ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

No. 20-1427

SIERRA CLUB, *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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JUNE 23, 2021

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

The parties before this Court are identified in Petitioners' Circuit Rule 28(a)(1) certificate.

B. Rulings Under Review

1. *Mountain Valley Pipeline, LLC*, 171 FERC ¶ 61,232 (June 18, 2020) ("Certificate Order"), R.601, JA ___;
2. *Mountain Valley Pipeline, LLC*, 172 FERC ¶ 62,100 (Aug. 20, 2020), R.612, JA ___; and
3. *Mountain Valley Pipeline, LLC*, 172 FERC ¶ 61,261 (Sept. 17, 2020) ("Rehearing Order"), R.628, JA ___.

C. Related Cases

This case has not previously been before this Court or any other court. To counsel's knowledge, there are no other related cases within the meaning of Circuit Rule 28(a)(1)(C).

This Court denied petitions for review, on 16 separate issues, of the Commission's 2017 grant of a certificate of public convenience and necessity for a different Mountain Valley project. *Appalachian Voices v. FERC*, Nos. 17-1271, *et al.*, 2019 WL 847199 (D.C. Cir. Feb. 19, 2019) (unpublished). Other petitions for review are still pending in this Court related to that Mountain Valley project, including challenges to FERC's

authorizations of construction, *Sierra Club v. FERC*, No. 20-1512 (petition filed Dec. 22, 2020), and *Sierra Club v. FERC*, No. 21-1040 (petition filed Jan. 25, 2021), and an appeal of a district court's dismissal of a complaint raising constitutional challenges to the Natural Gas Act and seeking injunctive relief (including a nationwide injunction to stop the existing FERC pipeline-approval process and a declaration that all FERC certificates are void), *Bohon v. FERC*, No. 20-5203 (petition filed July 13, 2020).

As referenced in the Statement of Facts below, several appeals have also been filed and decided in the Fourth Circuit related to permits and authorizations by other agencies for that 2017 Mountain Valley project.

/s/ Anand R. Viswanathan
Anand R. Viswanathan

June 23, 2021

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GLOSSARY

Br. or Sierra Club Br.	Opening brief of Petitioners
Certificate Order	*Mountain Valley Pipeline, LLC*, 171 FERC ¶ 61,232 (June 18, 2020), R.601, JA ___
Environmental Impact Statement	Final Environmental Impact Statement for Southgate Project (issued Feb. 14, 2020), R.566, JA ___
Erosion Plan	FERC's *Upland Erosion Control, Revegetation, and Maintenance Plan*
Intervenors Br.	Opening brief of Intervenors Monacan Indian Nation and Sappony Tribe
Mainline	Mountain Valley interstate pipeline approved by FERC in 2017
Mitigation Procedures	FERC's *Wetland and Waterbody Construction and Mitigation Procedures*
Mountain Valley	Respondent-Intervenor Mountain Valley Pipeline, LLC
Rehearing Order	*Mountain Valley Pipeline, LLC*, 172 FERC ¶ 61,261 (Sept. 17, 2020), R.628, JA ___
Sierra Club	Petitioners Sierra Club, Appalachian Voices, Blue Ridge Environmental Defense League, Chesapeake Climate Action Network, Center for Biological Diversity, and Haw River Assembly

Southgate or Southgate Project or Project	Mountain Valley's 75-mile pipeline project approved in FERC certificate on review, *Mountain Valley Pipeline, LLC*, 171 FERC ¶ 61,232 (2020), R.601, JA ___
Tribes	Intervenors Monacan Indian Nation and Sappony Tribe

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FEDERAL ENERGY REGULATORY COMMISSION,
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FEDERAL ENERGY REGULATORY COMMISSION

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF ISSUES

In an earlier proceeding, the Federal Energy Regulatory Commission ("FERC" or "Commission") issued a certificate of "public convenience and necessity" under section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c), to Mountain Valley Pipeline, LLC ("Mountain Valley"), to construct and operate a new natural gas pipeline in West Virginia and Virginia. This Court affirmed the Commission's certificate orders against all "sixteen different challenges" presented for review.

Appalachian Voices v. FERC, Nos. 17-1271, *et al.*, 2019 WL 847199, at *1 (D.C. Cir. Feb. 19, 2019) (unpublished).

In the current proceeding, the Commission issued another certificate of public convenience and necessity to Mountain Valley. This one authorizes Mountain Valley to construct and operate, subject to certain environmental mitigation conditions, a new 75-mile-long natural gas pipeline (hereinafter "the Southgate Project," "Southgate," or "Project") that extends from its previously-authorized "mainline" pipeline system in Pittsylvania County, Virginia, to local distribution facilities in Rockingham and Alamance Counties, North Carolina. *Mountain Valley Pipeline, LLC*, 171 FERC ¶ 61,232, at PP 1, 11 (2020) ("Certificate Order"), R.601, JA ___, *order on reh'g*, *Mountain Valley Pipeline, LLC*, 172 FERC ¶ 61,261, (2020) ("Rehearing Order"), R.628, JA ___.

Applying its policy statement on pipeline certificates, the Commission found a need for the Southgate Project based on Mountain Valley's execution of a long-term contract with a customer for 80 percent of the Project's capacity—and Sierra Club does not challenge that finding here. The Commission also considered and disclosed the

Project's potential environmental impacts and found the Project environmentally acceptable, so long as constructed and operated in accordance with prescribed mitigation measures.

On review, Petitioners (collectively "Sierra Club") raise two issues:

1. Did the Commission adequately explain its determination and follow its precedent in treating Mountain Valley as a new market entrant for purposes of establishing initial rates for the Southgate Project, because the company has neither revenue from existing operations nor a proven track record?

2. Did the Commission reasonably analyze environmental issues (impacts to aquatic resources and cumulative effects) consistent with the requirements of the National Environmental Policy Act, 42 U.S.C. §§ 4321, *et seq*. ("NEPA")?

Intervenors Monacan Indian Nation and Sappony Tribe (collectively "Tribes") raise an additional issue, not presented in Sierra Club's opening brief, that is not properly before the Court:

3. Did the Commission, consistent with its responsibilities under the National Historic Preservation Act, 54 U.S.C. § 306108, and

NEPA, adequately consider the Project's impacts on cultural and historic resources?

STATUTORY AND REGULATORY PROVISIONS

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

STATEMENT OF FACTS

I. Statutory and regulatory background

A. Natural Gas Act

The "principal purpose" of the Natural Gas Act is to "encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices." *NAACP v. FPC*, 425 U.S. 662, 669–70 (1976). To that end, sections 1(b) and (c) of the Act grant the Commission jurisdiction over the transportation and wholesale sale of natural gas in interstate commerce. 15 U.S.C. §§ 717(b), (c). Before a company may construct a natural gas pipeline, it must obtain from the Commission a certificate of "public convenience and necessity" under Natural Gas Act section 7(c), 15 U.S.C. § 717f(c), and "comply with all other federal,

state, and local regulations not preempted" by the Act. *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 240 (D.C. Cir. 2013).

Under Natural Gas Act section 7(e), the Commission shall issue a certificate to any qualified applicant upon finding that the proposed construction and operation of the pipeline facility "is or will be required by the present or future public convenience and necessity." 15 U.S.C. § 717f(e). The Act empowers the Commission to "attach to the issuance of the certificate . . . such reasonable terms and conditions as the public convenience and necessity may require." *Id.* Under that authority, FERC employs a "public interest" standard to determine the initial rates that a pipeline may charge for newly-certificated service, which is less exacting than the "just and reasonable" standard of the Natural Gas Act otherwise applicable to ratemaking determinations. *See, e.g.*, *Mo. Pub. Serv. Comm'n v. FERC*, 337 F.3d 1066, 1068, 1070 (D.C. Cir. 2003); *Mo. Pub. Serv. Comm'n v. FERC*, 601 F.3d 581, 583 (D.C. Cir. 2010).

B. National Environmental Policy Act

The Commission's consideration of an application for a certificate of public convenience and necessity triggers the National

Environmental Policy Act. *See* 42 U.S.C. §§ 4321, *et seq*. NEPA sets out procedures federal agencies must follow to ensure that the environmental effects of proposed actions are "adequately identified and evaluated." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). "NEPA imposes only procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions." *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 756–57 (2004). Foremost amongst those requirements is that an agency must "take a 'hard look' at the environmental consequences before taking a major action." *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983).

NEPA's implementing regulations[1] require agencies to consider the environmental effects of a proposed action by preparing either an

[1] On July 16, 2020, the Council on Environmental Quality amended NEPA regulations through a final rule, "Update to the Regulation Implementing the Procedural Provisions of the National Environmental Policy Act." 85 Fed. Reg. 43,304 (July 16, 2020) ("2020 Final Rule"). The 2020 Final Rule, however, only applies to NEPA processes begun after September 14, 2020, 40 C.F.R. § 1506.13, and thus does not apply to FERC's February 14, 2020 Environmental Impact Statement related to the Southgate Project. Accordingly, references in this brief to NEPA regulations will be to those versions in effect before the 2020 Final Rule.

environmental assessment, if supported by a finding of no significant impact, or a more comprehensive environmental impact statement. *See* 40 C.F.R. §§ 1501.3, 1501.5, 1502.1.

II. Commission review of the Project

The Certificate Order for the Southgate Project specifies that FERC staff may not issue any notice to proceed with construction of the Project until (1) Mountain Valley obtains necessary federal permits for the "mainline" system (for which FERC issued a certificate in 2017) and (2) the designated FERC official permits mainline construction to resume. Certificate Order P 9, JA ___; *see also* Certificate Order, Envtl. Condition No. 10, JA ___. At the time the Commission issued the Southgate certificate, Mountain Valley was not authorized to resume construction of the mainline system, due to ongoing consultation with the U.S. Fish and Wildlife Service under section 7 of the Endangered Species Act. Certificate Order P 8, JA ___.

A. The previously-certificated mainline project

On October 13, 2017, the Commission issued a certificate of public convenience and necessity authorizing Mountain Valley's mainline system, a new 303.5-mile-long interstate pipeline intended to transport

up to 2 million dekatherms per day of firm transportation service from Wetzel County, West Virginia to an interconnection with a Transcontinental Gas Pipe Line compressor station in Pittsylvania County, Virginia. Certificate Order P 3, JA ___; *see also infra* at 11–14 (describing developments on mainline).

This Court affirmed that certificate and the Commission's environmental review, rejecting sixteen different challenges raised by petitioners. *Appalachian Voices*, 2019 WL 847199, at *1. Among its findings, of particular relevance here, the Court found that: (1) the Commission's approval of Mountain Valley's requested fourteen percent return on equity was reasonable; (2) the Commission adequately considered and disclosed erosion and sedimentation impacts on aquatic resources; and (3) petitioners' challenges under the National Historic Preservation Act lacked merit. *Id.* at *1–3.

B. The proposed Southgate Project

Mountain Valley filed its Southgate application with the Commission on November 6, 2018 under section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c), and part 157 of the Commission's regulations, 18 C.F.R. pt. 157. Mountain Valley sought authorization to build and

operate approximately 75 miles of natural gas pipeline and associated facilities in Pittsylvania County, Virginia, and Rockingham and Alamance Counties, North Carolina. Certificate Order P 1, JA ___.

The Southgate Project extends from an interconnect with Mountain Valley's "mainline" pipeline system (in Pittsylvania County, Virginia) to local distribution facilities of Dominion Energy North Carolina. *Id.* P 11, JA ___. The Project is designed to provide up to 375,000 dekatherms per day of firm transportation service.[2] *Id.* P 1, JA ___. After conducting an "open season" process for service on the Project, Mountain Valley executed a binding precedent agreement with Dominion for 300,000 dekatherms per day of service, 80 percent of the Project's capacity. *Id.* PP 12, 29, JA ___, ___.

The Commission's pre-filing review of the Project began in May 2018. *Id.* P 69, JA ___. As part of that review, the agency issued a notice of intent to prepare an environmental impact statement, published in the Federal Register on August 15, 2018; that notice was

[2] "Firm" transportation service "means the delivery of natural gas is guaranteed regardless of the proportion of the pipeline's capacity that is in use." *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1307 n.1 (D.C. Cir. 2015).

sent to over 1,100 interested parties, including federal, state, and local agencies, elected officials, environmental groups, Native American tribes, and potentially affected landowners. *Id.* Commission staff held public meetings in North Carolina and Virginia in August 2018. *Id.* P 70 n.143, JA ___. In response, the Commission received 69 comment letters and 65 form letters, and 68 people presented oral comments at public scoping meetings. *Id.* P 70, JA ___.

C. The Commission's environmental review

In July 2019, Commission staff issued a draft environmental impact statement that addressed issues raised pre-filing. *Id.* P 73, JA ___. Subsequently, Commission staff held three public comment sessions in August 2019, at which approximately 65 people provided oral or written comments on the draft environmental impact statement; separately, the Commission also received 77 written comments. *Id.*

In October 2019, Mountain Valley filed several minor route modifications to reduce environmental and cultural resource impacts, to accommodate landowner requests, and to account for construction concerns. *Id.* P 74, JA ___. No landowners affected by these route modifications filed comments with the Commission. *Id.*

The final Environmental Impact Statement, issued February 2020, analyzed the Project's potential impact upon various environmental resources and responded to all substantive environmental comments received on the draft impact statement. *Id.* P 75, JA ___. The Environmental Impact Statement concluded that construction and operation of the Project would result in some adverse environmental impacts, which would be reduced to less-than-significant levels with the implementation of required mitigation measures. *Id.* P 76, JA ___.

D. Developments on Mountain Valley's mainline system before the orders on review

After the Commission issued a certificate for the mainline system in October 2017, its staff authorized Mountain Valley to commence construction in early 2018. Certificate Order P 4, JA ___. Mountain Valley began construction on that project in February 2018.

On July 27, 2018, the U.S. Court of Appeals for the Fourth Circuit vacated authorizations for the mainline from the Department of Interior's Bureau of Land Management and the Department of Agriculture's Forest Service. *See Sierra Club v. U.S. Forest Svc.*, 897 F.3d 582, 587–89 (4th Cir. 2018) (vacating a right-of-way granted by the

Bureau of Land Management and a decision by the Forest Service amending a land resource management plan for the Jefferson National Forest to accommodate the right-of-way and pipeline construction). After the Fourth Circuit's vacatur, FERC staff issued an order instructing Mountain Valley to immediately cease "construction activity along all portions of the [mainline] Project and in all work areas." *Mountain Valley Pipeline, LLC*, Notification of Stop Work Order, FERC Docket No. CP16-10 (Aug. 3, 2018); Certificate Order P 4, JA ___. Agency staff subsequently authorized partial construction to resume based on its assessment "that completing construction and restoration as quickly as possible would best protect the environment." Certificate Order P 4 (citing *Mountain Valley Pipeline, LLC*, Partial Authorization to Resume Construction, FERC Docket No. CP16-10 (Aug. 29, 2018)), JA ___.

On October 3, 2018, the Fourth Circuit vacated another mainline permit, this time the Nationwide Permit 12 issued by the U.S. Army Corps of Engineers (Huntingdon District) under the Clean Water Act. *See Sierra Club v. U.S. Army Corps of Eng'rs*, 905 F.3d 285 (4th Cir. 2018); Certificate Order P 5, JA ___; *see also Sierra Club v. U.S. Army*

Corp of Eng'rs, 981 F.3d 251, 255 (4th Cir. 2020) ("By operating under the more general [Nationwide Permit] 12, [Mountain Valley] would not have to undertake the more arduous and time-consuming individual [Clean Water Act] permitting process tailored to specific projects."). Mountain Valley informed the Commission that it was suspending construction in U.S. waters in the Corps' Huntingdon District and then in two other Corps districts, the latter in response to those districts also suspending nationwide permits for the mainline. Certificate Order P 5 & n.10, JA ___.

In August 2019, the Commission asked the Fish and Wildlife Service to reinitiate consultation on the mainline project under section 7 of the Endangered Species Act. *Id*. P 6, JA ___. The Fourth Circuit, in October 2019, granted a stay of the Service's 2017 Biological Opinion for the mainline and placed in abeyance the litigation related to the Opinion until completion of the reinitiated consultation process. *Id*. P 7; *Wild Va. v. U.S. Dep't of Interior*, No. 19-1866 (4th Cir. Oct. 11, 2019). In response, FERC staff again ordered Mountain Valley to stop all construction along the entirety of the mainline system. Certificate Order P 7 & n.13, JA ___–__. The Service issued a revised Biological

Opinion and Incidental Take Statement on September 4, 2020, concluding that the mainline project will not jeopardize the continued existence of any listed species or adversely modify critical habitat. *See Mountain Valley Pipeline, LLC*, 174 FERC ¶ 61,192, at P 7 (2021); *see also Appalachian Voices v. U.S. Dep't of Interior*, Nos. 20-2159, *et al.* (4th Cir.) (appeals challenging the revised Biological Opinion and Incidental Take Statement; briefs have been filed by all parties); *Wild Va. v. U.S. Dep't of Interior*, Order, No. 19-1866 (4th Cir. Oct. 1, 2020) (granting motion to voluntarily dismiss appeal related to original Biological Opinion).

E. The Commission orders on review

On June 18, 2020, the Commission issued a conditional certificate of public convenience and necessity for Mountain Valley's proposed Southgate Project under section 7 of the Natural Gas Act, 15 U.S.C. § 717f. *See* Certificate Order P 2, JA ___; Rehearing Order P 1, JA ___. On September 17, 2020, the Commission issued an order on rehearing that modified the Certificate Order while reaching the same result. Rehearing Order P 2, JA ___; *see also* 15 U.S.C. § 717r(a) ("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."); *Allegheny Def. Project v. FERC*, 964 F.3d 1, 16–17 (D.C. Cir. 2020) (en banc). One Commissioner (now-Chairman Glick) dissented in part on both orders, while another (Commissioner McNamee) filed a concurring statement on the Certificate Order.

The Commission found that Mountain Valley's "precedent agreement" (its supply contract) with Dominion for 80 percent of the Project's capacity adequately demonstrated market need for purposes of Natural Gas Act section 7. Certificate Order PP 39–40, 52, JA ___–__, ___; Rehearing Order P 11, JA ___. As to Mountain Valley's proposed rates, including its proposed 14 percent return on equity, the Commission found that they reasonably reflect current agency policy. Certificate Order PP 54, 57, JA ___, ___.

The challenged orders conditionally authorize the Project—that is, the Project is authorized only if the specified conditions are met. On environmental concerns, the Commission concluded that the Project

would be an environmentally acceptable action, if constructed under the certificate's requisite conditions and under applicable law and considering its public benefits. *Id.* PP 76, 144, JA ___, ___.

As to impacts on aquatic resources, as relevant here, the Commission required Mountain Valley to follow the agency's *Upland Erosion Control, Revegetation, and Maintenance Plan* ("Erosion Plan") and its *Wetland and Waterbody Construction and Mitigation Procedures* ("Mitigation Procedures"). Rehearing Order P 27, JA ___. The Erosion Plan and Mitigation Procedures are publicly available documents prepared by FERC staff that are intended to assist certificate applicants "by identifying baseline mitigation measures" to enhance revegetation and minimize erosion and "the extent and duration of project-related disturbance on wetlands and waterbodies"; and applicants may tailor these documents to their own projects, as needed.[3] *See* Final Envtl. Impact Statement at 2-12 (Feb. 14, 2020) (cited hereinafter "EIS at") (noting that Mountain Valley requested certain

[3] Both documents are available on FERC's website: https://www.ferc.gov/sites/default/files/2020-04/upland-erosion-control-revegetation-maintenance-plan.pdf; https://www.ferc.gov/sites/default/files/2020-04/wetland-waterbody-construction-mitigation-procedures.pdf.

modifications to the FERC Erosion Plan and Mitigation Procedures, with site-specific justifications described in the Environmental Impact Statement), R.566, JA ___; Mountain Valley Supp. Filing (Oct. 23, 2019) (Erosion Plan and Mitigation Procedures for Southgate Project), R.524, JA ___–__. The certificate also mandates, among other things, a team of inspectors to document compliance with environmental conditions. Certificate Order, Envtl. Condition No. 7, JA ___; Rehearing Order P 27, JA ___.

The Certificate Order also specifies that FERC staff may not issue any notice to allow Mountain Valley to proceed with construction of the Southgate Project until (1) Mountain Valley obtains necessary federal permits for the mainline system and (2) the designated FERC official lifts the "stop-work order" to allow mainline construction to resume.[4] Certificate Order P 9, JA ___; *see also* Certificate Order, Envtl. Condition No. 10, JA ___.

[4] At the time the certificate issued, Mountain Valley was not authorized to resume construction of the mainline system, due to ongoing reinitiated consultation with Fish and Wildlife Service. Certificate Order P 8, JA ___.

F. Post-record developments on the mainline system

In October 2020, after it had issued the Southgate orders on review, the Commission issued an order partially authorizing Mountain Valley's request to resume construction activities for the mainline—i.e., allowing construction along all portions of that previously-certificated project except for a 25-mile "exclusion zone." *Mountain Valley Pipeline, LLC*, 174 FERC ¶ 61,192, at P 9; *see also Mountain Valley Pipeline, LLC*, 173 FERC ¶ 61,252, at P 3 (2020) (noting that the exclusion zone encompassed two watersheds containing the pipeline's right-of-way that crossed the Jefferson National Forest). In December 2020, the Commission granted Mountain Valley's request to reduce the exclusion zone, finding that the project's construction would not contribute sediment to any portion of the Jefferson National Forest or any waterbody flowing into that forest. *Mountain Valley Pipeline, LLC*, 174 FERC ¶ 61,192, at P 10; *see also Sierra Club, et al. v. FERC*, Nos. 20-1512, *et al.* (D.C. Cir.) (petitions for review of FERC orders granting extension of time to complete mainline construction, and partially lifting stop-work order and allowing certain construction to proceed; motion for emergency stay denied Feb. 19, 2021).

As to the mainline's Nationwide Permit 12 (*see supra* at 12), which the Army Corps re-verified in September 2020, the Fourth Circuit issued a stay pending appeal in December 2020. *Sierra Club*, 981 F.3d 251 (4th Cir. 2020). But before the parties submitted briefs in that appeal (No. 20-2039), Mountain Valley applied for an individual permit and asked the Corps to revoke the verifications that were the subject of the petitions for review—which the Army Corps did in March 2021. The United States then moved for abeyance, noting that the revocations may preclude the need for further adjudication; the Fourth Circuit granted abeyance, also in March.

As for the other agencies that had granted permits to the mainline later vacated by the Fourth Circuit in July 2018, *Sierra Club*, 897 F.3d at 587–89 (*see supra* at 11), in January 2021 the Bureau of Land Management granted Mountain Valley a right-of-way across the Jefferson National Forest and the Forest Service approved amendments to the land resource management plan for the Jefferson National Forest. *See Mountain Valley Pipeline, LLC*, 174 FERC ¶ 61,192, at P 19 n.54. The parties in the litigation related to Fish and Wildlife's original Biological Opinion (from 2017; *see supra* at 13) agreed voluntarily to

dismiss the petition for review, which the Fourth Circuit granted in October 2020. *Wild Va. v. U.S. Dep't of Interior*, Order, No. 19-1866 (4th Cir. Oct. 1, 2020).

On February 19, 2021, Mountain Valley submitted an application with FERC to amend the mainline's 2017 certificate of public convenience and necessity. According to its application, Mountain Valley requested the amendment: (1) to change the proposed method for crossing approximately 180 waterbodies from "open-cut" (as originally authorized) to "trenchless"; and (2) to make two minor route adjustments to avoid environmental resources. *Mountain Valley Pipeline, LLC*, Notice of Application and Establishing Intervention Deadline, FERC Docket No. CP21-57 (Mar. 1, 2021). The Commission has not yet acted on the amendment application.

SUMMARY OF ARGUMENT

Sierra Club's once-expansive challenge to the Commission's approval of the Southgate Project has narrowed considerably, relative to its position before the agency. All the claims it raises here boil down to straightforward disputes about what FERC's precedent says (on rates) and whether the Environmental Impact Statement says enough (on

aquatic-resource and cumulative impacts). None of these claims, though, shows arbitrary agency action.

On rates, the Commission reasonably found that Mountain Valley's proposed return on equity reflected the risk it faced, which was commensurate with that of new companies building major new pipelines. While Mountain Valley may not seem "new" in some broad sense because the Commission previously approved another of its projects (its mainline system, in 2017), from the Commission's ratemaking perspective—and under Commission precedent—the company still may receive a rate like that of a new market entrant because it has no existing operations generating revenue and no track record.

On environmental concerns, the Commission gave an informed and reasoned determination, fully compliant with its information-gathering responsibility under the National Environmental Policy Act, for why it considered the Project an environmentally acceptable action. Consistent with the agency's NEPA obligations, the Environmental Impact Statement fully identified, described, and analyzed the Project's potential impacts on, as relevant here, water resources and any

cumulative effects of the Project. The Impact Statement also included extensive discussion of numerous mitigation measures designed to stem any impacts on water resources—and the Commission attached these measures as required conditions of Mountain Valley's certificate. As described in detail below, the record on review demonstrates that the agency fully satisfied its NEPA obligations.

As for Intervenors, they have not shown the sort of extraordinary circumstances this Court traditionally requires of intervenors seeking to expand the scope of appellate proceedings beyond the issues presented by Petitioners. This Court should thus decline to hear their new claims. But if the Court decides otherwise, and proceeds to the merits, the record here shows that the agency's interactions with Tribes faithfully followed the regulatory requirements of both the National Historic Preservation Act and NEPA. Tribes' frustrations with the agency process here do not rise to the level of showing violations of either of these procedural statutes.

ARGUMENT

I. Standard of review

This 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, a court "may not substitute its own policy judgment for that of the agency"—rather, the court "simply ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision." *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021); *accord FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 292 (2016).

Because the grant or denial of a Natural Gas Act section 7 certificate of public convenience and necessity 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.*

"In matters of ratemaking, [the Court's] review is highly deferential, as issues of rate design are fairly technical and, insofar as they are not technical, involve policy judgments that lie at the core of the regulatory mission." *Alcoa Inc. v. FERC*, 564 F.3d 1342, 1347 (D.C. Cir. 2009) (cleaned up); *see also Marsh v. Or. Nat. Res. Council*, 490

U.S. 360, 377 (1989) (holding that courts must defer to the "informed discretion" of federal agencies where the agencies' decisions require "a high level of technical expertise") (internal quotation marks omitted). Deference is particularly warranted when the Commission is setting initial rates for a newly-certificated pipeline, as those rates are assessed under a "public interest" standard that is "less exacting" than the traditional "just and reasonable" standard otherwise applicable to FERC-regulated rates. *Mo. Pub. Serv. Comm'n*, 337 F.3d at 1070 ("There is no dispute that the 'public interest' standard of NGA § 7 is less exacting than the 'just and reasonable' requirement of § 4."); *see also City of Oberlin v. FERC*, 937 F.3d 599, 608 (D.C. Cir. 2019).

As for review of the Commission's environmental analysis, NEPA does not create a private right of action, so this Court applies the arbitrary and capricious standard "and its deferential standard of review" to NEPA-based challenges. *Sierra Club v. FERC*, 867 F.3d 1357, 1367 (D.C. Cir. 2017). "[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 *Baltimore Gas*, 462 U.S. at 97–98).

Agency actions taken under NEPA are entitled to a high degree of respect. *Marsh*, 490 U.S. 377–78. This Court evaluates agency compliance with NEPA under a "rule of reason" standard, *Minisink Residents for Envtl. Pres. & Safety v. FERC*, 762 F.3d 97, 112 (D.C. Cir. 2014), and has consistently refused 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 quotation marks omitted).

II. The Commission's approval of Mountain Valley's requested initial rates was both reasonable and consistent with precedent

Sierra Club argues that the Commission's treatment of Mountain Valley as a new market entrant for the purpose of establishing initial rates for the Southgate Project both departed from agency policy and was arbitrary and capricious. Neither charge fits.

Under its longstanding policy, the Commission exercises discretion to approve, under section 7 of the Natural Gas Act, 15 U.S.C. § 717f, higher initial rates for new (or "greenfield") service or facilities that will "hold the line" while awaiting a more extensive adjudication of just and reasonable rates under sections 4 and 5 of the Act, 15 U.S.C. §§ 717c, 717d. Certificate Order P 63 (citing *Atl. Ref. Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 390–91 (1959)), JA ___. Both this Court and the Supreme Court have upheld that policy. *See Gulf South Pipeline Co. v. FERC*, 955 F.3d 1001, 1013–14 (D.C. Cir. 2020) ("The Supreme Court has consistently upheld FERC's policy of deferring the consideration of fact-intensive rate questions to the company's next general rate case, because initial Section 7 proceedings are meant only 'to hold the line awaiting adjudication of a just and reasonable rate.'") (quoting *Atlantic Refining*, 360 U.S. at 392); *see also City of Oberlin*, 937 F.3d at 609 (affirming initial return on equity of 14 percent); *Appalachian Voices*, 2019 WL 847199, at *1 (affirming FERC's approval of Mountain Valley's requested 14 percent return on equity for the mainline project).

As the Commission has explained, approving such higher initial

rates, up to 14 percent return on equity, both serves an incentive for new pipeline companies to enter the market and reflects higher business risks (e.g., regulatory, contractual, increased construction costs) that new entrants face. *See, e.g.*, Rehearing Order P 14 & n.40 (citing cases), JA ___; *PennEast Pipeline Co.*, 162 FERC ¶ 61,053, at P 59 (2018) (cited at Rehearing Order P 14 n.40, JA ___); *Rate Regulation of Certain Natural Gas Storage Facilities*, Order No. 678, 115 FERC ¶ 61,343, at P 127 (2006) ("As a going concern with existing customers and financial relationships, the risk associated with acquiring financing is lower for incremental expansions than the risk associated with a greenfield project undertaken by a new entrant in the market."). New entrants, as the Commission has recognized, have no existing customer base and no cash flows from existing operations. *See, e.g.*, *PennEast*, 162 FERC ¶ 61,053, at P 59.

Although Mountain Valley's Southgate Project connects with its previously-approved mainline system, the Commission reasonably explained how its finding was not a departure from this precedent. Southgate, in the Commission's judgment, should be treated as a greenfield pipeline because the mainline system from which it extends

"is still under construction and not in service." Rehearing Order P 14, JA ___. Mountain Valley thus has neither revenue from existing transportation services nor "established operations" nor a "proven track record." *Id.*; Certificate Order P 57, JA ___. As such, the risks it faces are not "reduce[d] . . . to the level experienced by natural gas companies whose existing systems are in service."[5] Certificate Order P 57, JA ___.

The Commission has drawn this line before—i.e., on whether the pipeline system subject to expansion is *operational*. In 2006, it approved higher initial rates for an extension of a previously-approved—but not fully operational—pipeline. Rehearing Order P 16 (citing *Rockies Express Pipeline LLC*, 116 FERC ¶ 61,272, at PP 44–47 (2006)), JA ___.

And along that same "operational" line, the Commission has, when circumstances warranted, denied requests for higher returns on

[5] Sierra Club argues, with no trace of irony, that Mountain Valley does not face the same level of financial risk as other new market entrants, Br. 24—even though Sierra Club's own litigation efforts have resulted in multiple vacaturs and stays of various required permits for the mainline and years of construction delays; and construction on Southgate is conditioned on the mainline receiving all necessary federal permits. *See supra* at 11–14 (describing mainline litigation); Certificate Order P 9, JA ___.

equity. It here cited the example of the Cheyenne Hub Expansion Project, which unlike Southgate concerned an incremental expansion of an existing system that had been operating for over a decade—and thus the higher (13 percent) equity return sought for that project "would not reflect the lower risks associated with expanding an existing pipeline system." *Cheyenne Connector, LLC*, 168 FERC ¶ 61,180, at P 52 (2019) (cited at Rehearing Order P 15, JA ___); *see also Gulfstream Natural Gas System, L.L.C.*, 170 FERC ¶ 61,199, at PP 18–20 (2020) (denying 14 percent return on equity for an expansion of a pipeline system that originally went into service in 2002) (cited at Rehearing Order P 15 n.46, JA ___).

The Commission's explanation here thus demonstrates its awareness of, and consistency with, its precedent, contrary to Sierra Club's claims. *See Old Dominion Elec. Coop. v. FERC*, 892 F.3d 1223, 1230 (D.C. Cir. 2018) (noting the Court's traditional deference to the Commission's interpretations of its own precedent). And while Sierra Club certainly is entitled to disagree with the Commission's policy, that alone does not show that application of that policy here is arbitrary. *See, e.g.*, *New England Power Generators Ass'n, Inc. v. FERC*, 757 F.3d

283, 297 (D.C. Cir. 2014) (petitioner's disagreement with FERC's rationale did not demonstrate that agency's decision was arbitrary and capricious); *Public Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 374 F.3d 1251, 1263 (D.C. Cir. 2004) (rejecting an arbitrary-and-capricious challenge that "boils down to a policy disagreement" with the agency).

Sierra Club also argues (Br. 21) that the Commission failed to account for "market-skewing incentives," including the possibility of overbuilding, that could result from granting higher returns on equity like the one approved here. In fact, however, the Commission addressed this argument, finding that Mountain Valley showed a need for this Project under Commission policy based on the applicant's contract for 80 percent of the Project's capacity—and Sierra Club does not challenge that finding before this Court. *See* Rehearing Order P 18, JA ___; *see also id.* P 11 & n.30 ("It is well established that precedent agreements are significant evidence of demand for a project.") (citing cases), JA ___.

The Environmental Impact Statement also considered—and rejected—the prospect of overbuilding here because existing pipeline

systems are fully subscribed and thus "cannot provide firm transportation of the required volumes of gas to the area that Mountain Valley is proposing to serve." Certificate Order P 44 (citing EIS at 5-14, JA ___), JA ___. These explanations show, under the arbitrary and capricious standard, the requisite rational connection between the facts the agency found and the choice it made. *See, e.g.*, *Elec. Power Supply Ass'n*, 577 U.S. at 292. No more is required.

III. The Commission's environmental review of the Project's aquatic-resource effects and cumulative effects fully complied with the National Environmental Policy Act

Council on Environmental Quality regulations implementing NEPA require the Commission to "discuss possible mitigation measures in the [environmental impact statement] and Record of Decision." *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 503 (D.C. Cir. 2010); *see also S. Fork Band Council of W. Shoshone of Nev. v. Dep't of Interior*, 588 F.3d 718, 727 (9th Cir. 2009) ("Though NEPA, of course, does not require that . . . harms actually be mitigated, it does require that an [environmental impact statement] discuss mitigation measures, with 'sufficient detail to ensure that environmental consequences have been fairly evaluated.'") (quoting *Methow Valley*, 490

U.S. at 352). Befitting a "rule of reason," however, NEPA does not mandate discussion of "any particular mitigation plans" the agency might put in place. *See Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 206 (D.C. Cir. 1991); *see also Methow Valley*, 490 U.S. at 353 ("[I]t would be inconsistent with NEPA[ ] . . . to demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act."); 40 C.F.R. § 1508.20.

NEPA also requires the agency to examine the direct, indirect, and cumulative impacts of proposed actions. *See, e.g., Sierra Club v. Dep't of Energy*, 867 F.3d 189, 193 (D.C. Cir. 2017); *see also EarthReports, Inc, v. FERC*, 828 F.3d 949, 955 (D.C. Cir. 2016) ("To warrant consideration under NEPA, an effect had to be sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision.") (cleaned up). Cumulative impacts are those that would result "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." 40 C.F.R. § 1508.7; *see also City of*

Boston Delegation, 897 F.3d at 253 (rejecting challenge to Commission's consideration of a project's cumulative effects).

Sierra Club finds insufficient the Environmental Impact Statement's discussion of mitigation measures and cumulative impacts. Neither claim has merit.

A. The Environmental Impact Statement reasonably discussed mitigation

In Sierra Club's view, the Commission's reliance on mitigation measures related to the Project's impacts on aquatic resources fails NEPA's "hard look" test. *See* Br. 28–29, 35. In fact, the Environmental Impact Statement here amply fulfills NEPA's mandate on mitigation.

It describes, for example, measures intended to limit impacts on riparian zones, including: allowing a "riparian strip" at least 25 feet wide to permanently revegetate with native plant species across the entire construction right-of-way; maintaining "in an herbaceous state" a 10-foot-wide corridor centered on the pipeline; and not clearing riparian areas between entry and exit points of horizontal drilling locations with the exception of a three-foot-wide path. EIS at 4-49, JA ___; *see also* Mitigation Procedures at 15, 21, JA ___, ___; Erosion Plan at 19, JA ___.

To mitigate erosion and runoff during construction, Mountain Valley must direct water discharged from excavation to vegetated land surfaces. EIS at 4-50, JA ___; *see also id.* at 1-12 (describing measures for maintaining upland runoff from entering the right-of-way and managing stormwater and sediment during construction), JA ___; Mitigation Procedures at 20–21, JA ___–__. The Environmental Impact Statement also notes that reintroducing water discharged from excavation would limit both the scale and timing of "potential dewatering impacts," without effect on surface waters. EIS at 4-50, JA ___.

As detailed further in the Environmental Impact Statement, Mountain Valley must also minimize impacts like erosion or transport of sediment that may result from hydrostatic testing (to verify the pipeline's structural integrity)—by discharging water used in testing over vegetated land surfaces through "energy dissipation devices, filter bags, or hay bale-lined dewatering structures," regulating the discharge rate using such devices or valves, and adhering to state requirements on sampling, monitoring, and effluent limits on discharges of

hydrostatic testing water. *Id.*; *see also* Mitigation Procedures at 23–24, JA ___–__.

The Impact Statement also describes, in detail, measures Mountain Valley must implement to limit or prevent impacts from flash flooding. These include installing erosion and sediment controls (e.g., trench breakers and water bars[6]) to inhibit water flow along the trench and right-of-way, monitoring and adjusting as needed erosion controls to account for weather conditions and heavy precipitation events, prioritizing scheduling to minimize construction activities within floodplain areas during seasonal high water periods, and removing equipment or loose material from potentially affected areas before anticipated significant rain. EIS at 4-50, JA ___; *see also id.* at 4-44, JA ___; Erosion Plan at 11–12, JA ___–__. After construction, Mountain Valley must restore ground surfaces and vegetation to facilitate overland water flow conditions as they existed pre-construction. EIS at 4-50, JA ___.

[6] Trench breakers include sand bags or foam used to "prevent subsurface water movement along the pipeline." EIS at 2-19, JA ___. Water bars are another erosion control measure used on slopes to inhibit water flow, *id.* at 2-21, 4-50, JA ___, ___.

And more still, under the certificate a team of environmental inspectors will review and ensure Mountain Valley's compliance with all mitigation measures and have authority to "stop work" immediately for all activities and to order correction of violations. Certificate Order, Condition 7, JA ___; EIS at 2-30, JA ___; *see also* Erosion Plan at 3–5, JA ___–__. Mountain Valley must also fund a third-party compliance monitor during the construction phase of the Project, who would report to FERC staff; FERC staff would continue to conduct its own inspections, during both compliance and restoration phases. *See* EIS at 2-30, JA ___; *see also* EIS at ES-11 (listing among "major conclusions" the existence of "an environmental inspection program and a third-party monitoring oversight program" to ensure compliance with mitigation measures required under the certificate), JA ___; Rehearing Order P 28, JA ___; *Mountain Valley Pipeline, LLC*, 173 FERC ¶ 61,027, at P 29 (2020) ("Commission staff's experience monitoring pipeline construction for thousands of projects spanning tens of thousands of miles across the United States makes staff qualified to assess environmental impacts associated with construction and restoration of rights-of-way.").

Mountain Valley also agreed to implement supplemental measures that exceed Virginia and North Carolina minimum standards on erosion and sediment control, including increased inspection frequency and authorizing inspectors to supplement erosion and sediment controls to better address field conditions. EIS at 1-12, JA ___; Erosion Plan at 4–5 (noting inspection frequency), JA ___–__; *see also* June 21, 2019 Mountain Valley Resp. to FERC Information Request No. 3, R.395, JA ___. To the extent Sierra Club challenges the Commission's reliance on Mountain Valley's representations, Br. 30, 32, this Court has found that agencies may reasonably count on the good faith of licensees. *See, e.g.*, *Murray Energy Corp. v. FERC*, 629 F.3d 231, 240 (D.C. Cir. 2011) (approving FERC's assumption, in the absence of contrary evidence, that a licensee would act in good faith in developing a post-construction mitigation plan); *accord Town of Weymouth v. FERC*, Nos. 17-1135, *et al.*, 2018 WL 6921213, at *2 (D.C. Cir. Dec. 27, 2018) (affirming FERC's reliance on pipelines' good faith that they would comply with federal safety regulations).

This record is far from "perfunctory," Br. 26—rather, this Environmental Impact Statement's comprehensive discussion of

mitigation measures bears greater resemblance to that in environmental documents this Court has upheld under NEPA's rule of reason. *See, e.g.*, *Indian River Cnty. v. U.S. Dep't of Transp.*, 945 F.3d 515, 534 (D.C. Cir. 2019) (finding that agency's environmental impact statement "sets forth a host of mitigation measures to ameliorate" negative impacts on numerous environmental resources including water resources, land use, and air quality, as well as "a thorough discussion of pedestrian safety"); *State of N.Y. v. Nuclear Reg. Comm'n*, 824 F.3d 1012, 1018 (D.C. Cir. 2016) (finding nothing in the environmental impact statement to indicate that the agency's discussion of mitigation measures "went astray of NEPA's rule of reason"); *see also Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998) (Forest Service's "perfunctory" description of mitigation consisted of general references to "improvements in fish habitats," "riparian enclosures (fences around riparian areas to keep cattle out) and fish passage restoration (removing fish passage blockages)") (cited at Sierra Club Br. 29). This Court, moreover, has previously rejected a similar NEPA claim challenging the Commission's environmental review of Mountain Valley's mainline project. *See Appalachian Voices*, 2019 WL

847199, at *2 (concluding that FERC "adequately considered and disclosed erosion and sedimentation impacts on aquatic resources").

Sierra Club also claims that the Commission's NEPA analysis is arbitrary and capricious because it lacks support for relying on sediment and erosion control measures that failed to prevent impacts during construction of Mountain Valley's mainline system in 2018. *See* Br. 31–32, 35. In fact, however, the Environmental Impact Statement drew upon available empirical data for its prediction that the Southgate Project likely would not experience the same erosion issues as the mainline. EIS at 1-12.

That data showed 2018 precipitation to be an outlier. As the Environmental Impact Statement noted, that year was the wettest on record (since 1895) for Roanoke County, Virginia, marking a 51 percent increase in rainfall over the annual median for the 124-year recording period. EIS at 1-12, JA ___. September and October 2018 saw sharply intense rainfall events over short durations, such as Hurricanes Florence and Michael and Subtropical Storm Alberto. *Id*. These historic, "record breaking" precipitation levels during 2018 generated stormwater and flooding within each of the watersheds affected by the

mainline—and thus set apart that project from the Southgate Project. *See id*. And while the Commission acknowledged (in the agency proceeding related to the mainline) "slightly different outcomes" on erosion and sedimentation impacts than those projected in the final environmental impact statement for that project "due to unpredictable rainfall events," it still concluded that "the resulting impacts are not significant enough to warrant a supplemental [environmental impact statement]." *Mountain Valley Pipeline, LLC*, 173 FERC ¶ 61,027, at P 39.

Sierra Club (Br. 34) disputes the Commission's reliance on 2018 rainfall data, citing an article that notes the effects of climate change on precipitation patterns—but such generic references alone to the global impacts of climate change do not demonstrate that the agency's review of a specific project, or the Environmental Impact Statement's reliance on data specific to that project's region, fails NEPA's rule of reason. As for Sierra Club's allegation on post-2018 violations on the mainline, it ignores the Environmental Impact Statement's finding of another distinguishing feature—i.e., the flatter terrain of the Southgate Project

area is less likely to experience erosion and sediment issues. *See* EIS at 1-12, JA ___.

These predictive judgments by the agency, based on both its experience and the evidence developed in the record, were reasonable, especially given the absence of any contrary empirical data in the record. *See Prometheus*, 141 S. Ct. at 1160 ("In the absence of additional data from commenters, the FCC made a reasonable predictive judgment based on the evidence it had.") (citing *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983)). This record is very different from that of cases like *South Fork Band Council*, where the environmental impact statement said "[n]othing whatsoever" about "whether the anticipated harms could be avoided by *any* of the listed mitigation measures" relating to groundwater. 588 F.3d at 727 (cited at Br. 29).

The Environmental Impact Statement, moreover, explains that the Project's erosion and sediment control measures are subject to both adjustment as needed by the certificate holder and regular oversight by Commission staff. *See* EIS at 1-12 (describing Mountain Valley's obligations to monitor weather conditions during construction and

adjust erosion control measures, as necessary, to mitigate impacts from heavy precipitation), JA ___; *id.* at 4-44, 4-50 (same), JA ___, ___; *id.* at 1-12–13 (FERC representatives must be on-site during construction to document the effectiveness of erosion control measures and verify they are properly maintained; and Mountain Valley must file weekly status reports with the Commission to document compliance with erosion control requirements, among other things), JA ___–__; Certificate Order, Envtl. Condition No. 8 (requiring reports to include "a description of the corrective actions implemented in response to all instances of noncompliance . . . [and] the effectiveness of all corrective and remedial actions implemented"), JA ___. The Commission thus reasonably concluded that prior instances of noncompliance at other projects do not demonstrate that such mitigation measures here are "fatally flawed." *See* Rehearing Order P 28, JA ___.

The certificate also empowers the FERC-delegated official with broad authority to "take whatever steps are necessary to ensure the protection of environmental resources during construction and operation of the Project," including modifying the certificate's conditions and ordering the stoppage of construction. Certificate Order, Envtl.

Condition No. 2, JA ___. And if the certificate holder fails to adhere to the mandatory conditions of the certificate, the Commission stands ready to take any necessary and immediate corrective actions, including initiating enforcement proceedings to protect the public. *See, e.g.*, *Midship Pipeline Co.*, 174 FERC ¶ 61,220, at PP 1, 12 (2021) (ordering pipeline "to take immediate action to remedy unresolved restoration issues," and cautioning that "[o]utstanding compliance issues may be referred to the Commission's Office of Enforcement for further investigation"); *Rover Pipeline, LLC*, 174 FERC ¶ 61,208, at P 1 (2021) (ordering respondents to show cause why they should not be (1) found to have violated FERC regulations based on alleged misrepresentations in their application for a certificate of public convenience and necessity and (2) assessed a civil penalty of over $20 million); *Enforcement of Statutes, Regulations and Orders*, Revised Policy Statement on Enforcement, 123 FERC ¶ 61,156, at P 6 (2008) (noting that FERC "has a number of enforcement tools at its disposal in overseeing those areas of the electric, natural gas, hydroelectric, and oil pipeline industries" within its jurisdiction, including "the ability to condition, suspend, or revoke . . . certificate authority").

All of this together is enough to satisfy both NEPA's information-forcing mandate and the arbitrary and capricious standard. *See* Rehearing Order P 28 (finding that the combination of FERC's Erosion Plan and Mitigation Procedures, its staff's "experience monitoring the construction of the project and ultimate restoration of the right-of-way, and the deployment of environmental inspectors along each construction spread" sufficiently mitigated impacts on aquatic resources), JA ___; *see also, e.g.*, *Mayo v. Reynolds*, 875 F.3d 11, 22 (D.C. Cir. 2017) ("All in all, given the level of detail in the assessment, there is no question that the 2007 EIS 'adequately considered and disclosed the environmental impact of' the 2007 Plan's preferred elk-reduction program, its necessity, and its alternatives.").

B. The Environmental Impact Statement reasonably discussed the Project's cumulative impacts

An agency's cumulative-impact analysis need only consider effects "'in the same geographic area'" as the one under review. *Sierra Club v. FERC (Freeport)*, 827 F.3d 36, 50 (D.C. Cir. 2016) (quoting *TOMAC, Taxpayers of Mich. Against Casinos v. Norton*, 433 F.3d 852, 864 (D.C. Cir. 2006)); *see also Grand Canyon Trust v. FAA*, 290 F.3d 339, 345 (D.C. Cir. 2002) (NEPA cumulative impacts apply to impacts in the

same area). And because determinations as to the appropriate size and location of the relevant geographic area require "'a high level of technical expertise,'" this Court has deemed them "'assigned to the special competency of' the Commission." *Sierra Club (Freeport)*, 827 F.3d at 49 (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 412, 414 (1976)).

The Environmental Impact Statement for the Southgate Project defined the geographic scope for its cumulative-impact analysis on water resources as actions within the same "hydrologic unit code"-10 (or "HUC-10") watershed boundary.[7] EIS at 4-227, 4-240, JA ___, ___. It identified seven HUC-10 watersheds—in total over a million acres—crossed by the Project and 41 other projects (four of which are FERC-jurisdictional natural gas projects, including Mountain Valley's mainline system). *Id.* at 4-230, 4-240–242, JA ___, ___–__; Rehearing Order P 30, JA ___. The Southgate Project would affect no more than 0.3 percent of each watershed—or just over 1,400 acres out of the total

[7] The U.S. Geological Survey designates hydrologic unit codes, which identify hydrological features such as drainage basins or watersheds. HUC-10 refers to "a watershed typically 40,000-250,000 acres in area." Certificate Order P 93 n.189, JA ___.

one million-plus acres covered by all these watersheds—according to the Environmental Impact Statement. Rehearing Order P 30, JA ___; EIS at 4-230–231, JA ___–__.

Notwithstanding this broad geographic scope, Sierra Club still claims that the Environmental Impact Statement's conclusion on the Project's cumulative impacts on waterbodies overlooks "substantial[] overlap" of the Project and Mountain Valley's mainline. Br. 37–38. In Sierra Club's view, that conclusion is both unsupported and conclusory. *Id*.

But this claim neglects the discussion that precedes the agency staff's conclusion. The Environmental Impact Statement acknowledged that in-stream activities[8] of all the various projects (including both Southgate and the mainline) within the affected HUC-10 watersheds "have the greatest potential to contribute to cumulative impacts on surface water resources through increased turbidity."[9] EIS at 4-242,

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[8] In-stream activities may include dredging and open-cut pipeline crossing techniques. EIS at 4-242, JA ___.

[9] *See Marsh*, 490 U.S. at 364 n.2 (turbidity "is an expression of the optical property of water which causes light to be scattered and absorbed rather than transmitted through in straight lines," and "is caused by the presence of suspended matter") (internal quotation marks omitted).

JA ___. These impacts, however, "are typically minor due to the short duration of in-water activities." *Id.* So even if a turbidity plume (essentially cloudy water) travels downstream, the Environmental Impact Statement explained, "typically the plume would disperse and become diluted to background levels within several days." *Id.*; *see also id.* at 4-51, JA ___; Rehearing Order P 30, JA ___.

From this judgment, the Statement reasonably concluded that the Project "would contribute little to the long-term cumulative impacts on waterbodies because the majority of the potential impacts are *short-term*." EIS at 4-243 (emphasis added), JA ___; *see also* Rehearing Order P 30, JA ___. The Commission also found that cumulative impacts of the Project with other projects in the area were unlikely to meaningfully contribute to sedimentation within the Kerr Reservoir, which is over 30 miles away from the Project and is outside the HUC-10 watersheds affected by the Project. Rehearing Order P 30, JA ___. The Environmental Impact Statement thus "'contains sufficient discussion of'" the cumulative impacts of the Southgate Project and is "'well-considered.'" *City of Boston Delegation*, 897 F.3d at 253 (quoting *Myersville*, 783 F.3d at 1325); *see also Sierra Club*, 867 F.3d at 1370

(affirming FERC environmental impact statement discussion of cumulative effects).

Southgate and the mainline, admittedly, do cross two of the same waterbodies. Still, the Environmental Impact Statement found that any additive cumulative impacts from sedimentation were unlikely to be significant, given that (1) the crossing locations are at least 3.5 miles apart and (2) these projects share no overlapping workspaces. EIS at 4-243, JA ___; *see also id.* at 4-242 ("Projects involving in-water work would have to occur *within similar timeframes within close distance* to have a cumulative effect on turbidity within the waterbody or watershed.") (emphasis added), JA ___; Rehearing Order P 31 (noting that Southgate crosses Little Cherrystone Creek and Cherrystone Creek approximately 3.5 miles and 10 miles, respectively, downstream of the mainline crossing), JA ___.

Sierra Club challenges that finding, appealing to "broadly accepted science," Br. 38, and noting the "research" it cited in its rehearing brief to the agency. *See id.* at 38–39 (citing Rehearing Br. 43, JA ___). That research consists of a website entitled "Sediment Transport and Deposition," with subtitles like "What is Sediment?" and

"Where does Sediment Come From?" But neither that website nor the City of Roanoke "briefing" that Sierra Club also cites (Br. 39) shows that sediment "can travel up to hundreds of miles downstream depending on conditions," Br. 38.

Nor does Sierra Club offer anything to counter this Court's traditional deference to an agency's findings on scientific and technical matters. *See, e.g.*, *Myersville*, 783 F.3d at 1314 ("[W]e must afford an extreme degree of deference to the Commission's scientific analysis") (internal quotation marks omitted); *Elec. Indus. Ass'n Consumer Elecs. Grp. v. FCC*, 636 F.2d 689, 695 (D.C. Cir. 1980) (deference to the agency "is especially appropriate in this instance because of the scientific nature of the questions involved, questions which call for the technical expertise of an agency and not the more general background of a lay judiciary").

As this Court has explained, "[w]e must look at the decision not as the chemist, biologist or statistician that we are qualified neither by training nor experience to be, but as a reviewing court exercising our narrowly defined duty of holding agencies to certain minimal standards of rationality." *Ethyl Corp. v. EPA*, 541 F.2d 1, 36 (D.C. Cir. 1976) (en

banc) (footnote omitted); *see also Nat. Res. Def. Council, Inc. v. EPA*, 824 F.2d 1211, 1216 (D.C. Cir. 1987) ("Happily, it is not for the judicial branch to undertake comparative evaluations of conflicting scientific evidence. Our review aims only to discern whether the agency's evaluation was rational."). The record here shows rational agency decisionmaking—and Sierra Club's disagreement with the agency's conclusions as to the Southgate Project do not show them to be arbitrary and capricious. *See, e.g.*, *New England Power Generators Ass'n*, 757 F.3d at 297; *Public Citizen*, 374 F.3d at 1263.

Sierra Club, Br. 40, also disputes the Environmental Impact Statement's timing prediction on cumulative impacts—i.e., such impacts from Southgate together with the mainline were unlikely because "stream crossings would not occur within the same time frame due to the construction schedules for both projects." EIS at 4-243, JA ___. But that prediction was reasonable, given that construction on the mainline right-of-way was largely complete before FERC staff issued the Environmental Impact Statement for Southgate or the Commission issued the certificate. *See* Certificate Order P 7 (Mountain Valley "had completed construction (trenched, installed, and backfilled

the pipeline) on about 78 [percent] of the Mainline System right-of-way" when FERC staff issued the October 15, 2019 stop-work order on that project), JA ___; *see also City of Boston Delegation*, 897 F.3d at 253 ("[T]he adequacy of an environmental impact statement is judged by reference to the information available to the agency at the time of review, such that the agency is expected to consider only those future impacts that are reasonably foreseeable.").

Sierra Club's contrary view, founded on speculation, is not enough to show that the Environmental Impact Statement's finding was arbitrary. *See* Br. 40 ("[T]hese schedules are far from set in stone, as the numerous delays and schedule adjustments on the Mainline demonstrate."); *see also Prometheus*, 141 S. Ct. at 1160 (rejecting arbitrary-and-capricious challenge to an agency's predictive judgment, which was "reasonable . . . based on the evidence it had"). And as for the condition in the certificate that authorizes Southgate construction on only upon resumption of mainline construction, Certificate Order P 9, JA ___, that limitation does not necessarily lead to the conclusion that construction on projects will proceed simultaneously—nor does it show the agency conclusion to be arbitrary.

IV. Intervenors' claims are not properly before the Court and offer no basis for reversal

A. This Court should decline to entertain any of the new issues raised by Intervenors

Intervenor Tribes raise several new issues, related to cultural and historic impacts, none of which is presented in Petitioners' opening brief to this Court. Because this Court traditionally limits intervenor participation to the scope of the original petition for review, and because Intervenors did not themselves petition for review, this Court should exercise its discretion not to consider any of Intervenors' claims here. *See, e.g.*, *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 962 F.2d 27, 37 n.4 (D.C. Cir. 1992) ("Absent extraordinary circumstances not present here, we have held that intervenors may only join issue on a matter that has been brought before the court by another party.") (internal citations and quotation marks omitted); *Nat'l Ass'n of Regulatory Util. Comm'rs v. ICC*, 41 F.3d 721, 729–30 (D.C. Cir. 1994) (stating that only in extraordinary cases may an intervenor raise additional issues not raised by petitioners); *Lamprecht v. FCC*, 958 F.2d 382, 389 (D.C. Cir. 1992) (intervenors "cannot expand the proceedings"); *see also Vinson v. Wash. Gas Light Co.*, 321 U.S. 489, 498 (1944) (noting the "usual" procedural rule that

"an intervenor is admitted to the proceeding as it stands, and in respect of the pending issues, but is not permitted to enlarge those issues or compel an alteration of the nature of the proceeding").

Intervenors had the opportunity to petition for review here, *see* 15 U.S.C. § 717r(b), yet offered no excuse for not doing so. *See, e.g.*, *Am. Fuel & Petrochemical Mfrs. v. EPA*, 937 F.3d 559, 590 (D.C. Cir. 2019) ("[W]e are reticent to consider an intervenor-only argument if the intervenor 'had every incentive to petition for review of the administrative decision and its failure to do so was without excuse.'") (quoting *Synovus Fin. Corp. v. Bd. of Governors*, 952 F.2d 426, 434 (D.C. Cir. 1991)). That the Commission, as an exercise of agency discretion, granted Tribes' untimely motion to intervene in the agency proceeding below, *see* Certificate Order P 14, JA ___, and did not oppose their motion to intervene in the appellate proceeding, does not grant them license to expand the proceeding on review. *Cf. Old Dominion Elec. Coop. v. FERC*, 898 F.3d 1254, 1259 (D.C. Cir. 2018) (considering intervenor argument that was "closely related" to petitioner's argument).

B. Intervenors fail to show that the process they received violated the National Historic Preservation Act or NEPA

Should the Court proceed to the merits of Intervenors' claims, the record here shows that the Commission provided Tribes all the process they were due under the National Historic Preservation Act and NEPA. Like NEPA, section 106 of the National Historic Preservation Act is essentially a procedural statute. *City of Alexandria v. Slater*, 198 F.3d 862, 871 (D.C. Cir. 1999). It "requires [the Commission] to consult with any Indian tribe . . . that attaches religious and cultural significance to historic properties that may be affected by an undertaking." 36 C.F.R. § 800.2(c)(2)(ii); *see also id.* § 800.6(a); Rehearing Order P 43, JA ___.

The record belies Tribes' claim (Intervenors Br. 11–13) that the Commission failed to provide them a reasonable opportunity, under 36 C.F.R. § 800.2(c)(2)(ii)(A), to participate in the section 106 consultation process. That regulation requires the agency to ensure that the section 106 process gives a tribe "*a reasonable opportunity* to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's

effects on such properties, and participate in the resolution of adverse effects." 36 C.F.R. § 800.2(c)(2)(ii)(A) (emphasis added).

Agency staff here followed the regulation's exhortation that consultation "should commence early in the planning process," *id.* Commission staff initiated consultation on August 8, 2018 by mailing the notice of intent to prepare an environmental impact statement for the Project, R.62, to thousands of interested parties, including the Virginia and North Carolina State Historic Preservation Offices, 33 federally recognized tribes, and 10 Native American organizations or state-recognized tribes in Virginia and North Carolina. Certificate Order PP 69, 121, JA ___, ____; EIS at 4-158, JA ___. Staff also sent individual letters to 25 federally recognized tribes, including the Monacan Indian Nation, on October 16, 2018. Certificate Order P 121, JA ___; *see also* 36 C.F.R. § 800.2(c)(2)(ii)(A) ("It is the responsibility of the agency official to make a reasonable and good faith effort to identify Indian tribes . . . that shall be consulted in the section 106 process.").

Tribes had multiple opportunities to share their input and articulate their views in writing on the Project's effects on historic properties. In July 2019, both the Monacan Indian Nation and the

Sappony Tribe offered comments on the cultural resources reports prepared for the Project. Certificate Order P 121, JA ___; EIS at 4-159, JA ___. Intervenors incorrectly claim that Mountain Valley did not provide them with the cultural resources reports "until nearly a month after the Draft Programmatic Agreement comments were due, and three weeks after the Final EIS was published." Br. 14. Yet several pages later, Br. 22, Intervenors cite their own July 2019 comments on those reports—well before the January 2020 draft programmatic agreement (R.546) and the February 2020 Environmental Impact Statement. Both Tribes also provided written comments on the draft environmental impact statement in September, November, and December 2019, Certificate Order P 121, JA ___, EIS at 4-159, JA ___, to which agency staff provided responses in the final Environmental Impact Statement. Certificate Order P 121 & n.273 (citing EIS, Appendix I.3 at I.3-62–80, JA ___–__), JA ___.

Agency staff also held in-person or telephone meetings with three federally recognized tribes, including a January 17, 2019 meeting with representatives of the Monacan Indian Nation in Richmond, Virginia. Certificate Order P 121, JA ___. While Intervenors complain that the

agency should have held more in-person meetings, Br. 16, 21, the Commission followed its practice of conducting consultation through a combination of issuing public notices, communicating both in writing and through in-person meetings, and preparing NEPA documents that are subject to public notice and comment. *See* Rehearing Order P 48, JA ___; Certificate Order P 122, JA ___; *see also* EIS at 4-157–160, JA ___–__.

That process satisfied the regulatory requirements implementing the Preservation Act, notwithstanding Tribes' preference for more process. *See, e.g.*, 36 C.F.R. § 800.2(a)(4) ("The agency official should plan consultations appropriate to the scale of the undertaking and the scope of Federal involvement and coordinated with other requirements of other statutes, as applicable . . . . The [Advisory] Council encourages the agency official to use to the extent possible existing agency procedures and mechanisms to fulfill the consultation requirements of this part.").

The process here also appropriately adhered to other Commission regulations and policies, including its rules on off-the-record communications in contested proceedings. Because Tribes were parties

to the agency proceeding, the Commission's *ex parte* regulations prevented it and its staff from communicating with Tribes "via off-the-record, non-public communications." Rehearing Order P 48 n.182, JA ___; *see also* 18 C.F.R. § 2.1c(d) ("As an independent regulatory agency, the Commission functions as a neutral, quasi-judicial body, rendering decisions on applications filed with it, and resolving issues among parties appearing before it, including Indian tribes. Therefore, the provisions of the Administrative Procedure Act and the Commission's rules concerning off-the-record communications, as well as the nature of the Commission's licensing and certificating processes . . . , place some limitations on the nature and type of consultation that the Commission may engage in with any party in a contested case."). To account for these rules, the Commission's practice is "to address tribal input and concerns in its environmental documents and decisions"—i.e., through a "primarily paper consultation." *See* Rehearing Order PP 49 & n.186, 54, JA ___–__, ___; 18 C.F.R. § 2.1c(e) (Commission "will use the agency's environmental and decisional documents to communicate how tribal input has been considered"); *see also Revision to Policy Statement on Consultation with Indian Tribes in*

Commission Proceedings, Order No. 863, 169 FERC ¶ 61,036, at P 5 (2019).

Tribes also contend that they were not given "any opportunity" to participate in the resolution of adverse effects or develop alternatives or modifications to the programmatic agreement. Br. 15; *see also* 36 C.F.R. § 800.6(b)(1)(iv) (the Commission and the State Historic Preservation Officers must execute an agreement if they agree on how to resolve a project's adverse effects); Rehearing Order P 43, JA ___. Again, incorrect.

While Tribes each sent letters to the Commission on January 16, 2020 (R.548 and R.549) and February 7, 2020 (R.560 and R.561) complaining about the process and lack of consultation on the January 8 draft programmatic agreement (R.546), they offered no substantive comments or textual edits on the draft itself. *See* Rehearing Order P 44 n.166, JA ___; Certificate Order P 114 n.254, JA ___. Nor did they move at any time for procedural relief from the Commission, such as an extension of the 30-day deadline for comments on the draft agreement. *See* Sappony Tribe Ltr. at 1 (Jan. 16, 2020) (characterizing as "unreasonable" the 30-day comment deadline), R.548, JA ___; Monacan

Nation Ltr. at 1 (Feb. 7, 2020) (FERC engaged in a "rush job"), R.560, JA ___; 18 C.F.R. § 385.2008(a) ("Except as otherwise provided by law, the time by which any person is required or allowed to act under any statute, rule, or order may be extended by the decisional authority for good cause, *upon a motion made before the expiration of the period prescribed* or previously extended.") (emphasis added).

The Virginia State Historic Preservation Officer provided comments to the Commission on Tribes' behalf on April 1, 2020, to which Commission staff responded on April 10. Rehearing Order P 44 & n.165, JA ___; Certificate Order P 114, JA ___; Ltr. of Roger W. Kirchen, Va. Dep't of Historic Resources (Apr. 1, 2020), R.589, JA ___; FERC staff response letter (Apr. 10, 2020), R.590, JA ___. In a subsequent letter enclosing his signature on the final programmatic agreement, the Virginia official noted the "difference of opinion regarding the sufficiency of consultation"—but found no basis to terminate consultation with FERC on the agreement and concluded that "the [programmatic agreement] clearly outlines a process that includes the Tribes in decision-making." Ltr. of Roger W. Kirchen, Va. Dep't of Historic Resources at 1 (May 18, 2020), R.598, JA ___.

The execution of the agreement here followed 36 C.F.R. § 800.6(b)(1)(iv): "If the agency official and the [State Historic Preservation Officer] agree on how the adverse effects will be resolved, they shall execute a memorandum of agreement." The final programmatic agreement, signed by the Commission and both the Virginia and North Carolina State Historic Preservation Officers, concluded the section 106 process. Certificate Order P 114, JA ___; *see also* 36 C.F.R. § 800.6(c) ("A memorandum of agreement executed and implemented pursuant to this section evidences the agency official's compliance with section 106 and this part and shall govern the undertaking and all of its parts.").

As the Commission correctly noted, the only required signatories to a section 106 agreement are the agency official, the appropriate state historic preservation officer, and, if participating, the Advisory Council on Historic Preservation. Certificate Order P 117 & n. 260, JA ___; 36 C.F.R. § 800.6(c)(1); *see also* Certificate Order P 113 (Advisory Council declined to participate in consultation on adverse effects), JA ___. And though the agency exercised its discretion to invite Tribes to sign the agreement and they declined to do so, per 36 C.F.R. § 800.6(c)(3) "[t]he

refusal of any party invited to concur in the memorandum of agreement does not invalidate the memorandum of agreement." *See* Certificate Order P 117, JA ___. The Commission thus reasonably concluded that it complied "with both the letter and spirit of section 106" of the Preservation Act. *Id.* P 116, JA ___.

Tribes nonetheless contend that section 106 "requires meaningful involvement with all consulting parties *prior* to drafting any agreement." Br. 18. But the regulation (on agreements to resolve adverse effects) itself suggests no such temporal bright line. It states simply that "[t]he agency official shall consult with the [State Historic Preservation Officer] and other consulting parties to seek ways to avoid, minimize or mitigate the adverse effects." 36 C.F.R. § 800.6(b)(1)(i).

And the agency's consultations with Tribes, both before drafting the agreement (*supra* at 55–56) and after, satisfied this requirement. Indeed, as the Commission reasonably noted, "[t]he purpose of distributing the draft agreement was to elicit *substantive comments and edits* from the consulting parties," Certificate Order P 119 (emphasis added), JA ___, which Tribes never bothered to provide, *see id.* P 114 n.254, JA ___; *supra* at 59.

This record shows that Tribes had "a reasonable opportunity to identify [their] concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate [their] views on the undertaking's effects on such properties, and participate in the resolution of adverse effects." 36 C.F.R. § 800.2(c)(2)(ii)(A). For their part, Intervenors do not cite a single case to support their opinion of that regulation—or for that matter any of their claims under the National Historic Preservation Act.

Tribes also suggest, Br. 26, that the Commission "seems to have" improperly delegated its section 106 consultation responsibilities to Mountain Valley. Not so. The Commission emphasized that it independently evaluated the Project's effects on historic and culturally significant properties and followed the regulation's mandate that "[t]he agency official remains legally responsible for all required findings and conclusions," 36 C.F.R. § 800.2(a)(3)). Rehearing Order P 51, JA ___. So long as the agency follows that mandate, it "may use the services of applicants" to "prepare information, analyses and recommendations

under this part," as the Commission correctly recognized. Rehearing Order P 51 (quoting 36 C.F.R. § 800.2(a)(3)), JA ___.

In any event, the record indicates that the Commission properly engaged in government-to-government consultation under section 106 of the Preservation Act, including giving Tribes "a reasonable opportunity" to identify concerns, articulate their views, and participate in the resolution of adverse effects. *See* 36 C.F.R. § 800.2(c)(2)(ii)(A); *Appalachian Voices*, 2019 WL 847199, at *3 (finding that FERC did not violate petitioners' rights under the Preservation Act). For the same reason, Tribes' NEPA claim—founded on the same alleged lack of consultation—fails as well. *See* Br. 31–32; *see also* Rehearing Order P 52 (finding that Commission's issuance of the certificate "only after considering the impacts on historic properties and cultural resources" as detailed in the Environmental Impact Statement was fully consistent with NEPA), JA ___.

CONCLUSION

The petition for review should be denied.

Respectfully submitted,

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June 23, 2021

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 11,960 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 Century Schoolbook 14-point font using Microsoft Word 365.

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June 23, 2021

ADDENDUM

STATUTES
AND
REGULATIONS

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ity shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

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

HISTORICAL AND REVISION NOTES

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

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

AMENDMENTS

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

§ 703. Form and venue of proceeding

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

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

HISTORICAL AND REVISION NOTES

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

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

AMENDMENTS

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

§ 704. Actions reviewable

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

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

HISTORICAL AND REVISION NOTES

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

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

§ 705. Relief pending review

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

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

HISTORICAL AND REVISION NOTES

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

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

§ 706. Scope of review

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

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

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

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

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

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

(D) without observance of procedure required by law;

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

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

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

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

HISTORICAL AND REVISION NOTES

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

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

ABBREVIATION OF RECORD

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

CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

Sec.

§ 801. Congressional review

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

(i) a copy of the rule;

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

(iii) the proposed effective date of the rule.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

or any Federal license, permit, or other approval is required) in accordance with the purposes of this division and give consideration to programs and projects that will further the purposes of this division.

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

HISTORICAL AND REVISION NOTES

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

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

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

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

HISTORICAL AND REVISION NOTES

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

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

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

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

HISTORICAL AND REVISION NOTES

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

§ 306108. Effect of undertaking on historic property

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

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

HISTORICAL AND REVISION NOTES

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

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

§ 306109. Costs of preservation as eligible project costs

A Federal agency may include the costs of preservation activities of the agency under this division as eligible project costs in all undertakings of the agency or assisted by the agency. The eligible project costs may include amounts paid by a Federal agency to a State to be used in carrying out the preservation responsibilities of the Federal agency under this division, and reasonable costs may be charged to Federal licensees and permittees as a condition to the issuance of the license or permit.

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

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
306109	16 U.S.C. 470h–2(g).	Pub. L. 89–665, title I, § 110(g), as added Pub. L. 96–515, title II, § 206, Dec. 12, 1980, 94 Stat. 2996.

§ 306110. Annual preservation awards program

The Secretary shall establish an annual preservation awards program under which the Secretary may make monetary awards in amounts of not to exceed $1,000 and provide citations for special achievement to officers and employees of Federal, State, and certified local governments in recognition of their outstanding contributions to the preservation of historic property. The program may include the issuance of annual awards by the President to any citizen of the United States recommended for the award by the Secretary.

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

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
306110	16 U.S.C. 470h–2(h).	Pub. L. 89–665, title I, § 110(h), as added Pub. L. 96–515, title II, § 206, Dec. 12, 1980, 94 Stat. 2997.

The words ''historic property'' are substituted for ''historic resources'' for consistency because the defined term in the new division is ''historic property''.

§ 306111. Environmental impact statement

Nothing in this division shall be construed to—

(1) require the preparation of an environmental impact statement where the statement would not otherwise be required under the Na-

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

(d) Inspections

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

(e) Emergency Response Plan

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

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

(A) at the LNG terminal; and

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

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

REFERENCES IN TEXT

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

§ 717c. Rates and charges

(a) Just and reasonable rates and charges

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

(b) Undue preferences and unreasonable rates and charges prohibited

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

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

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

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

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

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

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

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

(f) Storage services

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

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

(B) customers are adequately protected.

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

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

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

REFERENCES IN TEXT

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

AMENDMENTS

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

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

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

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

§ 717c–1. Prohibition on market manipulation

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

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

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

(a) Decreases in rates

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

(b) Costs of production and transportation

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

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

§ 717e. Ascertainment of cost of property

(a) Cost of property

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

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

(b) Inventory of property; statements of costs

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

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

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

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

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

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

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

(c) Certificate of public convenience and necessity

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

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

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

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

(B) natural gas produced by such person.

(d) Application for certificate of public convenience and necessity

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

(e) Granting of certificate of public convenience and necessity

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

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

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

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

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

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

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

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

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

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

AMENDMENTS

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

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

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

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

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

EFFECTIVE DATE OF 1988 AMENDMENT

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

TRANSFER OF FUNCTIONS

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

§ 717g. Accounts; records; memoranda

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

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

(b) Access to and inspection of accounts and records

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

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 Commis-

sion, 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.

§ 717s. Enforcement of chapter

(a) Action in district court for injunction

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper district court of the United States, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this chapter or any rule, regulation, or order thereunder,

rather than in the course of individual proceedings.

(b) Upon receipt of suggestions, comments, or proposals pursuant to paragraph (a) of this section, the Commission shall review the matters raised and take whatever action is deemed necessary with respect to the filing, including, but not limited to, requesting further information from the filing party, the public, or the staff, or prescribing an informal public conference for initial discussion and consultation with the Commission, a Commissioner, or the Staff, concerning the matter(s) raised. In the absence of a notice of proposed rulemaking, any conferences or procedures undertaken pursuant to this section shall not be deemed by the Commission as meeting the requirements of the Administrative Procedure Act with respect to notice of rulemakings, but are to be utilized by the Commission as initial discussions for advice as a means of determining the need for Commission action, investigation or study prior to the issuance of a notice of proposed rulemaking to the extent required by the Administrative Procedure Act, 5 U.S.C. 553.

(c) [Reserved]

(d) A person may not invoke this policy as a means of advocating ex parte before the Commission a position in a proceeding pending at the Commission and any such filing will be rejected. Comments must relate to general conditions in industry or the public or policies or practices of the Commission which may need reform, review, or initial consideration by the Commission.

[Order 547, 41 FR 15004, Apr. 9, 1976, as amended by Order 225, 47 FR 19054, May 3, 1982]

§ 2.1b Availability in contested cases of information acquired by staff investigation.

Pursuant to the Commission's authority under the Natural Gas Act, particularly subsection (b) of section 8 thereof, and under the Federal Power Act, particularly subsection (b) of section 301 thereof, upon request by a party to the proceedings, or as required in conjunction with the presentation of a Commission staff case of staff's cross-examination of any other presentation therein, all relevant information acquired by Commission staff, including workpapers pursuant to any staff investigation conducted under sections 8, 10, or 14 of the Natural Gas Act, and sections 301, 304 or 307 of the Federal Power Act, shall, without further order of the Commission, be free from the restraints of said subsection (b) of section 8 of the Natural Gas Act, and subsection (b) of section 301 of the Federal Power Act, regarding the divulgence of information, with respect to any matter hereafter set for formal hearing.

[58 FR 38292, July 16, 1993]

§ 2.1c Policy statement on consultation with Indian tribes in Commission proceedings.

(a) The Commission recognizes the unique relationship between the United States and Indian tribes and Alaska Native Claims Settlement Act (ANCSA) Corporations as defined by treaties, statutes, and judicial decisions. Indian tribes have various sovereign authorities, including the power to make and enforce laws, administer justice, and manage and control their lands and resources. Through several Executive Orders and a Presidential Memorandum, departments and agencies of the Executive Branch have been urged to consult with federally-recognized Indian tribes in a manner that recognizes the government-to-government relationship between these agencies and tribes. In essence, this means that consultation should involve direct contact between agencies and tribes and should recognize the status of the tribes as governmental sovereigns.

(b) The Commission acknowledges that, as an independent agency of the federal government, it has a trust responsibility to Indian tribes and this historic relationship requires it to adhere to certain fiduciary standards in its dealings with Indian tribes.

(c) The Commission will endeavor to work with Indian tribes on a government-to-government basis, and with ANCSA Corporations in a similar manner, and will seek to address the effects of proposed projects on tribal rights and resources through consultation pursuant to the Commission's trust responsibility, the Federal Power Act, the Natural Gas Act, the Public Utility Regulatory Policies Act, section 32 of

the Public Utility Holding Company Act, the Interstate Commerce Act, the Outer Continental Shelf Lands Act, section 106 of the National Historic Preservation Act, and in the Commission's environmental and decisional documents.

(d) As an independent regulatory agency, the Commission functions as a neutral, quasi-judicial body, rendering decisions on applications filed with it, and resolving issues among parties appearing before it, including Indian tribes. Therefore, the provisions of the Administrative Procedure Act and the Commission's rules concerning off-the-record communications, as well as the nature of the Commission's licensing and certificating processes and of the Commission's review of jurisdictional rates, terms and conditions, place some limitations on the nature and type of consultation that the Commission may engage in with any party in a contested case. Nevertheless, the Commission will endeavor, to the extent authorized by law, to reduce procedural impediments to working directly and effectively with tribal governments.

(e) The Commission, in keeping with its trust responsibility, will assure that tribal concerns and interests are considered whenever the Commission's actions or decisions have the potential to adversely affect Indian tribes, Indian trust resources, or treaty rights. The Commission will use the agency's environmental and decisional documents to communicate how tribal input has been considered.

(f) The Commission will seek to engage tribes in high-level meetings to discuss general matters of importance, such as those that uniquely affect the tribes. Where appropriate, these meetings may be arranged for particular tribes, by region, or in some proceedings involving hydroelectric projects, by river basins.

(g) The Commission will strive to develop working relationships with tribes and will seek to establish procedures to educate Commission staff about tribal governments and cultures and to educate tribes about the Commission's various statutory functions and programs. To assist in this effort, the Commission is establishing the position of tribal liaison. The tribal liaison will provide a point of contact and a resource for tribes for any proceeding at the Commission.

(h) Concurrently with this policy statement, the Commission is issuing certain new regulations regarding the licensing of hydroelectric projects. In this connection, the Commission sets forth the following additional policies for the hydroelectric licensing process.

(i) The Commission believes that the hydroelectric licensing process will benefit by more direct and substantial consultation between the Commission staff and Indian tribes. Because of the unique status of Indian tribes in relation to the Federal government, the Commission will endeavor to increase direct communications with tribal representatives in appropriate circumstances, recognizing that different issues and stages of a proceeding may call for different approaches, and there are some limitations that must be observed.

(j) The Commission will seek to notify potentially-affected tribes about upcoming hydroelectric licensing processes, to discuss the consultation process and the importance of tribal participation, to learn more about each tribe's culture, and to establish case-by-case consultation procedures consistent with our *ex parte* rules.

(k) In evaluating a proposed hydroelectric project, the Commission will consider any comprehensive plans prepared by Indian tribes or inter-tribal organizations for improving, developing, or conserving a waterway or waterways affected by a proposed project. The Commission will treat as a comprehensive plan, a plan that:

(1) Is a comprehensive study of one or more of the beneficial uses of a waterway or waterways;

(2) Includes a description of the standards applied, the data relied upon, and the methodology used in preparing the plan; and

(3) Is filed with the Secretary of the Commission. *See generally* 18 CFR 2.19.

[Order 635, 68 FR 46455, Aug. 6, 2003, as amended at 84 FR 56941, Oct. 24, 2019]

STATEMENTS OF GENERAL POLICY AND INTERPRETATIONS UNDER THE FEDERAL POWER ACT

AUTHORITY: Sections 2.2 through 2.13, issued under sec. 309, 49 Stat. 858; 16 U.S.C. 825h, unless otherwise noted.

§ 2.2 Transmission lines.

In a public statement dated March 7, 1941, the Commission announced its determination that transmission lines which are not primary lines transmitting power from the power house or appurtenant works of a project to the point of junction with the distribution system or with the interconnected primary transmission system as set forth in section 3(11) of the Act are not within the licensing authority of the Commission, and directed that future applications filed with it for such licenses be referred for appropriate action to the Federal department having supervision over the lands or waterways involved.

[Order 141, 12 FR 8471, Dec. 19, 1947. Redesignated by Order 147, 13 FR 8259, Dec. 23, 1948]

§ 2.4 Suspension of rate schedules.

The Commission approved and adopted on May 29, 1945, the following conclusions as to its powers of suspension of rate schedules under section 205 of the act:

(a) The Commission cannot suspend a rate schedule after its effective date.

(b) The Commission can suspend any new schedule making any change in an existing filed rate schedule, including any rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, contained in the filed schedule.

(c) Included in such changes which may be suspended are:

(1) Increases.

(2) Reductions.

(3) Discriminatory changes.

(4) Cancellation or notice of termination.

(5) Changes in classification, service, rule, regulation or contract.

(d) Immaterial, unimportant or routine changes will not be suspended.

(e) During suspension, the prior existing rate schedule continues in effect and should not be changed during suspension.

(f) Changes under escalator clauses may be suspended as changes in existing filed schedules.

(g) Suspension of a rate schedule, within the ambit of the Commission's statutory authority is a matter within the discretion of the Commission.

(Natural Gas Act, 15 U.S.C. 717–717w (1976 & Supp. IV 1980); Federal Power Act, 16 U.S.C. 791a–828c (1976 & Supp. IV 1980); Dept. of Energy Organization Act, 42 U.S.C. 7101–7352 (Supp. IV 1980); E.O. 12009, 3 CFR part 142 (1978); 5 U.S.C. 553 (1976))

[Order 141, 12 FR 8471, Dec. 19, 1947. Redesignated by Order 147, 13 FR 8259, Dec. 23, 1948, and amended by Order 303, 48 FR 24361, June 1, 1983; Order 575, 60 FR 4852, Jan. 25, 1995]

§ 2.7 Recreational development at licensed projects.

The Commission will evaluate the recreational resources of all projects under Federal license or applications therefor and seek, within its authority, the ultimate development of these resources, consistent with the needs of the area to the extent that such development is not inconsistent with the primary purpose of the project. Reasonable expenditures by a licensee for public recreational development pursuant to an approved plan, including the purchase of land, will be included as part of the project cost. The Commission will not object to licensees and operators of recreational facilities within the boundaries of a project charging reasonable fees to users of such facilities in order to help defray the cost of constructing, operating, and maintaining such facilities. The Commission expects the licensee to assume the following responsibilities:

(a) To acquire in fee and include within the project boundary enough land to assure optimum development of the recreational resources afforded by the project. To the extent consistent with the other objectives of the license, such lands to be acquired in fee for recreational purposes shall include the lands adjacent to the exterior margin of any project reservoir plus all other project lands specified in any approved recreational use plan for the project.

(b) To develop suitable public recreational facilities upon project lands and waters and to make provisions for adequate public access to such project

(2) If verification of any filing is required, the verification must be under oath by a person having knowledge of the matters set forth in the filing. If any verification is made by a person other than the signer, a statement must be attached to the verification explaining why a person other than the signer provides verification.

(3) Any requirement that a filing include or be supported by a sworn declaration, verification, certificate, statement, oath, or affidavit may be satisfied by compliance with the provisions of 28 U.S.C. 1746, provided that the filer, or an authorized representative of the filer, maintains a copy of the document bearing an original, physical signature until after such time as all administrative and judicial proceedings in the relevant matter are closed and all deadlines for further administrative or judicial review have passed.

(c) *Electronic signature.* In the case of any document filed in electronic form under the provisions of this Chapter, the typed characters representing the name of a person shall be sufficient to show that such person has signed the document for purposes of this section.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 619, 65 FR 57092, Sept. 21, 2000; Order 653, 70 FR 8724, Feb. 23, 2005]

§ 385.2006 Docket system (Rule 2006).

(a) The Secretary will maintain a system for docketing proceedings.

(b) Any public information in any docket is available for inspection and copying by the public during the office hours of the Commission, to the extent that such availability is consistent with the proper discharge of the Commission's duties and in conformity with part 388 of this chapter.

[Order 226, 47 FR 19022, May 3, 1982; 48 FR 786, Jan. 7, 1983]

§ 385.2007 Time (Rule 2007).

(a) *Computation.* (1) Except as otherwise required by law, any period of time prescribed or allowed by statute or Commission rule or order is computed to exclude the day of the act or event from which the time period begins to run.

(2) The last day of any time period is included in the time period, unless it is a Saturday; Sunday; a day on which the Commission closes due to adverse conditions and does not reopen prior to its official close of business, even though some official duties may continue through telework-ready employees; part-day holiday that affects the Commission; or legal public holiday as designated in section 6103 of title 5, U.S. Code. In each case the period does not end until the close of the Commission business of the next day which is not a Saturday; Sunday; a day on which the Commission closes due to adverse conditions and does not reopen prior to its official close of business even though some official duties may continue through telework-ready employees; part-day holiday that affects the Commission; or legal public holiday.

(b) *Date of issuance of Commission rules or orders.* (1) Any Commission rule or order is deemed issued when the Secretary does the earliest of the following:

(i) Posts a full-text copy in the Division of Public Information;

(ii) Mails or delivers copies of the order to the parties; or

(iii) Makes such copies public.

(2) Any date of issuance specified in a rule or order need not be the date on which the rule or order is adopted by the Commission.

(c) *Effective date of Commission rules or orders.* (1) Unless otherwise ordered by the Commission, rules or orders are effective on the date of issuance.

(2) Any initial or revised initial decision issued by a presiding officer is effective when the initial or revised initial decision is final under Rule 708(d).

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 375, 49 FR 21316, May 21, 1984; Order 376, 49 FR 21707, May 23, 1984; Order 645, 69 FR 2504, Jan. 16, 2004; 84 FR 3983, Feb. 14, 2019]

§ 385.2008 Extensions of time (Rule 2008).

(a) Except as otherwise provided by law, the time by which any person is required or allowed to act under any statute, rule, or order may be extended by the decisional authority for good cause, upon a motion made before the

expiration of the period prescribed or previously extended.

(b) If any motion for extension of time is made after the expiration of a specified time period, the decisional authority may permit performance of the act required or allowed, if the movant shows extraordinary circumstances sufficient to justify the failure to act in a timely manner.

§ 385.2009 Notice (Rule 2009).

Unless actual notice is given or unless newspaper notice is given as required by law, notice by the Commission is provided by the Secretary only by publication in the FEDERAL REGISTER. Actual notice is usually given by service under Rule 2010.

§ 385.2010 Service (Rule 2010).

(a) *By participants.* (1) Any participant filing a document in a proceeding must serve a copy of the document on:

(i) Each person whose name is on the official service list, or applicable restricted service list, for the proceeding or phase of the proceeding; and

(ii) Any other person required to be served under Commission rule or order or under law.

(2) If any person receives a rejection letter or deficiency letter from the Commission, the person must serve a copy of the letter on any person previously served copies of the rejected or deficient filing.

(b) *By the Secretary.* The Secretary will serve, as appropriate:

(1) A copy of any complaint on any person against whom the complaint is directed;

(2) A copy of any notice of tariff or rate examination or order to show cause, on any person to whom the notice or order is issued;

(3) A copy of any rule or any order by a decisional authority in a proceeding on any person included on the official service list, or applicable restricted service list, for the proceeding or phase of the proceeding, provided that such person has complied with paragraph (g) of this section.

(c) *Official service list.* (1) The official service list for any proceeding will contain:

(i) The name, address and, for proceedings commenced on or after March 21, 2005, e-mail address of any person designated for service in the initial pleading, other than a protest, or in the tariff or rate filing which is filed by any participant; and

(ii) The name of counsel for the staff of the Commission.

(2) Any designation of a person for service may be changed by following the instructions for the Commission's electronic registration system, located on its Web site at *http://www.ferc.gov* or, in the event that the proceeding was commenced prior to March 21, 2005, or the person designated for service is unable to use the electronic registration system, by filing a notice with the Commission and serving the notice on each person whose name is included on the official service list.

(d) *Restricted service list.* (1) For purposes of eliminating unnecessary expense or improving administrative efficiency, the Secretary, an office director, or the presiding officer may establish, by order, a restricted service list for an entire proceeding, a phase of a proceeding, one or more issues in a proceeding, or one or more cases in a consolidated proceeding.

(2) Any restricted service list will contain the names of each person on the official service list, or the person's representative, who, in the judgment of the decisional authority establishing the list, is an active participant with respect to the proceeding or consolidated proceeding, any phase of the proceeding, or any issue in the proceeding, for which the list is established.

(3) Any restricted service list is maintained in the same manner as, and in addition to, the official service list under paragraph (c) of this section.

(4) Before any restricted service list is established, each person included on the official service list will be given notice of any proposal to establish a restricted service list and an opportunity to show why that person should also be included on the restricted service list or why a restricted service list should not be established.

(5) Any designation of a person for service on a restricted service list may be changed by filing written notice with the Commission and serving that notice on each person whose name is on the applicable restricted service list.

PART 800—PROTECTION OF HISTORIC PROPERTIES

Subpart A—Purposes and Participants

Subpart B—The Section 106 Process

Subpart C—Program Alternatives

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

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

Subpart A—Purposes and Participants

§ 800.1 Purposes.

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

(b) *Relation to other provisions of the act.* Section 106 is related to other provisions of the act designed to further the national policy of historic preservation. References to those provisions are included in this part to identify circumstances where they may affect actions taken to meet section 106 requirements. Such provisions may have their own implementing regulations or guidelines and are not intended to be implemented by the procedures in this part except insofar as they relate to the section 106 process. Guidelines, policies, and procedures issued by other agencies, including the Secretary, have been cited in this part for ease of access and are not incorporated by reference.

(c) *Timing.* The agency official must complete the section 106 process ''prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license.'' This does not prohibit agency official from conducting or authorizing nondestructive project planning activities before completing compliance with section 106, provided that such actions do not restrict the subsequent consideration of alternatives to avoid, minimize or mitigate the undertaking's adverse effects on historic properties. The agency official shall ensure that the section 106 process is initiated early in the undertaking's planning, so that a broad range of alternatives may be considered during the planning process for the undertaking.

§ 800.2 Participants in the Section 106 process.

(a) *Agency official.* It is the statutory obligation of the Federal agency to fulfill the requirements of section 106 and to ensure that an agency official with jurisdiction over an undertaking takes legal and financial responsibility for section 106 compliance in accordance with subpart B of this part. The agency official has approval authority for the undertaking and can commit the Federal agency to take appropriate action

for a specific undertaking as a result of section 106 compliance. For the purposes of subpart C of this part, the agency official has the authority to commit the Federal agency to any obligation it may assume in the implementation of a program alternative. The agency official may be a State, local, or tribal government official who has been delegated legal responsibility for compliance with section 106 in accordance with Federal law.

(1) *Professional standards.* Section 112(a)(1)(A) of the act requires each Federal agency responsible for the protection of historic resources, including archeological resources, to ensure that all actions taken by employees or contractors of the agency shall meet professional standards under regulations developed by the Secretary.

(2) *Lead Federal agency.* If more than one Federal agency is involved in an undertaking, some or all the agencies may designate a lead Federal agency, which shall identify the appropriate official to serve as the agency official who shall act on their behalf, fulfilling their collective responsibilities under section 106. Those Federal agencies that do not designate a lead Federal agency remain individually responsible for their compliance with this part.

(3) *Use of contractors.* Consistent with applicable conflict of interest laws, the agency official may use the services of applicants, consultants, or designees to prepare information, analyses and recommendations under this part. The agency official remains legally responsible for all required findings and determinations. If a document or study is prepared by a non-Federal party, the agency official is responsible for ensuring that its content meets applicable standards and guidelines.

(4) *Consultation.* The agency official shall involve the consulting parties described in paragraph (c) of this section in findings and determinations made during the section 106 process. The agency official should plan consultations appropriate to the scale of the undertaking and the scope of Federal involvement and coordinated with other requirements of other statutes, as applicable, such as the National Environmental Policy Act, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, the Archeological Resources Protection Act, and agency-specific legislation. The Council encourages the agency official to use to the extent possible existing agency procedures and mechanisms to fulfill the consultation requirements of this part.

(b) *Council.* The Council issues regulations to implement section 106, provides guidance and advice on the application of the procedures in this part, and generally oversees the operation of the section 106 process. The Council also consults with and comments to agency officials on individual undertakings and programs that affect historic properties.

(1) *Council entry into the section 106 process.* When the Council determines that its involvement is necessary to ensure that the purposes of section 106 and the act are met, the Council may enter the section 106 process. Criteria guiding Council decisions to enter the section 106 process are found in appendix A to this part. The Council will document that the criteria have been met and notify the parties to the section 106 process as required by this part.

(2) *Council assistance.* Participants in the section 106 process may seek advice, guidance and assistance from the Council on the application of this part to specific undertakings, including the resolution of disagreements, whether or not the Council is formally involved in the review of the undertaking. If questions arise regarding the conduct of the section 106 process, participants are encouraged to obtain the Council's advice on completing the process.

(c) *Consulting parties.* The following parties have consultative roles in the section 106 process.

(1) *State historic preservation officer.* (i) The State historic preservation officer (SHPO) reflects the interests of the State and its citizens in the preservation of their cultural heritage. In accordance with section 101(b)(3) of the act, the SHPO advises and assists Federal agencies in carrying out their section 106 responsibilities and cooperates with such agencies, local governments and organizations and individuals to

ensure that historic properties are taking into consideration at all levels of planning and development.

(ii) If an Indian tribe has assumed the functions of the SHPO in the section 106 process for undertakings on tribal lands, the SHPO shall participate as a consulting party if the undertaking takes place on tribal lands but affects historic properties off tribal lands, if requested in accordance with § 800.3(c)(1), or if the Indian tribe agrees to include the SHPO pursuant to § 800.3(f)(3).

(2) *Indian tribes and Native Hawaiian organizations.* (i) *Consultation on tribal lands.* (A) *Tribal historic preservation officer.* For a tribe that has assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the act, the tribal historic preservation officer (THPO) appointed or designated in accordance with the act is the official representative for the purposes of section 106. The agency official shall consult with the THPO in lieu of the SHPO regarding undertakings occurring on or affecting historic properties on tribal lands.

(B) *Tribes that have not assumed SHPO functions.* When an Indian tribe has not assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the act, the agency official shall consult with a representative designated by such Indian tribe in addition to the SHPO regarding undertakings occurring on or affecting historic properties on its tribal lands. Such Indian tribes have the same rights of consultation and concurrence that the THPOs are given throughout subpart B of this part, except that such consultations shall be in addition to and on the same basis as consultation with the SHPO.

(ii) *Consultation on historic properties of significance to Indian tribes and Native Hawaiian organizations.* Section 101(d)(6)(B) of the act requires the agency official to consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties that may be affected by an undertaking. This requirement applies regardless of the location of the historic property. Such Indian tribe or Native Hawaiian organization shall be a consulting party.

(A) The agency official shall ensure that consultation in the section 106 process provides the Indian tribe or Native Hawaiian organization a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects. It is the responsibility of the agency official to make a reasonable and good faith effort to identify Indian tribes and Native Hawaiian organizations that shall be consulted in the section 106 process. Consultation should commence early in the planning process, in order to identify and discuss relevant preservation issues and resolve concerns about the confidentiality of information on historic properties.

(B) The Federal Government has a unique legal relationship with Indian tribes set forth in the Constitution of the United States, treaties, statutes, and court decisions. Consultation with Indian tribes should be conducted in a sensitive manner respectful of tribal sovereignty. Nothing in this part alters, amends, repeals, interprets, or modifies tribal sovereignty, any treaty rights, or other rights of an Indian tribe, or preempts, modifies, or limits the exercise of any such rights.

(C) Consultation with an Indian tribe must recognize the government-to-government relationship between the Federal Government and Indian tribes. The agency official shall consult with representatives designated or identified by the tribal government or the governing body of a Native Hawaiian organization. Consultation with Indian tribes and Native Hawaiian organizations should be conducted in a manner sensitive to the concerns and needs of the Indian tribe or Native Hawaiian organization.

(D) When Indian tribes and Native Hawaiian organizations attach religious and cultural significance to historic properties off tribal lands, section 101(d)(6)(B) of the act requires Federal agencies to consult with such Indian

tribes and Native Hawaiian organizations in the section 106 process. Federal agencies should be aware that frequently historic properties of religious and cultural significance are located on ancestral, aboriginal, or ceded lands of Indian tribes and Native Hawaiian organizations and should consider that when complying with the procedures in this part.

(E) An Indian tribe or a Native Hawaiian organization may enter into an agreement with an agency official that specifies how they will carry out responsibilities under this part, including concerns over the confidentiality of information. An agreement may cover all aspects of tribal participation in the section 106 process, provided that no modification may be made in the roles of other parties to the section 106 process without their consent. An agreement may grant the Indian tribe or Native Hawaiian organization additional rights to participate or concur in agency decisions in the section 106 process beyond those specified in subpart B of this part. The agency official shall provide a copy of any such agreement to the Council and the appropriate SHPOs.

(F) An Indian tribe that has not assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the act may notify the agency official in writing that it is waiving its rights under § 800.6(c)(1) to execute a memorandum of agreement.

(3) *Representatives of local governments.* A representative of a local government with jurisdiction over the area in which the effects of an undertaking may occur is entitled to participate as a consulting party. Under other provisions of Federal law, the local government may be authorized to act as the agency official for purposes of section 106.

(4) *Applicants for Federal assistance, permits, licenses, and other approvals.* An applicant for Federal assistance or for a Federal permit, license, or other approval is entitled to participate as a consulting party as defined in this part. The agency official may authorize an applicant or group of applicants to initiate consultation with the SHPO/THPO and others, but remains legally responsible for all findings and determinations charged to the agency official. The agency official shall notify the SHPO/THPO when an applicant or group of applicants is so authorized. A Federal agency may authorize all applicants in a specific program pursuant to this section by providing notice to all SHPO/THPOs. Federal agencies that provide authorizations to applicants remain responsible for their government-to-government relationships with Indian tribes.

(5) *Additional consulting parties.* Certain individuals and organizations with a demonstrated interest in the undertaking may participate as consulting parties due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking's effects on historic properties.

(d) *The public*—(1) *Nature of involvement.* The views of the public are essential to informed Federal decisionmaking in the section 106 process. The agency official shall seek and consider the views of the public in a manner that reflects the nature and complexity of the undertaking and its effects on historic properties, the likely interest of the public in the effects on historic properties, confidentiality concerns of private individuals and businesses, and the relationship of the Federal involvement to the undertaking.

(2) *Providing notice and information.* The agency official must, except where appropriate to protect confidentiality concerns of affected parties, provide the public with information about an undertaking and its effects on historic properties and seek public comment and input. Members of the public may also provide views on their own initiative for the agency official to consider in decisionmaking.

(3) *Use of agency procedures.* The agency official may use the agency's procedures for public involvement under the National Environmental Policy Act or other program requirements in lieu of public involvement requirements in subpart B of this part, if they provide adequate opportunities for public involvement consistent with this subpart.

(ii) If within the 30 day review period the Council provides the agency official and, if the Council determines the issue warrants it, the head of the agency, with a written opinion objecting to the finding, the agency shall then proceed according to paragraph (c)(3)(ii) of this section. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part.

(iii) The agency official should seek the concurrence of any Indian tribe or Native Hawaiian organization that has made known to the agency official that it attaches religious and cultural significance to a historic property subject to the finding. If such Indian tribe or Native Hawaiian organization disagrees with the finding, it may within the 30 day review period specify the reasons for disagreeing with the finding and request the Council to review and object to the finding pursuant to paragraph (c)(2)(ii) of this section.

(3) *Council review of findings.* (i) When a finding is submitted to the Council pursuant to paragraph (c)(2)(i) of this section, the Council shall review the finding and provide the agency official and, if the Council determines the issue warrants it, the head of the agency with its opinion as to whether the adverse effect criteria have been correctly applied. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part. The Council will provide its opinion within 15 days of receiving the documented finding from the agency official. The Council at its discretion may extend that time period for 15 days, in which case it shall notify the agency of such extension prior to the end of the initial 15 day period. If the Council does not respond within the applicable time period, the agency official's responsibilities under section 106 are fulfilled.

(ii)(A) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall take into account the Council's opinion in reaching a final decision on the finding.

(B) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall prepare a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council's opinion, and provide it to the Council, the SHPO/THPO, and the consulting parties. The head of the agency may delegate his or her duties under this paragraph to the agency's senior policy official. If the agency official's initial finding will be revised, the agency official shall proceed in accordance with the revised finding. If the final decision of the agency is to affirm the initial finding of no adverse effect, once the summary of the decision has been sent to the Council, the SHPO/THPO, and the consulting parties, the agency official's responsibilities under section 106 are fulfilled.

(C) The Council shall retain a record of agency responses to Council opinions on their findings of no adverse effects. The Council shall make this information available to the public.

(d) *Results of assessment*—(1) *No adverse effect.* The agency official shall maintain a record of the finding and provide information on the finding to the public on request, consistent with the confidentiality provisions of § 800.11(c). Implementation of the undertaking in accordance with the finding as documented fulfills the agency official's responsibilities under section 106 and this part. If the agency official will not conduct the undertaking as proposed in the finding, the agency official shall reopen consultation under paragraph (a) of this section.

(2) *Adverse effect.* If an adverse effect is found, the agency official shall consult further to resolve the adverse effect pursuant to § 800.6.

[65 FR 77725, Dec. 12, 2000, as amended at 69 FR 40553, July 6, 2004]

§ 800.6 Resolution of adverse effects.

(a) *Continue consultation.* The agency official shall consult with the SHPO/THPO and other consulting parties, including Indian tribes and Native Hawaiian organizations, to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties.

(1) *Notify the Council and determine Council participation.* The agency official shall notify the Council of the adverse effect finding by providing the documentation specified in §800.11(e).

(i) The notice shall invite the Council to participate in the consultation when:

(A) The agency official wants the Council to participate;

(B) The undertaking has an adverse effect upon a National Historic Landmark; or

(C) A programmatic agreement under §800.14(b) will be prepared;

(ii) The SHPO/THPO, an Indian tribe or Native Hawaiian organization, or any other consulting party may at any time independently request the Council to participate in the consultation.

(iii) The Council shall advise the agency official and all consulting parties whether it will participate within 15 days of receipt of notice or other request. Prior to entering the process, the Council shall provide written notice to the agency official and the consulting parties that its decision to participate meets the criteria set forth in appendix A to this part. The Council shall also advise the head of the agency of its decision to enter the process. Consultation with Council participation is conducted in accordance with paragraph (b)(2) of this section.

(iv) If the Council does not join the consultation, the agency official shall proceed with consultation in accordance with paragraph (b)(1) of this section.

(2) *Involve consulting parties.* In addition to the consulting parties identified under §800.3(f), the agency official, the SHPO/THPO and the Council, if participating, may agree to invite other individuals or organizations to become consulting parties. The agency official shall invite any individual or organization that will assume a specific role or responsibility in a memorandum of agreement to participate as a consulting party.

(3) *Provide documentation.* The agency official shall provide to all consulting parties the documentation specified in §800.11(e), subject to the confidentiality provisions of §800.11(c), and such other documentation as may be developed during the consultation to resolve adverse effects.

(4) *Involve the public.* The agency official shall make information available to the public, including the documentation specified in §800.11(e), subject to the confidentiality provisions of §800.11(c). The agency official shall provide an opportunity for members of the public to express their views on resolving adverse effects of the undertaking. The agency official should use appropriate mechanisms, taking into account the magnitude of the undertaking and the nature of its effects upon historic properties, the likely effects on historic properties, and the relationship of the Federal involvement to the undertaking to ensure that the public's views are considered in the consultation. The agency official should also consider the extent of notice and information concerning historic preservation issues afforded the public at earlier steps in the section 106 process to determine the appropriate level of public involvement when resolving adverse effects so that the standards of §800.2(d) are met.

(5) *Restrictions on disclosure of information.* Section 304 of the act and other authorities may limit the disclosure of information under paragraphs (a)(3) and (a)(4) of this section. If an Indian tribe or Native Hawaiian organization objects to the disclosure of information or if the agency official believes that there are other reasons to withhold information, the agency official shall comply with §800.11(c) regarding the disclosure of such information.

(b) *Resolve adverse effects*—(1) *Resolution without the Council.* (i) The agency official shall consult with the SHPO/THPO and other consulting parties to seek ways to avoid, minimize or mitigate the adverse effects.

(ii) The agency official may use standard treatments established by the Council under §800.14(d) as a basis for a memorandum of agreement.

(iii) If the Council decides to join the consultation, the agency official shall follow paragraph (b)(2) of this section.

(iv) If the agency official and the SHPO/THPO agree on how the adverse effects will be resolved, they shall execute a memorandum of agreement. The agency official must submit a copy of

the executed memorandum of agreement, along with the documentation specified in § 800.11(f), to the Council prior to approving the undertaking in order to meet the requirements of section 106 and this subpart.

(v) If the agency official, and the SHPO/THPO fail to agree on the terms of a memorandum of agreement, the agency official shall request the Council to join the consultation and provide the Council with the documentation set forth in § 800.11(g). If the Council decides to join the consultation, the agency official shall proceed in accordance with paragraph (b)(2) of this section. If the Council decides not to join the consultation, the Council will notify the agency and proceed to comment in accordance with § 800.7(c).

(2) *Resolution with Council participation.* If the Council decides to participate in the consultation, the agency official shall consult with the SHPO/THPO, the Council, and other consulting parties, including Indian tribes and Native Hawaiian organizations under § 800.2(c)(3), to seek ways to avoid, minimize or mitigate the adverse effects. If the agency official, the SHPO/THPO, and the Council agree on how the adverse effects will be resolved, they shall execute a memorandum of agreement.

(c) *Memorandum of agreement.* A memorandum of agreement executed and implemented pursuant to this section evidences the agency official's compliance with section 106 and this part and shall govern the undertaking and all of its parts. The agency official shall ensure that the undertaking is carried out in accordance with the memorandum of agreement.

(1) *Signatories.* The signatories have sole authority to execute, amend or terminate the agreement in accordance with this subpart.

(i) The agency official and the SHPO/THPO are the signatories to a memorandum of agreement executed pursuant to paragraph (b)(1) of this section.

(ii) The agency official, the SHPO/THPO, and the Council are the signatories to a memorandum of agreement executed pursuant to paragraph (b)(2) of this section.

(iii) The agency official and the Council are signatories to a memorandum of agreement executed pursuant to § 800.7(a)(2).

(2) *Invited signatories.* (i) The agency official may invite additional parties to be signatories to a memorandum of agreement. Any such party that signs the memorandum of agreement shall have the same rights with regard to seeking amendment or termination of the memorandum of agreement as other signatories.

(ii) The agency official may invite an Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties located off tribal lands to be a signatory to a memorandum of agreement concerning such properties.

(iii) The agency official should invite any party that assumes a responsibility under a memorandum of agreement to be a signatory.

(iv) The refusal of any party invited to become a signatory to a memorandum of agreement pursuant to paragraph (c)(2) of this section does not invalidate the memorandum of agreement.

(3) *Concurrence by others.* The agency official may invite all consulting parties to concur in the memorandum of agreement. The signatories may agree to invite others to concur. The refusal of any party invited to concur in the memorandum of agreement does not invalidate the memorandum of agreement.

(4) *Reports on implementation.* Where the signatories agree it is appropriate, a memorandum of agreement shall include a provision for monitoring and reporting on its implementation.

(5) *Duration.* A memorandum of agreement shall include provisions for termination and for reconsideration of terms if the undertaking has not been implemented within a specified time.

(6) *Discoveries.* Where the signatories agree it is appropriate, a memorandum of agreement shall include provisions to deal with the subsequent discovery or identification of additional historic properties affected by the undertaking.

(7) *Amendments.* The signatories to a memorandum of agreement may amend it. If the Council was not a signatory

to the original agreement and the signatories execute an amended agreement, the agency official shall file it with the Council.

(8) *Termination.* If any signatory determines that the terms of a memorandum of agreement cannot be or are not being carried out, the signatories shall consult to seek amendment of the agreement. If the agreement is not amended, any signatory may terminate it. The agency official shall either execute a memorandum of agreement with signatories under paragraph (c)(1) of this section or request the comments of the Council under § 800.7(a).

(9) *Copies.* The agency official shall provide each consulting party with a copy of any memorandum of agreement executed pursuant to this subpart.

§ 800.7 Failure to resolve adverse effects.

(a) *Termination of consultation.* After consulting to resolve adverse effects pursuant to § 800.6(b)(2), the agency official, the SHPO/THPO, or the Council may determine that further consultation will not be productive and terminate consultation. Any party that terminates consultation shall notify the other consulting parties and provide them the reasons for terminating in writing.

(1) If the agency official terminates consultation, the head of the agency or an Assistant Secretary or other officer with major department-wide or agency-wide responsibilities shall request that the Council comment pursuant to paragraph (c) of this section and shall notify all consulting parties of the request.

(2) If the SHPO terminates consultation, the agency official and the Council may execute a memorandum of agreement without the SHPO's involvement.

(3) If a THPO terminates consultation regarding an undertaking occurring on or affecting historic properties on its tribal lands, the Council shall comment pursuant to paragraph (c) of this section.

(4) If the Council terminates consultation, the Council shall notify the agency official, the agency's Federal preservation officer and all consulting parties of the termination and comment under paragraph (c) of this section. The Council may consult with the agency's Federal preservation officer prior to terminating consultation to seek to resolve issues concerning the undertaking and its effects on historic properties.

(b) *Comments without termination.* The Council may determine that it is appropriate to provide additional advisory comments upon an undertaking for which a memorandum of agreement will be executed. The Council shall provide them to the agency official when it executes the memorandum of agreement.

(c) *Comments by the Council*—(1) *Preparation.* The Council shall provide an opportunity for the agency official, all consulting parties, and the public to provide their views within the time frame for developing its comments. Upon request of the Council, the agency official shall provide additional existing information concerning the undertaking and assist the Council in arranging an onsite inspection and an opportunity for public participation.

(2) *Timing.* The Council shall transmit its comments within 45 days of receipt of a request under paragraph (a)(1) or (a)(3) of this section or § 800.8(c)(3), or termination by the Council under § 800.6(b)(1)(v) or paragraph (a)(4) of this section, unless otherwise agreed to by the agency official.

(3) *Transmittal.* The Council shall provide its comments to the head of the agency requesting comment with copies to the agency official, the agency's Federal preservation officer, all consulting parties, and others as appropriate.

(4) *Response to Council comment.* The head of the agency shall take into account the Council's comments in reaching a final decision on the undertaking. Section 110(l) of the act directs that the head of the agency shall document this decision and may not delegate his or her responsibilities pursuant to section 106. Documenting the agency head's decision shall include:

(i) Preparing a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council's comments and providing it to the Council prior to approval of the undertaking;

§ 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.

action, or if significant new circumstances or information arise which bear on the proposal or its impacts.

§ 1501.8 Time limits.

Although the Council has decided that prescribed universal time limits for the entire NEPA process are too inflexible, Federal agencies are encouraged to set time limits appropriate to individual actions (consistent with the time intervals required by § 1506.10). When multiple agencies are involved the reference to agency below means lead agency.

(a) The agency shall set time limits if an applicant for the proposed action requests them: *Provided*, That the limits are consistent with the purposes of NEPA and other essential considerations of national policy.

(b) The agency may:

(1) Consider the following factors in determining time limits:

(i) Potential for environmental harm.

(ii) Size of the proposed action.

(iii) State of the art of analytic techniques.

(iv) Degree of public need for the proposed action, including the consequences of delay.

(v) Number of persons and agencies affected.

(vi) Degree to which relevant information is known and if not known the time required for obtaining it.

(vii) Degree to which the action is controversial.

(viii) Other time limits imposed on the agency by law, regulations, or executive order.

(2) Set overall time limits or limits for each constituent part of the NEPA process, which may include:

(i) Decision on whether to prepare an environmental impact statement (if not already decided).

(ii) Determination of the scope of the environmental impact statement.

(iii) Preparation of the draft environmental impact statement.

(iv) Review of any comments on the draft environmental impact statement from the public and agencies.

(v) Preparation of the final environmental impact statement.

(vi) Review of any comments on the final environmental impact statement.

(vii) Decision on the action based in part on the environmental impact statement.

(3) Designate a person (such as the project manager or a person in the agency's office with NEPA responsibilities) to expedite the NEPA process.

(c) State or local agencies or members of the public may request a Federal Agency to set time limits.

PART 1502—ENVIRONMENTAL IMPACT STATEMENT

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 55994, Nov. 29, 1978, unless otherwise noted.

§ 1502.1 Purpose.

The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the

Act are infused into the ongoing programs and actions of the Federal Government. It shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment. Agencies shall focus on significant environmental issues and alternatives and shall reduce paperwork and the accumulation of extraneous background data. Statements shall be concise, clear, and to the point, and shall be supported by evidence that the agency has made the necessary environmental analyses. An environmental impact statement is more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions.

§ 1502.2 Implementation.

To achieve the purposes set forth in § 1502.1 agencies shall prepare environmental impact statements in the following manner:

(a) Environmental impact statements shall be analytic rather than encyclopedic.

(b) Impacts shall be discussed in proportion to their significance. There shall be only brief discussion of other than significant issues. As in a finding of no significant impact, there should be only enough discussion to show why more study is not warranted.

(c) Environmental impact statements shall be kept concise and shall be no longer than absolutely necessary to comply with NEPA and with these regulations. Length should vary first with potential environmental problems and then with project size.

(d) Environmental impact statements shall state how alternatives considered in it and decisions based on it will or will not achieve the requirements of sections 101 and 102(1) of the Act and other environmental laws and policies.

(e) The range of alternatives discussed in environmental impact statements shall encompass those to be considered by the ultimate agency decisionmaker.

(f) Agencies shall not commit resources prejudicing selection of alternatives before making a final decision (§ 1506.1).

(g) Environmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.

§ 1502.3 Statutory requirements for statements.

As required by sec. 102(2)(C) of NEPA environmental impact statements (§ 1508.11) are to be included in every recommendation or report.

On proposals (§ 1508.23).

For legislation and (§ 1508.17).

Other major Federal actions (§ 1508.18).

Significantly (§ 1508.27).

Affecting (§§ 1508.3, 1508.8).

The quality of the human environment (§ 1508.14).

§ 1502.4 Major Federal actions requiring the preparation of environmental impact statements.

(a) Agencies shall make sure the proposal which is the subject of an environmental impact statement is properly defined. Agencies shall use the criteria for scope (§ 1508.25) to determine which proposal(s) shall be the subject of a particular statement. Proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement.

(b) Environmental impact statements may be prepared, and are sometimes required, for broad Federal actions such as the adoption of new agency programs or regulations (§ 1508.18). Agencies shall prepare statements on broad actions so that they are relevant to policy and are timed to coincide with meaningful points in agency planning and decisionmaking.

(c) When preparing statements on broad actions (including proposals by more than one agency), agencies may find it useful to evaluate the proposal(s) in one of the following ways:

(1) Geographically, including actions occurring in the same general location, such as body of water, region, or metropolitan area.

(2) Generically, including actions which have relevant similarities, such

§ 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

(a) With respect to the Environmental Protection Agency, any proposed legislation, project, action or regulation as those terms are used in section 309(a) of the Clean Air Act (42 U.S.C. 7609).

(b) With respect to all other agencies, any proposed major federal action to which section 102(2)(C) of NEPA applies.

§ 1508.20 Mitigation.

Mitigation includes:

(a) Avoiding the impact altogether by not taking a certain action or parts of an action.

(b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.

(c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.

(d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.

(e) Compensating for the impact by replacing or providing substitute resources or environments.

§ 1508.21 NEPA process.

NEPA process means all measures necessary for compliance with the requirements of section 2 and title I of NEPA.

§ 1508.22 Notice of intent.

Notice of intent means a notice that an environmental impact statement will be prepared and considered. The notice shall briefly:

(a) Describe the proposed action and possible alternatives.

(b) Describe the agency's proposed scoping process including whether, when, and where any scoping meeting will be held.

(c) State the name and address of a person within the agency who can answer questions about the proposed action and the environmental impact statement.

§ 1508.23 Proposal.

Proposal exists at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated. Preparation of an environmental impact statement on a proposal should be timed (§ 1502.5) so that the final statement may be completed in time for the statement to be included in any recommendation or report on the proposal. A proposal may exist in fact as well as by agency declaration that one exists.

§ 1508.24 Referring agency.

Referring agency means the federal agency which has referred any matter to the Council after a determination that the matter is unsatisfactory from the standpoint of public health or welfare or environmental quality.

§ 1508.25 Scope.

Scope consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. The scope of an individual statement may depend on its relationships to other statements (§§ 1502.20 and 1508.28). To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:

(a) Actions (other than unconnected single actions) which may be:

(1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:

(i) Automatically trigger other actions which may require environmental impact statements.

(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.

(iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

(2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.

(3) Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental

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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 hereby certify that I have, this 23rd day of June 2021, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system.

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