ORAL ARGUMENT NOT YET SCHEDULED

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

No. 18-1218

LORI BIRCKHEAD, *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

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January 25, 2019

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties:

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

B. Rulings Under Review:

1. *Tennessee Gas Pipeline Company, L.L.C.*, 156 FERC ¶ 61,157 (2016) (Certificate Order), R. 427, JA ___; and

2. *Tennessee Gas Pipeline Company, L.L.C.*, 163 FERC ¶ 61,190 (2018) (Rehearing Order), R. 572, JA ___.

C. Related Cases:

This case has not previously been before this Court or any other court. A secondary issue in this case – 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 raised in (indeed is the only issue in) *Otsego 2000, Inc. v. FERC*, D.C. Cir. No. 18-1188. The Commission is filing its initial briefs in the *Otsego 2000* case and the *Birckhead* case on the same day.

/s/ Scott Ray Ediger
Scott Ray Ediger
Attorney

January 25, 2019

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Certificate Order	*Tennessee Gas Pipeline Company, L.L.C.*, 156 FERC ¶ 61,157 (2016), R. 427, JA ___
Citizens	Petitioners Lori Birckhead, Lane Brody (as CEO of Walden Puddle), Jim Wright, and Mike Younger
Commission or FERC	Federal Energy Regulatory Commission
Environmental Assessment or EA	Environmental Assessment for the Broad Run Project, issued March 11, 2016
Tennessee	Tennessee Gas Pipeline Company, L.L.C.
NEPA	National Environmental Policy Act
NGA	Natural Gas Act
P	Paragraph in a FERC order
Policy Statement	Certification of New Interstate Natural Gas Pipeline Facilities, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000)
Project	Broad Run Expansion Project
R.	An item in the record of this case
Rehearing Order	*Tennessee Gas Pipeline Company, L.L.C.*, 163 FERC ¶ 61,190 (2018), R. 572, JA ___

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STATEMENT OF THE ISSUES

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 Tennessee Gas Pipeline Company, L.L.C. (Tennessee). That certificate conditionally authorized Tennessee, which owns and operates interstate natural gas pipelines, to construct and operate the Broad Run Expansion Project (Project), consisting of natural gas compression facilities in West Virginia, Kentucky, and Tennessee. *Tenn. Gas Pipeline*

Company, L.L.C., 156 FERC ¶ 61,157 (2016) (Certificate Order), R. 427, JA ___, *order denying rehearing and dismissing clarification*, 163 FERC ¶ 61,190 (2018) (Rehearing Order), R. 572, JA ___.

The Project includes a Market Component and a Replacement Component. The Market Component includes two new compressor stations in West Virginia, one in Kentucky, and one in Davidson County, Tennessee, known as Compressor Station 563. Certificate Order P 4, JA ___. Compressor Station 563, which has two new 30,000 horsepower gas-fired turbine compressor units, is at issue in this case. *Id*., JA ___. The Replacement Component replaces compressor units at two compressor stations in Kentucky. *Id*., JA ___.

The issues on appeal, presented by Petitioners Lori Birckhead, Lane Brody, Jim Wright, and Mike Younger (collectively, Citizens), are:

(1) Whether the Commission reasonably complied with the National Environmental Policy Act (NEPA) when its Environmental Assessment analyzed two alternatives to the selected site (Compressor Station 563): (a) an alternative location in a neighboring county favored by the Citizens (site C1) (Br. 17-34); and (b) an alternative design at the selected location that used a smaller capacity compressor station (Br. 35-37); and

(2) Whether the Commission reasonably concluded that greenhouse gas emissions from downstream natural gas consumption and upstream natural gas

production are not indirect effects of the Project within the meaning of the National Environmental Policy Act. Br. 37-41.

STATUTORY AND REGULATORY PROVISIONS

Pertinent statutes and regulations are contained in the Addendum.

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY BACKGROUND

A. Natural Gas Act

The Natural Gas Act is designed "to encourage the orderly development of plentiful supplies of … natural gas at reasonable prices." *Pub. Utils. Comm'n of Cal. v. FERC*, 900 F.2d 269, 281 (D.C. Cir. 1990) (quoting *NAACP v. FPC*, 425 U.S. 662, 670 (1976)). To that end, section 1(b) grants the Commission jurisdiction over the transportation and wholesale sale of natural gas in interstate commerce. 15 U.S.C. §§ 717(b). Before a company may construct a natural gas pipeline, it must obtain from the Commission a "certificate of public convenience and necessity" under 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 NGA, the Commission shall issue a certificate to any qualified applicant upon finding that the proposed construction and operation of the pipeline facility "is or will be required by the present or future public

convenience and necessity." 15 U.S.C. § 717f(e). The Natural Gas Act empowers the Commission to "attach to the issuance of the certificate … such reasonable terms and conditions as the public convenience and necessity may require." *Id*.

B. National Environmental Policy Act

The Commission's consideration of an application for a certificate of public convenience and necessity triggers National Environmental Policy Act (NEPA) review. *See* 42 U.S.C. §§ 4321, *et seq*. NEPA sets out procedures to be followed by federal agencies to ensure that the environmental effects of proposed actions are "adequately identified and evaluated." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). "NEPA imposes only procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions." *Dep't of Transp. v. 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).

Council on Environmental Quality implementing regulations require agencies to consider the environmental effects of a proposed action by preparing either an environmental assessment, if supported by a finding of no significant

impact, or a more comprehensive environmental impact statement. *See* 40 C.F.R. § 1501.4.

The National Environmental Policy Act requires an environmental assessment to include a "brief discussion[] . . . of alternatives." 40 C.F.R. § 1508.9(b). NEPA requires consideration of direct effects ("caused by the action and occur at the same time and place") and indirect effects ("caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable"). 40 C.F.R. § 1508.8(a), (b). NEPA also requires consideration of cumulative effects, which are "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." 40 C.F.R. § 1508.7.

II. THE COMMISSION'S REVIEW OF THE PROJECT

A. The Broad Run Expansion Project

The Broad Run Expansion Project has a Market Component and a Replacement Component. The Market Component includes four new compressor stations:

- Compressor Station 118A in Kanawha County, West Virginia;
- Compressor Station 119A in Kanawha County, West Virginia;
- Compressor Station 875 in Madison County, Kentucky; and

- Compressor Station 563 in Davidson County, Tennessee. Certificate Order P 4, JA ___.

The Replacement Component includes new compression units at two existing compressor stations:

- Compressor Station 106 in Powell County, Kentucky; and
- Compressor Station 114 in Boyd County, Kentucky. Certificate Order P 7, JA ___.

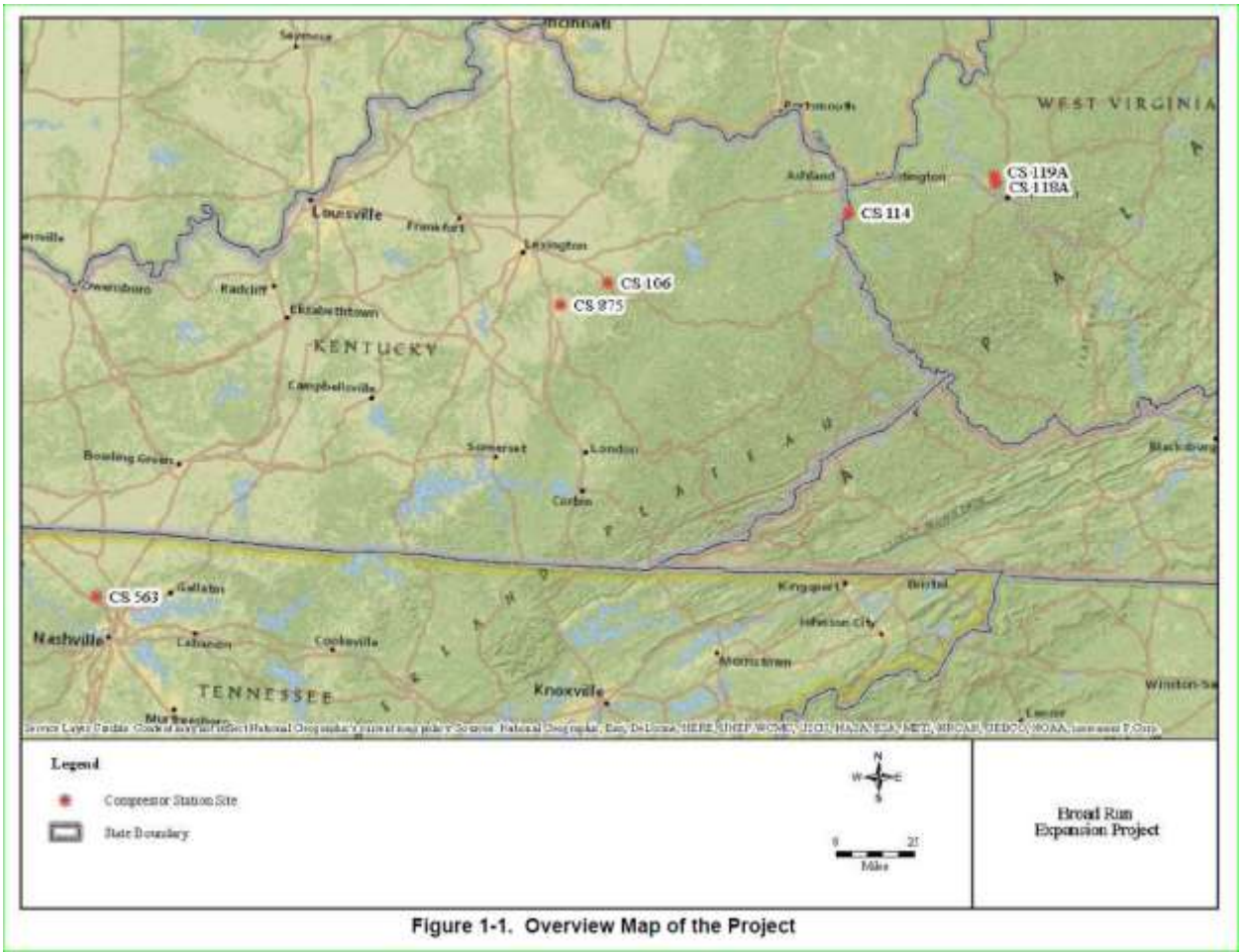

Figure 1-1. Overview Map of the Project

EA at 7, R. 385, JA ___.

The Replacement Component replaces older, less efficient compression facilities with new, more efficient compression facilities at Compressor Stations 106 and 114. In addition to the replacement of existing capacity, some incremental new capacity will be created at Compressor Stations 106 and 114, which will be dedicated to the Market Component. Certificate Order P 7, JA ___.

The Market Component will serve the "growing demand for firm transportation service to markets in the southeastern United States." Application at 4, R. 1, JA ___. The Replacement Component will "improve the efficiency and reduce certain emissions by replacing certain less efficient older existing compression facilities on [Tennessee's] system with newer, more efficient, cleaner burning, and lower emission compressor units." *Id.*, JA ___.

The Market Component adds sufficient capacity to allow for the transportation of up to 200,000 dekatherms per day. Antero Resources Corporation, which is engaged in the exploration, development, production, and acquisition of natural gas located in the Appalachian Basin in West Virginia and Ohio, subscribed to all of the incremental capacity to be created by the Market Component. *See* EA at 2, JA ___; Certificate Order P 16, JA ___. The incremental capacity will allow Antero Resources to transport the natural gas it produces to markets in the southeast United States. Application at 29, R. 1, JA ___.

B. Environmental Review

The Environmental Assessment addressed geology; soils; water resources and wetlands; vegetation, fisheries, wildlife, and threatened and endangered species; land use, recreation, and visual resources; cultural resources; air quality and noise; safety; socioeconomics; cumulative impacts; and alternatives. *See* Certificate Order P 44, JA ___. All substantive comments received in response to the Notice of Intent to Prepare an Environmental Assessment, 80 Fed. Reg. 26,239 (May 7, 2015), were addressed in the Environmental Assessment. Certificate Order P 110, JA ___.

The Environmental Assessment considered "a reasonable range of alternatives including the no-action alternative, system alternatives, . . . compressor station site alternatives, and compressor unit alternatives." *Id*. Commission staff evaluated a total of 12 alternative sites, including ones in Davidson, Robertson, and Cheatham Counties, Tennessee, when it considered alternative locations for the compressor station in Tennessee (Compressor Station 563). Based on an analysis of 18 different factors – including the fact that a landowner was willing to negotiate the sale of property at the preferred site – FERC staff concluded that none of these alternative sites would offer a significant environmental advantage over the proposed site. EA at 127-29, JA ___ - ___. Table 3-4 of the Environmental Assessment summarized all of this data. *Id*. at 128-29,

JA ___ - ___. The Environmental Assessment concluded that approval of the construction and operation of the Project would not constitute a major federal action significantly affecting the quality of the human environment. *Id*. at 131, JA ___; Certificate Order PP 49, 175, JA ___, ___.

C. The Certificate Order

On September 6, 2016, the Commission issued a conditional certificate of public convenience and necessity for the Broad Run Expansion Project. Certificate Order P 21, JA ___. The Commission applied the criteria set forth in its Policy Statement[1] to determine whether there is a need for the Project and whether the Project would serve the public interest. Certificate Order PP 13-22, JA ___ - ___. The Commission found market need, as evidenced by the precedent agreement with Antero Resources for 100 percent of the Project's capacity. *Id*. PP 16-17, JA ___ - ___.

The Certificate Order's environmental discussion considered the Environmental Assessment and all comments and other information in the record. *Id*. P 44, JA ___. The Commission found that the Project, if constructed and

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

operated as described in the Environmental Assessment and in compliance with the environmental conditions, would not constitute a major federal action significantly affecting the quality of the human environment. *Id*. P 175, JA ___.

Given its environmental conclusion, the Commission ultimately determined that the Project, with appropriate environmental conditions and mitigation measures, is required by the public convenience and necessity pursuant to section 7 of the Natural Gas Act, 15 U.S.C. § 717f. Certificate Order P 177, JA ___.

D. The Rehearing Order

On June 12, 2018, the Commission denied requests for rehearing filed by Citizens and others. As relevant here, the Commission rejected Citizens' arguments that: (1) Tennessee failed to demonstrate need for the Project, particularly for Compressor Station 563 (Rehearing Order PP 6-16, JA ___ - ___); (2) the Environmental Assessment erroneously relied on site ownership when comparing alternatives (*Id*. PP 18-28, JA ___ - ___); and (3) the Environmental Assessment erroneously limited the scope of environmental analysis to exclude climate change effects resulting from downstream consumption (*Id*. 61-70, JA ___ - ___) and upstream production (*Id*. P 58-60, JA ___ - ___).

SUMMARY OF ARGUMENT

The Commission satisfied all of its National Environmental Policy Act responsibilities when it approved the Broad Run Expansion Project. The

Commission reasonably and thoroughly analyzed alternatives to Tennessee's proposal, including potential alternative locations for the Davidson County, Tennessee compressor station (Compressor Station 563).

On rehearing to the agency, Citizens raised eight separate issues, but only three remain on judicial review. Citizens first assert a number of arguments with respect to their favored location (site C1), but these arguments do not demonstrate that the Commission failed to comply with NEPA. Citizens fundamentally err in their brief when they rest on the inaccurate description of their favored location (site C1) as "superior on every metric." Br. 13. *See also* Br. 18, 20. But NEPA only requires that the Commission consider the environmental effects of its action, not that it choose the environmentally superior alternative. Further, the record supports the Commission's determination that site C1 does not "offer significant environmental advantage over the proposed site." While some environmental factors weigh in favor of site C1, others weigh against it. The weighing process, which involved substantial record evidence about the selected location (Compressor Station 563) and all the alternative sites, not just the Citizens-favored location (C1), is what demonstrates compliance with NEPA. Finally, the Commission properly relied on site ownership when it considered the location for Compressor Station 563; Council on Environmental Quality regulations

contemplate the consideration of factors beyond strictly environmental concerns in selecting a preferred alternative.

Citizens' arguments with respect to a smaller-capacity facility at the selected location (Compressor Station 563) similarly fail. Citizens' arguments are based on flow diagrams that do not match the detail of the sophisticated hydraulic modeling used to properly design the compressor station.

Finally, the Commission reasonably declined to analyze greenhouse gas emissions from upstream natural gas production activities and downstream end use of gas that may be transported by the Project. Citizens err in their brief when they contend that this Court's decision in *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017), establishes a bright-line rule that the Commission must evaluate downstream and upstream greenhouse gas emissions as NEPA indirect effects in all circumstances. For purposes of NEPA analysis, the Commission's approval of the Project is not the legally relevant cause of any downstream consumption of natural gas. Moreover, the Commission reasonably concluded that, given the final destination of the natural gas could only be narrowed down to the "southeastern United States," greenhouse gas emissions from downstream consumption are not reasonably foreseeable. Similarly, the Commission reasonably concluded that approval of the compressor stations would not induce upstream natural gas

production, and that any effects on upstream production would not be reasonably foreseeable.

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 Natural Gas Act section 7 certificate is within the Commission's discretion, the Court does not substitute its judgment for that of the Commission. *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1308 (D.C. Cir. 2015). The Court evaluates only whether the Commission considered relevant factors and whether there was a clear error of judgment. *Id.*

The arbitrary and capricious standard also applies to challenges under the National Environmental Policy Act. *Nevada v. Dep't of Energy*, 457 F.3d 78, 87

(D.C. Cir. 2006). "[T]he court's role is 'simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious.'" *Nat'l Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323, 1327 (D.C. Cir. 2004) (*quoting Balt. Gas & Elec.*, 462 U.S. at 97-98).

Agency actions taken pursuant to NEPA are entitled to a high degree of deference. *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 377-78 (1989). A "rule of reason governs 'both which alternatives the agency must discuss, and the extent to which it must discuss them.'" *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991) (quoting *Alaska v. Andrus*, 580 F.2d 465, 475 (D.C. Cir. 1978)). *See also Public Citizen*, 541 U.S. at 767 ("rule of reason" guides an agency's implementation of NEPA); *Minisink Residents for Envtl. Pres. & Safety v. FERC*, 762 F.3d 97, 112 (D.C. Cir. 2014) (same). This Court has consistently declined to "flyspeck" the Commission's environmental analysis. *City of Boston Delegation v. FERC*, 897 F.3d 241, 251 (D.C. Cir. 2018). "[A]s long as the agency's decision is fully informed and well-considered, it is entitled to judicial deference and a reviewing court should not substitute its own policy judgment." *Nat. Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288, 294 (D.C. Cir. 1988) (internal quotations omitted).

II. THE COMMISSION'S ALTERNATIVES ANALYSIS FULLY COMPLIED WITH NEPA BY THOROUGHLY EXAMINING THE CITIZENS-FAVORED LOCATION (SITE C1).

The National Environmental Policy Act requires an environmental assessment to include a "brief discussion[] . . . of alternatives." 40 C.F.R. § 1508.9(b). The responsibility to determine how those alternatives will be evaluated rests with the action agency, which "need follow only a rule of reason." *Citizens Against Burlington*, 938 F.2d at 195 (internal quotation marks omitted).

The Commission must – as it did in this case – identify reasonable alternatives and look hard at the environmental effects of the Project. *See Midcoast Interstate Transm., Inc. v. FERC*, 198 F.3d 960, 967-68 (D.C. Cir. 2000). In response to comments about the Tennessee-proposed location for Compressor Station 563, the Commission considered 12 alternative locations for that station. EA at 127, JA ___. The Commission found that none of the 12 alternative locations offered a significant environmental advantage over the proposed site. *Id*. On review, Citizens' alternatives arguments fail to establish that this determination was erroneous, much less that the Commission failed to comply with the procedural dictates of NEPA.

Citizens fundamentally err when they inaccurately describe their preferred location (site C1) as "superior on every metric." Br. 13. *See also* Br. 18 (stating that the Citizens-favored location (site C1) is "environmentally superior on every

metric" and that "all evidence point[ed] in the direction" of site C1), 20 (section heading arguing that "Site C1 Was Environmentally Superior on All Counts"). Closer scrutiny of the record demonstrates that the Commission engaged in a far more nuanced balancing exercise when it selected the location for the compressor station located in Tennessee (Compressor Station 563). *See Citizens Against Burlington*, 938 F.2d at 195 (rule of reason governs action agency's determination of how to evaluate alternatives).

A. NEPA Does Not Require The Commission To Choose An Environmentally Superior Alternative.

Citizens assert their favored location (site C1) was "environmentally superior on all counts." Br. 20-23. This fundamental premise underlying Citizens' brief, even if true, does not provide grounds for finding the Commission's NEPA analysis inadequate. Moreover, Citizens ignore the "substantial weight" the Commission may accord "to the preferences of the applicant and/or sponsor in the siting and design of the project" when considering alternatives. *City of Grapevine v. Dep't of Transp.*, 17 F.3d 1502, 1506 (D.C. Cir. 1994) (quoting *Citizens Against Burlington*, 938 F.2d at 197).

NEPA does not impose an obligation to select the most environmentally benign alternative. *See Myersville*, 783 F.3d at 1324 ("Even if an agency has conceded that an alternative is environmentally superior, it nevertheless may be entitled under the circumstances not to choose that alternative."); *see also FPC v.*

Transcon. Gas Pipeline Corp., 365 U.S. 1, 7 (1961) (the Commission is "the guardian of the public interest," entrusted "with a wide range of discretionary authority"); *Midcoast Interstate*, 198 F.3d at 969 (affirming Commission's reliance on non-environmental values to support an alternative that was not environmentally superior). NEPA simply requires agencies to take a hard look at the environmental consequences, as the Commission has done in this case. *See Sierra Club v. Dep't of Energy*, 867 F.3d 189, 196 (D.C. Cir. 2017); *Del. Riverkeeper Network v. FERC*, 857 F.3d 388, 394 (D.C. Cir. 2017); *Myersville*, 783 F.3d at 1322; *Minisink*, 762 F.3d at 111; *see also Sierra Club*, 867 F.3d at 196 ("NEPA does not dictate particular decisional outcomes, but merely prohibits uninformed – rather than unwise – agency action.") (internal quotation omitted); *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 503 (D.C. Cir. 2010) (explaining that NEPA ensures a "fully informed and well-considered decision, not necessarily the best decision") (internal quotation omitted).

B. The Commission Took A Hard Look At Site C1 And Concluded, Based On Record Evidence, That It Does Not Offer Significant Environmental Advantage Over The Selected Location For Compressor Station 563.

The Commission went beyond its Council on Environmental Quality mandate that it provide a "brief discussion[] . . . of alternatives," 40 C.F.R. § 1508.9(b), when it compared Tennessee's proposed location (Compressor Station

563) to the Citizens-favored location (site C1) using 18 separate criteria. EA at 128-29, JA ___ - ___ (Table 3-4).

After considering the data in Table 3-4 of the Environmental Assessment, the Commission acknowledged that "some factors are more favorable at [the C1] site (e.g., less prime farmland would be affected, no high seismicity areas or faults are within 10 miles, and 12 fewer residences would be within 0.5 mile of the facility)." Certificate Order P 111, JA ___. But the Certificate Order also recognized that "[s]ome factors are less favorable (e.g., greater area of steep slopes and an intermittent waterbody would be crossed)." *Id.* The record supports the Commission's analysis of these factors, which "do not necessarily carry equal weight." *Id.*

As detailed below, Citizens' discussion of the advantages and disadvantages of their favored location (site C1) (Br. 20-23) either includes factors the Commission considered in its analysis, misstates the record, or constitutes unnecessary "flyspecking," which "encroaches on the deference to which the Commission is entitled for its technical analysis." *Myersville*, 783 F.3d at 1324; *see also id.* 1322-23 ("this court applies a 'rule of reason' to an agency's NEPA analysis and has repeatedly refused to 'flyspeck' the agency's findings in search of any deficiency no matter how minor") (internal quotation omitted).

1. The Citizens-Favored Location (Site C1) did not present any environmental advantages with respect to forested impacts.

Citizens misstate the acres of forest that would be affected by their favored location (site C1). Br. 20 (chart showing C1 affecting 33.8 acres of forest). The Commission concluded that the selected location (Compressor Station 563) and the Citizens-favored location (site C1) would affect a similar amount of forest: 43.2 acres for site C1 and 42.8 acres for Compressor Station 563. Certificate Order P 111, JA ___. Citizens' claimed 33.8 acres perpetuates an inadvertent error in Table 3-4 of the Environmental Assessment, which omitted 9.4 acres of evergreen forest when tabulating the acres affected. *Id*. P 111, JA ___; *see also* Rehearing Order P 24 n.40, JA ___; Tennessee November 12, 2015 Filing, revised Resource Report 10 at 24-25, R. 346, JA ___ (revised Table 10-4C showing 43.2 acres of forest affected by site C1: deciduous forest (31.6 acres), evergreen forest (9.4 acres), and mixed forest (2.2 acres)). Accordingly, the Commission reasonably determined that Compressor Station 563 and site C1 would affect a similar number of forest land acres.

2. The Commission reasonably analyzed potential impacts to prime farmland.

Citizens stress that their favored location (site C1) will only affect 0.7 acres of prime farmland, whereas the selected location (Compressor Station 563) will affect 23.6 acres. Br. 20. The Certificate Order acknowledged that construction of

the compressor station at the selected location (Compressor Station 563) would affect more acres of prime farmland. Certificate Order P 111, JA ___. Thus, the Commission did not ignore or overlook prime farmland. Notably, however, the Environmental Assessment pointed out that the selected location (Compressor Station 563) was "not currently used in agricultural production." EA at 30, JA ___.

3. The Commission properly accounted for the number of residences that would be affected by the preferred site.

Citizens emphasize the number of residences within a half-mile of the selected location (Compressor Station 563) and the Citizens-favored location (site C1). Br. 20. The Environmental Assessment found 25 residential structures within a half-mile of Compressor Station 563 and 13 residential structures within a half-mile of site C1. EA at 129, JA ___. Although Citizens emphasize the number of "properties" close to Compressor Station 563, the Commission rejected this argument, and cited the EA's calculation of the number of "residential structures within 0.5 mile" of the compressor station. Rehearing Order P 23, JA ___ (citing EA at 129, JA ___). Citizens state that "data from the *Davidson County Records* submitted to the Commission show only one residence within .5 miles of Site C1." Br. 20 n.12 (emphasis added). But site C1 is not in Davidson County; it is in Cheatham County. EA at 128, JA ___. In any event, the Commission

acknowledged that there are fewer residences close to site C1. *Id*. at 127-28, JA ___ - ___; Certificate Order P 111, JA ___; Rehearing Order P 22 n.34, JA ___.

However, as the Commission explained, "proximity to a proposed [compressor] site does not necessarily indicate potential environmental impacts on residences." Rehearing Order P 23, JA ___. *See* Certificate Order P 146, JA ___ (observing that "increases in ambient noise resulting from the operation of Compressor Station[] 563 … will not be readily noticeable, and in only one instance will they be perceptible"); EA at 79, JA ___ ("[N]o visual impacts are anticipated from construction and operation of Compressor Station 563."); *id*. at 105, 109; JA ___, ___ (mitigation measure that will "protect the public from activity interference and annoyance outdoors in residential areas"); Certificate Order, Appendix C, Environmental Conditions, Condition 16, JA ___ (noise condition).

4. The Commission appropriately considered an intermittent stream to be affected by site C1.

The Environmental Assessment showed no intermittent streams crossed by pipeline facilities at the selected location (Compressor Station 563). EA at 128, JA ___. In arguing that this conclusion was erroneous (Br. 22-23), Citizens misread the record. Only a fence at the selected location (Compressor Station 563) has the potential to affect a fully intermittent stream. EA at 38, JA ___ (Table 2-2, Waterbodies Crossed or Otherwise Impacted by the Project). The fence "will not

impede flow or require fill within streams that cross the compressor station properties." Tennessee July 22, 2015 Environmental Information Request Response at 2, R. 240, JA ___.

5. The Commission properly emphasized the avoidance of sloped terrain.

Citizens acknowledge that their favored location (site C1) has more sloped terrain than the selected location (Compressor Station 563), but question the importance of this factor because some of the other proposed compressor station locations had "even more acres of sloped terrain." Br. 23. But such a comparison is not apt because Citizens are not comparing apples to apples. That other compressor stations, located in other parts of the country, have no suitably flat alternatives says nothing about the wisdom of avoiding steep sloped terrain when possible. *See*, *e.g.* EA at 126, JA ___ (preferred site and alternatives for compression facility in West Virginia (Compressor Station 119) are located "in an area of steep slopes with high landslide potential").

As Tennessee explained, it considered "the flattest portions of the site … first to minimize the amount of construction work required on steep slopes." Tennessee July 22, 2015 Filing, Data Request Response 50, R. 240, JA ___. Tennessee further explained that creating a suitably flat surface results in "[s]ignificant removal and placement of overburden materials [that] increases the potential for safety-related incidents, increases the potential for indirect impacts to

environmental resources (e.g., materials rolling downhill into resource areas), and greatly increases the length of time the site is in a disturbed state." *Id*. The Commission reasonably found the avoidance of steep sloped terrain persuasive.

6. The Commission considered the idea that a smaller sized compressor station at site C1 could have offered a significant environmental advantage for air quality, but reasonably determined other factors outweighed any air quality advantages site C1 offered.

Citizens assert that the Commission never considered that a reduced size compressor station at their favored location (site C1) would bring air quality benefits. Br. 21-22 (section I.A.); 29-30 (citing *W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1050 (9th Cir. 2013)); 31-34 (section II.A.). Citizens reason that "[s]ite C1 also offers an added environmental advantage over the proposed site because it better splits the distance between the two adjacent compressor stations, thereby allowing the company to decrease the size of the compressor station and reduce air emissions by 40 percent." Br. 21-22.

The Commission weighed whether the Citizens-favored location (site C1) would have fewer emissions. Rehearing Order P 26, JA ___. The Commission concluded site C1 would not offer a significant air quality environmental advantage over the selected location (Compressor Station 563). Rehearing Order P 26, JA ___. Specifically, the Commission found that Compressor Station 563 "will not have a significant effect on regional air quality," since: (1) its emissions

are projected to be well below the National Ambient Air Quality Standards; (2) Tennessee will be required to comply with various Clean Air Act regulations; and (3) Tennessee has committed to various air quality mitigation measures. *Id*. *See* EA at 104, JA ___. Thus, "any improvement in air quality impacts by [Citizens' favored location (site C1)] will not be significant." Rehearing Order P 26, JA ___.

Citizens discount this reasoning. Br. 22. Citizens assert that the Commission "never made a finding as to whether a reduced compressor station at Site C1 was feasible." Br. 33. However, the criticism misses the mark because the Commission assumed the feasibility of site C1 when it concluded that any air quality advantage offered by site C1 would not outweigh other factors.

Citizens make much of the fact that emissions at the selected location (Compressor Station 563) exceeds major source thresholds for nitrogen oxides (NOx) and carbon monoxide (CO). Br. 33-34. However, exceeding the major source thresholds merely means that Compressor Station 563 would be subject to the Clean Air Act Title V operating permit program, which "generally does not impose any substantive pollution-control requirements;" rather it "facilitate[s] compliance and enforcement by consolidating into a single document all of a facility's obligations under the [Clean Air Act]." *Util. Air Regulatory Grp. v. EPA.*, 573 U.S. 302, 310 (2014). *See* EA at 97, JA ___.

Here, the Commission dedicated substantial attention to Citizens' arguments about their favored location (site C1) and its potential air quality advantages but ultimately concluded that the air quality benefits from site C1 would not outweigh other factors. *See* Rehearing Order P 26, JA ___. Nothing more is required. *See Citizens Against Burlington*, 938 F.2d at 196 (this Court will "uphold [an agency's] discussion of alternatives so long as the alternatives are reasonable and the agency discusses them in reasonable detail"); *North Slope Borough v. Andrus*, 642 F.2d 589, 600 (D.C. Cir. 1980) (decision regarding amount of detail to include in a NEPA document is for the agency and is guided by the "rule of reason"); *Citizens Against Burlington*, 938 F.2d at 195 (same).

7. Summary: The Commission balanced numerous environmental factors in its alternatives analysis.

When balancing a "number of environmental factors," "there were tradeoffs between environmental resources identified during the alternatives analysis, as minimization of impacts on one set of resources had to be compared to increased impacts on a different set of resources." EA at 124, JA ___. As found in the Certificate Order, some factors favored the Citizens-favored location (site C1) and some factors favored the selected location (Compressor Station 563), leaving the Commission well within the bounds of rational decision-making when it concluded that site C1 did not offer significant environmental advantage.

C. The Commission Appropriately Considered Site Ownership When Siting Compressor Station 563.

Citizens' argument (Br. 10-11) that the Commission improperly relied on site ownership in analyzing site C1 is misplaced.

Citizens claim that "there is no indication that Tennessee had ever contacted the Site C1 owner." Br. 10-11. But the record shows otherwise. *See* Tennessee's November 12, 2015 Filing, Revised Resource Report 10, Alternatives Analysis at 26, R. 346, JA ___ (revised Table 10-4C, Estimated Impacts for [Compressor Station 563] Site Options, indicating owner of site C1 "unlikely" to sell).

An "agency is not constrained by NEPA from deciding that other values outweigh the environmental costs." *Robertson*, 490 U.S. at 350. "[A]s an expert agency, the Commission is vested with wide discretion to balance competing equities against the backdrop of the public interest, and the exercise of that discretion will not be overturned unless the Commission's action lacks a rational basis." *Columbia Gas Transmission Corp. v. FERC*, 750 F.2d 105, 112 (D.C. Cir. 1984).

Council on Environmental Quality regulations encourage the identification of the agency's "preferred" alternative, which can be an alternative that advances the agency's policy aims, not necessarily the alternative with the fewest strictly environmental impacts. 40 C.F.R. § 1502.14(e). *See Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 712 (10th Cir. 2010) (citing 40 C.F.R.

§ 1502.14(e) for the proposition that "[a]n agency can have a preferred alternative in mind when it conducts a NEPA analysis"); *Comm. of 100 on Fed. City v. Foxx*, 87 F. Supp. 3d 191, 205-06 (D.D.C. 2015) (citing 40 C.F.R. § 1502.14(e) and explaining that NEPA "seeks to strike a careful balance" between "consider[ing] potential environmental effects objectively and in good faith" and "policy objectives" that lead the agencies to "prefer one course of action over another from the beginning of a project"). The Environmental Assessment has merely done so here.

Consistent with its established policy, the Commission believed it was appropriate to place weight upon avoidance of unnecessary use of eminent domain when analyzing alternatives to the proposed site. *See* Policy Statement, 88 FERC at ¶ 61,737 (the Commission's NGA analysis would "appropriately consider … the unneeded exercise of eminent domain"). This was also an important factor for Tennessee when identifying its preferred site for Compressor Station 563. *See* Tennessee Application at 7, JA ___ (locations for the compressor stations selected "after taking into consideration several factors, including … the willingness of landowners to sell the required parcels of land"); Tennessee November 12, 2015 Filing, Revised Resource Report 10, Alternatives Analysis at 2 (same). And again, the Commission's "consideration of alternatives may accord substantial weight to

the preferences of the project applicant … in the siting and design of the project." *City of Grapevine*, 17 F.3d at 1506.

Citizens argue that reliance on site ownership is incompatible with NEPA and violates the statute's prohibition of advance actions that prejudice the agency's selection of alternatives. Br. 19, 26-29. Citizens appear to base this theory on a misguided application of the NEPA principle that "a non-federal applicant seeking federal authorization for a project may not take any action concerning the project that would have an adverse environmental impact or limit the choice of reasonable alternatives." Br. 26. *See* 40 C.F.R. § 1506.1(a). However, none of these things has happened.

First, Tennessee took no action that had an adverse impact on the environment prior to issuance of the Certificate Order. A voluntary transfer of land is just that: voluntary, and would result in no environmental impacts. *See Nat'l Audubon Soc'y v. Dep't of Navy*, 422 F.3d 174, 204 (4th Cir. 2005) ("the record fails to support the idea that simple title transfers will injure the environment").

Second, land ownership did not limit the Commission's choice of reasonable alternatives. Here, Tennessee's decision to obtain voluntarily property rights for a project that may or may not be approved by the Commission at the proposed location, or may or may not be approved at all, is done at its own risk. *See Nexus*

Gas Transmission, LLC, 164 FERC ¶ 61,054, at P 78 (2018) (explaining that an applicant for a certificate of public convenience and necessity under Natural Gas Act section 7 "bears the risk that a certificate will be denied, or that the route will be changed notwithstanding … acquisition of property rights"). Moreover, the Commission explained that site ownership was not the determinative factor. *See* Rehearing Order P 25, JA ___ (stating that "site ownership is not dispositive"). The Commission merely concluded that consideration of land ownership was consistent with Commission policy regarding eminent domain. Such an approach did not limit the choice of reasonable alternatives.

III. THE COMMISSION REASONABLY REJECTED THE ALTERNATIVE OF A SMALLER CAPACITY FACILITY AT THE SELECTED LOCATION (COMPRESSOR STATION 563).

A. The Robertson Comments, Filed After The Deadline For Filing A Rehearing Request, Should Be Disregarded As An Untimely Rehearing Request Filed By A Non-Party.

Citizens concede that when they filed their rehearing request on October 6, 2016 (R. 439, JA ___), they "could not independently verify or challenge the Commission's finding that the compressor station was appropriately sized." Br. 5. Because the Commission properly rejected subsequently filed comments, this Court should dismiss the challenge related to the size of Compressor Station 563. *See* Rehearing Order P 11, JA ___.

On August 7, 2017, William Robertson, a non-party, filed comments asserting Compressor Station 563 was overbuilt. Robertson August 7, 2017 Comments, R. 504, JA ___. Citizens rely extensively on Dr. Robertson's comments (Br. 9-11, 22 n.16, 35-36), which were filed over ten months after the Natural Gas Act's 30-day deadline for filing a rehearing request. *See* NGA Section 19(a), 15 U.S.C. § 717r(a).

Although the Natural Gas Act provides for this Court to have jurisdiction over a matter raised after the 30-day deadline, there must be a finding that a "party" had "a reasonable ground for failure" to timely file a rehearing request. NGA Section 19(b), 15 U.S.C. § 717r(b). But Dr. Robertson was not a party to the administrative proceedings. And none of the Citizens sought to "supplement[] their rehearing request or otherwise referred to Dr. Robertson's newly filed analysis." Rehearing Order P 11, JA ___. As a result, the Court lacks jurisdiction to consider any arguments premised on this analysis. 15 U.S.C. § 717r(b).

Finally, even if Citizens had supplemented their rehearing request, there were no "reasonable grounds for failure to do so." NGA section 19(b), 15 U.S.C. § 717r(b). Citizens have failed to identify any reasonable grounds for failing to supplement their request for rehearing.

B. The Record Supports the Commission's Determination That Need Existed For Compressor Station 563 As Designed By Tennessee.

Citizens argue that the Commission failed to consider a smaller compressor station at the selected location (Compressor Station 563). Br. 35-36. But that is incorrect. The Commission carefully and thoroughly considered Citizens' assertion about the size of Compressor Station 563, and there is record support for the Commission's determinations.

The Commission rejected the idea of a smaller compressor station at the selected location because it would not serve the Broad Run Expansion Project's purpose of providing 200,000 dekatherms of transportation capacity – capacity for which there was a "strong showing of need." Certificate Order P 17, JA ___. Commission staff's independent analysis of Tennessee's pipeline system confirmed that the project, including Compressor Station 563, had been properly designed to provide the necessary 200,000 dekatherms per day of incremental capacity. Rehearing Order PP 11-16, JA ___ - ___.

The flow diagrams used by Citizens to challenge this finding were inferior to the detailed and sophisticated hydraulic models confirming that the selected location (Compressor Station 563) was properly sized. Rehearing Order P 14, JA ___. Citizens acknowledge that Dr. Robertson did not analyze the hydraulic models (Br. 11), and the record does not demonstrate that Citizens followed the procedures at 18 C.F.R. § 388.113(g)(4) to gain access to them.

The flow diagrams "generally illustrate how a system operates, but they typically do not include all design assumptions underlying the results they depict." Rehearing Order P 14, JA ___. The analysis offered by Citizens thus relies on "an over-simplified analysis of Tennessee's proposal that lacks many of the design assumptions underlying the project." *Id*. *See id*. P 13, JA ___. By contrast, Commission staff "used an industry standard hydraulic pipeline simulation software package to evaluate whether the proposed project has been properly designed to meet existing and proposed system delivery requirements." *Id*. *See* Tennessee December 2, 2015 Filing, R. 348, JA ___ (cover letter explaining filing of revised flow diagrams and modified hydraulic models). This analysis confirmed that Compressor Station 563 was properly designed at the selected site. The Commission's determination regarding disputed technical facts such as technical aspects concerning the design of a compressor station is based upon its expertise and is entitled to "an extreme degree of deference." *Del. Riverkeeper*, 857 F.3d at 396 (quoting *Myersville*, 783 F.3d at 1308).

The Commission also addressed Dr. Robertson's attempts to bolster his view about the size of the Compressor Station 563 by comparing it to another compressor station on a different pipeline system. Rehearing Order P 15, JA ___. The Commission explained that such comparisons were overly simplistic, and ignore such factors as "gas volumes transported, system design operating pressure

before and after the compressor station, compression ratio, design operating temperatures, gas flow velocities, and operational efficiencies for the compressor units." *Id.*, JA ___.

The Commission approved "incremental recourse reservation and commodity charges for firm service using the proposed Market Component facilities that are calculated to recover the incremental cost of service attributable to … these facilities." Certificate Order P 15, JA ___. Such an incremental rate prevents existing customers from subsidizing the project. *Id.* As an alternative to the recourse rates, Tennessee and Antero Resources entered into an agreement for Antero Resources to pay negotiated rates. *Id.* P 6, JA ___. "If there were no objective market demand for the additional gas, no rational company would spend money to secure the excess capacity." *Twp. of Bordentown, New Jersey v. FERC*, 903 F.3d 234, 262 (3d Cir. 2018). Tennessee, as the project sponsor, is entitled to deference in the design of the Broad Run Expansion Project. *See City of Grapevine*, 17 F.3d at 1506.

IV. THE COMMISSION REASONABLY DECLINED TO ANALYZE THE GREENHOUSE GAS EMISSIONS FROM DOWNSTREAM CONSUMPTION AND UPSTREAM PRODUCTION.

The Commission estimated the greenhouse gas emissions from construction and operation of the Project. Rehearing Order P 57, JA ___. The Environmental Assessment, citing the United States Global Change Research Program, discussed

the secondary impacts resulting from greenhouse gas emissions to the southeast region of the United States, including rising sea levels; increasing temperatures and associated increase in frequency, intensity, and duration of extreme heat events; and decreased water availability. EA at 118, JA ___. *See* Rehearing Order P 57, JA ___.

Citizens assert that this analysis was not enough and that the Commission should also have analyzed indirect greenhouse gas emissions associated with downstream consumption and upstream production activities. *See* Br. 37-40 (downstream) and 41 (upstream). The Commission reasonably concluded, however, that such impacts were not causally related to the Commission's approval of the Project or reasonably foreseeable. As a result, they are not Project-related impacts and need not be analyzed under NEPA as indirect effects of Project approval.

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

Citizens assert that the Commission's failure to quantify downstream emissions runs afoul of this Court's decision in *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017). Br. 37. Citizens fundamentally err in their brief (Br. 15, 37) when they characterize *Sierra Club* as establishing a bright-line rule that the

Commission must evaluate downstream and upstream greenhouse gas emissions in all circumstances.

Sierra Club, 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 project's "entire purpose" was to transport gas that will be burned in those power plants. *Id*. 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 "greenhouse-gas emissions are an indirect effect of authorizing *this* project, which FERC could reasonably foresee." *Id*. at 1374 (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) (quoting *Sierra Club*, 867 F.3d at 1371-74).

Citizens' 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 v. Jewell*, 738 F.3d 298, 312 (D.C. Cir. 2013) (quoting *Duncan's Point Lot Owners Ass'n, Inc. v. FERC*, 522 F.3d 371, 376 (D.C. Cir. 2008)).

Here, by contrast, gas transported by the Broad Run Expansion Project will go to a broad swath of the country, *i.e.* southeastern United States. *See* Rehearing Order P 27, JA ___. As a result, the Commission does not know where, by whom, or how (*i.e.*, to meet new demand, to replace other gas supplies, or to replace higher emitting fuels) gas transported by the Project may be used. Accordingly, the Commission found that it was necessary to review the unique record of this

proceeding to determine whether downstream greenhouse gas emissions are an indirect effect of the Project.

1. Approval of the Broad Run Expansion Project will not cause downstream consumption.

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." *Public 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.

In this case, downstream consumption is not sufficiently casually connected to the Project to be an indirect impact. The Commission found that the record did not support the conclusion that approval of the Broad Run Expansion Project "will spur additional identifiable gas consumption." Rehearing Order P 61, JA ___. Rather than identifying any specific downstream consumption, the record simply reveals that the Project's sole shipper, a natural gas producer, will use the capacity

provided by the Project to deliver natural gas into the interstate natural pipeline grid and not to a specific end user. *See id*. Finally, the Commission found that "end use consumption of natural gas will occur regardless of whether the project … is approved." *Id*.

2. Emissions from downstream consumption of gas to be transported by the Broad Run Expansion Project are not reasonably foreseeable.

To determine whether an effect is "reasonably foreseeable," the agency must engage in "reasonable forecasting and speculation,' with *reasonable* being the operative word." *Sierra Club v. Dep't of Energy*, 867 F.3d at 198. Here, the Commission only knows with respect to end use is that the natural gas transported by the Project is destined for the "southeastern United States." Rehearing Order P 27, JA ___. The "southeastern United States" is hardly akin to the specific destination of the natural gas at issue in *Sierra Club v. FERC*, which led that Court to conclude that additional emissions from end use were reasonably foreseeable. 867 F.3d at 1371-72.

In light of the broad geographic region in which end use may ultimately occur (southeastern United States), the "Commission does not know where the gas will ultimately be consumed or what fuels it will displace, and likely neither does the entity over which the Commission has jurisdiction, *i.e.*, the transporting pipeline." Rehearing Order P 61, JA ___. Without this information, the

Commission could not assess whether any natural gas transported by the Project will satisfy new, incremental demand (thereby increasing emissions), displace existing natural gas supplies (thereby holding emission levels steady), or displace higher emitting fuels (thereby decreasing emissions).

Under these circumstances, the Commission reasonably found that "[a]ny attempt to quantify downstream [greenhouse gas] emissions on the record before [it] would result in a number so imprecise as to be meaningless." Rehearing Order P 61, JA ___. Citizens challenge this conclusion by citing to other cases where downstream emissions were found to be an indirect effect. Br. at 37-39. But these district court cases all involve an agency's approval of fuel extraction projects. *See San Juan Citizens All. v. U.S. Bureau of Land Mgmt.*, 326 F. Supp. 3d 1227 (D.N.M. 2018) (approval of oil and gas lease); *W. Org. of Res. Councils v. U.S. Bureau of Land Mgmt.*, 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. Appx. 799 (10th Cir. 2016). By contrast, the Commission here did not approve the extraction of fuel where more could be known about both the source of

the natural gas and its destination. *See* Rehearing Order P 61, JA ___ (explaining that Antero Resources will deliver the natural gas "into the interstate natural gas pipeline grid and not to a specific user" and that the entity over which the Commission has jurisdiction, Tennessee, likely does not know where the natural gas will ultimately be consumed).

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

Finally, Citizens state that the Commission erred by "failing to consider the project's upstream impacts such as induced gas production." Br. 41. Citizens do not cite any authority, or even identify whether they believe upstream production falls within the scope of NEPA as an indirect effect, 40 C.F.R. § 1508.8(b), or as a cumulative effect, 40 C.F.R. § 1508.7. Instead, Citizens simply assume that, because Antero Resources has contracted for the full transportation capacity of the Project, upstream production must be causally related to approval of the Project and that upstream impacts are reasonably foreseeable. Br. 41.

Citizens' understanding of the relationship between the Commission's consideration of need and upstream production is backwards. The Commission understands that "natural gas production and transportation facilities are all components of the general supply chain," but it does not follow that "the Commission's approval of [the Project] will cause or induce the effect of

additional or further shale gas production." Certificate Order P 74, JA ___. "The Broad Run Expansion Project is responding to the need for transportation, not creating it." *Id*. The Commission found that multiple other factors could potentially induce gas production. *See id*. P 82, JA ___ ("As we have explained previously, factors such as market prices and production costs, among others, drive new drilling.").

In addition, the Commission reasonably found that upstream production was not reasonably foreseeable. The Commission concluded "there is no record evidence that the Broad Run Expansion Project will induce incremental production of natural gas and, even if additional gas is induced, the amount, timing, and location of such development activity is speculative." *Id*. P 84, JA ___. "[E]ven where both the producer of gas to be shipped on a pipeline and the general location of that producer's existing wells" are known, "the Commission could only speculate with regard to the number or location of potential additional wells." Rehearing Order P 58, JA ___.

In their brief, Citizens point to nothing in the record that would help the Commission understand the amount, timing, and location of induced production. *See Sierra Club v. 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 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 Commission'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 Environmental Assessment).

CONCLUSION

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

Respectfully submitted,

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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 this brief contains 8,853 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in Times New Roman 14-point font using Microsoft Word 2013.

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January 25, 2019

ADDENDUM

STATUTES
AND
REGULATIONS

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Statutes

Regulations

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

HISTORICAL AND REVISION NOTES

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

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

AMENDMENTS

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

§ 704. Actions reviewable

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

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

HISTORICAL AND REVISION NOTES

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

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

§ 705. Relief pending review

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

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

HISTORICAL AND REVISION NOTES

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

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

§ 706. Scope of review

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

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

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

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

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

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

(D) without observance of procedure required by law;

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

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

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

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

HISTORICAL AND REVISION NOTES

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

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

ABBREVIATION OF RECORD

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

CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

§ 801. Congressional review

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

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.

(b) report annually to the Chairman of the Council on Environmental Quality on actions taken to implement this order; and

(c) provide funding to the Office of Environmental Quality Management Fund (42 U.S.C. 4375) for the Conference for which section 4 of this order provides.

SEC. 4. *White House Conference on Cooperative Conservation*. The Chairman of the Council on Environmental Quality shall, to the extent permitted by law and subject to the availability of appropriations:

(a) convene not later than 1 year after the date of this order, and thereafter at such times as the Chairman deems appropriate, a White House Conference on Cooperative Conservation (Conference) to facilitate the exchange of information and advice relating to (i) cooperative conservation and (ii) means for achievement of the purpose of this order; and

(b) ensure that the Conference obtains information in a manner that seeks from Conference participants their individual advice and does not involve collective judgment or consensus advice or deliberation.

SEC. 5. *General Provision*. This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, instrumentalities or entities, its officers, employees or agents, or any other person.

GEORGE W. BUSH.

§ 4332a. Repealed. Pub. L. 114–94, div. A, title I, § 1304(j)(2), Dec. 4, 2015, 129 Stat. 1386

Section, Pub. L. 112–141, div. A, title I, § 1319, July 6, 2012, 126 Stat. 551, related to accelerated decisionmaking in environmental reviews.

EFFECTIVE DATE OF REPEAL

Repeal effective Oct. 1, 2015, see section 1003 of Pub. L. 114–94, set out as an Effective Date of 2015 Amendment note under section 5313 of Title 5, Government Organization and Employees.

§ 4333. Conformity of administrative procedures to national environmental policy

All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this chapter and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this chapter.

(Pub. L. 91–190, title I, § 103, Jan. 1, 1970, 83 Stat. 854.)

§ 4334. Other statutory obligations of agencies

Nothing in section 4332 or 4333 of this title shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

(Pub. L. 91–190, title I, § 104, Jan. 1, 1970, 83 Stat. 854.)

§ 4335. Efforts supplemental to existing authorizations

The policies and goals set forth in this chapter are supplementary to those set forth in existing authorizations of Federal agencies.

(Pub. L. 91–190, title I, § 105, Jan. 1, 1970, 83 Stat. 854.)

SUBCHAPTER II—COUNCIL ON ENVIRONMENTAL QUALITY

§ 4341. Omitted

CODIFICATION

Section, Pub. L. 91–190, title II, § 201, Jan. 1, 1970, 83 Stat. 854, which required the President to transmit to Congress annually an Environmental Quality Report, terminated, effective May 15, 2000, pursuant to section 3003 of Pub. L. 104–66, as amended, set out as a note under section 1113 of Title 31, Money and Finance. See, also, item 1 on page 41 of House Document No. 103–7.

§ 4342. Establishment; membership; Chairman; appointments

There is created in the Executive Office of the President a Council on Environmental Quality (hereinafter referred to as the ''Council''). The Council shall be composed of three members who shall be appointed by the President to serve at his pleasure, by and with the advice and consent of the Senate. The President shall designate one of the members of the Council to serve as Chairman. Each member shall be a person who, as a result of his training, experience, and attainments, is exceptionally well qualified to analyze and interpret environmental trends and information of all kinds; to appraise programs and activities of the Federal Government in the light of the policy set forth in subchapter I of this chapter; to be conscious of and responsive to the scientific, economic, social, esthetic, and cultural needs and interests of the Nation; and to formulate and recommend national policies to promote the improvement of the quality of the environment.

(Pub. L. 91–190, title II, § 202, Jan. 1, 1970, 83 Stat. 854.)

COUNCIL ON ENVIRONMENTAL QUALITY; REDUCTION OF MEMBERS

Provisions stating that notwithstanding this section, the Council was to consist of one member, appointed by the President, by and with the advice and consent of the Senate, serving as chairman and exercising all powers, functions, and duties of the Council, were contained in the Department of the Interior, Environment, and Related Agencies Appropriations Act, 2006, Pub. L. 109–54, title III, Aug. 2, 2005, 119 Stat. 543, and were repeated in provisions of subsequent appropriations acts which are not set out in the Code. Similar provisions were also contained in the following prior appropriations acts:

Pub. L. 108–447, div. I, title III, Dec. 8, 2004, 118 Stat. 3332.

Pub. L. 108–199, div. G, title III, Jan. 23, 2004, 118 Stat. 408.

Pub. L. 108–7, div. K, title III, Feb. 20, 2003, 117 Stat. 514.

Pub. L. 107–73, title III, Nov. 26, 2001, 115 Stat. 686.

Pub. L. 106–377, § 1(a)(1) [title III], Oct. 27, 2000, 114 Stat. 1441, 1441A–45.

Pub. L. 106–74, title III, Oct. 20, 1999, 113 Stat. 1084.

Pub. L. 105–276, title III, Oct. 21, 1998, 112 Stat. 2500.

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.

Commission. A copy of this notice will be sent to the FOIA requester.

(f) Notification of suit in Federal courts. When a FOIA requester brings suit to compel disclosure of information for which a person has claimed privileged treatment, the Commission will notify the person who submitted the documents of the suit.

[Order 769, 77 FR 65476, Oct. 29, 2012, as amended by Order 833, 81 FR 93748, Dec. 21, 2016]

§ 388.113 Critical Energy/Electric Infrastructure Information (CEII).

(a) *Scope.* This section governs the procedures for submitting, designating, handling, sharing, and disseminating Critical Energy/Electric Infrastructure Information (CEII) submitted to or generated by the Commission. The Commission reserves the right to restrict access to previously filed information as well as Commission-generated information containing CEII. Nothing in this section limits the ability of any other Federal agency to take all necessary steps to protect information within its custody or control that is necessary to ensure the safety and security of the electric grid. To the extent necessary, such agency may consult with the CEII Coordinator regarding the treatment or designation of such information.

(b) *Purpose.* The procedures in this section implement section 215A of the Federal Power Act, and provide a comprehensive overview of the manner in which the Commission will implement the CEII program.

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

(1) *Critical electric infrastructure information* means information related to critical electric infrastructure, or proposed critical electrical infrastructure, generated by or provided to the Commission or other Federal agency other than classified national security information, that is designated as critical electric infrastructure information by the Commission or the Secretary of the Department of Energy pursuant to section 215A(d) of the Federal Power Act. Such term includes information that qualifies as critical energy infrastructure information under the Commission's regulations. Critical Electric Infrastructure Information is exempt from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552(b)(3) and shall not be made available by any Federal, State, political subdivision or tribal authority pursuant to any Federal, State, political subdivision or tribal law requiring public disclosure of information or records pursuant to section 215A(d)(1)(A) and (B) of the Federal Power Act.

(2) *Critical energy infrastructure information* means specific engineering, vulnerability, or detailed design information about proposed or existing critical infrastructure that:

(i) Relates details about the production, generation, transportation, transmission, or distribution of energy;

(ii) Could be useful to a person in planning an attack on critical infrastructure;

(iii) Is exempt from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552; and

(iv) Does not simply give the general location of the critical infrastructure.

(3) *Critical electric infrastructure* means a system or asset of the bulk-power system, whether physical or virtual, the incapacity or destruction of which would negatively affect national security, economic security, public health or safety, or any combination of such matters.

(4) *Critical infrastructure* means existing and proposed systems and assets, whether physical or virtual, the incapacity or destruction of which would negatively affect security, economic security, public health or safety, or any combination of those matters.

(d) *Criteria and procedures for determining what constitutes CEII.* The following criteria and procedures apply to information labeled as CEII:

(1) For information submitted to the Commission:

(i) A person requesting that information submitted to the Commission be treated as CEII must include with its submission a justification for such treatment in accordance with the filing procedures posted on the Commission's Web site at *http://www.ferc.gov*. The justification must provide how the information, or any portion of the information, qualifies as CEII, as the terms are defined in paragraphs (c)(1) and (2) of

this section. The submission must also include a clear statement of the date the information was submitted to the Commission, how long the CEII designation should apply to the information and support for the period proposed. Failure to provide the justification or other required information could result in denial of the designation and release of the information to the public.

(ii) In addition to the justification required by paragraph (d)(1)(i) of this section, a person requesting that information submitted to the Commission be treated as CEII must clearly label the cover page and pages or portions of the information for which CEII treatment is claimed in bold, capital lettering, indicating that it contains CEII, as appropriate, and marked ''DO NOT RELEASE.'' The submitter must also segregate those portions of the information that contain CEII (or information that reasonably could be expected to lead to the disclosure of the CEII) wherever feasible. The submitter must also submit to the Commission a public version with the information where CEII is redacted, to the extent practicable.

(iii) If a person files material as CEII in a complaint proceeding or other proceeding to which a right to intervention exists, that person must include a proposed form of protective agreement with the filing, or identify a protective agreement that has already been filed in the proceeding that applies to the filed material.

(iv) The information for which CEII treatment is claimed will be maintained in the Commission's files as non-public until such time as the Commission may determine that the information is not entitled to the treatment sought. By treating the information as CEII, the Commission is not making a determination on any claim of CEII status. The Commission retains the right to make determinations with regard to any claim of CEII status at any time, and the discretion to release information as necessary to carry out its jurisdictional responsibilities. Although unmarked information may be eligible for CEII treatment, the Commission will treat unmarked information as CEII only if it is properly designated as CEII pursuant to Commission regulations.

(v) The CEII Coordinator will evaluate whether the submitted information or portions of the information are covered by the definitions in paragraphs (c)(1) and (2) of this section prior to making a designation as CEII.

(vi) Subject to the exceptions set forth in paragraph (f)(5) of this section, when a CEII requester seeks information for which CEII status has been claimed, or when the Commission itself is considering release of such information, the CEII Coordinator or any other appropriate Commission official will notify the person who submitted the information and give the person an opportunity (at least five business days) in which to comment in writing on the request. A copy of this notice will be sent to the requester. Notice of a decision by the Commission, or the CEII Coordinator to make a release of CEII, will be given to any person claiming that the information is CEII no less than five business days before disclosure. The notice will respond to any objections to disclosure from the submitter that are not sustained. Where applicable, a copy of this notice will be sent to the CEII requester.

(2) For Commission-generated information:

(i) After consultation with the Office Director for the office that created the information, or the Office Director's designee, the CEII Coordinator will designate Commission-generated information as CEII after determining that the information or portions of the information are covered by the definitions in paragraphs (c)(1) and (2) of this section. Commission-generated CEII shall include clear markings to indicate the information is CEII and the date of the designation.

(ii) The Commission will segregate non-CEII from Commission-generated CEII or information that reasonably could be expected to lead to the disclosure of CEII wherever feasible.

(e) *Duration of the CEII designation.* All CEII designations will be subject to the following conditions:

(1) A designation may last for up to a five-year period, unless re-designated. In making a determination as to

whether the designation should be extended, the CEII Coordinator will take into account information provided in response to paragraph (d)(1)(i) of this section, and any other information, as appropriate.

(2) A designation may be removed at any time, in whole or in part, if the Commission determines that the unauthorized disclosure of CEII could no longer be used to impair the security or reliability of the bulk-power system or distribution facilities or any other form of energy infrastructure.

(3) The Commission will treat CEII or documents marked as CEII as non-public after the designation has lapsed until the CEII Coordinator determines to un-designate the information.

(4) If a CEII designation is removed, the submitter will receive notice and an opportunity to comment. The CEII Coordinator will notify the submitter of the information and give the submitter an opportunity (at least five business days) in which to comment in writing prior to the removal of the designation. Notice of a removal decision will be given to any submitter claiming that the information is CEII no less than five business days before disclosure. The notice will briefly explain why the submitter's objections to the removal of the designation are not sustained by the Commission

(f) *Voluntary sharing of CEII.* The Commission, taking into account standards of the Electric Reliability Organization, will facilitate voluntary sharing of CEII with, between, and by Federal, state, political subdivision, and tribal authorities; the Electric Reliability Organization; regional entities; information sharing and analysis centers established pursuant to Presidential Decision Directive 63; owners, operators, and users of critical electric infrastructure in the United States; and other entities determined appropriate by the Commission. The process will be as follows:

(1) The Director of any Office of the Commission or his designee that wishes to voluntarily share CEII shall consult with the CEII Coordinator prior to the Office Director or his designee making a determination on whether to voluntarily share the CEII.

(2) Consistent with paragraph (d) of this section, the Commission retains the discretion to release information as necessary to carry out its jurisdictional responsibilities in facilitating voluntary sharing or, in the case of information provided to other federal agencies, the Commission retains the discretion to release information as necessary for those agencies to carry out their jurisdictional responsibilities.

(3) All entities receiving CEII must execute either a non-disclosure agreement or an acknowledgement and agreement. A copy of each agreement will be maintained by the Office Director with a copy to the CEII Coordinator.

(4) When the Commission voluntarily shares CEII pursuant to this subsection, the Commission may impose additional restrictions on how the information may be used and maintained.

(5) Submitters of CEII shall receive notification of a limited release of CEII no less than five business days before disclosure, except in instances where voluntary sharing is necessary for law enforcement purposes, to maintain infrastructure security, to address potential threats, when notice would not be practicable, and where there is an urgent need to quickly disseminate the information. When prior notice is not given, the Commission will provide submitters of CEII notice of a limited release of the CEII as soon as practicable.

(g) *Accessing CEII.* (1) An owner/operator of a facility, including employees and officers of the owner/operator, may obtain CEII relating to its own facility, excluding Commission-generated information except inspection reports/operation reports and any information directed to the owner-operators, directly from Commission staff without going through the procedures outlined in paragraph (g)(5) of this section. Non-employee agents of an owner/operator of such facility may obtain CEII relating to the owner/operator's facility in the same manner as owner/operators as long as they present written authorization from the owner/operator to obtain

such information. Notice of such requests must be given to the CEII Coordinator, who shall track this information.

(2) An employee of a federal agency acting within the scope of his or her federal employment may obtain CEII directly from Commission staff without following the procedures outlined in paragraph (g)(5) of this section. Any Commission employee at or above the level of division director or its equivalent may rule on requests for access to CEII by a representative of a federal agency. To obtain access to CEII, an agency employee must sign an acknowledgement and agreement, which states that the agency will protect the CEII in the same manner as the Commission and will refer any requests for the information to the Commission. Notice of each such request also must be given to the CEII Coordinator, who shall track this information.

(3) A landowner whose property is crossed by or in the vicinity of a project may receive detailed alignment sheets containing CEII directly from Commission staff without submitting a non-disclosure agreement as outlined in paragraph (g)(5) of this section. A landowner must provide Commission staff with proof of his or her property interest in the vicinity of a project.

(4) Any person who is a participant in a proceeding or has filed a motion to intervene or notice of intervention in a proceeding may make a written request to the filer for a copy of the complete CEII version of the document without following the procedures outlined in paragraph (g)(5) of this section. The request must include an executed copy of the applicable protective agreement and a statement of the person's right to party or participant status or a copy of the person's motion to intervene or notice of intervention. Any person may file an objection to the proposed form of protective agreement. A filer, or any other person, may file an objection to disclosure, generally or to a particular person or persons who have sought intervention. If no objection to disclosure is filed, the filer must provide a copy of the complete, non-public document to the requesting person within five business days after receipt of the written request that is accompanied by an executed copy of the protective agreement. If an objection to disclosure is filed, the filer shall not provide the non-public document to the person or class of persons identified in the objection until ordered by the Commission or a decisional authority.

(5) If any requester not described above in paragraphs (g)(1) through (4) of this section has a particular need for information designated as CEII, the requester may request the information using the following procedures:

(i) File a signed, written request with the Commission's CEII Coordinator. The request must contain the following:

(A) Requester's name (including any other name(s) which the requester has used and the dates the requester used such name(s)), title, address, and telephone number; and the name, address, and telephone number of the person or entity on whose behalf the information is requested;

(B) A detailed Statement of Need, which must state: The extent to which a particular function is dependent upon access to the information; why the function cannot be achieved or performed without access to the information; an explanation of whether other information is available to the requester that could facilitate the same objective; how long the information will be needed; whether or not the information is needed to participate in a specific proceeding (with that proceeding identified); and an explanation of whether the information is needed expeditiously.

(C) An executed non-disclosure agreement as described in paragraph (h)(2) of this section;

(D) A signed statement attesting to the accuracy of the information provided in the request; and

(E) A requester shall provide his or her date and place of birth upon request, if it is determined by the CEII Coordinator that this information is necessary to process the request.

(ii) A requester who seeks the information on behalf of all employees of an organization should clearly state that the information is sought for the organization, that the requester is authorized to seek the information on behalf

of the organization, and that all individuals in the organization that have access to the CEII will agree to be bound by a non-disclosure agreement that must be executed.

(iii) After the request is received, the CEII Coordinator will determine if the information is CEII, and, if it is, whether to release the CEII to the requester. The CEII Coordinator will balance the requester's need for the information against the sensitivity of the information. If the requester is determined to be eligible to receive the information requested, the CEII Coordinator will determine what conditions, if any, to place on release of the information.

(iv) If the CEII Coordinator determines that the CEII requester has not demonstrated a valid or legitimate need for the CEII or that access to the CEII should be denied for other reasons, this determination may be appealed to the General Counsel pursuant to §388.110. The General Counsel will decide whether the information is properly classified as CEII, which by definition is exempt from release under FOIA, and whether the Commission should in its discretion make such CEII available to the CEII requester in view of the requester's asserted legitimacy and need.

(v) Once a CEII requester has been verified by Commission staff as a legitimate requester who does not pose a security risk, his or her verification will be valid for the remainder of that calendar year. Such a requester is not required to provide detailed information about himself or herself with subsequent requests during the calendar year. He or she is also not required to file a non-disclosure agreement with subsequent requests during the calendar year because the original non-disclosure agreement will apply to all subsequent releases of CEII.

(vi) An organization that is granted access to CEII pursuant to paragraph (g)(5)(ii) of this section may seek to add additional individuals to the non-disclosure agreement within one (1) year of the date of the initial CEII request. Such an organization must provide the names of the added individuals to the CEII Coordinator and certify that notice of each added individual has been given to the submitter. Any newly added individuals must execute a supplement to the original non-disclosure agreement indicating their acceptance of its terms. If there is no written opposition within five business days of notifying the CEII Coordinator and the submitter concerning the addition of any newly added individuals, the CEII Coordinator will issue a standard notice accepting the addition of these names to the non-disclosure agreement. If the submitter files a timely opposition with the CEII Coordinator, the CEII Coordinator will issue a formal determination addressing the merits of such opposition. If an organization that is granted access to CEII pursuant to paragraph (g)(5)(ii) of this section wants to add new individuals to its non-disclosure agreement more than one year after the date of its initial CEII request, the organization must submit a new CEII request pursuant to paragraph (g)(5)(ii) of this section and a new non-disclosure agreement for each new individual added.

(vii) The CEII Coordinator will attempt to respond to the requester under this section according to the timing required for responses under the FOIA in §388.108(c).

(viii) Fees for processing CEII requests will be determined in accordance with §388.109.

(ix) Nothing in this section should be construed as requiring the release of proprietary information, personally identifiable information, cultural resource information, information on rare species of plants and animals, and other comparable data protected by statute or any privileged information, including information protected by the deliberative process privilege.

(h) *Duty to protect CEII.* Unauthorized disclosure of CEII is prohibited.

(1) To ensure that the Commissioners, Commission employees, and Commission contractors protect CEII from unauthorized disclosure, internal controls will describe the handling, marking, and security controls for CEII.

(2) Any individual who requests information pursuant to paragraph (g)(5) of this section must sign and execute a

non-disclosure agreement, which indicates the individual's willingness to adhere to limitations on the use and disclosure of the information requested. The non-disclosure agreement will, at a minimum, require the following: CEII will only be used for the purpose for which it was requested; CEII may only be discussed with authorized recipients; CEII must be kept in a secure place in a manner that would prevent unauthorized access; CEII must be destroyed or returned to the Commission upon request; the Commission may audit the recipient's compliance with the non-disclosure agreement; CEII provided pursuant to the agreement is not subject to release under either FOIA or Sunshine Laws; a recipient is obligated to protect the CEII even after a designation has lapsed until the CEII Coordinator determines the information should no longer be designated as CEII under paragraph (e)(2) of this section; and a recipient is required to promptly report all unauthorized disclosures of CEII to the Commission.

(i) *Sanctions.* Any officers, employees, or agents of the Commission who knowingly and willfully disclose CEII in a manner that is not authorized under this section will be subject to appropriate sanctions, such as removal from the federal service, or possible referral for criminal prosecution. Commissioners who knowingly and willfully disclose CEII without authorization may be referred to the Department of Energy Inspector General. The Commission will take responsibility for investigating and, as necessary, imposing sanctions on its employees and agents.

(j) *Administrative appeals of CEII determinations.* (1) Submitters who receive a determination that the Commission intends to remove a CEII designation may appeal that determination. The submitter must file notice of its intent to appeal that determination within five business days of the determination. The notice of intent to file an appeal must be sent to the General Counsel, with a copy to the CEII Coordinator. A statement in support of the notice of appeal must be submitted to the General Counsel within 20 business days of the date of the determination. The appeal will be considered received upon receipt of the statement in support of the notice of appeal.

(2) Individuals who receive a determination denying a request for the release of CEII, in whole or in part, or a determination denying a request to change the designation of CEII may appeal such determinations. Such appeals must be submitted to the General Counsel within 20 business days of the date of the determination.

(3) The Commission's General Counsel or the General Counsel's designee will make a determination with respect to any appeal within 20 business days after the receipt of the appeal. If, on appeal, the General Counsel or the General Counsel's designee upholds the determination in whole or in part, then the General Counsel or the General Counsel's designee will notify the person submitting the appeal of the availability of judicial review.

(4) The time limits prescribed for the General Counsel or his designee to act on an appeal may be extended pursuant to § 388.110(b)(1).

(5) Prior to seeking judicial review in federal district court pursuant to section 215A(d)(11) of the Federal Power Act, a person who received a determination from the Commission concerning a CEII designation must first appeal the determination to the Commission's General Counsel.

[Order 833, 81 FR 93749, Dec. 21, 2016]

PART 389—OMB CONTROL NUMBERS FOR COMMISSION INFORMATION COLLECTION REQUIREMENTS

AUTHORITY: 44 U.S.C. 3501–3520.

§ 389.101 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

(a) *Purpose.* This part displays Office of Management and Budget (OMB) control numbers assigned to information collection requirements. This part aids in fulfilling the requirements of the Paperwork Reduction Act to display current OMB control numbers for these information collection requirements. The Commission also displays OMB control numbers on its Web site,

§ 1501.2 Apply NEPA early in the process.

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

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

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

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

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

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

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

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

§ 1501.3 When to prepare an environmental assessment.

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

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

§ 1501.4 Whether to prepare an environmental impact statement.

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

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

(1) Normally requires an environmental impact statement, or

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

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

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

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

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

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

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

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

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

§ 1501.5 Lead agencies.

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

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

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

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

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

(1) Magnitude of agency's involvement.

(2) Project approval/disapproval authority.

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

(4) Duration of agency's involvement.

(5) Sequence of agency's involvement.

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

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

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

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

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

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

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

§ 1501.6 Cooperating agencies.

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

(a) The lead agency shall:

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

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

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

(b) Each cooperating agency shall:

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

among alternatives). The summary will normally not exceed 15 pages.

§ 1502.13 Purpose and need.

The statement shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.

§ 1502.14 Alternatives including the proposed action.

This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (§ 1502.15) and the Environmental Consequences (§ 1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:

(a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.

(b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.

(c) Include reasonable alternatives not within the jurisdiction of the lead agency.

(d) Include the alternative of no action.

(e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.

(f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

§ 1502.15 Affected environment.

The environmental impact statement shall succinctly describe the environment of the area(s) to be affected or created by the alternatives under consideration. The descriptions shall be no longer than is necessary to understand the effects of the alternatives. Data and analyses in a statement shall be commensurate with the importance of the impact, with less important material summarized, consolidated, or simply referenced. Agencies shall avoid useless bulk in statements and shall concentrate effort and attention on important issues. Verbose descriptions of the affected environment are themselves no measure of the adequacy of an environmental impact statement.

§ 1502.16 Environmental consequences.

This section forms the scientific and analytic basis for the comparisons under § 1502.14. It shall consolidate the discussions of those elements required by sections 102(2)(C)(i), (ii), (iv), and (v) of NEPA which are within the scope of the statement and as much of section 102(2)(C)(iii) as is necessary to support the comparisons. The discussion will include the environmental impacts of the alternatives including the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, the relationship between short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible or irretrievable commitments of resources which would be involved in the proposal should it be implemented. This section should not duplicate discussions in § 1502.14. It shall include discussions of:

(a) Direct effects and their significance (§ 1508.8).

(b) Indirect effects and their significance (§ 1508.8).

(c) Possible conflicts between the proposed action and the objectives of Federal, regional, State, and local (and in the case of a reservation, Indian tribe) land use plans, policies and controls for the area concerned. (See § 1506.2(d).)

(d) The environmental effects of alternatives including the proposed action. The comparisons under § 1502.14 will be based on this discussion.

(e) Energy requirements and conservation potential of various alternatives and mitigation measures.

(f) Natural or depletable resource requirements and conservation potential of various alternatives and mitigation measures.

§ 1505.2 Record of decision in cases requiring environmental impact statements.

At the time of its decision (§ 1506.10) or, if appropriate, its recommendation to Congress, each agency shall prepare a concise public record of decision. The record, which may be integrated into any other record prepared by the agency, including that required by OMB Circular A–95 (Revised), part I, sections 6(c) and (d), and part II, section 5(b)(4), shall:

(a) State what the decision was.

(b) Identify all alternatives considered by the agency in reaching its decision, specifying the alternative or alternatives which were considered to be environmentally preferable. An agency may discuss preferences among alternatives based on relevant factors including economic and technical considerations and agency statutory missions. An agency shall identify and discuss all such factors including any essential considerations of national policy which were balanced by the agency in making its decision and state how those considerations entered into its decision.

(c) State whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not. A monitoring and enforcement program shall be adopted and summarized where applicable for any mitigation.

§ 1505.3 Implementing the decision.

Agencies may provide for monitoring to assure that their decisions are carried out and should do so in important cases. Mitigation (§ 1505.2(c)) and other conditions established in the environmental impact statement or during its review and committed as part of the decision shall be implemented by the lead agency or other appropriate consenting agency. The lead agency shall:

(a) Include appropriate conditions in grants, permits or other approvals.

(b) Condition funding of actions on mitigation.

(c) Upon request, inform cooperating or commenting agencies on progress in carrying out mitigation measures which they have proposed and which were adopted by the agency making the decision.

(d) Upon request, make available to the public the results of relevant monitoring.

PART 1506—OTHER REQUIREMENTS OF NEPA

Sec.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 56000, Nov. 29, 1978, unless otherwise noted.

§ 1506.1 Limitations on actions during NEPA process.

(a) Until an agency issues a record of decision as provided in § 1505.2 (except as provided in paragraph (c) of this section), no action concerning the proposal shall be taken which would:

(1) Have an adverse environmental impact; or

(2) Limit the choice of reasonable alternatives.

(b) If any agency is considering an application from a non-Federal entity, and is aware that the applicant is about to take an action within the agency's jurisdiction that would meet either of the criteria in paragraph (a) of this section, then the agency shall promptly notify the applicant that the agency will take appropriate action to insure that the objectives and procedures of NEPA are achieved.

(c) While work on a required program environmental impact statement is in progress and the action is not covered by an existing program statement,

agencies shall not undertake in the interim any major Federal action covered by the program which may significantly affect the quality of the human environment unless such action:

(1) Is justified independently of the program;

(2) Is itself accompanied by an adequate environmental impact statement; and

(3) Will not prejudice the ultimate decision on the program. Interim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives.

(d) This section does not preclude development by applicants of plans or designs or performance of other work necessary to support an application for Federal, State or local permits or assistance. Nothing in this section shall preclude Rural Electrification Administration approval of minimal expenditures not affecting the environment (e.g. long leadtime equipment and purchase options) made by non-governmental entities seeking loan guarantees from the Administration.

§ 1506.2 Elimination of duplication with State and local procedures.

(a) Agencies authorized by law to cooperate with State agencies of statewide jurisdiction pursuant to section 102(2)(D) of the Act may do so.

(b) Agencies shall cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and State and local requirements, unless the agencies are specifically barred from doing so by some other law. Except for cases covered by paragraph (a) of this section, such cooperation shall to the fullest extent possible include:

(1) Joint planning processes.

(2) Joint environmental research and studies.

(3) Joint public hearings (except where otherwise provided by statute).

(4) Joint environmental assessments.

(c) Agencies shall cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and comparable State and local requirements, unless the agencies are specifically barred from doing so by some other law. Except for cases covered by paragraph (a) of this section, such cooperation shall to the fullest extent possible include joint environmental impact statements. In such cases one or more Federal agencies and one or more State or local agencies shall be joint lead agencies. Where State laws or local ordinances have environmental impact statement requirements in addition to but not in conflict with those in NEPA, Federal agencies shall cooperate in fulfilling these requirements as well as those of Federal laws so that one document will comply with all applicable laws.

(d) To better integrate environmental impact statements into State or local planning processes, statements shall discuss any inconsistency of a proposed action with any approved State or local plan and laws (whether or not federally sanctioned). Where an inconsistency exists, the statement should describe the extent to which the agency would reconcile its proposed action with the plan or law.

§ 1506.3 Adoption.

(a) An agency may adopt a Federal draft or final environmental impact statement or portion thereof provided that the statement or portion thereof meets the standards for an adequate statement under these regulations.

(b) If the actions covered by the original environmental impact statement and the proposed action are substantially the same, the agency adopting another agency's statement is not required to recirculate it except as a final statement. Otherwise the adopting agency shall treat the statement as a draft and recirculate it (except as provided in paragraph (c) of this section).

(c) A cooperating agency may adopt without recirculating the environmental impact statement of a lead agency when, after an independent review of the statement, the cooperating agency concludes that its comments and suggestions have been satisfied.

(d) When an agency adopts a statement which is not final within the agency that prepared it, or when the action it assesses is the subject of a referral under part 1504, or when the statement's adequacy is the subject of

§ 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

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CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I served, on January 25, 2019, the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system.

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