of 1986 (26 U.S.C. 1 et seq.).

(c) AVAILABILITY.—The Secretary shall make funding available to individual States and the National Trust as soon as practicable after execution of a grant agreement. For purposes of administration, grants to individual States and the National Trust each shall be deemed to be one grant and shall be administered by the Service as one grant.

(Pub. L. 113–287, § 3, Dec. 19, 2014, 128 Stat. 3202.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
302901(a)	16 U.S.C. 470b(a) (1st sentence paragraph (1)).	Pub. L. 89–665, title I, § 102(a) (1st sentence paragraph (1)), Oct. 15, 1966, 80 Stat. 916; Pub. L. 94–422, title II, § 201(1), Sept. 28, 1976, 90 Stat. 1319.
302901(b)	16 U.S.C. 470b(a) (last sentence).	Pub. L. 89–665, title I, § 102(a) (last sentence), as added Pub. L. 96–515, title II, § 202(b), Dec. 12, 1980, 94 Stat. 2993; Pub. L. 99–514, § 2, Oct. 22, 1986, 100 Stat. 2095.
302901(c)	16 U.S.C. 470b(d) (relating to availability).	Pub. L. 89–665, title I, § 102(d) (relating to availability), as added Pub. L. 102–575, title XL, § 4009(3), Oct. 30, 1992, 106 Stat. 4759.

In subsection (b), the words ''Notwithstanding any other provision of law'' are omitted as unnecessary.

§ 302902. Grants to States

(a) IN GENERAL.—The Secretary shall administer a program of matching grants to the States for the purposes of carrying out this division.

(b) CONDITIONS.—

(1) In general[1].—No grant may be made under this division—

(A) unless the application is in accordance with the comprehensive statewide historic preservation plan that has been approved by the Secretary after considering its relationship to the comprehensive statewide outdoor recreation plan prepared pursuant to chapter 2003 of this title;

[1] So in original. Probably should be ''IN GENERAL''.

§ 306103. Recordation of historic property prior to alteration or demolition

Each Federal agency shall initiate measures to ensure that where, as a result of Federal action or assistance carried out by the agency, a historic property is to be substantially altered or demolished—

(1) timely steps are taken to make or have made appropriate records; and

(2) the records are deposited, in accordance with section 302107 of this title, in the Library of Congress or with such other appropriate agency as the Secretary may designate, for future use and reference.

(Pub. L. 113–287, § 3, Dec. 19, 2014, 128 Stat. 3226.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
306103	16 U.S.C. 470h–2(b).	Pub. L. 89–665, title I, § 110(b), as added Pub. L. 96–515, title II, § 206, Dec. 12, 1980, 94 Stat. 2996.

§ 306104. Agency Preservation Officer

The head of each Federal agency (except an agency that is exempted under section 304108(c) of this title) shall designate a qualified official as the agency's Preservation Officer who shall be responsible for coordinating the agency's activities under this division. Each Preservation Officer may, to be considered qualified, satisfactorily complete an appropriate training program established by the Secretary under section 306101(c) of this title.

(Pub. L. 113–287, § 3, Dec. 19, 2014, 128 Stat. 3226.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
306104	16 U.S.C. 470h–2(c).	Pub. L. 89–665, title I, § 110(c), as added Pub. L. 96–515, title II, § 206, Dec. 12, 1980, 94 Stat. 2996; Pub. L. 102–575, title XL, § 4006(b), Oct. 30, 1992, 106 Stat. 4757.

§ 306105. Agency programs and projects

Consistent with the agency's missions and mandates, each Federal agency shall carry out agency programs and projects (including those under which any Federal assistance is provided or any Federal license, permit, or other approval is required) in accordance with the purposes of this division and give consideration to programs and projects that will further the purposes of this division.

(Pub. L. 113–287, § 3, Dec. 19, 2014, 128 Stat. 3226.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
306105	16 U.S.C. 470h–2(d).	Pub. L. 89–665, title I, § 110(d), as added Pub. L. 96–515, title II, § 206, Dec. 12, 1980, 94 Stat. 2996.

§ 306106. Review of plans of transferees of surplus federally owned historic property

The Secretary shall review and approve the plans of transferees of surplus federally owned historic property not later than 90 days after receipt of the plans to ensure that the prehistorical, historical, architectural, or culturally significant values will be preserved or enhanced.

(Pub. L. 113–287, § 3, Dec. 19, 2014, 128 Stat. 3226.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
306106	16 U.S.C. 470h–2(e).	Pub. L. 89–665, title I, § 110(e), as added Pub. L. 96–515, title II, § 206, Dec. 12, 1980, 94 Stat. 2996.

§ 306107. Planning and actions to minimize harm to National Historic Landmarks

Prior to the approval of any Federal undertaking that may directly and adversely affect any National Historic Landmark, the head of the responsible Federal agency shall to the maximum extent possible undertake such planning and actions as may be necessary to minimize harm to the landmark. The head of the Federal agency shall afford the Council a reasonable opportunity to comment with regard to the undertaking.

(Pub. L. 113–287, § 3, Dec. 19, 2014, 128 Stat. 3226.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
306107	16 U.S.C. 470h–2(f).	Pub. L. 89–665, title I, § 110(f), as added Pub. L. 96–515, title II, § 206, Dec. 12, 1980, 94 Stat. 2996.

§ 306108. Effect of undertaking on historic property

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property. The head of the Federal agency shall afford the Council a reasonable opportunity to comment with regard to the undertaking.

(Pub. L. 113–287, § 3, Dec. 19, 2014, 128 Stat. 3227.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
306108	16 U.S.C. 470f.	Pub. L. 89–665, title I, § 106, Oct. 15, 1966, 80 Stat. 917; Pub. L. 94–422, title II, § 201(3), Sept. 28, 1976, 90 Stat. 1320.

The words ''historic property'' are substituted for ''district, site, building, structure, or object that is included in or eligible for inclusion in the National Register'' because of the definition of ''historic property'' in section 300308 of the new title.

§ 300319. Tribal land

In this division, the term ''tribal land'' means—

(1) all land within the exterior boundaries of any Indian reservation; and

(2) all dependent Indian communities.

(Pub. L. 113–287, § 3, Dec. 19, 2014, 128 Stat. 3191.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
300319	16 U.S.C. 470w(14).	Pub. L. 89–665, title III, § 301(14), as added Pub. L. 102–575, title XL, § 4019(a)(12), Oct. 30, 1992, 106 Stat. 4764.

§ 300320. Undertaking

In this division, the term ''undertaking'' means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including—

(1) those carried out by or on behalf of the Federal agency;

(2) those carried out with Federal financial assistance;

(3) those requiring a Federal permit, license, or approval; and

(4) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.

(Pub. L. 113–287, § 3, Dec. 19, 2014, 128 Stat. 3191.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
300320	16 U.S.C. 470w(7).	Pub. L. 89–665, title III, § 301(7), as added Pub. L. 96–515, title V, § 501, Dec. 12, 1980, 94 Stat. 3001; Pub. L. 102–575, title XL, § 4019(a)(5), Oct. 30, 1992, 106 Stat. 4764.

§ 300321. World Heritage Convention

In this division, the term ''World Heritage Convention'' means the Convention concerning the Protection of the World Cultural and Natural Heritage, done at Paris November 23, 1972 (27 UST 37).

(Pub. L. 113–287, § 3, Dec. 19, 2014, 128 Stat. 3191.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
300321	no source.	

The words ''the Trust Territory of the Pacific Islands . . . and, upon termination of the Trusteeship Agreement for the Trust Territories of the Pacific Islands'' are omitted as obsolete. See note at 48 U.S.C. prec. 1681. For continued application of certain laws of the United States in certain cases, see the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America (48 U.S.C. 1801 note), the Compact of Free Association between the Government of the United States of America and the Governments of the Marshall Islands and the Federated States of Micronesia (48 U.S.C. 1901 note), and the Compact of Free Association between the Government of the United States of America and the Government of Palau (48 U.S.C. 1931 note).

SUBDIVISION 2—HISTORIC PRESERVATION PROGRAM

CHAPTER 3021—NATIONAL REGISTER OF HISTORIC PLACES

§ 302101. Maintenance by Secretary

The Secretary may expand and maintain a National Register of Historic Places composed of districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering, and culture.

(Pub. L. 113–287, § 3, Dec. 19, 2014, 128 Stat. 3191.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
302101	16 U.S.C. 470a(a)(1)(A) (1st sentence).	Pub. L. 89–665, title I, § 101(a)(1)(A) (1st sentence), Oct. 15, 1966, 80 Stat. 915; Pub. L. 91–383, § 11, as added Pub. L. 94–458, § 2, Oct. 7, 1976, 90 Stat. 1942; Pub. L. 93–54, § 1(d), July 1, 1973, 87 Stat. 139; Pub. L. 96–205, title VI, § 608(a)(1), (2), Mar. 12, 1980, 94 Stat. 92; Pub. L. 96–515, title II, § 201(a), Dec. 12, 1980, 94 Stat. 2988.

RECOVERY OF FEES FOR REVIEW SERVICES FOR HISTORIC PRESERVATION TAX CERTIFICATION

Pub. L. 106–113, div. B, § 1000(a)(3) [title I], Nov. 29, 1999, 113 Stat. 1535, 1501A–142, provided in part: ''That notwithstanding any other provision of law, the National Park Service may hereafter recover all fees derived from providing necessary review services associated with historic preservation tax certification, and such funds shall be available until expended without further appropriation for the costs of such review services''.

HISTORICALLY BLACK COLLEGES AND UNIVERSITIES HISTORIC BUILDING RESTORATION AND PRESERVATION

Pub. L. 104–333, div. I, title V, § 507, Nov. 12, 1996, 110 Stat. 4156, as amended by Pub. L. 108–7, div. F, title I, § 150, Feb. 20, 2003, 117 Stat. 245, provided that:

''(a) AUTHORITY TO MAKE GRANTS.—From the amounts made available to carry out the National Historic Preservation Act [see 54 U.S.C. 300101 et seq.], the Secretary of the Interior shall make grants in accordance with this section to eligible historically black colleges and universities for the preservation and restoration of historic buildings and structures on the campus of these institutions.

''(b) GRANT CONDITIONS.—Grants made under subsection (a) shall be subject to the condition that the grantee covenants, for the period of time specified by the Secretary, that—

''(1) no alteration will be made in the property with respect to which the grant is made without the concurrence of the Secretary; and

''(2) reasonable public access to the property with respect to which the grant is made will be permitted by the grantee for interpretive and educational purposes.

HISTORICAL AND REVISION NOTES—CONTINUED

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
60103(b)	49 App.:1674a(a)(1)(B), (2), (d)(2), (e).	
60103(c)(1), (2).	49 App.:1674a(c)(1).	
60103(c)(3) ..	49 App.:1674a(c)(3).	
60103(d)	49 App.:1674a(b), (d)(3), (e).	
60103(e)	49 App.:1674a(f).	
60103(f)	49 App.:1674a(a)(3).	
60103(g)	49 App.:1674a(c)(2).	

In subsections (a), (b), and (d), the words ''general safety'' are omitted as surplus. The text of 49 App.:1674a(e) is omitted for consistency in the revised title and with other titles of the United States Code.

In subsections (a) and (b), before each clause (1), the words ''Not later than 180 days after November 30, 1979'' are omitted as executed. The word ''prescribe'' is substituted for ''establish by regulation'' for consistency in the revised title and with other titles of the Code.

In subsection (a), before clause (1), the words ''with respect to standards relating to the location of any new LNG facility'' are omitted because of the restatement. In clause (2), the word ''involved'' is omitted as surplus. In clause (4), the words ''meteorological, geological, topographical, seismic, and other'' are omitted as surplus. In clause (5), the word ''existing'' is omitted as surplus.

In subsection (b), before clause (1), the text of 49 App.:1674a(a)(2) (1st sentence) is omitted as executed. The text of 49 App.:1674a(a)(2) (last sentence) is omitted as surplus. The words ''with respect to standards applicable to the design, installation, construction, initial inspection, and initial testing of any new LNG facility'' are omitted because of the restatement. In clause (1), the words ''thermal resistance and other'' are omitted as surplus. In clause (2), the words ''(such as multiple diking, insulated concrete, and vapor containment barriers)'' are omitted as surplus. In clause (3), the words ''(for example, whether it is to be in a liquid or semisolid state)'' are omitted as surplus. In clause (4), the words ''under such a design'' are omitted as surplus.

In subsection (c)(1) and (2), the word ''prescribed'' is substituted for ''issued'' for consistency in the revised title and with other titles of the Code.

In subsection (c)(1), before clause (A), the words ''if the standard is to be applied'' are added for clarity. The word ''either'' is omitted as surplus. In clause (B), the word ''Federal'' is omitted as surplus. The words ''the authority is applied'' are substituted for ''such authority was exercised'' for clarity.

In subsection (c)(2)(A), before clause (i), the words ''design, installation, construction, initial inspection, or initial testing standard prescribed under this chapter after March 1, 1978'' are substituted for ''Any such standard (other than one affecting location)'' for clarity. In clause (i), the words ''of the facility involved'' are omitted as surplus. In clause (ii), the word ''otherwise'' is omitted as surplus.

In subsection (d), before clause (1), the words ''Not later than 270 days after November 30, 1979'' are omitted as executed. The words ''with respect to standards for the operation and maintance [sic] of any LNG facility'' are omitted because of the restatement. In clause (3), the words ''to be used with respect to the operation of such facility'' and ''sabotage or other'' are omitted as surplus.

In subsection (e), the text of 49 App.:1674a(f) (related to 49 App.:1672(a)(1) (8th, last sentences), (c), and (d)) is omitted as surplus because those provisions apply to all standards prescribed under the Natural Gas Pipeline Safety Act of 1968 (Public Law 90–481, 82 Stat. 720).

In subsection (f), the words ''Secretary of Energy'' are substituted for ''Department of Energy'' because of 42:7131. The words ''or local'' are added for clarity. The words ''in the case of any facility not subject to the jurisdiction of the Department under the Natural Gas Act'' are omitted as surplus.

AMENDMENTS

2016—Subsec. (a)(7). Pub. L. 114–183 added par. (7).

SAVINGS CLAUSE

Pub. L. 114–183, § 27(c), June 22, 2016, 130 Stat. 532, provided that: ''Nothing in this section [amending this section and enacting provisions set out as a note below] shall be construed to limit the Secretary's authority under chapter 601 of title 49, United States Code, to regulate liquefied natural gas pipeline facilities.''

UPDATE TO MINIMUM SAFETY STANDARDS

Pub. L. 114–183, § 27(b), June 22, 2016, 130 Stat. 532, provided that: ''The Secretary of Transportation shall review and update the minimum safety standards prescribed pursuant to section 60103 of title 49, United States Code, for permanent, small scale liquefied natural gas pipeline facilities.''

§ 60104. Requirements and limitations

(a) OPPORTUNITY TO PRESENT VIEWS.—The Secretary of Transportation shall give an interested person an opportunity to make oral and written presentations of information, views, and arguments when prescribing a standard under this chapter.

(b) NONAPPLICATION.—A design, installation, construction, initial inspection, or initial testing standard does not apply to a pipeline facility existing when the standard is adopted.

(c) PREEMPTION.—A State authority that has submitted a current certification under section 60105(a) of this title may adopt additional or more stringent safety standards for intrastate pipeline facilities and intrastate pipeline transportation only if those standards are compatible with the minimum standards prescribed under this chapter. A State authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation. Notwithstanding the preceding sentence, a State authority may enforce a requirement of a one-call notification program of the State if the program meets the requirements for one-call notification programs under this chapter or chapter 61.

(d) CONSULTATION.—(1) When continuity of gas service is affected by prescribing a standard or waiving compliance with standards under this chapter, the Secretary of Transportation shall consult with and advise the Federal Energy Regulatory Commission or a State authority having jurisdiction over the affected gas pipeline facility before prescribing the standard or waiving compliance. The Secretary shall delay the effective date of the standard or waiver until the Commission or State authority has a reasonable opportunity to grant an authorization it considers necessary.

(2) In a proceeding under section 3 or 7 of the Natural Gas Act (15 U.S.C. 717b or 717f), each applicant for authority to import natural gas or to establish, construct, operate, or extend a gas pipeline facility subject to an applicable safety standard shall certify that it will design, install, inspect, test, construct, operate, replace, and maintain a gas pipeline facility under those standards and plans for inspection and maintenance under section 60108 of this title. The certification is binding on the Secretary of Energy and the Commission except when an appropriate enforcement agency has given timely written

notice to the Commission that the applicant has violated a standard prescribed under this chapter.

(e) LOCATION AND ROUTING OF FACILITIES.—This chapter does not authorize the Secretary of Transportation to prescribe the location or routing of a pipeline facility.

(Pub. L. 103–272, §1(e), July 5, 1994, 108 Stat. 1308; Pub. L. 107–355, §3(a), Dec. 17, 2002, 116 Stat. 2986.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
60104(a)	49 App.:1672(c).	Aug. 12, 1968, Pub. L. 90–481, §3(c), 82 Stat. 721; Nov. 30, 1979, Pub. L. 96–129, §§104(a)(2), (c), 109(c), 93 Stat. 992, 994, 996.
	49 App.:2002(g).	Nov. 30, 1979, Pub. L. 96–129, §§202(4) (28th–last words), 203(c) (last sentence), (g), 93 Stat. 1003, 1004, 1005.
60104(b)	49 App.:1672(a)(1) (6th sentence).	Aug. 12, 1968, Pub. L. 90–481, §3(a)(1) (6th, 9th, last sentences), 82 Stat. 721; Oct. 11, 1976, Pub. L. 94–477, §4(2), 90 Stat. 2073; Nov. 30, 1979, Pub. L. 96–129, §§101(a), 109(c), (e), 93 Stat. 990, 996; Oct. 24, 1992, Pub. L. 102–508, §116, 106 Stat. 3298.
	49 App.:2002(c) (last sentence).	
60104(c)	49 App.:1672(a)(1) (9th, last sentences).	
	49 App.:2002(d).	Nov. 30, 1979, Pub. L. 96–129, §203(d), 93 Stat. 1004; Oct. 24, 1992, Pub. L. 102–508, §215, 106 Stat. 3305.
60104(d)	49 App.:1676(a).	Aug. 12, 1968, Pub. L. 90–481, §9(a), 82 Stat. 725; Nov. 30, 1979, Pub. L. 96–129, §§109(i), 152(a), (b)(3), 93 Stat. 997, 999, 1001; Oct. 30, 1988, Pub. L. 100–561, §105(1), 102 Stat. 2807.
60104(e)	49 App.:1671(4) (33d–last words).	Aug. 12, 1968, Pub. L. 90–481, §2(4) (33d–last words), 82 Stat. 720.
	49 App.:2001(4) (28th–last words).	

Subsection (a) is substituted for 49 App.:1672(c) (last sentence) and 2002(g) (last sentence) to eliminate unnecessary words. The text of 49 App.:1672(c) (1st sentence) and 2002(g) (1st sentence) is omitted as unnecessary because 5:ch. 5, subch. II applies unless otherwise stated.

In subsection (c), the words ''prescribed under this chapter'' are added for clarity. The words ''after the Federal minimum standards become effective'' in 49 App.:1672(a) (last sentence) are omitted as obsolete.

In subsection (d)(1), the words ''waiving compliance'' are substituted for ''action upon application for waiver'' and ''acting on the waiver application'' to eliminate unnecessary words. The words ''the provisions of'' are omitted as surplus. The word ''authority'' is substituted for ''commission'' for consistency in the revised title and with other titles of the Code.

In subsection (d)(2), the words ''and conclusive'' are omitted as being included in ''binding''. The words ''Secretary of Energy'' are substituted for ''Department of Energy'' because of 42:7231.

AMENDMENTS

2002—Subsec. (c). Pub. L. 107–355 inserted at end ''Notwithstanding the preceding sentence, a State authority may enforce a requirement of a one-call notification program of the State if the program meets the requirements for one-call notification programs under this chapter or chapter 61.''

§ 60105. State pipeline safety program certifications

(a) GENERAL REQUIREMENTS AND SUBMISSION.—Except as provided in this section and sections 60114 and 60121 of this title, the Secretary of Transportation may not prescribe or enforce safety standards and practices for an intrastate pipeline facility or intrastate pipeline transportation to the extent that the safety standards and practices are regulated by a State authority (including a municipality if the standards and practices apply to intrastate gas pipeline transportation) that submits to the Secretary annually a certification for the facilities and transportation that complies with subsections (b) and (c) of this section.

(b) CONTENTS.—Each certification submitted under subsection (a) of this section shall state that the State authority—

(1) has regulatory jurisdiction over the standards and practices to which the certification applies;

(2) has adopted, by the date of certification, each applicable standard prescribed under this chapter or, if a standard under this chapter was prescribed not later than 120 days before certification, is taking steps to adopt that standard;

(3) is enforcing each adopted standard through ways that include inspections conducted by State employees meeting the qualifications the Secretary prescribes under section 60107(d)(1)(C) of this title;

(4) is encouraging and promoting the establishment of a program designed to prevent damage by demolition, excavation, tunneling, or construction activity to the pipeline facilities to which the certification applies that subjects persons who violate the applicable requirements of that program to civil penalties and other enforcement actions that are substantially the same as are provided under this chapter, and addresses the elements in section 60134(b);

(5) may require record maintenance, reporting, and inspection substantially the same as provided under section 60117 of this title;

(6) may require that plans for inspection and maintenance under section 60108 (a) and (b) of this title be filed for approval; and

(7) may enforce safety standards of the authority under a law of the State by injunctive relief and civil penalties substantially the same as provided under sections 60120 and 60122(a)(1) and (b)–(f) of this title.

(c) REPORTS.—(1) Each certification submitted under subsection (a) of this section shall include a report that contains—

(A) the name and address of each person to whom the certification applies that is subject to the safety jurisdiction of the State authority;

(B) each accident or incident reported during the prior 12 months by that person involving a fatality, personal injury requiring hospitalization, or property damage or loss of more than an amount the Secretary establishes (even if the person sustaining the fatality, personal injury, or property damage or loss is not subject to the safety jurisdiction of the authority),

this chapter, respectively, are not considered proceedings under part 385 of this chapter and are not open to motions to intervene. Once an application is filed under part 157 subpart A or part 50 of this chapter, any person may file a motion to intervene in accordance with §§ 157.10 or 50.10 of this chapter or in accordance with this section.

(b) *Rulemaking proceedings.* Any person may file comments on any environmental issue in a rulemaking proceeding.

[Order 486, 52 FR 47910, Dec. 17, 1987, as amended by Order 689, 71 FR 69471, Dec. 1, 2006]

§ 380.11 Environmental decisionmaking.

(a) *Decision points.* For the actions which require an environmental assessment or environmental impact statement, environmental considerations will be addressed at appropriate major decision points.

(1) In proceedings involving a party or parties and not set for trial-type hearing, major decision points are the approval or denial of proposals by the Commission or its designees.

(2) In matters set for trial-type hearing, the major decision points are the initial decision of an administrative law judge or the decision of the Commission.

(3) In a rulemaking proceeding, the major decision points are the Notice of Proposed Rulemaking and the Final Rule.

(b) *Environmental documents as part of the record.* The Commission will include environmental assessments, findings of no significant impact, or environmental impact statements, and any supplements in the record of the proceeding.

(c) *Application denials.* Notwithstanding any provision in this part, the Commission may dismiss or deny an application without performing an environmental impact statement or without undertaking environmental analysis.

§ 380.12 Environmental reports for Natural Gas Act applications.

(a) *Introduction.* (1) The applicant must submit an environmental report with any application that proposes the construction, operation, or abandonment of any facility identified in § 380.3(c)(2)(i). The environmental report shall consist of the thirteen resource reports and related material described in this section.

(2) The detail of each resource report must be commensurate with the complexity of the proposal and its potential for environmental impact. Each topic in each resource report shall be addressed or its omission justified, unless the resource report description indicates that the data is not required for that type of proposal. If material required for one resource report is provided in another resource report or in another exhibit, it may be incorporated by reference. If any resource report topic is required for a particular project but is not provided at the time the application is filed, the environmental report shall explain why it is missing and when the applicant anticipates it will be filed.

(3) The appendix to this part contains a checklist of the minimum filing requirements for an environmental report. Failure to provide at least the applicable checklist items will result in rejection of the application unless the Director of the Office of Energy Projects determines that the applicant has provided an acceptable reason for the item's absence and an acceptable schedule for filing it. Failure to file within the accepted schedule will result in rejection of the application.

(b) *General requirements.* As appropriate, each resource report shall:

(1) Address conditions or resources that might be directly or indirectly affected by the project;

(2) Identify significant environmental effects expected to occur as a result of the project;

(3) Identify the effects of construction, operation (including maintenance and malfunctions), and termination of the project, as well as cumulative effects resulting from existing or reasonably foreseeable projects;

(4) Identify measures proposed to enhance the environment or to avoid, mitigate, or compensate for adverse effects of the project;

(5) Provide a list of publications, reports, and other literature or communications, including agency contacts,

that were cited or relied upon to prepare each report. This list should include the name and title of the person contacted, their affiliations, and telephone number;

(6) Whenever this section refers to ''mileposts'' the applicant may substitute ''survey centerline stationing'' if so desired. However, whatever method is chosen should be used consistently throughout the resource reports.

(c) *Resource Report 1—General project description.* This report is required for all applications. It will describe facilities associated with the project, special construction and operation procedures, construction timetables, future plans for related construction, compliance with regulations and codes, and permits that must be obtained. Resource Report 1 must:

(1) Describe and provide location maps of all jurisdictional facilities, including all aboveground facilities associated with the project (such as: meter stations, pig launchers/receivers, valves), to be constructed, modified, abandoned, replaced, or removed, including related construction and operational support activities and areas such as maintenance bases, staging areas, communications towers, power lines, and new access roads (roads to be built or modified). As relevant, the report must describe the length and diameter of the pipeline, the types of aboveground facilities that would be installed, and associated land requirements. It must also identify other companies that must construct jurisdictional facilities related to the project, where the facilities would be located, and where they are in the Commission's approval process.

(2) Identify and describe all nonjurisdictional facilities, including auxiliary facilities, that will be built in association with the project, including facilities to be built by other companies.

(i) Provide the following information:

(A) A brief description of each facility, including as appropriate: Ownership, land requirements, gas consumption, megawatt size, construction status, and an update of the latest status of Federal, state, and local permits/approvals;

(B) The length and diameter of any interconnecting pipeline;

(C) Current 1:24,000/1:25,000 scale topographic maps showing the location of the facilities;

(D) Correspondence with the appropriate State Historic Preservation Officer (SHPO) or duly authorized Tribal Historic Preservation Officer (THPO) for tribal lands regarding whether properties eligible for listing on the National Register of Historic Places (NRHP) would be affected;

(E) Correspondence with the U.S. Fish and Wildlife Service (and National Marine Fisheries Service, if appropriate) regarding potential impacts of the proposed facility on federally listed threatened and endangered species; and

(F) For facilities within a designated coastal zone management area, a consistency determination or evidence that the owner has requested a consistency determination from the state's coastal zone management program.

(ii) Address each of the following factors and indicate which ones, if any, appear to indicate the need for the Commission to do an environmental review of project-related nonjurisdictional facilities.

(A) Whether or not the regulated activity comprises ''merely a link'' in a corridor type project (e.g., a transportation or utility transmission project).

(B) Whether there are aspects of the nonjurisdictional facility in the immediate vicinity of the regulated activity which uniquely determine the location and configuration of the regulated activity.

(C) The extent to which the entire project will be within the Commission's jurisdiction.

(D) The extent of cumulative Federal control and responsibility.

(3) Provide the following maps and photos:

(i) Current, original United States Geological Survey (USGS) 7.5-minute series topographic maps or maps of equivalent detail, covering at least a 0.5-mile-wide corridor centered on the pipeline, with integer mileposts identified, showing the location of rights-of-way, new access roads, other linear construction areas, compressor stations, and pipe storage areas. Show nonlinear construction areas on maps at a scale of 1:3,600 or larger keyed

graphically and by milepost to the right-of-way maps.

(ii) Original aerial images or photographs or photo-based alignment sheets based on these sources, not more than 1 year old (unless older ones accurately depict current land use and development) and with a scale of 1:6,000 or larger, showing the proposed pipeline route and location of major aboveground facilities, covering at least a 0.5 mile-wide corridor, and including mileposts. Older images/photographs/alignment sheets should be modified to show any residences not depicted in the original. Alternative formats (e.g., blue-line prints of acceptable resolution) need prior approval by the environmental staff of the Office of Energy Projects.

(iii) In addition to the copy required under §157.6(a)(2) of this chapter, applicant should send two additional copies of topographic maps and aerial images/photographs directly to the environmental staff of the Office of Energy Projects.

(4) When new or additional compression is proposed, include large scale (1:3,600 or greater) plot plans of each compressor station. The plot plan should reference a readily identifiable point(s) on the USGS maps required in paragraph (c)(3) of this section. The maps and plot plans must identify the location of the nearest noise-sensitive areas (schools, hospitals, or residences) within 1 mile of the compressor station, existing and proposed compressor and auxiliary buildings, access roads, and the limits of areas that would be permanently disturbed.

(5)(i) Identify facilities to be abandoned, and state how they would be abandoned, how the site would be restored, who would own the site or right-of-way after abandonment, and who would be responsible for any facilities abandoned in place.

(ii) When the right-of-way or the easement would be abandoned, identify whether landowners were given the opportunity to request that the facilities on their property, including foundations and below ground components, be removed. Identify any landowners whose preferences the company does not intend to honor, and the reasons therefore.

(6) Describe and identify by milepost, proposed construction and restoration methods to be used in areas of rugged topography, residential areas, active croplands, sites where the pipeline would be located parallel to and under roads, and sites where explosives are likely to be used.

(7) Unless provided in response to Resource Report 5, describe estimated workforce requirements, including the number of pipeline construction spreads, average workforce requirements for each construction spread and meter or compressor station, estimated duration of construction from initial clearing to final restoration, and number of personnel to be hired to operate the proposed project.

(8) Describe reasonably foreseeable plans for future expansion of facilities, including additional land requirements and the compatibility of those plans with the current proposal.

(9) Describe all authorizations required to complete the proposed action and the status of applications for such authorizations. Identify environmental mitigation requirements specified in any permit or proposed in any permit application to the extent not specified elsewhere in this section.

(10) Provide the names and mailing addresses of all affected landowners specified in §157.6(d) and certify that all affected landowners will be notified as required in §157.6(d).

(d) *Resource Report 2—Water use and quality.* This report is required for all applications, except those which involve only facilities within the areas of an existing compressor, meter, or regulator station that were disturbed by construction of the existing facilities, no wetlands or waterbodies are on the site and there would not be a significant increase in water use. The report must describe water quality and provide data sufficient to determine the expected impact of the project and the effectiveness of mitigative, enhancement, or protective measures. Resource Report 2 must:

(1) Identify and describe by milepost perennial waterbodies and municipal water supply or watershed areas, specially designated surface water protection areas and sensitive waterbodies, and wetlands that would be crossed.

For each waterbody crossing, identify the approximate width, state water quality classifications, any known potential pollutants present in the water or sediments, and any potable water intake sources within 3 miles downstream.

(2) Compare proposed mitigation measures with the staff's current ''*Wetland and Waterbody Construction and Mitigation Procedures*,'' which are available from the Commission Internet home page or the Commission staff, describe what proposed alternative mitigation would provide equivalent or greater protection to the environment, and provide a description of site- specific construction techniques that would be used at each major waterbody crossing.

(3) Describe typical staging area requirements at waterbody and wetland crossings. Also, identify and describe waterbodies and wetlands where staging areas are likely to be more extensive.

(4) Include National Wetland Inventory (NWI) maps. If NWI maps are not available, provide the appropriate state wetland maps. Identify for each crossing, the milepost, the wetland classification specified by the U.S. Fish and Wildlife Service, and the length of the crossing. Include two copies of the NWI maps (or the substitutes, if NWI maps are not available) clearly showing the proposed route and mileposts directed to the environmental staff. Describe by milepost, wetland crossings as determined by field delineations using the current Federal methodology.

(5) Identify aquifers within excavation depth in the project area, including the depth of the aquifer, current and projected use, water quality and average yield, and known or suspected contamination problems.

(6) Describe specific locations, the quantity required, and the method and rate of withdrawal and discharge of hydrostatic test water. Describe suspended or dissolved material likely to be present in the water as a result of contact with the pipeline, particularly if an existing pipeline is being retested. Describe chemical or physical treatment of the pipeline or hydrostatic test water. Discuss waste products generated and disposal methods.

(7) If underground storage of natural gas is proposed:

(i) Identify how water produced from the storage field will be disposed of, and

(ii) For salt caverns, identify the source locations, the quantity required, and the method and rate of withdrawal of water for creating salt cavern(s), as well as the means of disposal of brine resulting from cavern leaching.

(8) Discuss proposed mitigation measures to reduce the potential for adverse impacts to surface water, wetlands, or groundwater quality to the extent they are not described in response to paragraph (d)(2) of this section. Discuss the potential for blasting to affect water wells, springs, and wetlands, and measures to be taken to detect and remedy such effects.

(9) Identify the location of known public and private groundwater supply wells or springs within 150 feet of proposed construction areas. Identify locations of EPA or state-designated sole-source aquifers and wellhead protection areas crossed by the proposed pipeline facilities.

(e) *Resource Report 3—Fish, wildlife, and vegetation.* This report is required for all applications, except those involving only facilities within the improved area of an existing compressor, meter, or regulator station. It must describe aquatic life, wildlife, and vegetation in the vicinity of the proposed project; expected impacts on these resources including potential effects on biodiversity; and proposed mitigation, enhancement or protection measures. Resource Report 3 must:

(1) Describe commercial and recreational warmwater, coldwater, and saltwater fisheries in the affected area and associated significant habitats such as spawning or rearing areas and estuaries.

(2) Describe terrestrial habitats, including wetlands, typical wildlife habitats, and rare, unique, or otherwise significant habitats that might be affected by the proposed action. Describe typical species that have commercial, recreational, or aesthetic value.

(3) Describe and provide the acreage of vegetation cover types that would be affected, including unique ecosystems

or communities such as remnant prairie or old-growth forest, or significant individual plants, such as old-growth specimen trees.

(4) Describe the impact of construction and operation on aquatic and terrestrial species and their habitats, including the possibility of a major alteration to ecosystems or biodiversity, and any potential impact on state-listed endangered or threatened species. Describe the impact of maintenance, clearing and treatment of the project area on fish, wildlife, and vegetation. Surveys may be required to determine specific areas of significant habitats or communities of species of special concern to state or local agencies.

(5) Identify all federally listed or proposed endangered or threatened species and critical habitat that potentially occur in the vicinity of the project. Discuss the results of the consultation requirements listed in §380.13(b) at least through §380.13(b)(5)(i) and include any written correspondence that resulted from the consultation. The initial application must include the results of any required surveys unless seasonal considerations make this impractical. If species surveys are impractical, there must be field surveys to determine the presence of suitable habitat unless the entire project area is suitable habitat.

(6) Identify all federally listed essential fish habitat (EFH) that potentially occurs in the vicinity of the project. Provide information on all EFH, as identified by the pertinent Federal fishery management plans, that may be adversely affected by the project and the results of abbreviated consultations with NMFS, and any resulting EFH assessments.

(7) Describe site-specific mitigation measures to minimize impacts on fisheries, wildlife, and vegetation.

(8) Include copies of correspondence not provided pursuant to paragraph (e)(5) of this section, containing recommendations from appropriate Federal and state fish and wildlife agencies to avoid or limit impact on wildlife, fisheries, and vegetation, and the applicant's response to the recommendations.

(f) *Resource Report 4—Cultural resources.* This report is required for all applications. In preparing this report, the applicant must follow the principles in §380.14 of this part. Guidance on the content and the format for the documentation listed below, as well as professional qualifications of preparers, is detailed in '' *Office of Energy Projects' (OEP) Guidelines for Reporting on Cultural Resources Investigations*,'' which is available from the Commission Internet home page or from the Commission staff.

(1) Resource Report 4 must contain:

(i) Documentation of the applicant's initial cultural resources consultation, including consultations with Native Americans and other interested persons (if appropriate);

(ii) Overview and Survey Reports, as appropriate;

(iii) Evaluation Report, as appropriate;

(iv) Treatment Plan, as appropriate; and

(v) Written comments from State Historic Preservation Officer(s) (SHPO), Tribal Historic Preservation Officers (THPO), as appropriate, and applicable land-managing agencies on the reports in paragraphs (f)(1)(i)–(iv) of this section.

(2) *Initial filing requirements.* The initial application must include the documentation of initial cultural resource consultation, the Overview and Survey Reports, if required, and written comments from SHPOs, THPOs and land-managing agencies, if available. The initial cultural resources consultations should establish the need for surveys. If surveys are deemed necessary by the consultation with the SHPO/THPO, the survey report must be filed with the application.

(i) If the comments of the SHPOs, THPOs, or land-management agencies are not available at the time the application is filed, they may be filed separately, but they must be filed before a final certificate is issued.

(ii) If landowners deny access to private property and certain areas are not surveyed, the unsurveyed area must be identified by mileposts, and supplemental surveys or evaluations shall be conducted after access is granted. In

such circumstances, reports, and treatment plans, if necessary, for those inaccessible lands may be filed after a certificate is issued.

(3) The Evaluation Report and Treatment Plan, if required, for the entire project must be filed before a final certificate is issued.

(i) The Evaluation Report may be combined in a single synthetic report with the Overview and Survey Reports if the SHPOs, THPOs, and land-management agencies allow and if it is available at the time the application is filed.

(ii) In preparing the Treatment Plan, the applicant must consult with the Commission staff, the SHPO, and any applicable THPO and land-management agencies.

(iii) Authorization to implement the Treatment Plan will occur only after the final certificate is issued.

(4) Applicant must request privileged treatment for all material filed with the Commission containing location, character, and ownership information about cultural resources in accordance with § 388.112 of this chapter. The cover and relevant pages or portions of the report should be clearly labeled in bold lettering: ''CONTAINS PRIVILEGED INFORMATION—DO NOT RELEASE.''

(5) Except as specified in a final Commission order, or by the Director of the Office of Energy Projects, construction may not begin until all cultural resource reports and plans have been approved.

(g) *Resource Report 5—Socioeconomics.* This report is required only for applications involving significant aboveground facilities, including, among others, conditioning or liquefied natural gas (LNG) plants. It must identify and quantify the impacts of constructing and operating the proposed project on factors affecting towns and counties in the vicinity of the project. Resource Report 5 must:

(1) Describe the socioeconomic impact area.

(2) Evaluate the impact of any substantial immigration of people on governmental facilities and services and plans to reduce the impact on the local infrastructure.

(3) Describe on-site manpower requirements and payroll during construction and operation, including the number of construction personnel who currently reside within the impact area, would commute daily to the site from outside the impact area, or would relocate temporarily within the impact area.

(4) Determine whether existing housing within the impact area is sufficient to meet the needs of the additional population.

(5) Describe the number and types of residences and businesses that would be displaced by the project, procedures to be used to acquire these properties, and types and amounts of relocation assistance payments.

(6) Conduct a fiscal impact analysis evaluating incremental local government expenditures in relation to incremental local government revenues that would result from construction of the project. Incremental expenditures include, but are not limited to, school operating costs, road maintenance and repair, public safety, and public utility costs.

(h) *Resource Report 6—Geological resources.* This report is required for applications involving LNG facilities and all other applications, except those involving only facilities within the boundaries of existing aboveground facilities, such as a compressor, meter, or regulator station. It must describe geological resources and hazards in the project area that might be directly or indirectly affected by the proposed action or that could place the proposed facilities at risk, the potential effects of those hazards on the facility, and methods proposed to reduce the effects or risks. Resource Report 6 must:

(1) Describe, by milepost, mineral resources that are currently or potentially exploitable;

(2) Describe, by milepost, existing and potential geological hazards and areas of nonroutine geotechnical concern, such as high seismicity areas, active faults, and areas susceptible to soil liquefaction; planned, active, and abandoned mines; karst terrain; and areas of potential ground failure, such as subsidence, slumping, and landsliding. Discuss the hazards posed to the facility from each one.

(3) Describe how the project would be located or designed to avoid or minimize adverse effects to the resources or risk to itself, including geotechnical investigations and monitoring that would be conducted before, during, and after construction. Discuss also the potential for blasting to affect structures, and the measures to be taken to remedy such effects.

(4) Specify methods to be used to prevent project-induced contamination from surface mines or from mine tailings along the right-of-way and whether the project would hinder mine reclamation or expansion efforts.

(5) If the application involves an LNG facility located in zones 2, 3, or 4 of the Uniform Building Code's Seismic Risk Map, or where there is potential for surface faulting or liquefaction, prepare a report on earthquake hazards and engineering in conformance with ''*Data Requirements for the Seismic Review of LNG Facilities*,'' NBSIR 84–2833. This document may be obtained from the Commission staff.

(6) If the application is for underground storage facilities:

(i) Describe how the applicant would control and monitor the drilling activity of others within the field and buffer zone;

(ii) Describe how the applicant would monitor potential effects of the operation of adjacent storage or production facilities on the proposed facility, and vice versa;

(iii) Describe measures taken to locate and determine the condition of old wells within the field and buffer zone and how the applicant would reduce risk from failure of known and undiscovered wells; and

(iv) Identify and discuss safety and environmental safeguards required by state and Federal drilling regulations.

(i) *Resource Report 7—Soils.* This report is required for all applications except those not involving soil disturbance. It must describe the soils that would be affected by the proposed project, the effect on those soils, and measures proposed to minimize or avoid impact. Resource Report 7 must:

(1) List, by milepost, the soil associations that would be crossed and describe the erosion potential, fertility, and drainage characteristics of each association.

(2) If an aboveground facility site is greater than 5 acres:

(i) List the soil series within the property and the percentage of the property comprised of each series;

(ii) List the percentage of each series which would be permanently disturbed;

(iii) Describe the characteristics of each soil series; and

(iv) Indicate which are classified as prime or unique farmland by the U.S. Department of Agriculture, Natural Resources Conservation Service.

(3) Identify, by milepost, potential impact from: Soil erosion due to water, wind, or loss of vegetation; soil compaction and damage to soil structure resulting from movement of construction vehicles; wet soils and soils with poor drainage that are especially prone to structural damage; damage to drainage tile systems due to movement of construction vehicles and trenching activities; and interference with the operation of agricultural equipment due to the probability of large stones or blasted rock occurring on or near the surface as a result of construction.

(4) Identify, by milepost, cropland and residential areas where loss of soil fertility due to trenching and backfilling could occur.

(5) Describe proposed mitigation measures to reduce the potential for adverse impact to soils or agricultural productivity. Compare proposed mitigation measures with the staff's current ''*Upland Erosion Control, Revegetation and Maintenance Plan*,'' which is available from the Commission Internet home page or from the Commission staff, and explain how proposed mitigation measures provide equivalent or greater protections to the environment.

(j) *Resource Report 8—Land use, recreation and aesthetics.* This report is required for all applications except those involving only facilities which are of comparable use at existing compressor, meter, and regulator stations. It must describe the existing uses of land on, and (where specified) within 0.25 mile of, the proposed project and changes to those land uses that would occur if the project is approved. The report shall discuss proposed mitigation measures,

including protection and enhancement of existing land use. Resource Report 8 must:

(1) Describe the width and acreage requirements of all construction and permanent rights-of-way and the acreage required for each proposed plant and operational site, including injection or withdrawal wells.

(i) List, by milepost, locations where the proposed right-of-way would be adjacent to existing rights-of-way of any kind.

(ii) Identify, preferably by diagrams, existing rights-of-way that would be used for a portion of the construction or operational right-of-way, the overlap and how much additional width would be required.

(iii) Identify the total amount of land to be purchased or leased for each aboveground facility, the amount of land that would be disturbed for construction and operation of the facility, and the use of the remaining land not required for project operation.

(iv) Identify the size of typical staging areas and expanded work areas, such as those at railroad, road, and waterbody crossings, and the size and location of all pipe storage yards and access roads.

(2) Identify, by milepost, the existing use of lands crossed by the proposed pipeline, or on or adjacent to each proposed plant and operational site.

(3) Describe planned development on land crossed or within 0.25 mile of proposed facilities, the time frame (if available) for such development, and proposed coordination to minimize impacts on land use. Planned development means development which is included in a master plan or is on file with the local planning board or the county.

(4) Identify, by milepost and length of crossing, the area of direct effect of each proposed facility and operational site on sugar maple stands, orchards and nurseries, landfills, operating mines, hazardous waste sites, state wild and scenic rivers, state or local designated trails, nature preserves, game management areas, remnant prairie, old-growth forest, national or state forests, parks, golf courses, designated natural, recreational or scenic areas, or registered natural landmarks, Native American religious sites and traditional cultural properties to the extent they are known to the public at large, and reservations, lands identified under the Special Area Management Plan of the Office of Coastal Zone Management, National Oceanic and Atmospheric Administration, and lands owned or controlled by Federal or state agencies or private preservation groups. Also identify if any of those areas are located within 0.25 mile of any proposed facility.

(5) Identify, by milepost, all residences and buildings within 50 feet of the proposed pipeline construction right-of-way and the distance of the residence or building from the right-of-way. Provide survey drawings or alignment sheets to illustrate the location of the facilities in relation to the buildings.

(6) Describe any areas crossed by or within 0.25 mile of the proposed pipeline or plant and operational sites which are included in, or are designated for study for inclusion in: The National Wild and Scenic Rivers System (16 U.S.C. 1271); The National Trails System (16 U.S.C. 1241); or a wilderness area designated under the Wilderness Act (16 U.S.C. 1132).

(7) For facilities within a designated coastal zone management area, provide a consistency determination or evidence that the applicant has requested a consistency determination from the state's coastal zone management program.

(8) Describe the impact the project will have on present uses of the affected area as identified above, including commercial uses, mineral resources, recreational areas, public health and safety, and the aesthetic value of the land and its features. Describe any temporary or permanent restrictions on land use resulting from the project.

(9) Describe mitigation measures intended for all special use areas identified under paragraphs (j)(2) through (6) of this section.

(10) Describe proposed typical mitigation measures for each residence that is within 50 feet of the edge of the pipeline construction right-of-way, as well as any proposed residence-specific mitigation. Describe how residential

property, including for example, fences, driveways, stone walls, sidewalks, water supply, and septic systems, would be restored. Describe compensation plans for temporary and permanent rights-of-way and the eminent domain process for the affected areas.

(11) Describe measures proposed to mitigate the aesthetic impact of the facilities especially for aboveground facilities such as compressor or meter stations.

(12) Demonstrate that applications for rights-of-way or other proposed land use have been or soon will be filed with Federal land-management agencies with jurisdiction over land that would be affected by the project.

(k) *Resource Report 9—Air and noise quality*. This report is required for applications involving compressor facilities at new or existing stations, and for all new LNG facilities. It must identify the effects of the project on the existing air quality and noise environment and describe proposed measures to mitigate the effects. Resource Report 9 must:

(1) Describe the existing air quality, including background levels of nitrogen dioxide and other criteria pollutants which may be emitted above EPA-identified significance levels.

(2) Quantitatively describe existing noise levels at noise-sensitive areas, such as schools, hospitals, or residences and include any areas covered by relevant state or local noise ordinances.

(i) Report existing noise levels as the L_{eq} (day), L_{eq} (night), and L_{dn} and include the basis for the data or estimates.

(ii) For existing compressor stations, include the results of a sound level survey at the site property line and nearby noise-sensitive areas while the compressors are operated at full load.

(iii) For proposed new compressor station sites, measure or estimate the existing ambient sound environment based on current land uses and activities.

(iv) Include a plot plan that identifies the locations and duration of noise measurements, the time of day, weather conditions, wind speed and direction, engine load, and other noise sources present during each measurement.

(3) Estimate the impact of the project on air quality, including how existing regulatory standards would be met.

(i) Provide the emission rate of nitrogen oxides from existing and proposed facilities, expressed in pounds per hour and tons per year for maximum operating conditions, include supporting calculations, emission factors, fuel consumption rates, and annual hours of operation.

(ii) For major sources of air emissions (as defined by the Environmental Protection Agency), provide copies of applications for permits to construct (and operate, if applicable) or for applicability determinations under regulations for the prevention of significant air quality deterioration and subsequent determinations.

(4) Provide a quantitative estimate of the impact of the project on noise levels at noise-sensitive areas, such as schools, hospitals, or residences.

(i) Include step-by-step supporting calculations or identify the computer program used to model the noise levels, the input and raw output data and all assumptions made when running the model, far-field sound level data for maximum facility operation, and the source of the data.

(ii) Include sound pressure levels for unmuffled engine inlets and exhausts, engine casings, and cooling equipment; dynamic insertion loss for all mufflers; sound transmission loss for all compressor building components, including walls, roof, doors, windows and ventilation openings; sound attenuation from the station to nearby noise-sensitive areas; the manufacturer's name, the model number, the performance rating; and a description of each noise source and noise control component to be employed at the proposed compressor station. For proposed compressors the initial filing must include at least the proposed horsepower, type of compression, and energy source for the compressor.

(iii) Far-field sound level data measured from similar units in service elsewhere, when available, may be substituted for manufacturer's far-field sound level data.

(iv) If specific noise control equipment has not been chosen, include a

schedule for submitting the data prior to certification.

(v) The estimate must demonstrate that the project will comply with applicable noise regulations and show how the facility will meet the following requirements:

(A) The noise attributable to any new compressor station, compression added to an existing station, or any modification, upgrade or update of an existing station, must not exceed a day- night sound level (L_{dn}) of 55 dBA at any pre-existing noise-sensitive area (such as schools, hospitals, or residences).

(B) New compressor stations or modifications of existing stations shall not result in a perceptible increase in vibration at any noise-sensitive area.

(5) Describe measures and manufacturer's specifications for equipment proposed to mitigate impact to air and noise quality, including emission control systems, installation of filters, mufflers, or insulation of piping and buildings, and orientation of equipment away from noise-sensitive areas.

(l) *Resource Report 10—Alternatives.* This report is required for all applications. It must describe alternatives to the project and compare the environmental impacts of such alternatives to those of the proposal. The discussion must demonstrate how environmental benefits and costs were weighed against economic benefits and costs, and technological and procedural constraints. The potential for each alternative to meet project deadlines and the environmental consequences of each alternative shall be discussed. Resource Report 10 must:

(1) Discuss the ''no action'' alternative and the potential for accomplishing the proposed objectives through the use of other systems and/or energy conservation. Provide an analysis of the relative environmental benefits and costs for each alternative.

(2) Describe alternative routes or locations considered for each facility during the initial screening for the project.

(i) For alternative routes considered in the initial screening for the project but eliminated, describe the environmental characteristics of each route or site, and the reasons for rejecting it. Identify the location of such alternatives on maps of sufficient scale to depict their location and relationship to the proposed action, and the relationship of the pipeline to existing rights-of-way.

(ii) For alternative routes or locations considered for more in-depth consideration, describe the environmental characteristics of each route or site and the reasons for rejecting it. Provide comparative tables showing the differences in environmental characteristics for the alternative and proposed action. The location of any alternatives in this paragraph shall be provided on maps equivalent to those required in paragraph (c)(2) of this section.

(m) *Resource Report 11—Reliability and safety.* This report is required for applications involving new or recommissioned LNG facilities. Information previously filed with the Commission need not be refiled if the applicant verifies its continued validity. This report shall address the potential hazard to the public from failure of facility components resulting from accidents or natural catastrophes, how these events would affect reliability, and what procedures and design features have been used to reduce potential hazards. Resource Report 11 must:

(1) Describe measures proposed to protect the public from failure of the proposed facilities (including coordination with local agencies).

(2) Discuss hazards, the environmental impact, and service interruptions which could reasonably ensue from failure of the proposed facilities.

(3) Discuss design and operational measures to avoid or reduce risk.

(4) Discuss contingency plans for maintaining service or reducing downtime.

(5) Describe measures used to exclude the public from hazardous areas. Discuss measures used to minimize problems arising from malfunctions and accidents (with estimates of probability of occurrence) and identify standard procedures for protecting services and public safety during maintenance and breakdowns.

(n) *Resource Report 12—PCB contamination.* This report is required for applications involving the replacement,

abandonment by removal, or abandonment in place of pipeline facilities determined to have polychlorinated biphenyls (PCBs) in excess of 50 ppm in pipeline liquids. Resource Report 12 must:

(1) Provide a statement that activities would comply with an approved EPA disposal permit, with the dates of issuance and expiration specified, or with the requirements of the Toxic Substances Control Act.

(2) For compressor station modifications on sites that have been determined to have soils contaminated with PCBs, describe the status of remediation efforts completed to date.

(o) *Resource Report 13—Engineering and design material.* This report is required for construction of new liquefied natural gas (LNG) facilities, or the recommissioning of existing LNG facilities. If the recommissioned facility is existing and is not being replaced, relocated, or significantly altered, resubmittal of information already on file with the Commission is unnecessary. Resource Report 13 must:

(1) Provide a detailed plot plan showing the location of all major components to be installed, including compression, pretreatment, liquefaction, storage, transfer piping, vaporization, truck loading/unloading, vent stacks, pumps, and auxiliary or appurtenant service facilities.

(2) Provide a detailed layout of the fire protection system showing the location of fire water pumps, piping, hydrants, hose reels, dry chemical systems, high expansion foam systems, and auxiliary or appurtenant service facilities.

(3) Provide a layout of the hazard detection system showing the location of combustible-gas detectors, fire detectors, heat detectors, smoke or combustion product detectors, and low temperature detectors. Identify those detectors that activate automatic shutdowns and the equipment that would shut down. Include all safety provisions incorporated in the plant design, including automatic and manually activated emergency shutdown systems.

(4) Provide a detailed layout of the spill containment system showing the location of impoundments, sumps, subdikes, channels, and water removal systems.

(5) Provide manufacturer's specifications, drawings, and literature on the fail-safe shut-off valve for each loading area at a marine terminal (if applicable).

(6) Provide a detailed layout of the fuel gas system showing all taps with process components.

(7) Provide copies of company, engineering firm, or consultant studies of a conceptual nature that show the engineering planning or design approach to the construction of new facilities or plants.

(8) Provide engineering information on major process components related to the first six items above, which include (as applicable) function, capacity, type, manufacturer, drive system (horsepower, voltage), operating pressure, and temperature.

(9) Provide manuals and construction drawings for LNG storage tank(s).

(10) Provide up-to-date piping and instrumentation diagrams. Include a description of the instrumentation and control philosophy, type of instrumentation (pneumatic, electronic), use of computer technology, and control room display and operation. Also, provide an overall schematic diagram of the entire process flow system, including maps, materials, and energy balances.

(11) Provide engineering information on the plant's electrical power generation system, distribution system, emergency power system, uninterruptible power system, and battery backup system.

(12) Identify all codes and standards under which the plant (and marine terminal, if applicable) will be designed, and any special considerations or safety provisions that were applied to the design of plant components.

(13) Provide a list of all permits or approvals from local, state, Federal, or Native American groups or Indian agencies required prior to and during construction of the plant, and the status of each, including the date filed, the date issued, and any known obstacles to approval. Include a description of data records required for submission to such agencies and transcripts of any public hearings by such agencies. Also

provide copies of any correspondence relating to the actions by all, or any, of these agencies regarding all required approvals.

(14) Identify how each applicable requirement will comply with 49 CFR part 193 and the National Fire Protection Association 59A LNG Standards. For new facilities, the siting requirements of 49 CFR part 193, subpart B, must be given special attention. If applicable, vapor dispersion calculations from LNG spills over water should also be presented to ensure compliance with the U.S. Coast Guard's LNG regulations in 33 CFR part 127.

(15) Provide seismic information specified in Data Requirements for the Seismic Review of LNG facilities (NBSIR 84–2833, available from FERC staff) for facilities that would be located in zone 2, 3, or 4 of the Uniform Building Code Seismic Map of the United States.

[Order 603, 64 FR 26611, May 14, 1999, as amended by Order 603–A, 64 FR 54537, Oct. 7, 1999; Order 609, 64 FR 57392, Oct. 25, 1999; Order 699, 72 FR 45328, Aug. 14, 2007; Order 756, 77 FR 4895, Feb. 1, 2012]

§ 380.13 Compliance with the Endangered Species Act.

(a) *Definitions.* For purposes of this section:

(1) *Listed species* and *critical habitat* have the same meaning as provided in 50 CFR 402.02.

(2) *Project area* means any area subject to construction activities (for example, material storage sites, temporary work areas, and new access roads) necessary to install or abandon the facilities.

(b) *Procedures for informal consultation*—(1) *Designation of non-Federal representative.* The project sponsor is designated as the Commission's non-Federal representative for purposes of informal consultations with the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) under the Endangered Species Act of 1973, as amended (ESA).

(2) *Consultation requirement.* (i) Prior to the filing of the environmental report specified in § 380.12, the project sponsor must contact the appropriate regional or field office of the FWS or the NMFS, or both if appropriate, to initiate informal consultations, unless it is proceeding pursuant to a blanket clearance issued by the FWS and/or NMFS which is less than 1 year old and the clearance does not specify more frequent consultation.

(ii) If a blanket clearance is more than 1 year old or less than 1 year old and specifies more frequent consultations, or if the project sponsor is not proceeding pursuant to a blanket clearance, the project sponsor must request a list of federally listed or proposed species and designated or proposed critical habitat that may be present in the project area, or provide the consulted agency with such a list for its concurrence.

(iii) The consulted agency will provide a species and critical habitat list or concur with the species list provided within 30 days of its receipt of the initial request. In the event that the consulted agency does not provide this information within this time period, the project sponsor may notify the Director of the Office of Energy Projects and continue with the remaining procedures of this section.

(3) *End of informal consultation.* (i) At any time during the informal consultations, the consulted agency may determine or confirm:

(A) That no listed or proposed species, or designated or proposed critical habitat, occurs in the project area; or

(B) That the project is not likely to adversely affect a listed species or critical habitat;

(ii) If the consulted agency provides the determination or confirmation described in paragraph (b)(3)(i) of this section, no further consultation is required.

(4) *Potential impact to proposed species.* (i) If the consulted agency, pursuant to informal consultations, initially determines that any species proposed to be listed, or proposed critical habitat, occurs in the project area, the project sponsor must confer with the consulted agency on methods to avoid or reduce the potential impact.

(ii) The project sponsor shall include in its proposal, a discussion of any mitigating measures recommended through the consultation process.

(5) *Continued informal consultations for listed species.* (i) If the consulted agency

PART 800—PROTECTION OF HISTORIC PROPERTIES

Subpart A—Purposes and Participants

Subpart B—The Section 106 Process

Subpart C—Program Alternatives

AUTHORITY: 16 U.S.C. 470s.

SOURCE: 65 FR 77725, Dec. 12, 2000, unless otherwise noted.

Subpart A—Purposes and Participants

§ 800.1 Purposes.

(a) *Purposes of the section 106 process.* Section 106 of the National Historic Preservation Act requires Federal agencies to take into account the effects of their undertakings on historic properties and afford the Council a reasonable opportunity to comment on such undertakings. The procedures in this part define how Federal agencies meet these statutory responsibilities. The section 106 process seeks to accommodate historic preservation concerns with the needs of Federal undertakings through consultation among the agency official and other parties with an interest in the effects of the undertaking on historic properties, commencing at the early stages of project planning. The goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties.

(b) *Relation to other provisions of the act.* Section 106 is related to other provisions of the act designed to further the national policy of historic preservation. References to those provisions are included in this part to identify circumstances where they may affect actions taken to meet section 106 requirements. Such provisions may have their own implementing regulations or guidelines and are not intended to be implemented by the procedures in this part except insofar as they relate to the section 106 process. Guidelines, policies, and procedures issued by other agencies, including the Secretary, have been cited in this part for ease of access and are not incorporated by reference.

(c) *Timing.* The agency official must complete the section 106 process ''prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license.'' This does not prohibit agency official from conducting or authorizing nondestructive project planning activities before completing compliance with section 106, provided that such actions do not restrict the subsequent consideration of alternatives to avoid, minimize or mitigate the undertaking's adverse effects on historic properties. The agency official shall ensure that the section 106 process is initiated early in the undertaking's planning, so that a broad range of alternatives may be considered during the planning process for the undertaking.

§ 800.2 Participants in the Section 106 process.

(a) *Agency official.* It is the statutory obligation of the Federal agency to fulfill the requirements of section 106 and to ensure that an agency official with jurisdiction over an undertaking takes legal and financial responsibility for section 106 compliance in accordance with subpart B of this part. The agency official has approval authority for the undertaking and can commit the Federal agency to take appropriate action

for a specific undertaking as a result of section 106 compliance. For the purposes of subpart C of this part, the agency official has the authority to commit the Federal agency to any obligation it may assume in the implementation of a program alternative. The agency official may be a State, local, or tribal government official who has been delegated legal responsibility for compliance with section 106 in accordance with Federal law.

(1) *Professional standards.* Section 112(a)(1)(A) of the act requires each Federal agency responsible for the protection of historic resources, including archeological resources, to ensure that all actions taken by employees or contractors of the agency shall meet professional standards under regulations developed by the Secretary.

(2) *Lead Federal agency.* If more than one Federal agency is involved in an undertaking, some or all the agencies may designate a lead Federal agency, which shall identify the appropriate official to serve as the agency official who shall act on their behalf, fulfilling their collective responsibilities under section 106. Those Federal agencies that do not designate a lead Federal agency remain individually responsible for their compliance with this part.

(3) *Use of contractors.* Consistent with applicable conflict of interest laws, the agency official may use the services of applicants, consultants, or designees to prepare information, analyses and recommendations under this part. The agency official remains legally responsible for all required findings and determinations. If a document or study is prepared by a non-Federal party, the agency official is responsible for ensuring that its content meets applicable standards and guidelines.

(4) *Consultation.* The agency official shall involve the consulting parties described in paragraph (c) of this section in findings and determinations made during the section 106 process. The agency official should plan consultations appropriate to the scale of the undertaking and the scope of Federal involvement and coordinated with other requirements of other statutes, as applicable, such as the National Environmental Policy Act, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, the Archeological Resources Protection Act, and agency-specific legislation. The Council encourages the agency official to use to the extent possible existing agency procedures and mechanisms to fulfill the consultation requirements of this part.

(b) *Council.* The Council issues regulations to implement section 106, provides guidance and advice on the application of the procedures in this part, and generally oversees the operation of the section 106 process. The Council also consults with and comments to agency officials on individual undertakings and programs that affect historic properties.

(1) *Council entry into the section 106 process.* When the Council determines that its involvement is necessary to ensure that the purposes of section 106 and the act are met, the Council may enter the section 106 process. Criteria guiding Council decisions to enter the section 106 process are found in appendix A to this part. The Council will document that the criteria have been met and notify the parties to the section 106 process as required by this part.

(2) *Council assistance.* Participants in the section 106 process may seek advice, guidance and assistance from the Council on the application of this part to specific undertakings, including the resolution of disagreements, whether or not the Council is formally involved in the review of the undertaking. If questions arise regarding the conduct of the section 106 process, participants are encouraged to obtain the Council's advice on completing the process.

(c) *Consulting parties.* The following parties have consultative roles in the section 106 process.

(1) *State historic preservation officer.* (i) The State historic preservation officer (SHPO) reflects the interests of the State and its citizens in the preservation of their cultural heritage. In accordance with section 101(b)(3) of the act, the SHPO advises and assists Federal agencies in carrying out their section 106 responsibilities and cooperates with such agencies, local governments and organizations and individuals to

ensure that historic properties are taking into consideration at all levels of planning and development.

(ii) If an Indian tribe has assumed the functions of the SHPO in the section 106 process for undertakings on tribal lands, the SHPO shall participate as a consulting party if the undertaking takes place on tribal lands but affects historic properties off tribal lands, if requested in accordance with § 800.3(c)(1), or if the Indian tribe agrees to include the SHPO pursuant to § 800.3(f)(3).

(2) *Indian tribes and Native Hawaiian organizations.* (i) *Consultation on tribal lands.* (A) *Tribal historic preservation officer.* For a tribe that has assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the act, the tribal historic preservation officer (THPO) appointed or designated in accordance with the act is the official representative for the purposes of section 106. The agency official shall consult with the THPO in lieu of the SHPO regarding undertakings occurring on or affecting historic properties on tribal lands.

(B) *Tribes that have not assumed SHPO functions.* When an Indian tribe has not assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the act, the agency official shall consult with a representative designated by such Indian tribe in addition to the SHPO regarding undertakings occurring on or affecting historic properties on its tribal lands. Such Indian tribes have the same rights of consultation and concurrence that the THPOs are given throughout subpart B of this part, except that such consultations shall be in addition to and on the same basis as consultation with the SHPO.

(ii) *Consultation on historic properties of significance to Indian tribes and Native Hawaiian organizations.* Section 101(d)(6)(B) of the act requires the agency official to consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties that may be affected by an undertaking. This requirement applies regardless of the location of the historic property. Such Indian tribe or Native Hawaiian organization shall be a consulting party.

(A) The agency official shall ensure that consultation in the section 106 process provides the Indian tribe or Native Hawaiian organization a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects. It is the responsibility of the agency official to make a reasonable and good faith effort to identify Indian tribes and Native Hawaiian organizations that shall be consulted in the section 106 process. Consultation should commence early in the planning process, in order to identify and discuss relevant preservation issues and resolve concerns about the confidentiality of information on historic properties.

(B) The Federal Government has a unique legal relationship with Indian tribes set forth in the Constitution of the United States, treaties, statutes, and court decisions. Consultation with Indian tribes should be conducted in a sensitive manner respectful of tribal sovereignty. Nothing in this part alters, amends, repeals, interprets, or modifies tribal sovereignty, any treaty rights, or other rights of an Indian tribe, or preempts, modifies, or limits the exercise of any such rights.

(C) Consultation with an Indian tribe must recognize the government-to-government relationship between the Federal Government and Indian tribes. The agency official shall consult with representatives designated or identified by the tribal government or the governing body of a Native Hawaiian organization. Consultation with Indian tribes and Native Hawaiian organizations should be conducted in a manner sensitive to the concerns and needs of the Indian tribe or Native Hawaiian organization.

(D) When Indian tribes and Native Hawaiian organizations attach religious and cultural significance to historic properties off tribal lands, section 101(d)(6)(B) of the act requires Federal agencies to consult with such Indian

tribes and Native Hawaiian organizations in the section 106 process. Federal agencies should be aware that frequently historic properties of religious and cultural significance are located on ancestral, aboriginal, or ceded lands of Indian tribes and Native Hawaiian organizations and should consider that when complying with the procedures in this part.

(E) An Indian tribe or a Native Hawaiian organization may enter into an agreement with an agency official that specifies how they will carry out responsibilities under this part, including concerns over the confidentiality of information. An agreement may cover all aspects of tribal participation in the section 106 process, provided that no modification may be made in the roles of other parties to the section 106 process without their consent. An agreement may grant the Indian tribe or Native Hawaiian organization additional rights to participate or concur in agency decisions in the section 106 process beyond those specified in subpart B of this part. The agency official shall provide a copy of any such agreement to the Council and the appropriate SHPOs.

(F) An Indian tribe that has not assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the act may notify the agency official in writing that it is waiving its rights under § 800.6(c)(1) to execute a memorandum of agreement.

(3) *Representatives of local governments.* A representative of a local government with jurisdiction over the area in which the effects of an undertaking may occur is entitled to participate as a consulting party. Under other provisions of Federal law, the local government may be authorized to act as the agency official for purposes of section 106.

(4) *Applicants for Federal assistance, permits, licenses, and other approvals.* An applicant for Federal assistance or for a Federal permit, license, or other approval is entitled to participate as a consulting party as defined in this part. The agency official may authorize an applicant or group of applicants to initiate consultation with the SHPO/THPO and others, but remains legally responsible for all findings and determinations charged to the agency official. The agency official shall notify the SHPO/THPO when an applicant or group of applicants is so authorized. A Federal agency may authorize all applicants in a specific program pursuant to this section by providing notice to all SHPO/THPOs. Federal agencies that provide authorizations to applicants remain responsible for their government-to-government relationships with Indian tribes.

(5) *Additional consulting parties.* Certain individuals and organizations with a demonstrated interest in the undertaking may participate as consulting parties due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking's effects on historic properties.

(d) *The public*—(1) *Nature of involvement.* The views of the public are essential to informed Federal decisionmaking in the section 106 process. The agency official shall seek and consider the views of the public in a manner that reflects the nature and complexity of the undertaking and its effects on historic properties, the likely interest of the public in the effects on historic properties, confidentiality concerns of private individuals and businesses, and the relationship of the Federal involvement to the undertaking.

(2) *Providing notice and information.* The agency official must, except where appropriate to protect confidentiality concerns of affected parties, provide the public with information about an undertaking and its effects on historic properties and seek public comment and input. Members of the public may also provide views on their own initiative for the agency official to consider in decisionmaking.

(3) *Use of agency procedures.* The agency official may use the agency's procedures for public involvement under the National Environmental Policy Act or other program requirements in lieu of public involvement requirements in subpart B of this part, if they provide adequate opportunities for public involvement consistent with this subpart.

Subpart B—The section 106 Process

§ 800.3 Initiation of the section 106 process.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 800.4 Identification of historic properties.

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

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

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

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

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

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

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

oral history interviews, sample field investigation, and field survey. The agency official shall take into account past planning, research and studies, the magnitude and nature of the undertaking and the degree of Federal involvement, the nature and extent of potential effects on historic properties, and the likely nature and location of historic properties within the area of potential effects. The Secretary's standards and guidelines for identification provide guidance on this subject. The agency official should also consider other applicable professional, State, tribal, and local laws, standards, and guidelines. The agency official shall take into account any confidentiality concerns raised by Indian tribes or Native Hawaiian organizations during the identification process.

(2) *Phased identification and evaluation.* Where alternatives under consideration consist of corridors or large land areas, or where access to properties is restricted, the agency official may use a phased process to conduct identification and evaluation efforts. The agency official may also defer final identification and evaluation of historic properties if it is specifically provided for in a memorandum of agreement executed pursuant to § 800.6, a programmatic agreement executed pursuant to § 800.14(b), or the documents used by an agency official to comply with the National Environmental Policy Act pursuant to § 800.8. The process should establish the likely presence of historic properties within the area of potential effects for each alternative or inaccessible area through background research, consultation and an appropriate level of field investigation, taking into account the number of alternatives under consideration, the magnitude of the undertaking and its likely effects, and the views of the SHPO/THPO and any other consulting parties. As specific aspects or locations of an alternative are refined or access is gained, the agency official shall proceed with the identification and evaluation of historic properties in accordance with paragraphs (b)(1) and (c) of this section.

(c) *Evaluate historic significance*—(1) *Apply National Register criteria.* In consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to identified properties and guided by the Secretary's standards and guidelines for evaluation, the agency official shall apply the National Register criteria (36 CFR part 63) to properties identified within the area of potential effects that have not been previously evaluated for National Register eligibility. The passage of time, changing perceptions of significance, or incomplete prior evaluations may require the agency official to reevaluate properties previously determined eligible or ineligible. The agency official shall acknowledge that Indian tribes and Native Hawaiian organizations possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them.

(2) *Determine whether a property is eligible.* If the agency official determines any of the National Register criteria are met and the SHPO/THPO agrees, the property shall be considered eligible for the National Register for section 106 purposes. If the agency official determines the criteria are not met and the SHPO/THPO agrees, the property shall be considered not eligible. If the agency official and the SHPO/THPO do not agree, or if the Council or the Secretary so request, the agency official shall obtain a determination of eligibility from the Secretary pursuant to 36 CFR part 63. If an Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to a property off tribal lands does not agree, it may ask the Council to request the agency official to obtain a determination of eligibility.

(d) *Results of identification and evaluation*—(1) *No historic properties affected.* If the agency official finds that either there are no historic properties present or there are historic properties present but the undertaking will have no effect upon them as defined in § 800.16(i), the agency official shall provide documentation of this finding, as set forth in § 800.11(d), to the SHPO/THPO. The agency official shall notify all consulting parties, including Indian tribes and Native Hawaiian organizations, and make the documentation available

for public inspection prior to approving the undertaking.

(i) If the SHPO/THPO, or the Council if it has entered the section 106 process, does not object within 30 days of receipt of an adequately documented finding, the agency official's responsibilities under section 106 are fulfilled.

(ii) If the SHPO/THPO objects within 30 days of receipt of an adequately documented finding, the agency official shall either consult with the objecting party to resolve the disagreement, or forward the finding and supporting documentation to the Council and request that the Council review the finding pursuant to paragraphs (d)(1)(iv)(A) through (d)(1)(iv)(C) of this section. When an agency official forwards such requests for review to the Council, the agency official shall concurrently notify all consulting parties that such a request has been made and make the request documentation available to the public.

(iii) During the SHPO/THPO 30 day review period, the Council may object to the finding and provide its opinion regarding the finding to the agency official and, if the Council determines the issue warrants it, the head of the agency. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part. The agency shall then proceed according to paragraphs (d)(1)(iv)(B) and (d)(1)(iv)(C) of this section.

(iv) (A) Upon receipt of the request under paragraph (d)(1)(ii) of this section, the Council will have 30 days in which to review the finding and provide the agency official and, if the Council determines the issue warrants it, the head of the agency with the Council's opinion regarding the finding. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part. If the Council does not respond within 30 days of receipt of the request, the agency official's responsibilities under section 106 are fulfilled.

(B) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall take into account the Council's opinion before the agency reaches a final decision on the finding.

(C) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall then prepare a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council's opinion, and provide it to the Council, the SHPO/THPO, and the consulting parties. The head of the agency may delegate his or her duties under this paragraph to the agency's senior policy official. If the agency official's initial finding will be revised, the agency official shall proceed in accordance with the revised finding. If the final decision of the agency is to affirm the initial agency finding of no historic properties affected, once the summary of the decision has been sent to the Council, the SHPO/THPO, and the consulting parties, the agency official's responsibilities under section 106 are fulfilled.

(D) The Council shall retain a record of agency responses to Council opinions on their findings of no historic properties affected. The Council shall make this information available to the public.

(2) *Historic properties affected.* If the agency official finds that there are historic properties which may be affected by the undertaking, the agency official shall notify all consulting parties, including Indian tribes or Native Hawaiian organizations, invite their views on the effects and assess adverse effects, if any, in accordance with § 800.5.

[65 FR 77725, Dec. 12, 2000, as amended at 69 FR 40553, July 6, 2004]

§ 800.5 Assessment of adverse effects.

(a) *Apply criteria of adverse effect.* In consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to identified historic properties, the agency official shall apply the criteria of adverse effect to historic properties within the area of potential effects. The agency official shall consider any views concerning such effects which have been provided by consulting parties and the public.

(1) *Criteria of adverse effect.* An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a

historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Consideration shall be given to all qualifying characteristics of a historic property, including those that may have been identified subsequent to the original evaluation of the property's eligibility for the National Register. Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative.

(2) *Examples of adverse effects.* Adverse effects on historic properties include, but are not limited to:

(i) Physical destruction of or damage to all or part of the property;

(ii) Alteration of a property, including restoration, rehabilitation, repair, maintenance, stabilization, hazardous material remediation, and provision of handicapped access, that is not consistent with the Secretary's standards for the treatment of historic properties (36 CFR part 68) and applicable guidelines;

(iii) Removal of the property from its historic location;

(iv) Change of the character of the property's use or of physical features within the property's setting that contribute to its historic significance;

(v) Introduction of visual, atmospheric or audible elements that diminish the integrity of the property's significant historic features;

(vi) Neglect of a property which causes its deterioration, except where such neglect and deterioration are recognized qualities of a property of religious and cultural significance to an Indian tribe or Native Hawaiian organization; and

(vii) Transfer, lease, or sale of property out of Federal ownership or control without adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the property's historic significance.

(3) *Phased application of criteria.* Where alternatives under consideration consist of corridors or large land areas, or where access to properties is restricted, the agency official may use a phased process in applying the criteria of adverse effect consistent with phased identification and evaluation efforts conducted pursuant to § 800.4(b)(2).

(b) *Finding of no adverse effect.* The agency official, in consultation with the SHPO/THPO, may propose a finding of no adverse effect when the undertaking's effects do not meet the criteria of paragraph (a)(1) of this section or the undertaking is modified or conditions are imposed, such as the subsequent review of plans for rehabilitation by the SHPO/THPO to ensure consistency with the Secretary's standards for the treatment of historic properties (36 CFR part 68) and applicable guidelines, to avoid adverse effects.

(c) *Consulting party review.* If the agency official proposes a finding of no adverse effect, the agency official shall notify all consulting parties of the finding and provide them with the documentation specified in § 800.11(e). The SHPO/THPO shall have 30 days from receipt to review the finding.

(1) *Agreement with, or no objection to, finding.* Unless the Council is reviewing the finding pursuant to papagraph (c)(3) of this section, the agency official may proceed after the close of the 30 day review period if the SHPO/THPO has agreed with the finding or has not provided a response, and no consulting party has objected. The agency official shall then carry out the undertaking in accordance with paragraph (d)(1) of this section.

(2) *Disagreement with finding.* (i) If within the 30 day review period the SHPO/THPO or any consulting party notifies the agency official in writing that it disagrees with the finding and specifies the reasons for the disagreement in the notification, the agency official shall either consult with the party to resolve the disagreement, or request the Council to review the finding pursuant to paragraphs (c)(3)(i) and (c)(3)(ii) of this section. The agency official shall include with such request the documentation specified in § 800.11(e). The agency official shall also concurrently notify all consulting parties that such a submission has been made and make the submission documentation available to the public.

(ii) If within the 30 day review period the Council provides the agency official and, if the Council determines the issue warrants it, the head of the agency, with a written opinion objecting to the finding, the agency shall then proceed according to paragraph (c)(3)(ii) of this section. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part.

(iii) The agency official should seek the concurrence of any Indian tribe or Native Hawaiian organization that has made known to the agency official that it attaches religious and cultural significance to a historic property subject to the finding. If such Indian tribe or Native Hawaiian organization disagrees with the finding, it may within the 30 day review period specify the reasons for disagreeing with the finding and request the Council to review and object to the finding pursuant to paragraph (c)(2)(ii) of this section.

(3) *Council review of findings.* (i) When a finding is submitted to the Council pursuant to paragraph (c)(2)(i) of this section, the Council shall review the finding and provide the agency official and, if the Council determines the issue warrants it, the head of the agency with its opinion as to whether the adverse effect criteria have been correctly applied. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part. The Council will provide its opinion within 15 days of receiving the documented finding from the agency official. The Council at its discretion may extend that time period for 15 days, in which case it shall notify the agency of such extension prior to the end of the initial 15 day period. If the Council does not respond within the applicable time period, the agency official's responsibilities under section 106 are fulfilled.

(ii)(A) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall take into account the Council's opinion in reaching a final decision on the finding.

(B) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall prepare a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council's opinion, and provide it to the Council, the SHPO/THPO, and the consulting parties. The head of the agency may delegate his or her duties under this paragraph to the agency's senior policy official. If the agency official's initial finding will be revised, the agency official shall proceed in accordance with the revised finding. If the final decision of the agency is to affirm the initial finding of no adverse effect, once the summary of the decision has been sent to the Council, the SHPO/THPO, and the consulting parties, the agency official's responsibilities under section 106 are fulfilled.

(C) The Council shall retain a record of agency responses to Council opinions on their findings of no adverse effects. The Council shall make this information available to the public.

(d) *Results of assessment*—(1) *No adverse effect.* The agency official shall maintain a record of the finding and provide information on the finding to the public on request, consistent with the confidentiality provisions of § 800.11(c). Implementation of the undertaking in accordance with the finding as documented fulfills the agency official's responsibilities under section 106 and this part. If the agency official will not conduct the undertaking as proposed in the finding, the agency official shall reopen consultation under paragraph (a) of this section.

(2) *Adverse effect.* If an adverse effect is found, the agency official shall consult further to resolve the adverse effect pursuant to § 800.6.

[65 FR 77725, Dec. 12, 2000, as amended at 69 FR 40553, July 6, 2004]

§ 800.6 Resolution of adverse effects.

(a) *Continue consultation.* The agency official shall consult with the SHPO/THPO and other consulting parties, including Indian tribes and Native Hawaiian organizations, to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties.

(1) *Notify the Council and determine Council participation.* The agency official shall notify the Council of the adverse effect finding by providing the documentation specified in § 800.11(e).

(i) The notice shall invite the Council to participate in the consultation when:

(A) The agency official wants the Council to participate;

(B) The undertaking has an adverse effect upon a National Historic Landmark; or

(C) A programmatic agreement under § 800.14(b) will be prepared;

(ii) The SHPO/THPO, an Indian tribe or Native Hawaiian organization, or any other consulting party may at any time independently request the Council to participate in the consultation.

(iii) The Council shall advise the agency official and all consulting parties whether it will participate within 15 days of receipt of notice or other request. Prior to entering the process, the Council shall provide written notice to the agency official and the consulting parties that its decision to participate meets the criteria set forth in appendix A to this part. The Council shall also advise the head of the agency of its decision to enter the process. Consultation with Council participation is conducted in accordance with paragraph (b)(2) of this section.

(iv) If the Council does not join the consultation, the agency official shall proceed with consultation in accordance with paragraph (b)(1) of this section.

(2) *Involve consulting parties.* In addition to the consulting parties identified under § 800.3(f), the agency official, the SHPO/THPO and the Council, if participating, may agree to invite other individuals or organizations to become consulting parties. The agency official shall invite any individual or organization that will assume a specific role or responsibility in a memorandum of agreement to participate as a consulting party.

(3) *Provide documentation.* The agency official shall provide to all consulting parties the documentation specified in § 800.11(e), subject to the confidentiality provisions of § 800.11(c), and such other documentation as may be developed during the consultation to resolve adverse effects.

(4) *Involve the public.* The agency official shall make information available to the public, including the documentation specified in § 800.11(e), subject to the confidentiality provisions of § 800.11(c). The agency official shall provide an opportunity for members of the public to express their views on resolving adverse effects of the undertaking. The agency official should use appropriate mechanisms, taking into account the magnitude of the undertaking and the nature of its effects upon historic properties, the likely effects on historic properties, and the relationship of the Federal involvement to the undertaking to ensure that the public's views are considered in the consultation. The agency official should also consider the extent of notice and information concerning historic preservation issues afforded the public at earlier steps in the section 106 process to determine the appropriate level of public involvement when resolving adverse effects so that the standards of § 800.2(d) are met.

(5) *Restrictions on disclosure of information.* Section 304 of the act and other authorities may limit the disclosure of information under paragraphs (a)(3) and (a)(4) of this section. If an Indian tribe or Native Hawaiian organization objects to the disclosure of information or if the agency official believes that there are other reasons to withhold information, the agency official shall comply with § 800.11(c) regarding the disclosure of such information.

(b) *Resolve adverse effects*—(1) *Resolution without the Council.* (i) The agency official shall consult with the SHPO/THPO and other consulting parties to seek ways to avoid, minimize or mitigate the adverse effects.

(ii) The agency official may use standard treatments established by the Council under § 800.14(d) as a basis for a memorandum of agreement.

(iii) If the Council decides to join the consultation, the agency official shall follow paragraph (b)(2) of this section.

(iv) If the agency official and the SHPO/THPO agree on how the adverse effects will be resolved, they shall execute a memorandum of agreement. The agency official must submit a copy of

the executed memorandum of agreement, along with the documentation specified in § 800.11(f), to the Council prior to approving the undertaking in order to meet the requirements of section 106 and this subpart.

(v) If the agency official, and the SHPO/THPO fail to agree on the terms of a memorandum of agreement, the agency official shall request the Council to join the consultation and provide the Council with the documentation set forth in § 800.11(g). If the Council decides to join the consultation, the agency official shall proceed in accordance with paragraph (b)(2) of this section. If the Council decides not to join the consultation, the Council will notify the agency and proceed to comment in accordance with § 800.7(c).

(2) *Resolution with Council participation.* If the Council decides to participate in the consultation, the agency official shall consult with the SHPO/THPO, the Council, and other consulting parties, including Indian tribes and Native Hawaiian organizations under § 800.2(c)(3), to seek ways to avoid, minimize or mitigate the adverse effects. If the agency official, the SHPO/THPO, and the Council agree on how the adverse effects will be resolved, they shall execute a memorandum of agreement.

(c) *Memorandum of agreement.* A memorandum of agreement executed and implemented pursuant to this section evidences the agency official's compliance with section 106 and this part and shall govern the undertaking and all of its parts. The agency official shall ensure that the undertaking is carried out in accordance with the memorandum of agreement.

(1) *Signatories.* The signatories have sole authority to execute, amend or terminate the agreement in accordance with this subpart.

(i) The agency official and the SHPO/THPO are the signatories to a memorandum of agreement executed pursuant to paragraph (b)(1) of this section.

(ii) The agency official, the SHPO/THPO, and the Council are the signatories to a memorandum of agreement executed pursuant to paragraph (b)(2) of this section.

(iii) The agency official and the Council are signatories to a memorandum of agreement executed pursuant to § 800.7(a)(2).

(2) *Invited signatories.* (i) The agency official may invite additional parties to be signatories to a memorandum of agreement. Any such party that signs the memorandum of agreement shall have the same rights with regard to seeking amendment or termination of the memorandum of agreement as other signatories.

(ii) The agency official may invite an Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties located off tribal lands to be a signatory to a memorandum of agreement concerning such properties.

(iii) The agency official should invite any party that assumes a responsibility under a memorandum of agreement to be a signatory.

(iv) The refusal of any party invited to become a signatory to a memorandum of agreement pursuant to paragraph (c)(2) of this section does not invalidate the memorandum of agreement.

(3) *Concurrence by others.* The agency official may invite all consulting parties to concur in the memorandum of agreement. The signatories may agree to invite others to concur. The refusal of any party invited to concur in the memorandum of agreement does not invalidate the memorandum of agreement.

(4) *Reports on implementation.* Where the signatories agree it is appropriate, a memorandum of agreement shall include a provision for monitoring and reporting on its implementation.

(5) *Duration.* A memorandum of agreement shall include provisions for termination and for reconsideration of terms if the undertaking has not been implemented within a specified time.

(6) *Discoveries.* Where the signatories agree it is appropriate, a memorandum of agreement shall include provisions to deal with the subsequent discovery or identification of additional historic properties affected by the undertaking.

(7) *Amendments.* The signatories to a memorandum of agreement may amend it. If the Council was not a signatory

to the original agreement and the signatories execute an amended agreement, the agency official shall file it with the Council.

(8) *Termination.* If any signatory determines that the terms of a memorandum of agreement cannot be or are not being carried out, the signatories shall consult to seek amendment of the agreement. If the agreement is not amended, any signatory may terminate it. The agency official shall either execute a memorandum of agreement with signatories under paragraph (c)(1) of this section or request the comments of the Council under § 800.7(a).

(9) *Copies.* The agency official shall provide each consulting party with a copy of any memorandum of agreement executed pursuant to this subpart.

§ 800.7 Failure to resolve adverse effects.

(a) *Termination of consultation.* After consulting to resolve adverse effects pursuant to § 800.6(b)(2), the agency official, the SHPO/THPO, or the Council may determine that further consultation will not be productive and terminate consultation. Any party that terminates consultation shall notify the other consulting parties and provide them the reasons for terminating in writing.

(1) If the agency official terminates consultation, the head of the agency or an Assistant Secretary or other officer with major department-wide or agency-wide responsibilities shall request that the Council comment pursuant to paragraph (c) of this section and shall notify all consulting parties of the request.

(2) If the SHPO terminates consultation, the agency official and the Council may execute a memorandum of agreement without the SHPO's involvement.

(3) If a THPO terminates consultation regarding an undertaking occurring on or affecting historic properties on its tribal lands, the Council shall comment pursuant to paragraph (c) of this section.

(4) If the Council terminates consultation, the Council shall notify the agency official, the agency's Federal preservation officer and all consulting parties of the termination and comment under paragraph (c) of this section. The Council may consult with the agency's Federal preservation officer prior to terminating consultation to seek to resolve issues concerning the undertaking and its effects on historic properties.

(b) *Comments without termination.* The Council may determine that it is appropriate to provide additional advisory comments upon an undertaking for which a memorandum of agreement will be executed. The Council shall provide them to the agency official when it executes the memorandum of agreement.

(c) *Comments by the Council*—(1) *Preparation.* The Council shall provide an opportunity for the agency official, all consulting parties, and the public to provide their views within the time frame for developing its comments. Upon request of the Council, the agency official shall provide additional existing information concerning the undertaking and assist the Council in arranging an onsite inspection and an opportunity for public participation.

(2) *Timing.* The Council shall transmit its comments within 45 days of receipt of a request under paragraph (a)(1) or (a)(3) of this section or § 800.8(c)(3), or termination by the Council under § 800.6(b)(1)(v) or paragraph (a)(4) of this section, unless otherwise agreed to by the agency official.

(3) *Transmittal.* The Council shall provide its comments to the head of the agency requesting comment with copies to the agency official, the agency's Federal preservation officer, all consulting parties, and others as appropriate.

(4) *Response to Council comment.* The head of the agency shall take into account the Council's comments in reaching a final decision on the undertaking. Section 110(l) of the act directs that the head of the agency shall document this decision and may not delegate his or her responsibilities pursuant to section 106. Documenting the agency head's decision shall include:

(i) Preparing a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council's comments and providing it to the Council prior to approval of the undertaking;

without establishing a process under paragraph (a) of this section, the agency official shall make reasonable efforts to avoid, minimize or mitigate adverse effects to such properties and:

(1) If the agency official has not approved the undertaking or if construction on an approved undertaking has not commenced, consult to resolve adverse effects pursuant to § 800.6; or

(2) If the agency official, the SHPO/THPO and any Indian tribe or Native Hawaiian organization that might attach religious and cultural significance to the affected property agree that such property is of value solely for its scientific, prehistoric, historic or archeological data, the agency official may comply with the Archeological and Historic Preservation Act instead of the procedures in this part and provide the Council, the SHPO/THPO, and the Indian tribe or Native Hawaiian organization with a report on the actions within a reasonable time after they are completed; or

(3) If the agency official has approved the undertaking and construction has commenced, determine actions that the agency official can take to resolve adverse effects, and notify the SHPO/THPO, any Indian tribe or Native Hawaiian organization that might attach religious and cultural significance to the affected property, and the Council within 48 hours of the discovery. The notification shall describe the agency official's assessment of National Register eligibility of the property and proposed actions to resolve the adverse effects. The SHPO/THPO, the Indian tribe or Native Hawaiian organization and the Council shall respond within 48 hours of the notification. The agency official shall take into account their recommendations regarding National Register eligibility and proposed actions, and then carry out appropriate actions. The agency official shall provide the SHPO/THPO, the Indian tribe or Native Hawaiian organization and the Council a report of the actions when they are completed.

(c) *Eligibility of properties.* The agency official, in consultation with the SHPO/THPO, may assume a newly-discovered property to be eligible for the National Register for purposes of section 106. The agency official shall specify the National Register criteria used to assume the property's eligibility so that information can be used in the resolution of adverse effects.

(d) *Discoveries on tribal lands.* If historic properties are discovered on tribal lands, or there are unanticipated effects on historic properties found on tribal lands, after the agency official has completed the section 106 process without establishing a process under paragraph (a) of this section and construction has commenced, the agency official shall comply with applicable tribal regulations and procedures and obtain the concurrence of the Indian tribe on the proposed action.

Subpart C—Program Alternatives

§ 800.14 Federal agency program alternatives.

(a) *Alternate procedures.* An agency official may develop procedures to implement section 106 and substitute them for all or part of subpart B of this part if they are consistent with the Council's regulations pursuant to section 110(a)(2)(E) of the act.

(1) *Development of procedures.* The agency official shall consult with the Council, the National Conference of State Historic Preservation Officers, or individual SHPO/THPOs, as appropriate, and Indian tribes and Native Hawaiian organizations, as specified in paragraph (f) of this section, in the development of alternate procedures, publish notice of the availability of proposed alternate procedures in the FEDERAL REGISTER and take other appropriate steps to seek public input during the development of alternate procedures.

(2) *Council review.* The agency official shall submit the proposed alternate procedures to the Council for a 60-day review period. If the Council finds the procedures to be consistent with this part, it shall notify the agency official and the agency official may adopt them as final alternate procedures.

(3) *Notice.* The agency official shall notify the parties with which it has consulted and publish notice of final alternate procedures in the FEDERAL REGISTER.

(4) *Legal effect.* Alternate procedures adopted pursuant to this subpart substitute for the Council's regulations for the purposes of the agency's compliance with section 106, except that where an Indian tribe has entered into an agreement with the Council to substitute tribal historic preservation regulations for the Council's regulations under section 101(d)(5) of the act, the agency shall follow those regulations in lieu of the agency's procedures regarding undertakings on tribal lands. Prior to the Council entering into such agreements, the Council will provide Federal agencies notice and opportunity to comment on the proposed substitute tribal regulations.

(b) *Programmatic agreements.* The Council and the agency official may negotiate a programmatic agreement to govern the implementation of a particular program or the resolution of adverse effects from certain complex project situations or multiple undertakings.

(1) *Use of programmatic agreements.* A programmatic agreement may be used:

(i) When effects on historic properties are similar and repetitive or are multi-State or regional in scope;

(ii) When effects on historic properties cannot be fully determined prior to approval of an undertaking;

(iii) When nonfederal parties are delegated major decisionmaking responsibilities;

(iv) Where routine management activities are undertaken at Federal installations, facilities, or other land-management units; or

(v) Where other circumstances warrant a departure from the normal section 106 process.

(2) *Developing programmatic agreements for agency programs.* (i) The consultation shall involve, as appropriate, SHPO/THPOs, the National Conference of State Historic Preservation Officers (NCSHPO), Indian tribes and Native Hawaiian organizations, other Federal agencies, and members of the public. If the programmatic agreement has the potential to affect historic properties on tribal lands or historic properties of religious and cultural significance to an Indian tribe or Native Hawaiian organization, the agency official shall also follow paragraph (f) of this section.

(ii) *Public participation.* The agency official shall arrange for public participation appropriate to the subject matter and the scope of the program and in accordance with subpart A of this part. The agency official shall consider the nature of the program and its likely effects on historic properties and take steps to involve the individuals, organizations and entities likely to be interested.

(iii) *Effect.* The programmatic agreement shall take effect when executed by the Council, the agency official and the appropriate SHPOs/THPOs when the programmatic agreement concerns a specific region or the president of NCSHPO when NCSHPO has participated in the consultation. A programmatic agreement shall take effect on tribal lands only when the THPO, Indian tribe, or a designated representative of the tribe is a signatory to the agreement. Compliance with the procedures established by an approved programmatic agreement satisfies the agency's section 106 responsibilities for all individual undertakings of the program covered by the agreement until it expires or is terminated by the agency, the president of NCSHPO when a signatory, or the Council. Termination by an individual SHPO/THPO shall only terminate the application of a regional programmatic agreement within the jurisdiction of the SHPO/THPO. If a THPO assumes the responsibilities of a SHPO pursuant to section 101(d)(2) of the act and the SHPO is signatory to programmatic agreement, the THPO assumes the role of a signatory, including the right to terminate a regional programmatic agreement on lands under the jurisdiction of the tribe.

(iv) *Notice.* The agency official shall notify the parties with which it has consulted that a programmatic agreement has been executed under paragraph (b) of this section, provide appropriate public notice before it takes effect, and make any internal agency procedures implementing the agreement readily available to the Council, SHPO/THPOs, and the public.

(v) If the Council determines that the terms of a programmatic agreement are not being carried out, or if such an

agreement is terminated, the agency official shall comply with subpart B of this part with regard to individual undertakings of the program covered by the agreement.

(3) *Developing programmatic agreements for complex or multiple undertakings.* Consultation to develop a programmatic agreement for dealing with the potential adverse effects of complex projects or multiple undertakings shall follow § 800.6. If consultation pertains to an activity involving multiple undertakings and the parties fail to reach agreement, then the agency official shall comply with the provisions of subpart B of this part for each individual undertaking.

(4) *Prototype programmatic agreements.* The Council may designate an agreement document as a prototype programmatic agreement that may be used for the same type of program or undertaking in more than one case or area. When an agency official uses such a prototype programmatic agreement, the agency official may develop and execute the agreement with the appropriate SHPO/THPO and the agreement shall become final without need for Council participation in consultation or Council signature.

(c) *Exempted categories*—(1) *Criteria for establishing.* The Council or an agency official may propose a program or category of undertakings that may be exempted from review under the provisions of subpart B of this part, if the program or category meets the following criteria:

(i) The actions within the program or category would otherwise qualify as ''undertakings'' as defined in § 800.16;

(ii) The potential effects of the undertakings within the program or category upon historic properties are foreseeable and likely to be minimal or not adverse; and

(iii) Exemption of the program or category is consistent with the purposes of the act.

(2) *Public participation.* The proponent of the exemption shall arrange for public participation appropriate to the subject matter and the scope of the exemption and in accordance with the standards in subpart A of this part. The proponent of the exemption shall consider the nature of the exemption and its likely effects on historic properties and take steps to involve individuals, organizations and entities likely to be interested.

(3) *Consultation with SHPOs/THPOs.* The proponent of the exemption shall notify and consider the views of the SHPOs/THPOs on the exemption.

(4) *Consultation with Indian tribes and Native Hawaiian organizations.* If the exempted program or category of undertakings has the potential to affect historic properties on tribal lands or historic properties of religious and cultural significance to an Indian tribe or Native Hawaiian organization, the Council shall follow the requirements for the agency official set forth in paragraph (f) of this section.

(5) *Council review of proposed exemptions.* The Council shall review an exemption proposal that is supported by documentation describing the program or category for which the exemption is sought, demonstrating that the criteria of paragraph (c)(1) of this section have been met, describing the methods used to seek the views of the public, and summarizing any views submitted by the SHPO/THPOs, the public, and any others consulted. Unless it requests further information, the Council shall approve or reject the proposed exemption within 30 days of receipt, and thereafter notify the relevant agency official and SHPO/THPOs of the decision. The decision shall be based on the consistency of the exemption with the purposes of the act, taking into consideration the magnitude of the exempted undertaking or program and the likelihood of impairment of historic properties in accordance with section 214 of the act.

(6) *Legal consequences.* Any undertaking that falls within an approved exempted program or category shall require no further review pursuant to subpart B of this part, unless the agency official or the Council determines that there are circumstances under which the normally excluded undertaking should be reviewed under subpart B of this part.

(7) *Termination.* The Council may terminate an exemption at the request of the agency official or when the Council determines that the exemption no longer meets the criteria of paragraph

(c)(1) of this section. The Council shall notify the agency official 30 days before termination becomes effective.

(8) *Notice.* The proponent of the exemption shall publish notice of any approved exemption in the FEDERAL REGISTER.

(d) *Standard treatments*—(1) *Establishment.* The Council, on its own initiative or at the request of another party, may establish standard methods for the treatment of a category of historic properties, a category of undertakings, or a category of effects on historic properties to assist Federal agencies in satisfying the requirements of subpart B of this part. The Council shall publish notice of standard treatments in the FEDERAL REGISTER.

(2) *Public participation.* The Council shall arrange for public participation appropriate to the subject matter and the scope of the standard treatment and consistent with subpart A of this part. The Council shall consider the nature of the standard treatment and its likely effects on historic properties and the individuals, organizations and entities likely to be interested. Where an agency official has proposed a standard treatment, the Council may request the agency official to arrange for public involvement.

(3) *Consultation with SHPOs/THPOs.* The Council shall notify and consider the views of SHPOs/THPOs on the proposed standard treatment.

(4) *Consultation with Indian tribes and Native Hawaiian organizations.* If the proposed standard treatment has the potential to affect historic properties on tribal lands or historic properties of religious and cultural significance to an Indian tribe or Native Hawaiian organization, the Council shall follow the requirements for the agency official set forth in paragraph (f) of this section.

(5) *Termination.* The Council may terminate a standard treatment by publication of a notice in the FEDERAL REGISTER 30 days before the termination takes effect.

(e) *Program comments.* An agency official may request the Council to comment on a category of undertakings in lieu of conducting individual reviews under §§ 800.4 through 800.6. The Council may provide program comments at its own initiative.

(1) *Agency request.* The agency official shall identify the category of undertakings, specify the likely effects on historic properties, specify the steps the agency official will take to ensure that the effects are taken into account, identify the time period for which the comment is requested and summarize any views submitted by the public.

(2) *Public participation.* The agency official shall arrange for public participation appropriate to the subject matter and the scope of the category and in accordance with the standards in subpart A of this part. The agency official shall consider the nature of the undertakings and their likely effects on historic properties and the individuals, organizations and entities likely to be interested.

(3) *Consultation with SHPOs/THPOs.* The Council shall notify and consider the views of SHPOs/THPOs on the proposed program comment.

(4) *Consultation with Indian tribes and Native Hawaiian organizations.* If the program comment has the potential to affect historic properties on tribal lands or historic properties of religious and cultural significance to an Indian tribe or Native Hawaiian organization, the Council shall follow the requirements for the agency official set forth in paragraph (f) of this section.

(5) *Council action.* Unless the Council requests additional documentation, notifies the agency official that it will decline to comment, or obtains the consent of the agency official to extend the period for providing comment, the Council shall comment to the agency official within 45 days of the request.

(i) If the Council comments, the agency official shall take into account the comments of the Council in carrying out the undertakings within the category and publish notice in the FEDERAL REGISTER of the Council's comments and steps the agency will take to ensure that effects to historic properties are taken into account.

(ii) If the Council declines to comment, the agency official shall continue to comply with the requirements of §§ 800.3 through 800.6 for the individual undertakings.

(6) *Withdrawal of comment.* If the Council determines that the consideration of historic properties is not being

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

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

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

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

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

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

§ 800.16 Definitions.

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

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

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

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

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

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

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

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

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

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

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

§ 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.

§ 1508.8 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 related to it (§ 1501.7(a)(5)). If the assessment is included, the finding need not repeat any of the discussion in the assessment but may incorporate it by reference.

§ 1508.14 Human environment.

Human environment shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. (See the definition of ''effects'' (§ 1508.8).) This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement

CERTIFICATE OF SERVICE

I hereby certify that, on November 20, 2018, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Robert M. Kennedy
Robert M. Kennedy
Senior Attorney