ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

No. 18-1188

OTSEGO 2000, INC., *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

James P. Danly
General Counsel

Robert H. Solomon
Solicitor

Robert M. Kennedy
Senior Attorney

For Respondent
Federal Energy Regulatory Commission
Washington, D.C. 20426

January 25, 2019

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties, Intervenors, and Amici Curiae:

Before The Court: The parties and intervenors before this Court are Petitioners Otsego 2000, Inc. and John and Mary Valentine, (b) Respondent Federal Energy Regulatory Commission, and (c) Intervenor for Respondent Dominion Energy Transmission Inc. The States of New York, Maryland, New Jersey, Oregon, and Washington, the Commonwealth of Massachusetts, and the District of Columbia have submitted an amici curiae brief. The Sierra Club has also filed an amicus brief. The Commission understands that the Interstate Natural Gas Association of America and the American Fuel and Petrochemical Manufacturers Association, the Chamber of Commerce of the United States of America, the National Association of Manufacturers, and the American Petroleum Institute will seek leave to file amici curiae briefs in support of the Commission.

Before the Commission: The following parties and intervenors appeared in the proceedings below in FERC Docket No. CP14-497: Atlanta Gas Light Company, Virginia Natural Gas, Inc., and Pivotal Utility Holdings, Inc. d/b/a Elizabethtown Gas (jointly); Carol M. Babcock; Erskine W. Babcock, Jr.; The Brooklyn Union Gas Company d/b/a National Grid NY; Boston Gas Company and Colonial Gas Company collectively d/b/a National Grid; KeySpan Gas East Corporation d/b/a National Grid, The Narragansett Electric Company d/b/a

National Grid, and Niagara Mohawk Power Corporation d/b/a National Grid (jointly); Laura Brown; Juanita Bush; Columbia Gas of Ohio, Inc., Columbia Gas of Pennsylvania, Inc., and Columbia Gas of Virginia, Inc. (jointly); Consolidated Edison Company of New York, Inc. and Philadelphia Gas Works (jointly); Carmen Druke; Exelon Corporation; Elizabeth M. Haskins; James Haskins; Shane Hayes; Deborah B. Midlar; NJR Energy Services Company; National Fuel Gas Distribution Corporation; New Jersey Natural Gas Company; New York Public Service Commission; New York State Department of Environmental Conservation; New York State Electric & Gas Corporation and Rochester Gas and Electric Corporation (jointly); Onondaga Audubon Society; PSEG Energy Resources & Trade LLC; Piedmont Natural Gas Company, Inc.; Linda H. Salter; T. Michael Salter; Ruthanne Stone; Jamie E. Tousant; Levi Tousant, Jr.; Allegheny Defense Project; John and Pauline Brownell; John and Michelle Boylan; Craig Buckbee; Concerned Citizens of Otego; FreshWater Accountability Project; Heartwood; Robin and Shirley Hudyncia; Stephen and Linda Hudyncia; William Huston; Elam G. King; Tammy and Henry Knoop; Paul Mendelsohn and Ilse Funk; Melvin and Fanny Miller; Maria and Michael Minerva; Mohawk Valley Keeper; Katherine O'Donnell; Ohio Valley Environmental Coalition; Otsego 2000, Inc.; Judith Pierpont and Stuart A. Davis; Virginia and Richard Pugliese; Glenn Sanders; Phil

Scalia; Keith and Shirley Schue; David C. Stockwell; John and Mary Valentine; Suzanne Winkler; David F. Zook; and Henry E. Zook.

B. Rulings Under Review:

1. *Dominion Transmission, Inc.*, 155 FERC ¶ 61,106 (2016) (Certificate Order) (R. 1373), JA ___; and

2. *Dominion Transmission, Inc.*, 163 FERC ¶ 61,128 (2018) (Rehearing Order) (R. 1523), JA ___.

C. Related Cases:

This case has not been before this Court or any other court. The issue of whether greenhouse gas emissions stemming from upstream natural gas production activities and downstream natural gas consumption are an indirect or cumulative effect of the Commission's approval of natural gas transportation projects is one of several issues raised in *Birckhead v. FERC*, D.C. Cir. No. 18-1218. The Commission is filing its initial briefs in the *Birckhead* case and the *Otsego 2000* case on the same day.

/s/ Robert M. Kennedy
Robert M. Kennedy
Senior Attorney

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

* Cases chiefly relied upon are marked with an asterisk

ADMINISTRATIVE CASES:

STATUTES:

ADMINISTRATIVE PROCEDURE ACT

NATURAL GAS ACT

NATIONAL ENVIRONMENTAL POLICY ACT

REGULATIONS:

GLOSSARY

2018 Notice of Inquiry	*Certification of New Interstate Natural Gas Facilities*, 163 FERC ¶ 61,042 (2018)
Br.	Petitioners' Opening Brief
Brooklyn Union	Brooklyn Union Gas Co. d/b/a National Grid NY
Certificate Order	*Dominion Transmission, Inc.*, 155 FERC ¶ 61,106 (2016), JA ___
Certificate 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)
Commission or FERC	Federal Energy Regulatory Commission
Dominion	Dominion Transmission, Inc.
Environmental Assessment or EA	Environmental Assessment for the New Market Project, issued October 2015
NEPA	National Environmental Policy Act
NGA	Natural Gas Act
Niagara Mohawk	Niagara Mohawk Power Corporation
Otsego	collectively, Otsego 2000, Inc. and John and Mary Valentine
Project	New Market Project
R.	Entry in the Certified Index to the Record, filed August 30, 2018
Rehearing Order	*Dominion Transmission, Inc.*, 163 FERC ¶ 61,128 (2018), JA ___

Sierra Club Am. Br.	Amicus Brief of Sierra Club
State Am. Br.	Amici Brief of New York, Maryland, New Jersey, Oregon, and Washington, the Commonwealth of Massachusetts, and the District of Columbia

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

No. 18-1188

OTSEGO 2000, INC., *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

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 Dominion Transmission, Inc. (Dominion). That certificate conditionally authorized Dominion to construct and operate its proposed New Market Project (Project). *See Dominion Transmission, Inc.*, 155 FERC ¶ 61,106 (2016) (Certificate Order), JA ___, *on reh'g*, 163 FERC ¶ 61,128 (2018) (Rehearing Order), JA ___.

The New Market Project involves the construction and operation of two new compressor stations – facilities which help push and pull gas through Dominion's existing pipeline – as well as the modification of three existing compressor stations and one metering station, all of which are located in various counties in New York. The Project will provide an additional 112,000 dekatherms per day of transportation service along Dominion's existing transmission system in New York.

In its Environmental Assessment (EA), Commission staff determined that, if constructed and operated in accordance with Dominion's application and in compliance with the staff-recommended conditions, the Project would not significantly affect the quality of the human environment. Ultimately, upon balancing the Project's public benefits against its potential adverse economic effects, and considering its environmental impacts, the Commission determined that the Project would serve the public interest.

On appeal, Petitioners Otsego 2000, Inc. and John and Mary Valentine (collectively, Otsego) raise two issues:

1. Whether the Commission reasonably concluded that greenhouse gas emissions from upstream natural gas extraction activities and downstream natural gas end use are not indirect or cumulative impacts of the Project, within the meaning of the National Environmental Policy Act (NEPA); and

2. Whether the Commission reasonably ended its temporary practice of providing generic estimates of upstream and downstream greenhouse gas emissions, even when not required by the National Environmental Policy Act, after concluding that such speculative estimates do not provide helpful information to the public or meaningfully inform the Commission's review of natural gas transportation projects.

COUNTERSTATEMENT OF JURISDICTION

Petitioners John and Mary Valentine are jurisdictionally-barred from seeking review of the underlying orders. Section 19(a) of the Natural Gas Act provides that "[n]o 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 U.S.C. § 717r(a). The only timely request for rehearing of the Certificate Order was filed by Otsego 2000, Inc. *See* Rehearing Order, 163 FERC ¶ 61,128 at P 10, JA __. While Otsego 2000, Inc. later sought to amend its filing to include the Valentines, the Commission rejected that amendment as it was filed beyond the Natural Gas Act's 30-day time limit for rehearing. *Id*. P 9, JA __. No petitioner challenges that ruling on appeal. Br. at 6 n.2 ("As resolution of this matter does not affect Petitioners' principal argument, it is not herein challenged.").

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes and regulations are contained in the Addendum to this brief.

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

B. 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, 42 U.S.C. §§ 4321, *et seq.*, which 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. Pub. 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).

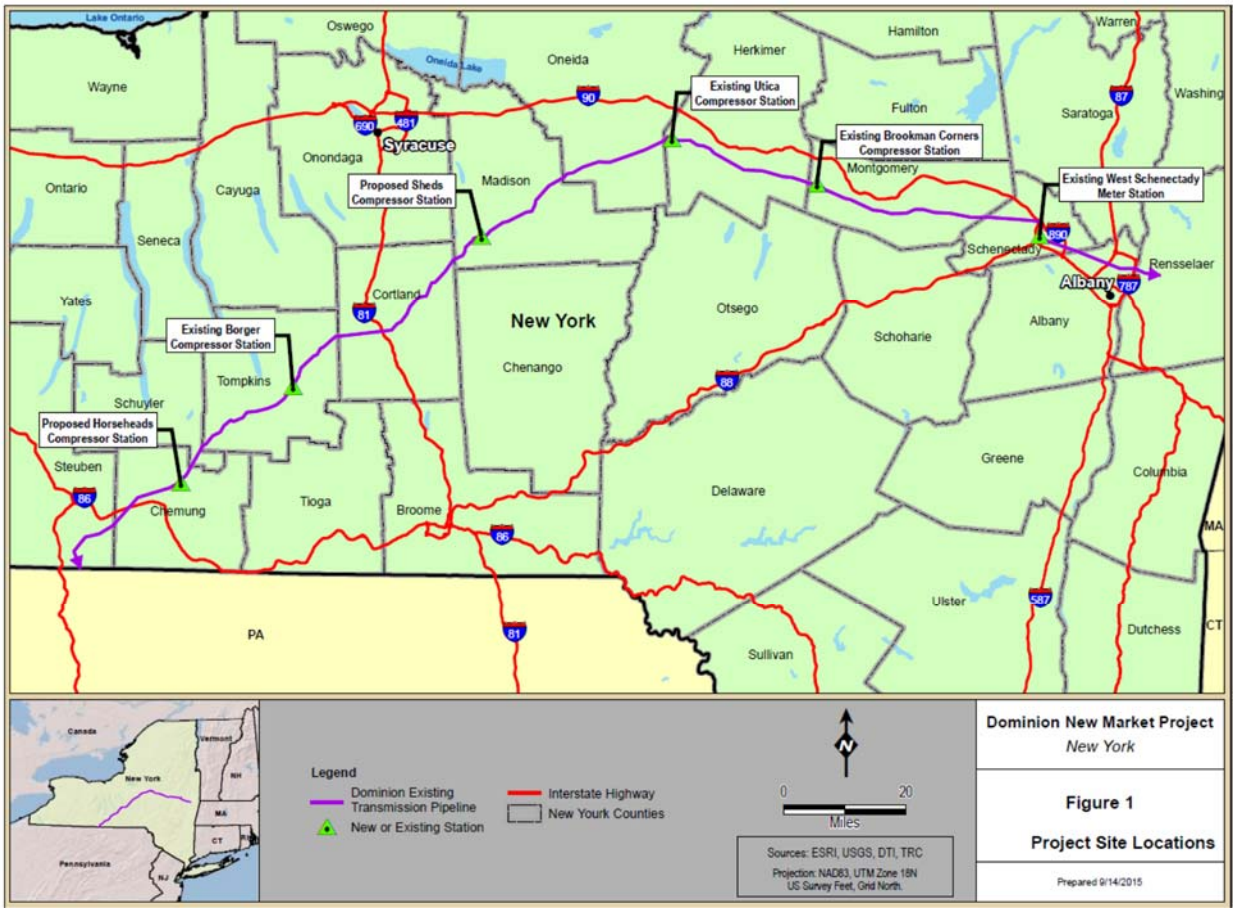
In particular, the agency must examine the "direct" environmental effects that "are caused by the [agency's] action and occur at the same time and place" as the proposed project. 40 C.F.R. § 1508.8. In addition, the agency must consider the action's "indirect" environmental effects that "are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." *Id*. The agency must also consider the "cumulative impact[s]" on the environment, meaning "the incremental impact of the action when added to other past, present,

and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." *Id.* § 1508.7.

II. THE COMMISSION'S REVIEW OF THE PROJECT

A. The New Market Project

The New Market Project will enable Dominion's existing transmission system in New York to provide up to an additional 112,000 dekatherms per day of firm transportation (with each dekatherm roughly equivalent to 1,000 cubic feet of gas). Certificate Order, 155 FERC ¶ 61,106 at P 4, JA ___. The Project was proposed to serve additional demand, increase the diversity of supply in the region, and alleviate the possibility of shortages by increasing transportation service along Dominion's existing system in New York. *See* EA at 1-2 (R. 1272), JA ___-___. As shown below, the Project contemplates construction and operation of two new compressor stations, upgrade and modification of three existing compressor stations, and upgrade and modification of one existing metering station, at locations throughout New York:



Id. at 9, J A___.[1]

Dominion executed 15-year contracts for 100 percent of the capacity provided by the Project with two local distribution companies, Brooklyn Union Gas Company (Brooklyn Union) and Niagara Mohawk Power Corporation

[1] Project construction and operation are entirely outside Otsego County. As petitioner Otsego 2000, Inc.'s Executive Director, Ellen Pope, explains in the affidavit attached to the petition for review, Otsego 2000, Inc.'s "environmental and historic preservation advocacy work extends to the larger region encompassed within a roughly 25-mile radius of Cooperstown, New York." Pope Decl. ¶ 4. The Brookman Corner Compressor Station falls within this radius.

(Niagara Mohawk). Certificate Order, 155 FERC ¶ 61,106 at P 4, JA ___.[2] The service contemplated by these agreements will begin with Dominion's receipt of gas at its existing interconnection with Texas Eastern Transmission, LP or Transcontinental Gas Pipe Line Company, LLC in Clinton County, Pennsylvania. The gas will then be transported to Dominion's existing Brookman Corners Interconnection in Montgomery County for Brooklyn Union, and to the Western Schenectady Interconnection for Niagara Mohawk. *Id*. PP 4-5, JA ___.

The Commission's environmental review analyzed potential impacts to geology, soils, water resources, wetlands, vegetation, fisheries, wildlife, threatened and endangered species, land use, recreation, visual resources, cultural resources, socioeconomics, air quality, noise, safety, cumulative impacts, and alternatives. *Id*. P 30, JA ___. The Environmental Assessment concluded that, if constructed in accordance with Dominion's proposal, as supplemented by FERC Staff-recommended mitigation measures, the Project would not significantly affect the quality of the human environment. EA at 115, JA ___.

B. The Certificate Order

On October 23, 2017, the Commission issued a conditional certificate of public convenience and necessity to Dominion. Certificate Order, 155 FERC

[2] Local distribution companies deliver gas to retail consumers, subject to price regulation by state utility commissions. *See Nat'l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 834 (D.C. Cir. 2006).

¶ 61,106 at P 1, JA ___. Applying the criteria set forth in its Certificate Policy Statement,[3] which provides guidance for evaluating proposed interstate transportation projects, the Commission found a market need for the Project, as evidenced by the precedent agreements for 100 percent of the Project's capacity. *Id.* P 18, JA ___. The Commission also found that the Project would have minimal impacts on landowners, as the proposed facilities would be constructed on land Dominion currently owns or leases or that it would purchase. *Id*. P 17, JA ___.

The Commission's environmental review considered the Environmental Assessment and all comments and other information in the record. *Id.* PP 29-32, JA ___-___. The Commission declined requests to analyze the impacts from future, additional shale gas development in the Marcellus and Utica Shale formations, which extend northward from West Virginia through Ohio, Pennsylvania, and New York. The Commission explained that any such environmental effects are not caused by the Project, nor are they reasonably foreseeable in light of the lack of information regarding the specific source of gas that might be transported on the Project and the highly localized nature of the vast

[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) (Certificate Policy Statement). The Commission recently issued a Notice of Inquiry regarding potential revisions to its approach under its currently effective Certificate Policy Statement. *See Certification of New Interstate Natural Gas Facilities*, 163 FERC ¶ 61,042 (2018) (2018 Notice of Inquiry).

majority of the impacts arising from production activities. *Id*. PP 77-83, JA ___-___. In addition, "[g]iven the large geographic scope of this formation," an analysis of the environmental impacts of shale gas extraction "bears no relation to the limited scope of Dominion's instant proposals." *Id*. P 91 JA ___.

The Commission ultimately found that the Project, if constructed and operated as described in the Environmental Assessment and in compliance with the environmental conditions imposed by the Certificate Order, would not have significant environmental impacts. *Id*. P 142, JA ___.

C. The Commission's Temporary Practice Of Calculating Generic Estimates

Beginning in late-2016, the Commission went beyond the requirements of NEPA and included in its certificate orders information regarding the potential upstream impacts associated with unconventional natural gas production (*i.e.*, fracking) and downstream combustion of natural gas, even where the effects of such production and end-use activities are not reasonably foreseeable or causally related to the proposal at issue. *See* Rehearing Order, 163 FERC ¶ 61,128 at P 41, JA ___.[4] The Commission at the time believed such information could be useful to

[4] *See also NEXUS Gas Transmission, LLC*, 160 FERC ¶ 61,022, PP 172-73 (2017); *Nat'l Fuel Gas Supply Corp*., 158 FERC ¶ 61,145, PP 189-90 (2017); *Dominion Carolina Gas Transmission, LLC*, 158 FERC ¶ 61,126, P 81 (2017); *Transcon. Gas Pipe Line Co*., *LLC*, 158 FERC ¶ 61,125, P 143 (2017); *Tenn. Gas*

the public.

Information concerning possible upstream impacts consisted of generic estimates of greenhouse gas emissions and land and water use impacts associated with shale gas extraction, based on general Marcellus shale well data. *See, e.g.*, *Millennium Pipeline Co., LLC*, 161 FERC ¶ 61,229, PP 151-62 (2017). A "full-burn" calculation, which estimated end-use greenhouse gas emissions by assuming the full combustion of the total volume of gas being transported by the project, was supplied to represent possible downstream impacts. *See, e.g.*, *Columbia Gas Transmission, LLC*, 158 FERC ¶ 61,046, P 120 (2017).

During this period, the Commission also grappled with the issue of whether downstream greenhouse gas emission figures could be placed in context or ascribed significance so as to be useful in evaluating a particular project. On remand from the Court's decision in *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017), the Commission confirmed that it could not identify a "widely accepted standard to ascribe significance to a given rate or volume of [greenhouse gas] emissions." *Fla. Se. Connection, LLC*, 162 FERC ¶ 61,233, P 27 (2018). The use of local or state greenhouse gas inventories was problematic because any two projects with the same capacity, but which are designed to serve markets in

---

Pipeline Co., 158 FERC ¶ 61,110, PP 100-104 (2017); *Rover Pipeline, LLC*, 158 FERC ¶ 61,109, P 274 (2017).

different states, "will contribute identically to global climate change," but could have "widely different percent increases over different states' [greenhouse gas] emissions inventories." *Id.* P 28. And the Commission identified a number of issues that prevent the Social Cost of Carbon tool[5] from meaningfully informing its project-specific review under the Natural Gas Act. *Id.* P 36. *See also DTE Midstream Appalachia, LLC*, 162 FERC ¶ 61,238, P 79 (2018) (explaining that "[t]he Commission's policy on the use of the Social Cost of Carbon has been to recognize the availability of this tool, while concluding that it is not appropriate for use in project-level NEPA reviews").

Moreover, end-use greenhouse gas emissions "are primarily a function of a proposed project's incremental transportation capacity," rather than construction or operation of the transportation facilities, and thus "will not vary regardless of the project's routing or location." *Fla. Se. Connection, LLC*, 162 FERC ¶ 61,233 at P 29. As a result, there are no conditions the Commission could impose on the construction or operation of jurisdictional facilities that will affect end-use-related greenhouse gas emissions. And the Commission lacks statutory authority to regulate such emissions directly. The Commission's only tool to address any

[5] The tool assigns a series of annual costs per metric ton of emissions discounted to a present-day value. *See Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197, P 277 (2018).

concerns it may have regarding downstream greenhouse gas emissions would be to decline to authorize the pipeline project. *Id.* But "that decision 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*, 867 F.3d at 1373). This would be inconsistent with the Commission's statutory duty to evaluate the merits of proposed transportation projects. *Id.* The Commission determined that its "proper role is to implement federal climate policies – as established by Congress and those Executive departments to which Congress has delegated the requisite authority – in discharging its duties under the [Natural Gas Act] and other statutes the Commission administers." *Fla. Se. Connection, LLC*, 164 FERC ¶ 61,099, P 57 (2018). Neither Sierra Club, nor any other party, petitioned for judicial review of these findings on remand.

D. The Rehearing Order

In a May 18, 2018 order, the Commission denied Otsego 2000, Inc.'s request for rehearing. Rehearing Order, 163 FERC ¶ 61,128 at P 1, JA ___. As relevant here, the Commission found that the Environmental Assessment appropriately excluded an analysis of the Project's upstream and downstream impacts. Where, as here, the origin of the gas that will be transported on a pipeline and the identity of specific end use or new additional demand cannot be determined, the production- and consumption-related impacts are not reasonably

foreseeable and thus do not constitute cumulative impacts. *Id*. PP 34, 39, JA ___, ___.

Nor are the greenhouse gas emissions from upstream production activities or downstream combustion indirect impacts that must be modeled under NEPA. In addition to a lack of reasonable foreseeability, there was no evidence establishing that the potential increase in greenhouse gas emissions "associated with the production, processing, distribution, or consumption of gas are causally related to [the Commission's] action approving this Project," as required by NEPA. *Id*. P 63, JA ___.

The Rehearing Order also reiterated that where the record establishes that upstream or downstream environmental effects are, in fact, indirect or cumulative impacts of a proposed project, the Commission would of course analyze those effects. *Id*. PP 42, 44, JA ___. ___. But the Commission decided to end its practice of preparing generic emissions estimates where upstream and downstream activities are not indirect or cumulative impacts, and thus need not be considered under NEPA. *Id*. P 44, JA ___. Based on two years of experience, the Commission found that such estimates do not meaningfully inform its project-specific analysis and do not provide useful information to the public. *Id*. P 42, JA ___. Of course, in any particular case, parties are free to seek judicial review of

the Commission's determination as to whether or not upstream and downstream activities are project-related effects for purposes of NEPA.

Commissioners Glick and LaFleur dissented in part from the Rehearing Order. Those dissents focused on the Commission's decision to terminate its temporary practice of providing generic, worst-case estimates of upstream and downstream impacts, rather than on the particular findings regarding upstream and downstream emissions in this case. *See id*. at Glick Dissent n.4, JA ___ ("I agree that the record in this particular proceeding does not contain 'meaningful information,' … sufficient to identify the reasonably foreseeable effects of the New Market Project on greenhouse gas emissions associated with the production and consumption of natural gas."); LaFleur Dissent at 1, JA ___ ("I write separately to comment on the policy change announced in this order."). The dissenting Commissioners also believed that Commission should have done more to gather information regarding potential upstream and downstream emissions impacts.

SUMMARY OF ARGUMENT

The Commission fully satisfied its obligations under the National Environmental Policy Act. The Commission estimated and discussed the greenhouse gas emissions associated with the construction and operation of the Project and discussed potential climate change impacts to the region. The

Commission reasonably declined to analyze the upstream greenhouse gas emissions arising from any additional natural gas production activities. The record establishes that the Project – which was built to satisfy a demand for additional gas transportation capacity – was not the proximate cause of the natural gas extraction activities that led to that very transportation demand. This is consistent with the Commission's experience in numerous natural gas proceedings that transportation infrastructure follows production, rather than *vice versa*. And here it is unknown – and virtually unknowable – whether the gas to be transported on the Project will come from new or existing production. Absent that basic information, it is nearly impossible to assess whether there will be any additional production activities in connection with the gas to be transported on the Project. As a result, any greenhouse gas emissions from any additional, incremental production activities are not reasonably foreseeable.

The Commission also reasonably declined to analyze downstream greenhouse gas emissions stemming from the end use of gas that may be transported by the Project. Contrary to Otsego's contention, this Court's 2017 *Sierra Club v. FERC* decision did not replace the Commission's obligation to analyze potential impacts on a case-by-case basis with an absolute rule that downstream emissions are always an indirect effect of natural gas transportation projects. The unique record in this case – which does not establish any specific

end use for the gas transported by the Project or what fuels it might displace – does not support a finding that any increase in greenhouse gas emissions associated with the end use of gas is reasonably foreseeable. The Commission also reaffirmed – without challenge from Otsego – that, even if it could develop a plausible estimation of downstream emissions, there exists no suitable methodology to attribute significance or ascribe climate change impacts to any particular emissions figure.

Finally, the Commission reasonably exercised its broad discretion to announce in this adjudication, rather than in a separate rulemaking, that it would end its temporary practice of providing generic emissions estimates when the upstream production and downstream use of natural gas are not cumulative or indirect impacts of the proposed natural gas transportation project. Interested parties will be able to comment on this issue in the Commission's ongoing examination of its policy for certifying new natural gas facilities. And in any particular case, parties will be free to seek judicial review of the Commission's determination as to whether or not upstream and downstream emissions are project effects under NEPA and any analysis of those emissions.

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 certificate of public convenience and necessity is within the agency's discretion under the Natural Gas Act, 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 National Environmental Policy Act. *Nev. 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), and 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"). In doing so, the Commission has "wide discretion to balance competing equities against the backdrop of the public interest." *Columbia Gas Transmission Corp. v. FERC*, 750 F.2d 105, 112 (D.C. Cir. 1984).

A. The Commission Reasonably Concluded That The Project's Public Benefits Outweigh Its Adverse Economic Effects.

Here, the Commission found that Dominion is prepared to financially support the Project because it will charge an incremental rate for use of the new, fully-subscribed capacity, which is calculated to recover all associated construction, installation, operation, and maintenance costs. Certificate Order, 155 FERC ¶ 61,106 at P 15, JA ___. In addition, the Project would not impact landowners because all proposed facilities would be constructed on land currently owned or leased by Dominion, or that it would purchase through the exercise of option rights. *Id*. P 17, JA ___.

Finally, the Commission determined that the Project would serve a demonstrated market need as evidenced by the long-term precedent agreements executed by Brooklyn Union and Niagara Mohawk for all of the Project's capacity. *Id*. PP 5, 18, JA ___, ___. *See also Minisink*, 762 F.3d at 111 n.10 (holding that FERC need not "look[] beyond the market need reflected by the applicant's existing contracts with shippers" to establish a project's public benefits).

B. The Commission Reasonably Concluded That The Project Would Not Have Significant Environmental Impacts.

Having determined that the Project's benefits outweigh any adverse economic and landowner impacts, the Commission went on to analyze the Project's environmental impacts. The Environmental Assessment addressed all substantive issues raised during the scoping period regarding a broad range of environmental issues. *See* Certificate Order, 155 FERC ¶ 61,106 at P 31, JA ___. With respect to air quality issues in particular, the Commission quantified and discussed the greenhouse gas emissions associated with construction and operation of the Project, including venting and inadvertent leakage. *See*, *e.g.*, EA at 64-89, 108, JA ___-___, ___. The Commission explained that those emissions, along with other activities in the region, "could collectively increase the atmospheric concentration of [greenhouse gases] … and contribute incrementally to climate change." *Id*. at 108, JA ___. The Commission also included a discussion of climate change impacts in the region and the regulatory structure for greenhouse gasses under the Clean Air Act. *Id*. at 66, 71, 108, JA ___, ___, ___. *See also* Certificate Order, 155 FERC ¶ 61,106 at PP 123-24, JA ___-___; Rehearing Order, 163 FERC ¶ 61,128 at PP 57-58, JA ___. But the Commission was unable to assess the significance of these greenhouse gas emissions because there is no accepted methodology to determine how a project's greenhouse gas emissions would translate into physical environmental effects. *See* Certificate Order, 155

FERC ¶ 61,106 at P 124, JA ___; Rehearing Order, 163 FERC ¶ 61,128 at PP 67-69, JA ___. *See also WildEarth Guardians v. Jewell*, 738 F.3d 298, 309 (D.C. Cir. 2013) (Bureau of Land Management not required to identify specific effects of leasing tracts for coal mining on global climate change in order to prepare an adequate Environmental Impact Statement).

The Commission's environmental analysis concluded that construction and operation of the Project would not result in significant environmental impacts. Certificate Order, 155 FERC ¶ 61,106 at P 36, JA ___. On the basis of this finding, the Commission determined that the Project, as governed by the certificate conditions, was an environmentally-acceptable action and that the public convenience and necessity required approval of Dominion's proposal. *Id*. PP 18, 142, JA ___, ___. That conclusion was reasonable and well-supported by the record.

III. THE COMMISSION REASONABLY DECLINED TO ANALYZE GREENHOUSE GAS EMISSIONS STEMMING FROM UPSTREAM NATURAL GAS PRODUCTION AND DOWNSTREAM END USE.

Otsego does not challenge any aspect of the Commission's environmental analysis of the Project itself. Instead, it asks the Court to direct the Commission to conduct a wide-ranging analysis of any additional upstream greenhouse gas emissions that could be associated with the extraction of the gas to be transported on the Project and any additional downstream emissions that could arise from the

combustion of that gas. The Commission reasonably concluded, however, that such impacts are not causally-related to the Commission's approval of the Project, nor are they reasonably foreseeable. As a result, these impacts are not indirect or cumulative effects of the Project and need not be analyzed under NEPA.

A. *Sierra Club* Does Not Establish That Upstream And Downstream Emissions Are Project-Related Impacts.

Otsego's argument is premised on the notion that the Court's 2017 *Sierra Club v. FERC* decision established that the Commission must evaluate upstream and downstream greenhouse gas emissions in all circumstances. *See, e.g.*, Br. at 29 ("FERC intentionally ignored binding legal precedent"). *See also* State Am. Br. at 12-14. *Sierra Club*, however, did not cast aside the statutorily-mandated, case-specific consideration of indirect and cumulative impacts in favor of a judicially-crafted absolute rule. Whether an environmental impact constitutes a project-related impact that must be analyzed under NEPA is a fact-based inquiry grounded in the unique record before the agency. *See* 42 U.S.C. § 4332(C)(i) (requiring agencies to discuss "the environmental impact of the proposed action"); *Calvert Cliffs' Coordinating Comm., Inc. v. Atomic Energy Comm'n*, 449 F.2d 1109, 1122 (D.C. Cir. 1971) ("NEPA compels a case-by-case examination and balancing of discrete factors").

Sierra Club concerned the Commission's certification of a pipeline that would connect to specifically-identified existing and planned power plants. Based

on its configuration, the Court found that the project's "entire purpose" was to transport gas that will be burned in those power plants. 867 F.3d at 1372. Because the destination and use of the gas were actually known, the Court found that it was reasonably foreseeable that the gas would be burned by those power plants and produce new greenhouse gas emissions at their respective locations. *Id*. at 1371-72. Accordingly, the Court concluded that downstream "greenhouse-gas emissions are an indirect effect of authorizing *this* project, which FERC could reasonably foresee." *Id*. at 1372 (emphasis added). In a subsequent case, the Court emphasized the fact-specific nature of *Sierra Club*, explaining that the decision "invalidated an indirect effects analysis because the agency had technical and contractual information on how much gas the pipelines [would] transport to specific power plants, and so could have estimated with some precision the level of greenhouse gas emissions produced by those plants." *Friends of Capital Crescent Trail v. Fed. Transit Admin.*, 877 F.3d 1051, 1065 (D.C. Cir. 2017).

Petitioners' contention that *Sierra Club* stripped the Commission of discretion to consider the unique characteristics of the projects before it is not only contrary to the facts of that case, but also the dictates of NEPA. It is well-settled that NEPA involves "an almost endless series of judgment calls" and "line drawing decisions" that are "vested in the agencies, not the courts." *WildEarth Guardians*, 738 F.3d at 312.

B. Greenhouse Gas Emissions From Upstream Natural Gas Production Activities Are Not An Indirect Impact Of The Commission's Approval Of The Project.

Two preconditions must be satisfied for an environmental effect to be considered an indirect impact of a proposed action: (1) the environmental effect must be "caused by" the proposed action; and (2) the environmental effect must be "reasonably foreseeable," even though it may be later in time or further removed in distance. 40 C.F.R. § 1508.8(b). The Commission reasonably concluded that, in this case, any additional greenhouse gas emissions associated with natural gas production satisfy neither condition. *See, e.g.*, Rehearing Order, 163 FERC ¶ 61,128 at PP 60-61, JA ___-___.

1. The Commission's approval of the Project is not the legally relevant cause of any potential increased natural gas production.

NEPA "requires a reasonably close causal relation between the environmental effect and the alleged cause," akin to the "familiar doctrine of proximate cause from tort law." *Pub. Citizen*, 541 U.S. at 767 (internal quotations omitted). A "but for" causal relationship is not enough. As a result, "[s]ome effects that are 'caused by' a change in the physical environment in the sense of 'but for' causation," will not constitute an indirect impact of agency action "if the causal chain is too attenuated." *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983). Moreover, "where an agency has no ability to

prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect." *Pub. Citizen*, 541 U.S. at 770.

Notwithstanding the Supreme Court's explanation in *Public Citizen*, Otsego contends that *Sierra Club* establishes that the Commission is the "legally relevant cause" of the greenhouse gas emissions associated with natural gas production activities. Br. at 30-31. *See also* States Am. Br. at 11-13; Sierra Club Am. Br. at 7-9. But *Sierra Club* did not address upstream greenhouse gas emissions whatsoever. The Commission interprets NEPA's "causal relationship" requirement to call for an analysis of upstream production activities where a proposed pipeline would transport new production from a specified production area and that production would not occur in the absence of the proposed pipeline – *i.e.*, where the production can plausibly be said to be caused by the pipeline. *See* Rehearing Order, 163 FERC ¶ 61,128 at P 59, JA ___. *See also Sylvester v. Army Corps of Eng'rs*, 884 F.2d 394, 400 (9th Cir. 1989) (upholding environmental review of golf course that excluded the impacts of adjoining resort complex project). In this case, the record did not support such a finding. Rehearing Order, 163 FERC ¶ 61,128 at P 60, JA ___. And Otsego has never argued otherwise. *See id*. P 41 ("No party in this proceeding has argued that either the upstream or

downstream activities are sufficiently causally connected to the New Market Project to be indirect impacts of the project").

The Commission's extensive experience in natural gas transportation proceedings has led it to conclude that production drives transportation, rather than the "if you build it, they will come" causal relationship posited by Otsego. *See* Certificate Order, 155 FERC ¶ 61,106 at P 71, JA ___. As the Commission explained, "[o]nce production begins in an area, shippers or end users will support the development of a pipeline to move the produced gas." *Id*. Indeed, it would "make little economic sense" to undertake the enormous commitment of resources associated with a natural gas transportation project "in the hope that production might later be determined to be economically feasible" and that producers will subsequently choose that proposed project "as best suited for moving their gas to market." *Id*. Rather than being spurred by pipeline development, natural gas production activities are driven by a number of factors, such as domestic natural gas prices and production costs. *See id*. P 77, JA ___; Rehearing Order, 163 FERC ¶ 61,128 at P 60, JA ___. *See also Sierra Club v. Clinton*, 746 F. Supp. 2d 1025, 1045 (D. Minn. 2010) (holding that Department of State's analysis of an oil pipeline permit properly excluded upstream impacts associated with oil production because, among other things, oil production is driven by other economic considerations). The Commission's finding in this regard, "[b]ased on its expertise

and experience," "warrants substantial deference from this court." *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 67 (D.C. Cir. 2014).

2. The greenhouse gas emissions impacts of any potential increased natural gas production activities are not reasonably foreseeable.

Even if there were a causal relationship between the Commission's approval of the Project and any new additional upstream production activities, the Commission reasonably found that the greenhouse gas emissions impacts from such activities are not reasonably foreseeable. *See* Certificate Order, 155 FERC ¶ 61,106 at P 72, JA ___; Rehearing Order, 163 FERC ¶ 61,128 at P 61, JA ___. To be sure, NEPA requires the Commission to engage in "reasonable forecasting and speculation," but "*reasonable* [is] the operative word." *Sierra Club v. Dep't of Energy*, 867 F.3d 189, 198 (D.C. Cir. 2017) (citation omitted).

In proposing the Project, Dominion noted that its pipeline system is particularly suited to transport gas produced in the Appalachian regions of West Virginia and Ohio. *See* Dominion Application, filed June 2, 2014 (R. 1), at 4, JA ___. But in light of the design of the Project, supply opportunities are not limited to even those broad regions. The Project would transport gas from Dominion's existing interconnection with two systems operated by other pipeline companies that cross several states and have supply interconnections in multiple natural gas basins. *See* Rehearing Order, 163 FERC ¶ 61,128 at P 38.

Accordingly, there is no identifiable dedicated supply area of the gas to be transported by the Project, much less information regarding the locale and number of specific wells and details about production methods that would be necessary for the Commission to meaningfully predict the greenhouse gas emissions-related impacts. *See* Rehearing Order, 163 FERC ¶ 61,128 at P 38, JA ___. Moreover, because the Project's customers do not control production, the "specific source of natural gas to be transported … is currently unknown and will likely change throughout the Project's operations." *Id*. P 61, JA ___.

Otsego faults the Commission for failing to ask for more detailed information regarding upstream production activities. Br. at 33-35. *See also* State Am. Br. at 20-22; Sierra Club Am. Br. at 10-13. But it is far too late for Otsego to raise this complaint now. "Persons challenging an agency's compliance with NEPA must structure their participation so that it alerts the agency to the parties' position and contentions." *Pub. Citizen*, 541 U.S. at 764. Here, Otsego failed to raise any specific objection regarding the state of the record with respect to upstream production activities until four years after the Commission sought comments on the Environmental Assessment and over two years after the Certificate Order – which expressly noted that the Commission "does not have sufficient information to determine the origin of the gas that will be transported." 155 FERC ¶ 61,106 at P 72, JA ___. Otsego has "forfeited any objection" on this

basis. *Pub. Citizen*, 541 U.S. at 764. The failure to raise any objection to the status of the agency record on rehearing separately precludes any claim on this ground. *See* 15 U.S.C. § 717r(b) ("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.").[6]

In addition, natural gas production activities are regulated by the states. *See* Certificate Order, 155 FERC ¶ 61,106 at P 72, JA ___. The Commission only has jurisdiction over the pipeline applicant, whose sole function is to transport gas between two points. Rehearing Order, 163 FERC ¶ 61,128 at P 61, JA ___. While a pipeline's customers may contract for their gas with a specific producer, the shipper would not know the source of the producer's gas. Nor are producers required to dedicate particular supplies to a particular shipper. *Id*.

Otsego claims that the Commission found that information about upstream impacts was "irrelevant because states have jurisdiction over the production of natural gas." Br. at 34. That is incorrect. The limited scope of the Commission's jurisdiction does not make upstream impacts irrelevant, but it does necessarily

[6] Ostsego 2000, Inc.'s request for rehearing simply "urged" the Commission to consider "all 'upstream'" impacts. Otsego 2000, Inc. Request for Rehearing (R. 1379) at 13, JA ___.

limit the information available to the Commission to meaningfully predict production-related impacts. *See* Certificate Order, 155 FERC ¶ 61,106 at P 72, JA ___. Moreover, "[n]ot even the states … would have information regarding where (other than in a general region) gas that will be delivered into a particular new pipeline will be produced, or whether the gas will come from existing or new wells." Rehearing Order, 163 FERC ¶ 61,128 at P 61 n.146, JA ___.

Finally, Otsego ignores this Court's 2016 decision in *Sierra Club v. FERC*, 827 F.3d 36 (D.C. Cir. 2016), which found that the Commission's NEPA analysis need not consider upstream production impacts where "the asserted linkage" between those impacts and the Commission-approved pipeline was "too attenuated." *Id*. at 47. There, as here, parties failed to cite to record evidence that the pipeline "would lead to increased gas production because no specific shale-play had been identified as a source of natural gas." *Id*. (internal quotations omitted). And there, as here, nothing suggested that the gas transported by the pipeline "would come from future, *induced* natural gas production, as opposed to from existing production." *Id*. (internal quotations omitted).[7] *See also Sierra Club v.*

[7] The Court found that the Commission did not need to examine the indirect effects of the anticipated export of liquefied natural gas because the Department of Energy has sole authority to license such exports. *Sierra Club*, 827 F.3d at 47. As discussed above, the Court also upheld the Commission's determination that induced production from *domestic* operations was not causally related or a reasonably foreseeable effect of the project at-issue. *Id*.

FERC, 827 F.3d 59, 69 (D.C. Cir. 2016) (holding that the Commission need not examine upstream production impacts where the record did not establish that the project would "necessitate an increase in domestic natural gas production"); *Coal. for Responsible Growth & Resource Conservation v. FERC*, 485 Fed. Appx. 472, 474 (2d Cir. 2012) (affirming FERC's conclusion that the impacts of mid-Atlantic shale development were not sufficiently causally related to the certificated project to warrant more than a short discussion in the Environmental Assessment).

C. Greenhouse Gas Emissions From Downstream Natural Gas Consumption Are Not An Indirect Impact Of The Commission's Approval Of The Project.

Otsego asserts that the 2017 *Sierra Club v. FERC* decision directed the Commission to analyze greenhouse gas emissions associated with potential downstream natural gas consumption in every natural gas infrastructure proceeding. *See* Br. at 31 (arguing *Sierra Club* creates a "legal obligation" to analyze downstream emissions). *See also* State Am. Br. 12-14; Sierra Club Am. Br. 7-10. But again, *Sierra Club* did not establish a bright-line rule requiring an analysis of downstream emissions for all natural gas transportation projects. *See supra* pp. 23-24. And, as the Commission found here, the configuration of the projects at issue in *Sierra Club* were "factually distinct from the New Market Project." Rehearing Order, 163 FERC ¶ 61,128 at P 62, JA ___.

The record underlying the *Sierra Club* decision "indicated that natural gas would be delivered to specific customers – power plants in Florida," unlike the instant case where no party "has identified what the specific end use of the transported natural gas will be." *Id*. Based on the record before it here, the Commission reasonably concluded that downstream greenhouse gas emissions are not indirect impacts of its approval of the Project.

1. The Commission's approval of the Project is not the legally relevant cause of any incremental increase in natural gas consumption.

The Commission reasonably concluded that any future incremental increase in greenhouse gas emissions stemming from the consumption of natural gas is not causally related to the Commission's approval of the Project. Rehearing Order, 163 FERC ¶ 61,128 at P 63, JA ___. As the Commission explained, "[c]ompanies will continue to negotiate for and find natural gas supplies" and "end use consumption of natural gas will occur regardless of whether" the Project is approved. *Id*. *See also id*. P 43 (noting that market participants "respond freely to market signals about location-specific supply and location-specific demand"), JA ___.

Otsego contends that the 2017 *Sierra Club* decision establishes that the Commission is the "legally relevant cause" of any downstream emissions because the Commission could decline to approve the Project. Br. at 30. The 2017 *Sierra*

Club decision did find that the Commission's approval was the "legally relevant cause" of the downstream emissions from the power plants to be served by the pipeline at issue in that case because the Commission "could deny a pipeline certificate based on the ground that the pipeline would be too harmful to the environment." 867 F.3d at 1373. But that statement – made with respect to a pipeline whose "entire purpose" was to serve specifically-identified power plants, *id*. at 1372 – should not be read to mean that any pipeline approved by the Commission must be the legally relevant cause of any conceivable downstream activities. To read *Sierra Club* in such a manner would transform NEPA's causation test into a "but for" question, rather than the "proximate cause" analysis dictated by the Supreme Court. *See Pub. Citizen*, 541 U.S. at 767 (holding that NEPA's requirement of a "reasonably close causal relationship" is analogous to a "proximate cause" inquiry, rather than an "unyielding variation of 'but for' causation").

In addition, the *Sierra Club* court's causation conclusion was driven by the Court's view that the Commission has the legal authority to mitigate downstream effects. *Id*. Here, however, section 1(b) of the Natural Gas Act expressly excludes "local distribution companies and distribution facilities" – the entities and mechanisms that will distribute gas transported by the Project to end users – from the Commission's jurisdiction. 15 U.S.C. § 717(b). *See also* Rehearing Order, 163

FERC ¶ 61,128 at P 43, JA ___. Moreover, there are "no conditions the Commission can impose on the construction of jurisdictional facilities that will affect the end-use-related [greenhouse gas] emissions." *Fla. Se. Connection*, 164 FERC ¶ 61,099 at P 50. Rather it is the states who have authority over the local distribution company shippers in this case and who possess the ability to regulate natural gas consumption. *See, e.g.*, *General Motors Corp. v. Tracy*, 519 U.S. 278, 293-94 (1997) (notwithstanding changes to the natural gas industry "Congress did nothing to limit the States' traditional autonomy to authorize and regulate local gas franchises"); *Nat'l Fuel Gas Supply Corp.*, 468 F.3d at 834 (D.C. Cir. 2006) ("local distribution companies deliver gas to retail consumers, subject to price regulation by state utility commissions"). *See also infra* at pp. 51-52.

Finding that these jurisdictional limitations break the causal chain for NEPA purposes is consistent with the Supreme Court's directive to look to underlying policies or legislative intent when drawing "a manageable line between those causal changes that may make an actor responsible for an effect" under NEPA "and those that do not." *Metro. Edison Co.*, 460 U.S. at 774 n.7. That line "approximate[s] the limits for an agency's area of control." *N.J. Dep't of Envtl. Prot. v. Nuclear Regulatory Comm'n*, 561 F.3d 132, 141 (3d Cir. 2009).

The Commission's role under the Natural Gas Act is to consider "whether a '*proposed* … operation, construction, [or] extension, to the extent authorized by

the certificate, is or will be required by the present or future public convenience and necessity." Rehearing Order, 163 FERC ¶ 61,128 at P 43 (quoting 15 U.S.C. § 717f(e)), JA ___. To reject a proposed pipeline based on the impacts stemming from the end use of the gas transported 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." *Fla. Se. Connection*, 162 FERC ¶ 61,233 at P 29 (quoting *Sierra Club*, 867 F.3d at 1357).

Moreover, the animating purpose of the Natural Gas Act is "to encourage the orderly development of plentiful supplies of … natural gas at reasonable prices," *NAACP*, 425 U.S. at 670, and the scope of the Commission's authority to carry out that statutory directive is generally limited to the interstate transportation of natural gas. 15 U.S.C. § 717(b). The Commission's proper role is to implement federal climate policies while exercising that statutory authority. *See Fla. Se. Connection*, 164 FERC ¶ 61,099 at P 57. It is not the Commission's place to use its authority over the transportation of natural gas to effectively regulate any associated upstream and downstream activities that contribute to climate change. *See id.* (citing *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) ("had Congress wished to assign" questions of "deep economic and political significance" to an agency, "it surely would have done so explicitly")). Yet that would be the result if the Commission were to deny a proposed natural gas transportation project based on

the potential impacts of any upstream and downstream activities conceivably associated with that transportation. *See Sierra Club*, 867 F.3d at 1382 (Brown, J., dissenting) ("nothing in the text of [the Natural Gas Act] empowers the Commission to entirely deny the … issuance of a certificate based solely on an adverse indirect environmental effect regulated by another agency").

2. The greenhouse gas emissions impacts of any incremental increase in natural gas consumption are not reasonably foreseeable.

The Commission also reasonably found that any potential increase in greenhouse gas emissions associated with the consumption of natural gas is not a reasonably foreseeable effect of the Project. *See* Rehearing Order, 163 FERC ¶ 61,128 at P 62, JA ___. Petitioners and amici again point to the 2017 *Sierra Club* decision to challenge this finding. *See, e.g.*, Br. at 32, State Amici at 11-13; Sierra Club at 7-10. But there are fundamental differences between the power plant end users in *Sierra Club* and the local distribution company shippers here. These differences render reliance upon *Sierra Club* inappropriate.

First, the *Sierra Club* court found that "[a]ll the natural gas that will travel through" the pipelines under review would go "to power plants in Florida," which "will burn the gas." 867 F.3d at 1371. Here, by contrast, the local distribution company shippers could resell the gas into the market, rather than deliver it to any of its distribution customers. *See* Rehearing Order, 163 FERC ¶ 61,128 at P 62,

JA ___. Local distribution companies have marketing affiliates that facilitate the resale of any gas that is not needed to meet customer demand. *See* FERC, *Energy Primer: A Handbook of Energy Market Basics* 32 (Nov. 2015) (Energy Primer).[8] And because Dominion's system in New York is interconnected with two interstate pipeline systems that extend into southern, mid-Western, and mid-Atlantic states, the resold gas could be transported over a wide geographic area. *See* Rehearing Order, 163 FERC ¶ 61,128 at 38, JA ___ (discussing system configuration).

Second, in finding that end-use emissions were reasonably foreseeable, the *Sierra Club* court pointed to Department of Energy reports providing emissions estimates per unit of energy for various types of power plants. 867 F.3d at 1374. And such estimates are feasible given the relatively fixed fuel needs of natural gas-fired power plants. By contrast, local distribution companies face "extremely variable retail demand." Energy Primer at 122. The New Market Project's capacity was sized to meet the local distribution companies' forecasted peak demand, which will occur on an intermittent basis. Rehearing Order, 163 FERC ¶ 61,128 at P 62 ("the project's transportation capacity is designed for intermittent peak use"), JA ___. Thus, unlike *Sierra Club*, this is not a case where a project will be delivering a relatively fixed amount of gas on a relatively fixed schedule.

[8] The Energy Primer is available at https://www.ferc.gov/market-oversight/guide/energy-primer.pdf.

Third, the highly variable demand faced by local distribution companies makes it likely that Brooklyn Union and Niagara Mohawk will not utilize all of their contracted-for transportation capacity on the Project to serve their own end-users. It is common for local distribution companies to enter into agreements with marketers to release their capacity to other shippers when it is not needed to meet demand. *See Promotion of a More Efficient Capacity Release Market*, Order No. 712, 123 FERC ¶ 61,286, PP 120-25 (2008), *order on reh'g*, Order No. 712-A, FERC Stats. & Regs. ¶ 31,284, *order on reh'g*, Order No. 712-B, 127 FERC ¶ 61,051 (2009). As a result, on any particular day, the capacity created by the Project could be used to transport gas on behalf of different shippers to serve different end users.

Fourth, it is unknown whether the gas to be transported by the Project will actually lead to any increase in greenhouse gas emissions. Even if it were assumed that Brooklyn Union and Niagara Mohawk use the gas to serve their industrial and residential customers, the gas could be "substitut[ed] for higher-emitting fuels, [used as] industrial feedstock for existing or potentially new customers, or other combustion." Rehearing Order, 163 FERC ¶ 61,128 at P 62, JA___. See *also id.* P 39, JA ___ ("there is nothing in the record that identifies any specific end use or new incremental load downstream of the New Market Project"). In the absence of such information, there is no way to determine whether end use of gas transported

by the Project is: (1) adding to the overall existing combustion of natural gas (and increasing greenhouse gas emissions); (2) displacing natural gas that was previously shipped from other sources (and holding emissions steady); or (3) replacing higher-emitting fuels such as coal or oil (and decreasing emissions). This Court has already observed that an environmental analysis that could not conclude "whether total emissions, on net, will be reduced or increased" would be of little use to agency decisionmakers. *Sierra Club*, 867 F.3d at 1375.

a. Otsego's claim that the Commission need not know how Project gas will be used is misplaced.

Otsego asserts that the Commission does not need to know how gas transported by the Project will be used because the emissions attributable to combustion can be determined through a "straight-forward chemical conversion" calculation. Br. at 35. *See also* State Am. Br. at 15-16; 19. While that is true, it misses the point. Among the key variables needed to reasonably project any incremental increase in downstream emissions stemming from end use of Project-transported gas are (1) the amount of gas transported over a particular period of time, (2) whether and how much of that gas will be used to satisfy new, incremental demand, and (3) whether and how much the gas will displace other, higher-emitting fuels. The analysis advocated by Otsego is the equivalent of the generic "full burn" calculations (*see supra*. pp. 10-11), which did not meaningfully

inform the Commission's project-specific reviews. *See* Rehearing Order, 163 FERC ¶ 61,128 at P 42, JA ___.

Sierra Club asserts that basic economic theory dictates that, if the Project increases the supply of gas, prices will fall, and increased demand will necessarily follow. Sierra Club Am. Br. at 9-10. This fails, however, to account for the fact that the Project is "designed for intermittent peak use" in response to spikes in demand. Rehearing Order, 163 FERC ¶ 61,128 at P 62, JA ___.

Moreover, Sierra Club's theoretical argument fails to assist the Commission in ascertaining whether any demand created by the Project reflects new, incremental demand (and thus a potential increase in greenhouse gas emissions), a need to diversify fuel supply options, or a change from higher emitting fuels (and thus a potential static or decreased level of emissions). The issue is not just the extent of the consumption-related emissions (*see* State Am. Br. at 16), but also whether the Project will lead to any increased greenhouse gas emissions. *See, e.g.*, Certificate Order, 155 FERC ¶ 61,106 at P 79, JA ___; Rehearing Order, 163 FERC ¶ 61,128 at PP 62, 66, JA ___, ___. In the face of that uncertainty, the Environmental Assessment's discussion of potential climate change impacts in the region and the regulatory structure for greenhouse gasses under the Clean Air Act satisfied the Commission's obligations under NEPA. *See* Rehearing Order, 163

FERC ¶ 61,128 at P 66, JA ___; *see also supra* pp. 10-11 (discussing Commission's temporary practice).

b. Criticisms about the state of the agency record are not properly before this Court.

Otsego argues that the Commission erred in failing to develop information about the likely end use of gas to be transported by the Project. *See* Br. at 33-34. *See also* State Am. Br. at 20-22; Sierra Club Am. Br. at 10-13. But Petitioners make little effort to show that, in light of the unique operating characteristics of the Project and the specific needs of the local distribution company shippers, information exists that would allow the Commission to develop a useful estimate of downstream greenhouse gas emissions. They have thus failed to establish that the Commission abused the "substantial discretion" granted by NEPA to "determine how best to gather and assess information." *Biodiversity Conservation Alliance v. Forest Service*, 765 F.3d 1264, 1270 (10th Cir. 2014).

Moreover, at no point before the agency did Otsego argue that the Commission was relying upon an incomplete record and urge further fact gathering

regarding end use.[9] Nor did Otsego raise this claim on rehearing.[10] As a result, it is not properly before the Court. *See* 15 U.S.C. § 717r(b) (court lacks jurisdiction to consider arguments not presented to the Commission); *Pub. Citizen*, 541 U.S. at 764 (party who fails to timely raise NEPA compliance issue "forfeit[s] any objection" to the analysis on that ground).

In a similar vein, Sierra Club belatedly asserts that there are models available – such as the Energy Information Agency's Modeling System – that would permit the Commission to predict any incremental increase in greenhouse gas emissions associated with the Project. Sierra Club Am. Br. 17-18. This contention was not presented to the Commission and thus cannot be considered by the Court. *See* 15 U.S.C. § 717r(b). Moreover, as the Commission has explained in other proceedings, tools like the National Energy Modeling System "can be used

---

[9] Otsego 2000, Inc.'s comments during the environmental scoping period (cited in State Am. Br. at 21) asked for an analysis of "potential 'downstream' negative impacts resulting from the increased use of fracked gas …. These include, but are not limited to, the likelihood of future power plants, storage facilities, distribution networks and other types of gas infrastructure." Otsego 2000, Inc. Scoping Comments, dated Dec. 3, 2014, at 12, JA ___.

[10] With respect to greenhouse gas emissions, Otsego 2000, Inc.'s request for agency rehearing provided its own generic, "full burn" calculation and simply states that "Otsego 2000 maintains that a comprehensive analysis of lifecycle emissions, including emissions relating to the production, processing, distribution, and consumption of gas associated with Dominion's New Market Project, should be performed." Request for Rehearing (R. 1379) at 23, JA ___.

to project the response of domestic energy markets to a wide variety of alternative assumptions and policies … or to examine the impact of new energy programs and policies. However it is not designed to predict or analyze the environmental impacts of specific infrastructure projects." *Sabine Pass Liquefaction Expansion*, 151 FERC ¶ 61,253, P 19 (2015).

3. The cases relied upon by Otsego are inapposite.

In an effort to establish that downstream greenhouse emissions are an indirect effect of the Commission's approval of the Project, Otsego points to various cases involving other undertakings. Br. at 32-33, 35. But the indirect effects analysis is fact-specific and Otsego's cases are inapposite.

For example, in *Mid States Coal. for Progress v. Surface Transportation Board*, 345 F.3d 520 (8th Cir. 2003) (Br. at 35), the Eighth Circuit concluded that it was reasonably foreseeable that the Surface Transportation Board's approval of a rail line creating a direct route from coal mines to power plants would increase the demand for coal. *Id*. at 549. In *Mid States*, like the 2017 *Sierra Club* decision, there were identifiable end-users and the project proponent acknowledged that the proposed project would increase the use of coal for power generation. *Id*. at 549; *see also* Certificate Order, 155 FERC ¶ 61,106 at P 79, JA ___ (distinguishing *Mid States*); Rehearing Order, 163 FERC ¶ 61,128 PP 65-66, JA ___-___ (same). Indeed, the Board specifically stated that it would "evaluate the potential air

quality impacts associated with the increased availability and utilization" of coal from the rail line project, but then "failed to deliver on this promise." *Id*. at 550. The Eighth Circuit subsequently limited *Mid States* to situations where an agency states "that a particular outcome was reasonably foreseeable and that it would consider its impact, but then failed to do so." *Ark. Wildlife Fed'n v. Army Corps of Eng'rs*, 431 F.3d 1096, 1102 (8th Cir. 2005).

The remaining cases cited by Otsego (at 32-33) involve agencies' approval of fuel extraction projects and hold that combustion emissions are an indirect effect of those approvals.[11] The fact that fuel production may be the proximate cause of fuel demand does not establish such a relationship between transportation and end use. As the Commission found, "the link between the pipeline and the local distribution company shippers on the one hand, and between the pipeline and the

[11] *See San Juan Citizens All. v. Bureau of Land Mgmt.*, 326 F. Supp. 3d 1227 (D.N.M. June 14, 2018) (approval of oil and gas leases); *W. Org. of Res. Councils v. U.S. Bureau of Land Mgmt*., No. 16-21 GF-BMM, 2018 WL 1475470, *13 (D. Mont. Mar. 26, 2018) (approval of Resource Management Plans permitting oil, coal, and gas extraction); *Mont. Envtl. Info. Ctr. v. Office of Surface Mining*, 274 F. Supp. 3d 1074 (D. Mont. 2017) (approval of coal mining plan modification); *Dine Citizens Against Ruining Our Env't v. Office of Surface Mining, Reclamation & Enforcement*, 82 F. Supp. 3d 1201 (D. Colo. 2015) (approval of coal mine expansion), *vacated as moot by* 643 F. App'x 799 (10th Cir. 2016); *WildEarth Guardians v. Office of Surface Mining, Reclamation & Enf't*, 104 F. Supp. 3d 1208 (D. Colo. 2015) (approval of coal mining plan modifications), *vacated as moot by* 652 F.3d 717 (10th Cir. 2016).

producer on the other, is much more attenuated than the links" in these types of cases. Rehearing Order, 163 FERC ¶ 61,128 at P 66, JA ___.

4. A generic estimate of downstream emissions would not help the Commission make an informed decision.

Otsego argues that, even though it is unknown where the gas to be transported by the Project will come from and how it will be used, NEPA still requires the development of some generic, ballpark emissions estimates. *See* Br. 35-36 (calling for "full-calculations" and "a range of estimates"). But "the purpose of NEPA is to help agencies and the public make informed decisions." *Sierra Club*, 867 F.3d at 1372. The decision to be made in this case was whether the "public convenience and necessity" required approval of the particular transportation project proposed by Dominion. The Commission has found that broad, generic estimates based on its experience in temporarily providing such estimates (*see supra* pp. 10-11) do "not meaningfully inform [its] project-specific review," nor are they "helpful to the public." Rehearing Order, 163 FERC ¶ 61,128 at P 42, JA ___.

Moreover, the Commission has determined that there is no widely accepted standard to ascribe significance to any particular volume of greenhouse gas emissions. *Id*. P 68, JA ___. Nor is there any standard methodology to determine "how a project's contribution to greenhouse gas emissions would translate into physical effects on the environment for the purpose of evaluating the Project's

impacts on climate change." *Id*. P 67, JA ___.[12] *See EarthReports, Inc. v. FERC*, 828 F.3d 949, 956 (D.C. Cir. 2016) (affirming the reasonableness of Commission's conclusion that Social Cost of Carbon is not appropriate for use in project-specific reviews). Accordingly, even if generic emissions estimates were suitable for use in a project-specific review context, they could not meaningfully inform the Commission's assessment of whether a particular quantity of emissions results in significant environmental impacts. NEPA does not require agencies to perform analyses that would serve little practical purpose. *See, e.g.*, *Sierra Club*, 827 F.3d at 50 ("'practical considerations of feasibility might well necessitate restricting the scope' of an agency's analysis") (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 414 (1976)).

The State and Sierra Club amici take issue with the Commission's determination that the Social Cost of Carbon tool and similar methodologies are not appropriate for use in project-level NEPA reviews. *See* State Amici Br. at 18-20; Sierra Club Br. at 21-27. But as non-parties, the amici may not raise issues that were not presented by a party to an appeal. *See EarthReports*, 828 F.3d at 956 (citing *Eldred v. Reno*, 239 F.3d 372, 378 (D.C. Cir. 2001)). The Natural Gas Act separately bars Sierra Club and the States from seeking judicial review of this issue

[12] Otsego does not challenge either of these findings.

because they did not participate in the proceeding below. *See* 15 U.S.C. § 717r(b) (only parties to FERC proceedings may seek judicial review).[13]

D. Upstream And Downstream Greenhouse Gas Emissions Are Not Cumulative Impacts Of The Project.

Otsego also contends that the Commission "defied" the Court's 2017 *Sierra Club* decision by failing to analyze greenhouse gas emissions as cumulative impacts of the Project. Br. 31-32. But *Sierra Club* did not consider whether the greenhouse gas emissions should be characterized as cumulative impacts. Moreover, the Commission did discuss how the direct emissions from the Project's construction and operation, together with other activities in the region, could have cumulative impacts on air quality and climate change. *See* EA at 106-108, JA __-__; Certificate Order, 155 FERC ¶ 61,106 at P 90, PP 123-24, JA ___, ___-___.

Under the Council on Environmental Quality's regulations, "cumulative impacts" are those that result "from the incremental impact of the action [being studied] when added to other past, present, and reasonably foreseeable future actions." 40 C.F.R. § 1508.7. For the same reasons that incremental upstream and downstream emissions are not reasonably foreseeable indirect impacts of the

[13] Again, Sierra Club had the opportunity to seek judicial review of this issue in connection with the Commission's orders on remand from the 2017 *Sierra Club* decision. *See, e.g.*, *Fla. Se. Connection*, 164 FERC ¶ 61,099 at PP 18-37 (declining to employ Social Cost of Carbon tool in project-level reviews). It chose not to do so.

Project, they are not reasonably foreseeable cumulative impacts. *See* Certificate Order, 155 FERC ¶ 61,106 at P 91, JA ___; Rehearing Order, 163 FERC ¶ 61,128 at PP 34, 38-39, JA ___, ___-___.

Moreover, NEPA requirements are governed by a rule of reason. *See Pub. Citizen*, 541 U.S. at 767; *Mayo v. Reynolds*, 875 F.3d 11, 20 (D.C. Cir. 2017). The Council on Environmental Quality's 2016 *Final Guidance on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change* (withdrawn in 2017) recognized that agencies have substantial discretion in determining the scope of the cumulative impacts analysis, and that scope should relate to the magnitude of a project's environmental impacts. *See* Certificate Order, 155 FERC ¶ 61,106 at PP 90-91, JA ___-___. In addition, a cumulative impacts analysis "need only consider the 'effect of the current project along with any other past, present or likely future actions in the same geographic area' as the project under review." *Sierra Club*, 827 F.3d at 50 (quoting *TOMAC, Taxpayers of Michigan Against Casinos v. Norton*, 433 F.3d 852, 864 (D.C. Cir. 2006)). Here, the Project will only require 65.4 acres for operation and is located entirely within New York, a state which has banned hydraulic fracturing. *See, e.g.*, Rehearing Order, 163 FERC ¶ 61,128 at P 37, JA ___. Accordingly, a broad analysis of all possible incremental upstream and downstream emissions – most, if not all, of which would

occur well beyond the immediate vicinity of the Project – bear no relation to the limited scope of the Project. *See id*. at PP 35-40, JA __-___.

E. If Upstream And Downstream Greenhouse Gas Emissions Are Not Indirect Or Cumulative Impacts Under NEPA, They Need Not Be Analyzed.

Otsego contends that upstream and downstream emissions must still be analyzed under NEPA's "hard look" standard, even if those emissions are not indirect or cumulative impacts of the Project. Br. at 36. But NEPA does not impose any freestanding obligation to analyze matters that are not environmental effects of the proposed federal action.

Otsego also asserts that the greenhouse gas emissions associated with the production or consumption of natural gas must be considered under the Natural Gas Act's public interest standard. Br. at 36. But whether analyzed under NEPA or the Natural Gas Act, the fact remains that the specific configuration of the Project, coupled with uncertainties regarding the source and ultimate end use of gas potentially transported by the Project, preclude the development of any reasonable analysis of the associated upstream and downstream emissions.

Moreover, as the Commission explained, the pertinent issues under the Natural Gas Act's "public convenience and necessity" standard are those relating to the "'orderly development of plentiful supplies of electricity and natural gas at reasonable prices.'" Rehearing Order, 163 FERC ¶ 61,128 at P 43 (quoting

NAACP, 425 U.S. at 669-70), JA ___. As the Commission explained, a consideration of "[e]nvironmental effects that are not effects of the proposed project are extraneous" to the matters Congress directed the Commission to consider under NGA section 7(e) (Rehearing Order, 163 FERC ¶ 61,128 at P 43, JA __) – *i.e.*, whether the "proposed … operation, construction, [or] extension, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity." 15 U.S.C. § 717f(e).

Finally, the State amici suggest that the Commission should be compelled to go beyond the requirements of NEPA and analyze upstream and downstream greenhouse gas emissions because the states "are limited in their ability to address" such emissions. State Am. Br. at 5. But the Commission's jurisdiction is restricted to the interstate transportation of natural gas, 15 U.S.C. § 717(b), which – according to Sierra Club – accounts for only three percent of the greenhouse gas emissions arising from the production, transport, and consumption of natural gas potentially related to the Project. Sierra Club Am. Br. at 5. The Commission has little control over the production or consumption of natural gas. Rehearing Order, 163 FERC ¶ 61,128 at P 43, JA ___.

It is the states, not the Commission, who have control over natural gas production. And New York, one of the State amici and the home of the Project, has banned hydraulic fracturing production techniques. *See id*. P 37, JA ___. And

it is the states, not the Commission, who have the ability to regulate greenhouse gas emissions associated with the consumption of natural gas. For instance, many of the State amici (New York, Maryland, and Massachusetts) are members of the Regional Greenhouse Gas Initiative, a market-based emission trading program applicable to the power sector.[14] Others (such as Oregon, Washington, and the District of Columbia) have enacted renewable portfolio standards which direct how much of the energy used within a state comes from renewable resources.[15]

IV. THE COMMISSION REASONABLY ANNOUCED THE TERMINATION OF ITS TEMPORARY PRACTICE OF PROVIDING ENVIROMENTAL INFORMATION BEYOND THAT REQUIRED BY NEPA.

In the Rehearing Order, the Commission announced the cessation of its temporary practice of going beyond the requirements of NEPA and providing generalized information regarding the potential impacts associated with upstream natural gas production and downstream combustion of natural gas, even where any

[14] For an overview of the Regional Greenhouse Gas Initiative program, *see* https://www.rggi.org/. *See also New York Indep. Sys. Operator*, 122 FERC ¶ 61,186, P 18 n.10 (2008) (discussing program).

[15] For an overview of these standards *see* https://www.oregon.gov/energy/energy-oregon/Pages/Renewable-Portfolio-Standard.aspx (Oregon); https://www.commerce.wa.gov/growing-the-economy/energy/energy-independence-act/ (Washington); https://dcpsc.org/RPSFAQ (District of Columbia). *See also* 2018 Notice of Inquiry, 163 FERC ¶ 61,042 at P 45 (discussing variety of state plans or policies regarding greenhouse gas emissions).

increased emissions associated with such production and use are neither reasonably foreseeable nor causally related to the proposals before the Commission. 163 FERC ¶ 61,128 at P 42, JA ___; *see also supra* pp. 14-15. The Commission made clear that it would analyze upstream and downstream emissions when those emissions are indirect or cumulative impacts as contemplated by the Council of Environmental Quality's regulations. *Id*. Otsego and the State amici argue the Commission erred in announcing the cessation of its temporary practice in the context of an adjudication, rather than a rulemaking, and has limited public comment on the consideration of upstream and downstream impacts in any particular case. Br. at 38-40; State Amici at 22-26. They are wrong.

"[I]t is well settled that an agency is not precluded from announcing new principles in an adjudicative proceeding, and that the choice between rulemaking and an adjudication lies in the first instance within the agency's discretion." *POM Wonderful, LLC v. FTC*, 777 F.3d 478, 497 (D.C. Cir. 2015) (internal quotation omitted). *See also NLRB v. Bell Aerospace Co. Div. of Textron Inc*., 416 U.S. 267, 294 (1974) (same); *American Forest & Paper Ass'n v. FERC*, 550 F.3d 1179, 1183 (D.C. Cir. 2008). Otsego asserts that the Commission's choice "makes it virtually impossible for interested parties to comment on or secure court review." Br. 38-39. But as the State amici note (at 23-24), the Commission recently issued a Notice of Inquiry regarding potential revisions to it 1999 Certificate Policy

Statement on the certification of new natural gas facilities. *See supra* n.3. In that Notice of Inquiry, the Commission specifically sought comment on whether and how it should consider the potential greenhouse gas emissions from upstream production and downstream consumption of natural gas transported by a proposed project. *See* 2018 Notice of Inquiry, 163 FERC ¶ 61,042 at P 58. The Project-specific orders on review are not the agency's last word on its environmental review policy.

As for judicial review, the Commission will continue to consider on a case-by-case basis whether upstream and downstream emissions are sufficiently causally connected to, and are reasonably foreseeable effects of, the proposed action. *See* Rehearing Order, 163 FERC ¶ 61,128 at P 44, JA ___-___. To the extent a party disagrees with the Commission's conclusion in any particular case, it will be free to seek judicial review. The Commission's announcement of the termination of its temporary practice of going beyond what is required by NEPA will not affect that right. *See, e.g., Pac. Gas & Elec. Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974) ("A policy statement announces the agency's tentative intentions for the future. When the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued.").

CONCLUSION

For the foregoing reasons, the petition for review should be denied, and the Commission's orders should be affirmed.

Respectfully submitted,

James P. Danly
General Counsel

Robert H. Solomon
Solicitor

/s/ Robert M. Kennedy
Robert M. Kennedy
Senior Attorney

Federal Energy Regulatory Commission
Washington, D.C. 20426
Tel: (202) 502-8904
Fax: (202) 273-0901

January 25, 2019

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) and Circuit Rule 32(e), I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,194 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.

/s/ Robert M. Kennedy
Robert M. Kennedy
Senior Attorney

Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426
Phone: 202-502-8904
Fax: 202-273-0901
E-mail: robert.kennedy@ferc.gov

January 25, 2019

ADDENDUM

STATUTES
AND
REGULATIONS

TABLE OF CONTENTS

(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—

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-

lation, or order in effect before January 1, 1989. This subsection shall not apply to any provision of any State law, regulation, or order to the extent that such provision has as its primary purpose the protection of public safety.''

EMERGENCY NATURAL GAS ACT OF 1977

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

EXECUTIVE ORDER NO. 11969

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

PROCLAMATION NO. 4485

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

PROCLAMATION NO. 4495

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

§ 717a. Definitions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

AMENDMENTS

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

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)(1), 7291, and 7293 of Title 42, The Public Health and Welfare.

§ 717b. Exportation or importation of natural gas; LNG terminals

(a) Mandatory authorization order

After six months from June 21, 1938, no person shall export any natural gas from the United States to a foreign country or import any natural gas from a foreign country without first having secured an order of the Commission authorizing it to do so. The Commission shall issue such order upon application, unless, after opportunity for hearing, it finds that the proposed exportation or importation will not be consistent with the public interest. The Commission may by its order grant such application, in whole or in part, with such modification and upon such terms and conditions as the Commission may find necessary or appropriate, and may from time to time, after opportunity for hearing, and for good cause shown, make such supplemental order in the premises as it may find necessary or appropriate.

(b) Free trade agreements

With respect to natural gas which is imported into the United States from a nation with which there is in effect a free trade agreement requiring national treatment for trade in natural gas, and with respect to liquefied natural gas—

(1) the importation of such natural gas shall be treated as a ''first sale'' within the meaning of section 3301(21) of this title; and

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.

and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

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

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

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

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

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

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

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

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

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

COMMISSION ON POPULATION GROWTH AND THE AMERICAN FUTURE

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

EXECUTIVE ORDER NO. 11507

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

EXECUTIVE ORDER NO. 11752

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

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

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

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

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

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

(i) the environmental impact of the proposed action,

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

(iii) alternatives to the proposed action,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

AMENDMENTS

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

CERTAIN COMMERCIAL SPACE LAUNCH ACTIVITIES

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

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

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

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

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

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

SECTION 1. *Purpose*. The purpose of this order is to ensure that the Departments of the Interior, Agriculture, Commerce, and Defense and the Environmental Protection Agency implement laws relating to the environment and natural resources in a manner that promotes cooperative conservation, with an emphasis on appropriate inclusion of local participation in Federal decisionmaking, in accordance with their respective agency missions, policies, and regulations.

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

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

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

(i) facilitates cooperative conservation;

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

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

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

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

§ 1508.6 Council.

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

§ 1508.7 Cumulative impact.

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

§ 1508.8 Effects.

Effects include:

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

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

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

§ 1508.9 Environmental assessment.

Environmental assessment:

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

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

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

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

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

§ 1508.10 Environmental document.

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

§ 1508.11 Environmental impact statement.

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

§ 1508.12 Federal agency.

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

§ 1508.13 Finding of no significant impact.

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

CERTIFICATE OF SERVICE

I hereby certify that, on January 25, 2019, 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