ORAL ARGUMENT NOT YET SCHEDULED

No. 18-1128 (and consolidated cases)

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

DELAWARE RIVERKEEPER NETWORK, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF OF *AMICUS CURIAE* INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA IN SUPPORT OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION AND AFFIRMANCE

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Dated: March 28, 2019

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and *Amici*. Except for the following, all parties, intervenors, and *amici* appearing before this Court are listed in the Petitioners' Opening Briefs.

Niskanen Center, Environmental Defense Fund, and Institute for Policy Integrity at New York University School of Law are *amici curiae* in support of Petitioners.

Interstate Natural Gas Association of America is seeking leave to participate as *amicus curiae* in support of Respondent.

Rulings Under Review. The following final agency actions by Respondents are under review:

(1) *PennEast Pipeline Co., LLC*, 162 FERC ¶ 61,053 (2018), R.10769, JA ___; and

(2) *PennEast Pipeline Co., LLC*, 164 FERC ¶ 61,098 (2018), R.11024, JA ___.

Related Cases. All related cases are as stated in the Brief of Respondent Federal Energy Regulatory Commission.

CORPORATE DISCLOSURE STATEMENT

The Interstate Natural Gas Association of America ("INGAA") is an incorporated, not-for-profit trade association representing virtually all of the interstate natural gas pipeline companies operating in the United States. INGAA has no parent companies, subsidiaries, or affiliates that have issued publicly traded stock. Most INGAA member companies are corporations with publicly traded stock.

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GLOSSARY

2010 TSD	Interagency Working Group on Social Cost of Carbon, Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866 (Feb. 2010)
Amicus Policy Integrity	Institute for Policy Integrity at New York University
FERC	Federal Energy Regulatory Commission
Joint Petitioners	Petitioners New Jersey Conservation Foundation, The Watershed Institute, Delaware Riverkeeper Network, Homeowners Against Land Taking – PennEast, Inc., and Hopewell Township
NEPA	National Environmental Policy Act
PennEast	PennEast Pipeline Company, LLC
Project	PennEast Pipeline Company Project

STATEMENT AS TO THE IDENTITY OF THE *AMICUS*, ITS INTEREST IN THE CASE, AND THE SOURCE OF ITS AUTHORITY TO FILE

Amicus Interstate Natural Gas Association of America ("INGAA") represents the vast majority of interstate natural gas transmission pipeline companies in the United States. Its 27 members operate approximately 200,000 miles of interstate natural gas pipelines, serving as an indispensable link between natural gas producers and consumers. INGAA has a strong interest in effectuating the efficient, transparent, and predictable approval of natural gas pipeline projects, and the Court's decision in these petitions for review may affect how the Federal Energy Regulatory Commission ("FERC") reviews certificate applications for such projects. In support of that interest, INGAA's brief explains that FERC correctly determined that any environmental impacts from activities related to gas production upstream of the PennEast Pipeline Company ("PennEast") project ("Project") are not causally connected to the Project and not "reasonably foreseeable" under the National Environmental Policy Act ("NEPA"). 42 U.S.C. §§ 4321, *et seq*. In addition, INGAA's brief explains that, consistent with the rulings of this and other courts, FERC provided an adequate justification for rejecting reliance on the Social Cost of Carbon due to its severe limitations and highly speculative nature. This separate brief is necessary because of the unique perspective that INGAA provides on behalf of the FERC-regulated interstate natural gas pipeline industry. This perspective is not provided by any other party or *amici*.

Pursuant to this Court's Rule 29(b), counsel for all parties except Petitioner Township of Hopewell have consented to INGAA's participation as *amicus curiae*. Petitioner Township of Hopewell has not responded to INGAA's request for consent at the time of filing this Motion.

STATEMENT AS TO AUTHORSHIP AND FUNDING OF THE BRIEF

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), undersigned counsel hereby represent the following:

(i) None of the counsel for the parties in this case authored this brief in whole or in part.

(ii) INGAA funded the preparation and submittal of this brief. Neither any party nor any party's counsel contributed money to fund the preparation or submittal of this brief.

(iii) No other person contributed money that was intended to fund the preparation or submittal of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

In these consolidated cases, a group of petitioners ("Joint Petitioners")[1] and the Institute for Policy Integrity at New York University participating as *amicus curiae* ("Amicus Policy Integrity"), argue that the FERC environmental impact statement and the certificate authorizing the Project should be vacated. INGAA submits this brief as *amicus curiae* to address two of the arguments these challengers raise: (1) that FERC failed to adequately assess upstream effects associated with gas production; and (2) that FERC inappropriately declined to use the Social Cost of Carbon tool, which purports to monetize the costs of greenhouse gas emissions. FERC's assessment of upstream impacts was more than sufficient, and its decision not to use the unreliable Social Cost of Carbon tool was sound.

Under NEPA, FERC need consider only those impacts that are proximately caused by a project. Here, FERC correctly concluded that the Project is not the proximate cause of environmental impacts associated with upstream gas production since, among other reasons, FERC lacks authority to regulate natural gas production. What's more, the complexity of the natural gas market and FERC's lack of information about the location, scale and timing of natural gas production make any attempt to assess one project's effect on upstream production

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[1] Joint Petitioners are New Jersey Conservation Foundation, The Watershed Institute, Delaware Riverkeeper Network, Homeowners Against Land Taking – PennEast, Inc., and Hopewell Township.

practically impossible. FERC was right not to evaluate those impacts in the way Joint Petitioners demand.

FERC was also right not to use the Social Cost of Carbon tool. That tool was not designed with NEPA in mind, and it is highly sensitive, producing widely diverging outcomes based on small changes in inputs. The federal government has withdrawn support for it, and FERC has consistently refused to use it. Amicus Policy Integrity is wrong to argue that FERC should have overlooked these flaws and its own longstanding practice to use the Social Cost of Carbon tool here.

ARGUMENT

I. Upstream Effects Associated With Gas Production Are Not "Indirect Effects" of the Project Under NEPA.

NEPA requires federal agencies to consider only those environmental impacts that qualify as direct or indirect effects or cumulative impacts of a project. Under the Council on Environmental Quality's NEPA regulations, environmental impacts can qualify as indirect effects only if they are sufficiently causally connected to and are reasonably foreseeable effects of the proposed action. *See* 40 C.F.R. § 1508.8. Under settled precedent, that causal nexus must be tight—akin to proximate causation under tort law. *See Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 754 (2004).

The specific impacts that Joint Petitioners argue FERC failed to consider are, at best, speculative, and were not caused by FERC's action in this case.

Therefore, FERC was right to determine that NEPA did not require their analysis.[2] *See* PennEast Pipeline, LLC, 162 FERC ¶ 61,053 at ¶ 197 ("Certificate Order"), JA___, *on reh'g*, 164 FERC ¶ 61,098 (2018) ("Rehearing Order") ("[T]he environmental effects resulting from natural gas production are generally neither caused by a proposed pipeline . . . nor are they reasonably foreseeable consequences of our approval of an infrastructure project, as contemplated by CEQ [Council on Environmental Quality] regulations.").

FERC correctly concluded that the Project is not the proximate cause of impacts from upstream gas production. If anything, it is the other way around. FERC approves pipeline projects to respond to increased demand for natural gas, not to create it. Specifically, FERC is not authorized to certificate projects in the absence of a demonstrated market need, nor is it authorized to approve speculative "overbuilding" of a pipeline. Demand for energy exists and is growing due to macro-level factors such as population and economic growth.[3] FERC has no ability, let alone legal authority, to change the ultimate causes of increasing energy

[2] Nonetheless, FERC provided conservative upper-bound estimates of the alleged greenhouse gas emissions as well as land and other potential impacts stemming from upstream production. *See* Certificate Order ¶¶ 203-204, JA___-___.

[3] *See, e.g.*, U.S. Energy Information Administration, Use of Energy in the United States *Explained*, https://bit.ly/2RRxK2q (last visited Mar. 27, 2019) (noting "general historical trend of year-over-year increases in energy consumption" from 1949 to 2007).

demand. Although it regulates aspects of natural gas markets, FERC does not control other significant elements of energy markets, such as the construction or operation of oil production wells or (apart from interstate rates) oil pipelines. *See generally* JAMES H. MCGREW, FERC: FEDERAL ENERGY REGULATORY COMMISSION 1-3, 228 (2d ed. 2009) ("McGrew"), JA___-___, ___; FERC, What FERC Does, https://www.ferc.gov/about/ferc-does.asp (last visited Mar. 27, 2019). Nor does FERC control the mining, transportation, or consumption of coal; the construction or operation of non-hydropower electric generation facilities; or plans for reducing general energy usage. *Id.* Even as to natural gas, FERC's jurisdiction is statutorily confined and distinct: Congress gave the agency jurisdiction over the interstate transportation of natural gas, but specifically declined to authorize it to regulate production, gathering, or local distribution of gas, 15 U.S.C. § 717(b), or "facilities used for the generation of electric energy," 16 U.S.C. § 824(b)(1). *See Fed. Power Comm'n v. Panhandle E. Pipe Line Co.*, 337 U.S. 498, 503-04 (1949).[4] Since FERC cannot authorize or site new natural gas production, its proposed

[4] The purpose of the Natural Gas Act was not to give FERC comprehensive authority over natural gas, let alone energy or environmental policy in general. *See, e.g., ONEOK, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1595-96 (2015) (describing history); *California v. Southland Royalty Co.*, 436 U.S. 519, 523 (1978) ("The fundamental purpose of the Natural Gas Act is to assure an adequate and reliable supply of gas at reasonable prices."); *Atl. Ref. Co. v. Pub. Serv. Comm'n*, 360 U.S. 378, 388 (1959) (similar).

action of certificating the Project cannot be the proximate cause of alleged upstream environmental impacts.

Due to the integrated natural gas transportation network, no one interstate pipeline project can induce additional production because pipeline shippers can access natural gas supplies from various sources across a variety of pipelines and likely will not know where the natural gas production originates. "The U.S. natural gas pipeline network is a highly integrated transmission and distribution grid" that includes over 300,000 miles of interstate and intrastate transmission pipelines, as well as "[m]ore than 11,000 delivery points, 5,000 receipt points, and 1,400 interconnection points that provide for the transfer of natural gas throughout the United States." U.S. Energy Information Administration, About U.S. Natural Gas Pipelines – Transporting Natural Gas, https://bit.ly/2CERWOm (last visited Mar. 27, 2019). In many ways, this network is "analogous to the interstate highway system,"[5] especially under FERC's modern natural gas regulatory program, which is designed to promote an economically efficient, competitive, and market-responsive integrated natural gas pipeline system. *See generally* McGrew, *supra*, at 117-23, JA___-___; Robert Christin et al., *Considering the Public*

[5] *Energy Infrastructure: Hearing Before the S. Comm. on Energy & Nat. Res.*, 115th Cong. 1 (2018) (statement of Donald F. Santa, President & CEO, Interstate Natural Gas Association of America), https://bit.ly/2B6X6Tv.

Convenience and Necessity in Pipeline Certificate Cases Under the Natural Gas Act, 38 ENERGY L.J. 115, 123-25 (2017), JA___, ___-___. For example, FERC has promoted an efficient market for natural gas pipeline capacity that allows shippers to "segment" their capacity to allow transportation of natural gas to multiple delivery points along a pipeline's path. *See* 18 C.F.R. § 284.7. It also has fostered a robust secondary transportation market for pipeline capacity, in which shippers can and do release capacity when they do not need it, to be purchased by replacement shippers who may utilize it at different receipt or delivery points, to move natural gas between regions or trading hubs, wherever it is valued most. *See id*. § 284.8.

Given these realities, a project's impact on net upstream greenhouse gas emissions and other upstream environmental impacts is largely opaque. With respect to upstream production, the source of natural gas to be shipped on a particular pipeline expansion project can vary widely, particularly where a pipeline is connected (directly or indirectly) with distribution hubs that allow sourcing from various production regions. For example, an interstate natural gas pipeline operator may not know the source of the natural gas to be transported when a new pipeline connects points on the existing pipeline grid. Under those circumstances, the proposed pipeline may transport natural gas between various supply sources and users. Or the proposed pipeline could originate in a natural gas production basin, yet not be causally or reliably linked to particular wells and production locations, which likely would change through the lifetime of the proposed facility, if certificated. To the extent new wells are drilled, their location will be determined by a range of short- and long-term factors related to the cost of production, state and local regulatory regimes (or federal or tribal regulatory regimes other than the Natural Gas Act), technological developments, and natural gas and energy markets more broadly, over which FERC lacks even indirect control.

The inability to identify the particular sources of natural gas, including the specific production wells, precludes a meaningful analysis of the specific impacts from production at the source location. Meaningful analysis would generally require, among other things, particular information about the specific environmental resources affected by the production—water resources, flora and fauna, cultural and historical resources, geology and soils, and air quality. A generalized sense that various impacts tend to arise from natural gas production activities is not compatible with analyzing other particular, often quantitative, direct and indirect impacts to specific resources arising from FERC's decision. Such vagueness does not comport with NEPA, which requires information to be sufficiently specific and reliable. 40 C.F.R. §§ 1500.1(b), 1502.24.

To the extent Joint Petitioners assert that the PennEast Project will create additional demand for natural gas (i.e., consumption) and that increased demand will lead to increased production, factors over which FERC has little control or ability to predict, this is not the case. In fact, FERC noted that the opposite causal relationship is more likely, because shippers or end users support new pipeline projects to move natural gas after production begins. *See* Certificate Order ¶ 197, JA___. Therefore, since the proposed pipeline project was not the proximate cause of the upstream production and the alleged greenhouse gas emissions and other impacts were not reasonably foreseeable, FERC correctly determined that NEPA did not compel it to examine upstream environmental impacts.

II. FERC Correctly Declined to Rely on the Social Cost of Carbon Tool.

The Social Cost of Carbon tool purports to produce "an estimate of the monetized damages associated with an incremental increase in carbon emissions in a given year." Interagency Working Group on Social Cost of Carbon, Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866 at 2 (Feb. 2010) ("2010 TSD").[6] These "monetized damages" include "changes in agricultural productivity, human health, property damages from increased flood risk, and the value of ecosystem services due to

[6] https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/for-agencies/Social-Cost-of-Carbon-for-RIA.pdf.

climate change." *Id.* at 1. The Social Cost of Carbon does not predict that these particular impacts will occur because of any particular project or manifest themselves in any particular area. Instead, it attempts to provide a monetized estimate of "full (global) damages caused by GHG [greenhouse gas] emissions." *Id.* at 10.

The Social Cost of Carbon, controversial since its inception, produces unreliable and widely variable results. Indeed, the 2016 social cost of one ton of carbon dioxide for the year 2020 (in 2007 dollars) ranged from $12 to $123, depending on the discount rate and assumptions used. *See* Interagency Working Group on Social Cost of Greenhouse Gases, Technical Support Document: Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866 at 4 (Aug. 2016).[7] Among other concerns, the Social Cost of Carbon can produce widely varying results—spanning an order of magnitude using the values described above—depending upon the underlying assumptions the user inputs. This ability to manipulate the outcome of the Social Cost of Carbon greatly diminishes its utility for any application, including for NEPA purposes.

[7] www.epa.gov/sites/production/files/2016-12/documents/sc_co2_tsd_august_2016.pdf.

For those reasons, the federal government recently withdrew its support for the Social Cost of Carbon tool, 82 Fed. Reg. 16,093, 16,096 (Mar. 31, 2017), JA___, and FERC has consistently and properly rejected using it in its NEPA analyses.

Amicus Policy Integrity nonetheless argues that FERC should have used that tool here. They claim that the Social Cost of Carbon tool is uncontroversial and reliable, that courts require agencies to use it to comply with NEPA, and that FERC has not provided a reasonable justification for declining to use the Social Cost of Carbon to evaluate the PennEast Project. They are wrong in each respect.

A. NEPA Does Not Require Agencies To Prepare or Consider a Cost-Benefit Analysis.

NEPA does not require an environmental impact statement to include a cost-benefit analysis. The governing regulations say so expressly: "[T]he weighing of the merits and drawbacks of the various alternatives need not be displayed in a monetary cost-benefit analysis and should not be when there are important qualitative considerations." 40 C.F.R. § 1502.23. Courts agree. *E.g.*, *Minisink Resident for Envtl. Pres. & Safety v. FERC*, 762 F.3d 97, 112 (D.C. Cir. 2014) (holding that FERC need not prepare a cost-benefit analysis to satisfy NEPA); *Communities Against Runway Expansion, Inc. v. FAA*, 355 F.3d 678, 687 (D.C. Cir. 2004) ("[I]t is undisputed that the FAA was not required to undertake a formal cost-benefit analysis as part of the EIS [environmental impact statement].");

Webster v. U.S. Dep't of Agric., 685 F.3d 411, 430 (4th Cir. 2012) ("The agency does not, however, need to display the weighing of the merits and drawback of the alternatives in a monetary cost-benefit analysis."); *S. La. Envtl. Council, Inc. v. Sand*, 629 F.2d 1005, 1013 n.7 (5th Cir. 1980) ("NEPA does not require that a cost-benefit ratio be included in the impact statement.").

Joint Petitioners and Amicus Policy Integrity nonetheless argue that NEPA compelled FERC to conduct a cost-benefit analysis that included climate change-related costs calculated pursuant to a specific tool—the Social Cost of Carbon. Amicus Policy Integrity argues that agencies *must* use the Social Cost of Carbon to monetize climate change-related impacts any time an agency has monetized any benefit of a proposed project.

No such requirement exists. Instead, courts have explained that if an agency elects to include a cost-benefit analysis in an environmental impact statement, it must not be misleading. *E.g.*, *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 446–48 (4th Cir. 1996) ("it is essential that the EIS [environmental impact statement] not be based on misleading economic assumptions"). To satisfy that standard, agencies need only provide a rational explanation if they decide not to monetize certain costs or benefits, and that is what FERC did here.

B. FERC Provided a Well-Reasoned Justification for Declining To Use the Social Cost of Carbon in Reviewing the Project.

FERC's brief explains how it accounted for the impacts of the Project's direct and indirect greenhouse gas emissions, and that it adopted the reasoning from its order on remand from this Court's 2017 *Sierra Club v. FERC*[8] decision as its basis for declining to use the Social Cost of Carbon tool in its review of the Project. *See* FERC Br. at 54-56; *see also* Rehearing Order at ¶ 123 (expressly adopting the rationale for rejecting use of the Social Cost of Carbon as stated in *Florida Southeast Connection, LLC*, 162 FERC ¶ 61,233 at ¶¶ 30-51 (2018)), JA___.

FERC identified extensive and convincing reasons for rejecting the Social Cost of Carbon tool in its *Florida Southeast Connection* decision. *See Florida Southeast Connection, LLC*, 162 FERC ¶ 61,233 at ¶¶ 30-51. In FERC's Order on Remand in that proceeding, FERC directly addressed the arguments that Amicus Policy Integrity raises here. Some commenters in the *Florida Southeast Connection* proceeding believed it was insufficient to quantify a proposed action's greenhouse gas emissions and qualitatively discuss the general effects of climate change. Only an analysis based on the Social Cost of Carbon, they argued, could adequately account for greenhouse gas and climate change-related impacts—

[8] 867 F.3d 1357 (D.C. Cir. 2017).

precisely what the parties in these cases argue. *Id*. at ¶ 33. FERC comprehensively rejected these arguments, explaining that the Social Cost of Carbon was "not appropriate in project-level environmental review under NEPA" for three reasons. *Id*. at ¶¶ 35-51.

First, FERC explained that the Social Cost of Carbon tool did not provide meaningful information with respect to project decisions under the Natural Gas Act. FERC has no "direct connection" to the production or end use of fossil fuels. *Id*. at ¶ 38. Instead, other federal and state agencies "directly control whether some quantity of fossil fuels is burned and thus directly control whether end use greenhouse gas emissions occur." *Id*. at ¶ 37. These agencies, not FERC, might decide to use the Social Cost of Carbon to evaluate the impact of emissions. *See id*. But if FERC were to consider those impacts, they would be double-counted, inappropriately skewing FERC's NEPA analysis. And as to the relatively small percentage of greenhouse gas emissions directly attributable to a project under FERC's review (such as emissions resulting from operation of construction equipment or a pipeline compressor station), FERC can thoroughly consider and address them without use of the Social Cost of Carbon tool. *See id*. at ¶ 38.

Second, FERC does not conduct a monetized cost-benefit analysis to comply with NEPA. *See id*. at ¶¶ 39-44. The Council on Environmental Quality's NEPA rules state that agencies "'should not'" use monetized cost-benefit analysis when there are important qualitative considerations, as is the case with respect to climate change-related impacts. *See id*. at ¶ 40 (quoting 40 C.F.R. § 1502.23). While its NEPA analysis often includes some of a Project's direct socioeconomic benefits expressed in dollar amounts, FERC does not use "the limited available quantified benefits in a cost-benefit analysis to inform FERC staff's comparison of alternative, choices of mitigation measures, or determination about the significance of [a project's] environmental impacts." *Id*. It is reasonable that some effects of a project, like new jobs or increased tax revenue, would be most readily understood in a monetized form, while other costs and benefits cannot reasonably be expressed in that manner with any degree of accuracy. In the absence of agreed upon methodologies for monetizing all relevant costs and benefits, any attempt to present a complete cost-benefit analysis would be misleading. *See Hughes River Watershed Conservancy*, 81 F.3d at 446–48. For that reason, FERC has appropriately opted for a qualitative analysis, which NEPA allows.

Third, FERC explained that using the Social Cost of Carbon tool is no longer appropriate because it has been withdrawn "as no longer representative of government policy." *Florida Southeast Connection, LLC*, 162 FERC ¶ 61,233 at ¶ 46. To begin, the Social Cost of Carbon was not created to be used to analyze impacts under NEPA and was never intended to be used to determine how a project could affect the surrounding environment. *See* 2010 TSD at 4. Instead, it was "specifically designed for the rulemaking process." *Id*. So even before the federal government withdrew its support, reliance on the Social Cost of Carbon tool in NEPA analyses would have been inappropriate.

The federal government withdrew support for the Social Cost of Carbon because of its the many technical flaws, including its consideration of global rather than domestic impacts and its reliance on unsupported discount rates at odds with the Office of Management and Budget's longstanding cost-benefit analysis policy. *See Florida Southeast Connection, LLC*, 162 FERC ¶ 61,233 at ¶¶ 46, 49. The discount rate can significantly affect the results of a Social Cost of Carbon calculation, and the Joint Petitioners and Amicus Policy Integrity cannot even agree on what it should be (with Joint Petitioners arguing that the Project would cost $250 million annually and Amicus Policy Integrity arguing the cost is over $1 billion each year). *Compare* Joint Pet. Br. at 14 *with* Amicus Policy Integrity Br. at 8. Such wide divergence undercuts Amicus Policy Integrity's argument that the Social Cost of Carbon metric is "a widely-accepted and easy-to-use tool." Amicus Policy Integrity Br. at 4; Joint Pet. Br. at 13 ("generally accepted in the scientific community").

The Social Cost of Carbon is also highly sensitive to other key inputs that drive its results and that amount to little more than the policy judgments and preferences of those who designed it. For instance, the integrated assessment models underlying the Social Cost of Carbon use damage functions that essentially "aggregate relationships between global temperature change and GDP [gross domestic product] losses" but that "do not describe the specific impacts that lead to damages due to temperature change." NERA Economic Consulting, *A Review of the Damage Functions Used in Estimating the Social Cost of Carbon* at 1 (Feb. 20, 2014), https://www.afpm.org/WorkArea/DownloadAsset.aspx?id=4111. The U.S. Environmental Protection Agency recognized these serious shortcomings:

> When attempting to assess the incremental economic impacts of carbon dioxide emissions, the analyst faces a number of serious challenges. A recent report from the National Academies of Science (NRC 2009) points out that any assessment will suffer from uncertainty, speculation, and lack of information about (1) future emissions of greenhouse gases, (2) the effects of past and future emissions on the climate system, (3) the impact of changes in climate on the physical and biological environment, and (4) the translation of these environmental impacts into economic damages. As a result, any effort to quantify and monetize the harms associated with climate change will raise serious questions of science, economics, and ethics and should be viewed as provisional.

2010 TSD at 2.

Similarly, Massachusetts Institute of Technology economist Robert S. Pindyck opined that "the models are so deeply flawed as to be close to useless as tools for policy analysis. Worse yet, their use suggests a level of knowledge and precision that is simply illusory, and can be highly misleading." Robert S.

Pindyck, Climate Change Policy: What Do The Models Tell Us? National Bureau of Economic Research Working Paper 19244 at 3 (July 2013), https://www.nber.org/papers/w19244.pdf.

Without empirical or even widely accepted theoretical bases for the relationships between temperature and gross domestic product losses, the damage functions become arbitrary normative choices, casting heavy doubt on the meaning of the quantitative outputs generated by using the Social Cost of Carbon. For these reasons, the Social Cost of Carbon is an inappropriate tool for use by FERC in NEPA analyses conducted in support of decisionmaking under Section 7 of the Natural Gas Act.

Finally, FERC also concluded that, regardless of the validity of the values generated by the Social Cost of Carbon, there were no criteria by which to judge whether the values should be considered "significant" under NEPA. *Florida Southeast Connection, LLC*, 162 FERC ¶ 61,233 at ¶ 51. Because the values generated by the Social Cost of Carbon are unreliable and impossible to contextualize, they could serve no useful purpose in evaluating a project's environmental impact. Rejecting the tool was the right decision.

FERC's adoption of its rationale in *Florida Southeast Connection, LLC* is consistent with the agency's longstanding practice that this Court has twice affirmed. In *EarthReports, Inc. v. FERC*, 828 F.3d 949 (D.C. Cir. 2016), the Court affirmed FERC's decision not to use the Social Cost of Carbon in a NEPA analysis for a project that would have authorized expansion of a liquefied natural gas facility for the same reasons FERC has given for declining to do so in the PennEast proceeding. *See id*. at 956. FERC reached this decision in 2016, when the Social Cost of Carbon was still endorsed by the federal government. Then, less than two months ago, this Court reached the same conclusion in *Appalachian Voices v. FERC*, No. 17-1271 (and consolidated cases), 2019 WL 847199, at *3 (D.C. Cir. Feb. 19, 2019) (per curiam). The U.S. District Court for the District of Columbia followed suit in *WildEarth Guardians v. Zinke*, where Judge Rudolph Contreras concluded that the Bureau of Land Management adequately explained its decision not to use the Social Cost of Carbon in one of its NEPA analyses because of the speculative nature of the Social Cost of Carbon tool and the wide range of potential cost estimates the tool produces. *See WildEarth Guardians v. Zinke*, No. 16-1724(RC), 2019 WL 1273181, at *22-23 (D.D.C. Mar. 19, 2019).

The decisions of this Court and other courts firmly support FERC's decision to reject the Social Cost of Carbon tool in its NEPA analysis for the Project. FERC's rationale was thorough, reasonable, and consistent with longstanding agency practice and official government policy. The Court should not disturb it.

C. Decisions Relied on by Amicus Policy Integrity Do Not Support Requiring FERC To Use the Social Cost of Carbon.

Amicus Policy Integrity argues that other court decisions compel FERC to adopt the Social Cost of Carbon metric and to use it in the NEPA analysis for the Project. They are wrong.

Amicus Policy Integrity argues, for instance, that the Seventh Circuit's decision in *Zero Zone, Inc. v. Department of Energy*, 832 F.3d 654 (7th Cir. 2016), generally supports reliance on the Social Cost of Carbon tool to inform agency decisionmaking. *See* Amicus Policy Integrity Br. at 7. But that case involved challenges to generally applicable energy efficiency regulations that were supported, in part, by an economic analysis that incorporated the Social Cost of Carbon metric, not a NEPA analysis. As explained above, the Social Cost of Carbon was developed specifically for use in the rulemaking setting, and the Department of Energy's use of it in that context does not compel FERC to use the tool in the very different context of reviewing a specific proposed pipeline project under NEPA. Moreover, the Seventh Circuit held only that the Department of Energy, in the particular rulemaking proceedings at issue there, had adequately justified its decision to rely on the Social Cost of Carbon. *Zero Zone*, 832 F.3d at 679. *Zero Zone* has nothing to say about the circumstances presented here.

Amicus Policy Integrity also relies heavily on two district court decisions: *High Country Conservation Advocates v. U.S. Forest Service*, 52 F. Supp. 3d 1174

(D. Colo. 2014), and *Montana Environmental Information Center v. U.S. Office of Surface Mining*, 274 F. Supp. 3d 1074 (D. Mont. 2017) ("*Montana EIC*"). Amicus Policy Integrity argues that these cases stand for the proposition that an agency is obligated to use the Social Cost of Carbon to monetize climate-related costs whenever that agency has monetized benefits. These district court decisions are not binding precedent, and regardless, Amicus Policy Integrity misreads their holdings. These cases stand for the basic administrative law principles that agencies cannot rely on factually incorrect assumptions to support their actions and must provide a response to significant comments. Here, FERC has satisfied both of those requirements and reasonably explained why the circumstances of those cases are very different from FERC's project-level review of a particular proposed pipeline project.

High Country involved challenges to the NEPA analysis supporting regulatory action to expand mining operations on certain federal lands. *See* 52 F. Supp. 3d at 1184-85. The court there found a NEPA analysis insufficient because it failed to address the Social Cost of Carbon tool. The court in *High Country* made that decision because the agency's reason for declining to monetize climate change-related impacts was contrary to the record in the case. *Id*. at 1190. Despite the fact that the agency relied on the Social Cost of Carbon in its draft environmental impact statement, the agency's final environmental impact statement said that no tool to monetize climate change-related impacts existed. *Id*. "Agency action based on a factual premise that is flatly contradicted by the agency's own record does not constitute reasoned administrative decisionmaking, and cannot survive review under the arbitrary and capricious standard." *City of Kansas City, Mo. v. Dep't of Hous. & Urban Dev.*, 923 F.2d 188, 194 (D.C. Cir. 1991).

The *High Country* court did not, however, endorse the use of the Social Cost of Carbon or find that the agency must rely on it in future proceedings. To the contrary, the court only held that it was arbitrary for the agency to refuse to monetize climate change-related impacts without providing a reasoned explanation for doing so. 52 F. Supp. 3d at 1191-92. Indeed, the court explained that "agencies might have justifiable reasons for not using (or assigning minimal weight to) the social cost of carbon protocol to quantify the cost of greenhouse gas emissions from the Lease Modifications. Unfortunately, they did not provide those reasons. . . ." *Id.* at 1993. By contrast, FERC in this proceeding acknowledged the availability of the Social Cost of Carbon and provided a detailed rationale for declining to use it when reviewing the Project. FERC fully satisfied its obligations, consistent with the ruling in *High Country*.

Montana EIC also involved an agency decision to allow mining on federal lands. *See* 274 F. Supp. 3d at 1081. That decision, which relies on *High Country*, also cannot be read to endorse the Social Cost of Carbon. Rather, it states only that it is unreasonable for an agency to decline to monetize climate change-related costs without providing an adequate rationale for doing so. In *Montana EIC*, the agency attempted to justify declining to use the Social Cost of Carbon, but the court concluded that the agency's rationale "sidestep[ped] Plaintiff's argument" in support of the tool rather than squarely addressing the reasons that monetization of climate change-related costs was inappropriate and unreliable. *Id*. at 1098. The court further explained that the agency failed to conclude that "the specific effects of greenhouse gas emissions from the [mining] expansion would be too uncertain to predict," which could have supported the agency's decision. *Id*.

Fundamentally, the *Montana EIC* ruling stands for the well-known principles that (1) agencies must respond to significant comments and (2) their decisions must be based on a consideration of the relevant factors. *See City of Portland, Or. v. EPA*, 507 F.3d 706, 713 (D.C. Cir. 2007) ("'The requirement that agency action not be arbitrary or capricious includes a requirement that the agency . . . respond to "relevant" and "significant" public comments.'") (quoting *Pub. Citizen, Inc. v. FAA*, 988 F.2d 186, 197 (D.C. Cir. 1993)); *Thompson v. Clark*, 741 F.2d 401, 409 (D.C. Cir. 1984) (agency's responses must show that its "decision was . . . based on a consideration of the relevant factors") (internal quotation marks and citation omitted). FERC satisfied both of those standards.

CONCLUSION

For the foregoing reasons, the Petitions for Review should be denied and FERC's orders should be affirmed.

Dated: March 28, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(a)(4)(G) and 32(g)(1), I hereby certify that the foregoing brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 5,472 words (as determined by the Microsoft Word 2010 word-processing system used to prepare the brief), excluding those portions exempted by Federal Rule of Appellate Procedure 32(f) and D.C. Cir. R. 32(e)(1), which is not more than half the length of the parties' principle briefs.

I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using the Microsoft Word 2010 word-processing system in 14-point Times New Roman font.

/s/ *Aaron M. Flynn*

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of March, 2019, the foregoing Brief of *Amicus Curiae* Interstate Natural Gas Association of America in Support of Respondent Federal Energy Regulatory Commission and Affirmance was served electronically on all counsel of record through the Court's CM/ECF system.

/s/ *Aaron M. Flynn*
Aaron M. Flynn

STATUTORY AND REGULATORY ADDENDUM

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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-

(2) Notwithstanding section 811 of this title, the Secretary of the Interior or the Secretary of Commerce, as appropriate, shall accept and prescribe, and the Commission shall require, the proposed alternative referred to in paragraph (1), if the Secretary of the appropriate department determines, based on substantial evidence provided by the license applicant, any other party to the proceeding, or otherwise available to the Secretary, that such alternative—

(A) will be no less protective than the fishway initially prescribed by the Secretary; and

(B) will either, as compared to the fishway initially prescribed by the Secretary—

(i) cost significantly less to implement; or

(ii) result in improved operation of the project works for electricity production.

(3) In making a determination under paragraph (2), the Secretary shall consider evidence provided for the record by any party to a licensing proceeding, or otherwise available to the Secretary, including any evidence provided by the Commission, on the implementation costs or operational impacts for electricity production of a proposed alternative.

(4) The Secretary concerned shall submit into the public record of the Commission proceeding with any prescription under section 811 of this title or alternative prescription it accepts under this section, a written statement explaining the basis for such prescription, and reason for not accepting any alternative prescription under this section. The written statement must demonstrate that the Secretary gave equal consideration to the effects of the prescription adopted and alternatives not accepted on energy supply, distribution, cost, and use; flood control; navigation; water supply; and air quality (in addition to the preservation of other aspects of environmental quality); based on such information as may be available to the Secretary, including information voluntarily provided in a timely manner by the applicant and others. The Secretary shall also submit, together with the aforementioned written statement, all studies, data, and other factual information available to the Secretary and relevant to the Secretary's decision.

(5) If the Commission finds that the Secretary's final prescription would be inconsistent with the purposes of this subchapter, or other applicable law, the Commission may refer the dispute to the Commission's Dispute Resolution Service. The Dispute Resolution Service shall consult with the Secretary and the Commission and issue a non-binding advisory within 90 days. The Secretary may accept the Dispute Resolution Service advisory unless the Secretary finds that the recommendation will not adequately protect the fish resources. The Secretary shall submit the advisory and the Secretary's final written determination into the record of the Commission's proceeding.

(June 10, 1920, ch. 285, pt. I, § 33, as added Pub. L. 109–58, title II, § 241(c), Aug. 8, 2005, 119 Stat. 675.)

SUBCHAPTER II—REGULATION OF ELECTRIC UTILITY COMPANIES ENGAGED IN INTERSTATE COMMERCE

§ 824. Declaration of policy; application of subchapter

(a) Federal regulation of transmission and sale of electric energy

It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) Use or sale of electric energy in interstate commerce

(1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(2) Notwithstanding subsection (f), the provisions of sections 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 824*o*, 824*o*–1, 824p, 824q, 824r, 824s, 824t, 824u, and 824v of this title shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this chapter with respect to such provisions. Compliance with any order or rule of the Commission under the provisions of section 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 824*o*, 824*o*–1, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title, shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence.

(c) Electric energy in interstate commerce

For the purpose of this subchapter, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

transportation authorized by section 311(a) of the NGPA.

[44 FR 52184, Sept. 7, 1979, as amended by Order 581, 60 FR 53072, Oct. 11, 1995]

§ 284.4 Reporting.

(a) *Reports in MMBtu.* All reports filed pursuant to this part must indicate quantities of natural gas in MMBtu's. An MMBtu means a million British thermal units. A British thermal unit or Btu means the quantity of heat required to raise the temperature of one pound avoirdupois of pure water from 58.5 degrees to 59.5 degrees Fahrenheit, determined in accordance with paragraphs (b) and (c) of this section.

(b) *Measurement.* The Btu content of one cubic foot of natural gas under the standard conditions specified in paragraph (c) of this section is the number of Btu's produced by the complete combustion of such cubic foot of gas, at constant pressure with air of the same temperature and pressure as the gas, when the products of combustion are cooled to the initial temperature of the gas and air and when the water formed by such combustion is condensed to a liquid state.

(c) *Standard conditions.* The standard conditions for purposes of paragraph (b) of this section are as follows: The gas is saturated with water vapor at 60 degrees Fahrenheit under a pressure equivalent to that of 30.00 inches of mercury at 32 degrees Fahrenheit, under standard gravitational force (980.665 centimeters per second squared).

[Order 581, 60 FR 53072, Oct. 11, 1995]

§ 284.5 Further terms and conditions.

The Commission may prospectively, by rule or order, impose such further terms and conditions as it deems appropriate on transactions authorized by this part.

§ 284.6 Rate interpretations.

(a) *Procedure.* A pipeline may obtain an interpretation pursuant to subpart L of part 385 of this chapter concerning whether particular rates and charges comply with the requirements of this part.

(b) *Address.* Requests for interpretations should be addressed to: FERC Part 284 Interpretations, Office of General Counsel, Federal Energy Regulatory Commission, Washington, DC 20426.

[44 FR 66791, Nov. 21, 1979; 44 FR 75383, Dec. 20, 1979, as amended by Order 225, 47 FR 19058, May 3, 1982; Order 581, 60 FR 53072, Oct. 11, 1995]

§ 284.7 Firm transportation service.

(a) *Firm transportation availability.* (1) An interstate pipeline that provides transportation service under subpart B or G or this part must offer such transportation service on a firm basis and separately from any sales service.

(2) An intrastate pipeline that provides transportation service under Subpart C may offer such transportation service on a firm basis.

(3) *Service on a firm basis* means that the service is not subject to a prior claim by another customer or another class of service and receives the same priority as any other class of firm service.

(4) An interstate pipeline that provided a firm sales service on May 18, 1992, and that offers transportation service on a firm basis under subpart B or G of this part, must offer a firm transportation service under which firm shippers may receive delivery up to their firm entitlements on a daily basis without penalty.

(b) *Non-discriminatory access.* (1) An interstate pipeline or intrastate pipeline that offers transportation service on a firm basis under subpart B, C or G must provide such service without undue discrimination, or preference, including undue discrimination or preference in the quality of service provided, the duration of service, the categories, prices, or volumes of natural gas to be transported, customer classification, or undue discrimination or preference of any kind.

(2) An interstate pipeline that offers transportation service on a firm basis under subpart B or G of this part must provide each service on a basis that is equal in quality for all gas supplies transported under that service, whether purchased from the pipeline or another seller.

(3) An interstate pipeline that offers transportation service on a firm basis under subpart B or G of this part may

not include in its tariff any provision that inhibits the development of market centers.

(c) *Reasonable operational conditions.* Consistent with paragraph (b) of this section, a pipeline may impose reasonable operational conditions on any service provided under this part. Such conditions must be filed by the pipeline as part of its transportation tariff.

(d) *Segmentation.* An interstate pipeline that offers transportation service under subpart B or G of this part must permit a shipper to make use of the firm capacity for which it has contracted by segmenting that capacity into separate parts for its own use or for the purpose of releasing that capacity to replacement shippers to the extent such segmentation is operationally feasible.

(e) *Reservation fee.* Where the customer purchases firm service, a pipeline may impose a reservation fee or charge on a shipper as a condition for providing such service. Except for pipelines subject to subpart C of this part, if a reservation fee is charged, it must recover all fixed costs attributable to the firm transportation service, unless the Commission permits the pipeline to recover some of the fixed costs in the volumetric portion of a two-part rate. A reservation fee may not recover any variable costs or fixed costs not attributable to the firm transportation service. Except as provided in this paragraph, the pipeline may not include in a rate for any transportation provided under subpart B, C or G of this part any minimum bill or minimum take provision, or any other provision that has the effect of guaranteeing revenue.

(f) *Limitation.* A person providing service under Subpart B, C or G of this part is not required to provide any requested transportation service for which capacity is not available or that would require the construction or acquisition of any new facilities.

[Order 436, 50 FR 42493, Oct. 18, 1985]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 284.7, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.fdsys.gov*.

§ 284.8 Release of firm capacity on interstate pipelines.

(a) An interstate pipeline that offers transportation service on a firm basis under subpart B or G of this part must include in its tariff a mechanism for firm shippers to release firm capacity to the pipeline for resale by the pipeline on a firm basis under this section.

(b)(1) Firm shippers must be permitted to release their capacity, in whole or in part, on a permanent or short-term basis, without restriction on the terms or conditions of the release. A firm shipper may arrange for a replacement shipper to obtain its released capacity from the pipeline. A replacement shipper is any shipper that obtains released capacity.

(2) The rate charged the replacement shipper for a release of capacity may not exceed the applicable maximum rate, except that no rate limitation applies to the release of capacity for a period of one year or less if the release is to take effect on or before one year from the date on which the pipeline is notified of the release. Payments or other consideration exchanged between the releasing and replacement shippers in a release to an asset manager as defined in paragraph (h)(3) of this section are not subject to the maximum rate.

(c) Except as provided in paragraph (h) of this section, a firm shipper that wants to release any or all of its firm capacity must notify the pipeline of the terms and conditions under which the shipper will release its capacity. The firm shipper must also notify the pipeline of any replacement shipper designated to obtain the released capacity under the terms and conditions specified by the firm shipper.

(d) The pipeline must provide notice of offers to release or to purchase capacity, the terms and conditions of such offers, and the name of any replacement shipper designated in paragraph (b) of this section, on an Internet web site, for a reasonable period.

(e) The pipeline must allocate released capacity to the person offering the highest rate and offering to meet any other terms and conditions of the release. If more than one person offers the highest rate and meets the terms and conditions of the release, the released capacity may be allocated on a basis provided in the pipeline's tariff, provided however, if the replacement shipper designated in paragraph (b) of this section offers the highest rate, the capacity must be allocated to the designated replacement shipper.

(f) Unless otherwise agreed by the pipeline, the contract of the shipper releasing capacity will remain in full force and effect, with the net proceeds from any resale to a replacement shipper credited to the releasing shipper's reservation charge.

(g) To the extent necessary, a firm shipper on an interstate pipeline that offers transportation service on a firm basis under subpart B or G of this part is granted a limited-jurisdiction blanket certificate of public convenience and necessity pursuant to section 7 of the Natural Gas Act solely for the purpose of releasing firm capacity pursuant to this section.

(h)(1) The following releases need not comply with the bidding requirements of paragraphs (c) through (e) of this section:

(i) A release of capacity to an asset manager as defined in paragraph (h)(3) of this section;

(ii) A release of capacity to a marketer participating in a state-regulated retail access program as defined in paragraph (h)(4) of this section;

(iii) A release for more than one year at the maximum tariff rate; and

(iv) A release for any period of 31 days or less.

(v) If a release is exempt from bidding under paragraph (h)(1) of this section, notice of the release must be provided on the pipeline's Internet Web site as soon as possible, but not later than the first nomination, after the release transaction commences.

(2) When a release of capacity is exempt from bidding under paragraph (h)(1)(iv) of this section, a firm shipper may not roll over, extend or in any way continue the release to the same replacement shipper using the 31 days or less bidding exemption until 28 days after the first release period has ended. The 28-day hiatus does not apply to any re-release to the same replacement shipper that is posted for bidding or that qualifies for any of the other exemptions from bidding in paragraph (h)(1) of this section.

(3) A release to an asset manager exempt from bidding requirements under paragraph (h)(1)(i) of this section is any pre-arranged release that contains a condition that the releasing shipper may call upon the replacement shipper to deliver to, or purchase from, the releasing shipper a volume of gas up to 100 percent of the daily contract demand of the released transportation or storage capacity, as provided in paragraphs (h)(3)(i) through (h)(3)(iii) of this paragraph.

(i) If the capacity release is for a period of one year or less, the asset manager's delivery or purchase obligation must apply on any day during a minimum period of the lesser of five months (or 155 days) or the term of the release.

(ii) If the capacity release is for a period of more than one year, the asset manager's delivery or purchase obligation must apply on any day during a minimum period of five months (or 155 days) of each twelve-month period of the release, and on five-twelfths of the days of any additional period of the release not equal to twelve months.

(iii) If the capacity release is a release of storage capacity, the asset manager's delivery or purchase obligation need only be up to 100 percent of the daily contract demand under the release for storage withdrawals or injections, as applicable.

(4) A release to a marketer participating in a state-regulated retail access program exempt from bidding requirements under paragraph (h)(1)(ii) of this section is any prearranged capacity release that will be utilized by the replacement shipper to provide the gas supply requirement of retail consumers pursuant to a retail access program approved by the state agency with jurisdiction over the local distribution company that provides delivery service to such retail consumers.

[Order 636, 57 FR 13318, Apr. 16, 1992, as amended by Order 636–A, 57 FR 36217, Aug. 12, 1992; Order 577, 60 FR 16983, Apr. 4, 1995; Order 577–A, 60 FR 30187, June 8, 1995. Redesignated and amended by Order 637, 65 FR 10220, Feb. 25, 2000; Order 637–A, 65 FR 35765, June 5, 2000; Order 712, 73 FR 37092, June 30, 2008; Order 712–A, 73 FR 72714, Dec. 1, 2008; 73 FR 79628, Dec. 30, 2008]

PART 1500—PURPOSE, POLICY, AND MANDATE

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 55990, Nov. 28, 1978, unless otherwise noted.

§ 1500.1 Purpose.

(a) The National Environmental Policy Act (NEPA) is our basic national charter for protection of the environment. It establishes policy, sets goals (section 101), and provides means (section 102) for carrying out the policy. Section 102(2) contains ''action-forcing'' provisions to make sure that federal agencies act according to the letter and spirit of the Act. The regulations that follow implement section 102(2). Their purpose is to tell federal agencies what they must do to comply with the procedures and achieve the goals of the Act. The President, the federal agencies, and the courts share responsibility for enforcing the Act so as to achieve the substantive requirements of section 101.

(b) NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail.

(c) Ultimately, of course, it is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment. These regulations provide the direction to achieve this purpose.

§ 1500.2 Policy.

Federal agencies shall to the fullest extent possible:

(a) Interpret and administer the policies, regulations, and public laws of the United States in accordance with the policies set forth in the Act and in these regulations.

(b) Implement procedures to make the NEPA process more useful to decisionmakers and the public; to reduce paperwork and the accumulation of extraneous background data; and to emphasize real environmental issues and alternatives. Environmental impact statements shall be concise, clear, and to the point, and shall be supported by evidence that agencies have made the necessary environmental analyses.

(c) Integrate the requirements of NEPA with other planning and environmental review procedures required by law or by agency practice so that all such procedures run concurrently rather than consecutively.

(d) Encourage and facilitate public involvement in decisions which affect the quality of the human environment.

(e) Use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment.

(f) Use all practicable means, consistent with the requirements of the Act and other essential considerations of national policy, to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment.

§ 1500.3 Mandate.

Parts 1500 through 1508 of this title provide regulations applicable to and binding on all Federal agencies for implementing the procedural provisions of the National Environmental Policy Act of 1969, as amended (Pub. L. 91–190, 42 U.S.C. 4321 *et seq.*) (NEPA or the Act) may be incorporated by reference unless it is reasonably available for inspection by potentially interested persons within the time allowed for comment. Material based on proprietary data which is itself not available for review and comment shall not be incorporated by reference.

§ 1502.22 Incomplete or unavailable information.

When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking.

(a) If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.

(b) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the agency shall include within the environmental impact statement:

(1) A statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community. For the purposes of this section, "reasonably foreseeable" includes impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.

(c) The amended regulation will be applicable to all environmental impact statements for which a Notice of Intent (40 CFR 1508.22) is published in the FEDERAL REGISTER on or after May 27, 1986. For environmental impact statements in progress, agencies may choose to comply with the requirements of either the original or amended regulation.

[51 FR 15625, Apr. 25, 1986]

§ 1502.23 Cost-benefit analysis.

If a cost-benefit analysis relevant to the choice among environmentally different alternatives is being considered for the proposed action, it shall be incorporated by reference or appended to the statement as an aid in evaluating the environmental consequences. To assess the adequacy of compliance with section 102(2)(B) of the Act the statement shall, when a cost-benefit analysis is prepared, discuss the relationship between that analysis and any analyses of unquantified environmental impacts, values, and amenities. For purposes of complying with the Act, the weighing of the merits and drawbacks of the various alternatives need not be displayed in a monetary cost-benefit analysis and should not be when there are important qualitative considerations. In any event, an environmental impact statement should at least indicate those considerations, including factors not related to environmental quality, which are likely to be relevant and important to a decision.

§ 1502.24 Methodology and scientific accuracy.

Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements. They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement. An agency may place discussion of methodology in an appendix.

§ 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