

16-345, -361

**In The United States Court of Appeals
for the Second Circuit**

CATSKILL MOUNTAINKEEPER, INC.; CLEAN AIR COUNCIL;
DELAWARE-OTSEGO AUDUBON SOCIETY, INC.; RIVERKEEPER,
INC.; SIERRA CLUB; AND STOP THE PIPELINE,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent,

CONSTITUTION PIPELINE COMPANY, LLC; IROQUOIS GAS
TRANSMISSION SYSTEM, L.P.; AND NATURAL GAS SUPPLY
ASSOCIATION,

Intervenors.

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

**BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

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TABLE OF CONTENTS

	<u>PAGE</u>
STATEMENT OF THE ISSUES.....	1
STATUTES AND REGULATIONS.....	2
COUNTER-STATEMENT OF JURISDICTION	3
STATEMENT OF THE CASE.....	5
I. INTRODUCTION	5
II. STATEMENT OF THE FACTS	8
A. Statutory And Regulatory Background.....	8
1. Natural Gas Act.....	8
2. National Environmental Policy Act.....	10
3. Clean Water Act.....	12
B. Factual Background.....	13
1. The Project	13
2. The Commission’s Environmental Review	14
3. The Challenged Orders	16
a. The Certificate Order	16
b. The Rehearing Order.....	18
4. Motions For Stay.....	19
5. Subsequent Proceedings.....	20

TABLE OF CONTENTS

	<u>PAGE</u>
SUMMARY OF ARGUMENT	21
ARGUMENT.....	25
I. STANDARD OF REVIEW.....	25
II. THE COMMISSION’S DECISION TO AUTHORIZE THE PROJECT FULLY SATISFIED THE NATURAL GAS ACT	26
A. The Commission Appropriately Balanced The Public Benefits Of The Project With The Potential Adverse Effects.....	27
B. Substantial Evidence Supports The Need For The Project To Satisfy Natural Gas Demand.....	30
III. THE COMMISSION FULLY SATISFIED ITS NEPA OBLIGATIONS	38
A. Standard Of Review	38
B. The Commission’s Indirect And Cumulative Impacts Analyses Fully Complied With NEPA	39
1. Under NEPA, Potential Impacts From Increases In Natural Gas Production Are Not Indirect Impacts Of The Project.....	39
a. There Is No Casual Link Between Increased Gas Production And The Project	41
b. Potential Environmental Impacts From Gas Production Are Not Reasonably Foreseeable.....	47
2. The Commission Reasonably Analyzed The Project’s Greenhouse Gas Emissions.....	52

TABLE OF CONTENTS

	<u>PAGE</u>
C. The Commission’s Analysis Of Water Resources Impacts Fully Satisfies NEPA	60
D. The Commission Did Not Impermissibly Segment The Project From Other Potential Pipeline Proposals.....	66
IV. THE COMMISSION’S CONDITIONAL APPROVAL OF THE PROJECT COMPLIES WITH THE CLEAN WATER ACT	72
A. Standard Of Review	73
B. The Certificate Order Requires Compliance With The Clean Water Act	74
1. The Conditional Authorization Appropriately Integrates Federal And State Authority	74
2. Petitioners’ Contrary Arguments Lack Merit	81
V. THE COMMISSION WAS ENTITLED, CONSISTENT WITH THE NATURAL GAS ACT AND DUE PROCESS, TO EXPEND MORE THAN 30 DAYS IN ACTING ON REQUESTS FOR REHEARING OF ITS CERTIFICATE ORDER.....	85
A. Tolling Orders Comply With the Natural Gas Act	85
B. Tolling Orders Do Not Violate Due Process.....	88
CONCLUSION.....	92

TABLE OF AUTHORITIES

<u>COURT CASES:</u>	<u>PAGE</u>
<i>Alcoa Power Generating, Inc. v. FERC</i> , 643 F.3d 963 (D.C. Cir. 2011).....	73, 75
<i>Allegheny Elec. Coop. Inc. v. FERC</i> , 922 F.2d 73 (2d Cir. 1990)	25
<i>Alliance Pipeline L.P. v. 4.360 Acres of Land, More or Less</i> , 746 F.3d 362 (8th Cir. 2014)	9
<i>Am. Rivers v. FERC</i> , 129 F.3d 99 (2d Cir. 1997)	73, 81
<i>ANR Pipeline Co. v. FERC</i> , 876 F.2d 124 (D.C. Cir. 1989).....	74
<i>Atl. Refining Co. v. Pub. Serv. Comm’n of N.Y.</i> , 360 U.S. 378 (1959).....	9
<i>Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.</i> , 462 U.S. 87 (1983).....	11, 38, 45, 51
<i>Bear Lake Watch, Inc. v. FERC</i> , 324 F.3d 1071 (9th Cir. 2003)	51
<i>Cal. Co. v. FPC</i> , 411 F.2d 720 (D.C. Cir. 1969).....	87
<i>Catskill Mountainkeeper, Inc. v. FERC</i> , No. 16-345 (2d Cir. Feb. 24, 2016)	19, 90
<i>Cellular Phone Taskforce v. FCC</i> , 205 F.3d 82 (2d Cir. 2000)	51
<i>Center for Biological Diversity v. Nat’l Hwy. Traffic Safety Admin.</i> , 538 F.3d 1172 (9th Cir. 2008)	58

TABLE OF AUTHORITIES

<u>COURT CASES:</u>	<u>PAGE</u>
<i>Central Hudson Gas & Elec. Corp. v. FERC</i> , 783 F.3d 92 (2d Cir. 2015)	25, 46, 65
<i>Cheney v. U.S. Dist. Court</i> , 542 U.S. 367 (2004).....	19
<i>Chevron U.S.A., Inc. v. Natural Res. Def. Council</i> , 467 U.S. 837 (1984).....	73, 88
<i>Citizens to Preserve Overton Park, Inc. v. Volpe</i> , 401 U.S. 402 (1971).....	25
<i>City of Arlington v. FCC</i> , 133 S. Ct. 1863 (2013).....	73, 87, 88
<i>City of Carmel-by-the-Sea v. U.S. Dep’t of Transp.</i> , 123 F.3d 1142 (9th Cir. 1997)	42
<i>City of Fall River v. FERC</i> , 507 F.3d 1 (1st Cir. 2007).....	4
<i>City of Grapevine v. U.S. Dep’t of Transp.</i> , 17 F.3d 1502 (D.C. Cir. 1994).....	78, 79
<i>City of Tacoma v. FERC</i> , 460 F.3d 53 (D.C. Cir. 2006).....	78, 81, 82
<i>Coalition on Sensible Transp. v. Dole</i> , 826 F.2d 60 (D.C. Cir. 1987).....	71
<i>Coalition for Responsible Growth and Res. Conservation v. FERC</i> , 485 F. Appx. 472 (2d Cir. 2012)	10, 40, 41, 46, 47
<i>Columbia Gas Transmission Co. v. FERC</i> , 750 F.2d 105 (D.C. Cir. 1984).....	27

TABLE OF AUTHORITIES

<u>COURT CASES:</u>	<u>PAGE</u>
<i>Constitution Pipeline Co., LLC v. A Permanent Easement for 1.80 Acres</i> , 2015 WL 1638250 (N.D.N.Y. Feb. 23, 2015).....	91
<i>Del. Dep’t of Nat. Res. and Envtl. Control v. FERC</i> , 558 F.3d 575 (D.C. Cir. 2009).....	76, 77, 80
<i>Del. Riverkeeper Network v. FERC</i> , 753 F.3d 1304 (D.C. Cir. 2014).....	67, 68, 70, 71
<i>Dep’t of Transp. v. Public Citizen</i> , 541 U.S. 752 (2004).....	10, 38, 42, 49
<i>Dominion Transmission Inc. v. Summers</i> , 723 F.3d 238 (D.C. Cir. 2013).....	8
<i>Duncan’s Point Lot Owners Ass’n, Inc. v. FERC</i> , 522 F.3d 731 (D.C. Cir. 2008).....	51
<i>EarthReports, Inc. v. FERC</i> , No. 15-1127, 2016 WL 3853830 (D.C. Cir. July 15, 2016)	56, 57
<i>FERC v. Elec. Power Supply Ass’n</i> , 136 S. Ct. 760 (2016).....	25
<i>Florida Wildlife Fed’n v. Goldschmidt</i> , 506 F. Supp. 350 (S.D. Fla. 1981).....	44
<i>FPC v. Transcon. Gas Pipeline Corp.</i> , 365 U.S. 1 (1961).....	27
<i>Friends of the Ompompanoosuc v. FERC</i> , 968 F.2d 1549 (2d Cir. 1992)	25, 66
<i>Fund for Animals v. Kempthorne</i> , 538 F.3d 124 (2d Cir. 2008)	26, 38, 50, 64

TABLE OF AUTHORITIES

<u>COURT CASES:</u>	<u>PAGE</u>
<i>General Am. Oil Co. of Texas v. FPC</i> , 409 F.2d 597 (5th Cir. 1969)	87
<i>Granholm ex rel. Michigan Dep't of Nat. Res. v. FERC</i> , 180 F.3d 278 (D.C. Cir. 1999).....	83
<i>Gunpowder Riverkeeper v. FERC</i> , 807 F.3d 267 (D.C. Cir. 2015).....	12, 72, 77, 78, 79, 81
<i>High Country Conservation Advocates v. U.S. Forest Serv.</i> , 52 F. Supp. 3d 1174 (D. Colo. 2014)	57, 58, 59
<i>Inland Empire Pub. Lands Council v. Schultz</i> , 992 F.2d 977 (9th Cir. 1993)	51
<i>In re Stop The Pipeline</i> , No. 15-926 (2d Cir. Apr. 21, 2015).....	19, 90
<i>Islander East Pipeline Co., LLC v. McCarthy</i> , 525 F.3d 141 (2d Cir. 2008)	3, 75, 76
<i>Keating v. FERC</i> , 927 F.2d 616 (D.C. Cir. 1991).....	74
<i>Kleppe v. Sierra Club</i> , 427 U.S. 390 (1976).....	38, 68
<i>Knaust v. City of Kingston</i> , 157 F.3d 86 (2d Cir. 1998)	5
<i>Kokajko v. FERC</i> , 837 F.2d 524 (1st Cir. 1988).....	86, 87, 92
<i>Krimstock v. Kelly</i> , 306 F.3d 40 (2d Cir. 2002)	89

TABLE OF AUTHORITIES

<u>COURT CASES:</u>	<u>PAGE</u>
<i>LaFlamme v. FERC</i> , 945 F.2d 1124 (9th Cir. 1991)	63
<i>League of Wilderness Defenders/Blue Mtns. Biodiversity Proj. v. Connaughton</i> , 2014 WL 6977611 (D. Or. Dec. 9, 2014).....	59
<i>Marsh v. Oregon Natural Res. Council</i> , 490 U.S. 360 (1989).....	38, 50
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976).....	91
<i>Mid-Atlantic Express, LLC v. Baltimore County, Md</i> , 410 F. App'x 653 (4th Cir. 2011).....	89
<i>Midcoast Interstate Transmission, Inc. v. FERC</i> , 198 F.3d 960 (D.C. Cir. 2000).....	27, 33, 88
<i>Mid States Coal. for Progress v. Surface Transp. Bd.</i> , 345 F.3d 520 (8th Cir. 2003)	44, 45
<i>Minisink Residents for Env'tl. Pres. and Safety v. FERC</i> , 762 F.3d 97 (D.C. Cir. 2014).....	10, 11, 31, 32, 70, 90
<i>Morrissey v. Brewer</i> , 408 U.S. 471 (1972).....	91
<i>Motor Vehicles Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Automobile Ins. Co.</i> , 463 U.S. 29 (1983).....	25
<i>Murray Energy Corp. v. FERC</i> , 629 F.3d 231 (D.C. Cir. 2011).....	83

TABLE OF AUTHORITIES

<u>COURT CASES:</u>	<u>PAGE</u>
<i>Myersville Citizens for a Rural Cmty., Inc. v. FERC</i> , 783 F.3d 1301 (D.C. Cir. 2015).....	27, 28, 31, 32, 35, 51, 71, 73, 76, 80, 90
<i>N. Plains Res. Council v. Surface Transp. Bd.</i> , 668 F.3d 1067 (9th Cir. 2011)	50
<i>NAACP v. FPC</i> , 425 U.S. 662 (1976).....	8
<i>Nat’l Audubon Soc. v. Hoffman</i> , 132 F.3d 7 (2d Cir. 1997)	12, 38, 66
<i>Nat’l Wildlife Fed’n v. Appalachian Reg’l Comm’n</i> , 677 F.2d 883 (D.C. Cir. 1981).....	72
<i>Nat’l Wildlife Fed’n v. Goldschmidt</i> , 677 F.2d 259 (2d Cir. 1982)	4, 5
<i>Nat. Res. Def. Council, Inc. v. FAA</i> , 564 F.3d 549 (2d Cir. 2009)	38
<i>Nat. Res. Defense Council, Inc. v. Callaway</i> , 524 F.2d 79 (2d Cir. 1975)	50, 63
<i>New York v. FERC</i> , 783 F.3d 946 (2d Cir. 2015)	88
<i>Occidental Chem. Corp. v. FERC</i> , 869 F.2d 127 (2d Cir. 1989)	84
<i>Oregon v. FERC</i> , 636 F.3d 1203 (9th Cir. 2011)	4

TABLE OF AUTHORITIES

<u>COURT CASES:</u>	<u>PAGE</u>
<i>Oregon Envtl. Council v. Kunzman</i> , 817 F.2d 484 (9th Cir. 1987)	63
<i>Phillips v. Comm’r</i> , 283 U.S. 589 (1931).....	89
<i>Pub. Util. Dist. No. 1 of Jefferson Cnty. v. Wash. Dep’t of Ecology</i> , 511 U.S. 700 (1994).....	12, 82
<i>Pub. Utils. Comm’n of Cal. v. FERC</i> , 900 F.2d 269 (D.C. Cir. 1990).....	8, 76, 80
<i>Robertson v. Methow Valley Citizens Council</i> , 490 U.S. 332 (1989).....	10, 38, 54, 60, 63
<i>Save Our Ecosystems v. Clark</i> , 747 F.2d 1240 (9th Cir. 1984)	63
<i>Scientists’ Inst. for Pub. Info., Inc. v. Atomic Energy Comm’n</i> , 481 F.2d 1079 (D.C. Cir. 1973).....	50
<i>S.D. Warren Co. v. Me. Bd. of Envtl. Prot.</i> , 547 U.S. 370 (2006).....	12, 82
<i>Sierra Club v. Clinton</i> , 746 F. Supp. 2d 1025 (D. Minn. 2010)	44
<i>Sierra Club v. FERC</i> , No. 14-1249, 2016 WL 3525562 (D.C. Cir. June 28, 2016).....	40, 45, 47
<i>Sierra Club v. FERC</i> , No. 14-1275, 2016 WL 3524262 (D.C. Cir. June 28, 2016).....	40, 45, 47
<i>Sierra Club v. Marsh</i> , 976 F.2d 763 (1st Cir. 1992).....	47

TABLE OF AUTHORITIES

<u>COURT CASES:</u>	<u>PAGE</u>
<i>Sierra Club v. Van Antwerp</i> , 526 F.3d 1353 (11th Cir. 2008)	55
<i>Stewart Park & Reserve Coal., Inc. v. Slater</i> , 352 F.3d 545 (2d Cir. 2003)	67, 68, 69, 71
<i>Sylvester v. U.S. Army Corps of Eng’rs</i> , 884 F.2d 394 (9th Cir. 1989)	42
<i>Taxpayers Watchdog, Inc. v. Stanley</i> , 819 F.2d 294 (D.C. Cir. 1987).....	68
<i>Theodore Roosevelt Conservation P’ship v. Salazar</i> , 616 F.3d 497 (D.C. Cir. 2010).....	11
<i>Town of Winthrop v. FAA</i> , 535 F.3d 1 (1st Cir. 2008).....	54
<i>U.S. Dep’t of Interior v. FERC</i> , 952 F.2d 538 (D.C. Cir. 1992).....	63, 84
<i>Weinberger v. Catholic Action of Haw.</i> , 454 U.S. 139 (1981).....	70
<i>WildEarth Guardians v. Jewell</i> , 738 F.2d 298 (D.C. Cir. 2013).....	51
<i>WildEarth Guardians v. U.S. Forest Serv.</i> , 120 F. Supp. 3d 1237 (D. Wyo. 2015), <i>appeal pending</i> , No. 15-8109 (10th Cir. Oct. 7, 2015)	59
<i>Zero Zone, Inc. v. U.S. Dep’t of Energy</i> , No. 14-2147, 2016 WL 4177217 (7th Cir. Aug. 8, 2016).....	56

TABLE OF AUTHORITIES

<u>ADMINISTRATIVE CASES:</u>	<u>PAGE</u>
<i>AES Sparrows Point LNG, LLC</i> , 129 FERC ¶ 61,245 (2009).....	75, 79, 85
<i>Broadwater Energy, LLC</i> , 124 FERC ¶ 61,225 (2008).....	76, 77, 79, 85
<i>Central New York Oil and Gas Co., LLC</i> , 137 FERC ¶ 61,121 (2011), <i>order on reh’g</i> , 138 FERC ¶ 61,104 (2012).....	46
<i>Certification of New Interstate Natural Gas Pipeline Facilities</i> , 88 FERC ¶ 61,227 (1999), <i>clarified</i> , 90 FERC ¶ 61,128, <i>further clarified</i> , 92 FERC ¶ 61,094 (2000).....	17, 28, 31, 35
<i>Constitution Pipeline Co., LLC</i> , 149 FERC ¶ 61,199 (2014), <i>reh’g denied</i> , 154 FERC ¶ 61,046 (2016).....	5, <i>passim</i>
<i>Constitution Pipeline Co., LLC</i> , Docket No. CP13-499 (Jan. 29, 2016)	20
<i>Constitution Pipeline Co., LLC</i> , 156 FERC ¶ 61,035 (Jul. 13, 2016).....	21
<i>Crown Landing, LLC</i> , 117 FERC ¶ 61,209 (2006).....	77
<i>Georgia Strait Crossing Pipeline, LP</i> , 108 FERC ¶ 61,053 (2004).....	79
<i>Jordan Cove Energy Project, LP</i> , 154 FERC ¶ 61,190 (2016).....	37
<i>Koch Gateway Pipeline Co.</i> , 79 FERC ¶ 61,115 (1997).....	35

TABLE OF AUTHORITIES

ADMINISTRATIVE CASES: **PAGE**

Millennium Pipeline Co., L.P.,
97 FERC ¶ 61,292 (2001)..... 34

Questar Pipeline Co.,
78 FERC ¶ 61,315 (1997)..... 35

Rockies Express Pipeline LLC,
150 FERC ¶ 61,161 (2015)..... 44

Transcontinental Pipe Line Co., LLC,
143 FERC ¶ 61,132 (2013)..... 34

Turtle Bayou Gas Storage Co., LLC,
135 FERC ¶ 61,233 (2011)..... 37

MISCELLANEOUS:

Guidance: FERC Staff NEPA Pre-Filing Involvement In Natural Gas Projects
(Oct. 23, 2002).....9

STATUTES:

Administrative Procedure Act

5 U.S.C. § 706(2)(A) 25

All Writs Act

28 U.S.C. § 1651..... 90

TABLE OF AUTHORITIES

<u>STATUTES:</u>	<u>PAGE</u>
Clean Water Act	
Section 401(a)(1), 33 U.S.C. § 1341(a)(1)	12, 75
Section 401(d), 33 U.S.C. § 1341(d)	74
Department of Energy Organization Act	
42 U.S.C. § 7171(c)	89
Natural Gas Act	
Section 7(b), 15 U.S.C. §§ 717(b), (c).....	8
Section 7(c), 15 U.S.C. § 717f(c)	5, 6, 8, 26
Section 7(e), 15 U.S.C. § 717f(e)	6, 8, 27, 74
Section 7(h), 15 U.S.C. § 717f(h).....	9, 88
Section 19(a), 15 U.S.C. §717r(a)	83, 85, 86, 87, 88
Section 19(b), 15 U.S.C. § 717r(b).....	25, 65, 70
Section 19(c), 15 U.S.C. § 717r(c)	86, 88
Section 21, 15 U.S.C. § 717t-1	84
National Environmental Policy Act	
42 U.S.C. §§ 4321, <i>et seq.</i>	10
42 U.S.C. § 4332(2)(C)	11

TABLE OF AUTHORITIES

<u>REGULATIONS:</u>	<u>PAGE</u>
18 C.F.R. § 157.5.....	9
18 C.F.R. § 157.6.....	9
18 C.F.R. § 157.21(b).....	10
18 C.F.R. § 385.713.....	86
18 C.F.R. § 385.1902.....	83
40 C.F.R. § 1501.4.....	11
40 C.F.R. § 1508.8(b).....	40, 41
40 C.F.R. § 1508.25(a)(1)-(3).....	67
40 C.F.R. § 1508.25(a)(1)(iii).....	67

GLOSSARY

Catskill Br.	Opening brief of Petitioner Catskill Mountainkeeper
Catskill Mountainkeeper	Petitioners Catskill Mountainkeeper, Inc., Clean Air Council, Delaware-Otsego Audubon Society, Inc., Riverkeeper, Inc., and Sierra Club
Commission or FERC	Federal Energy Regulatory Commission
Certificate Order	<i>Constitution Pipeline Co. LLC & Iroquois Gas Transmission Sys., LP</i> , 149 FERC ¶ 61,119 (Dec. 2, 2014), R. 2628, JA 5
Final EIS	Final Environmental Impact Statement for the Constitution Pipeline and Wright Interconnect Projects, Docket Nos. CP13-499-000 and CP13-502-000, October 2014, R. 2609, JA 137
JA	Joint Appendix
NGA	Natural Gas Act
P	Paragraph number in a Commission order
R.	Item in the certified index to the record
Rehearing Order	<i>Constitution Pipeline Co. LLC & Iroquois Gas Transmission Sys., LP</i> , 154 FERC ¶ 61,046 (Jan. 28, 2016), R. 2851, JA 62
Stop Br.	Opening brief of Petitioner Stop The Pipeline

**In The United States Court of Appeals
for the Second Circuit**

Nos. 16-345 and 16-361 (consolidated)

CATSKILL MOUNTAINKEEPER, INC.; CLEAN AIR COUNCIL;
DELAWARE-OTSEGO AUDUBON SOCIETY, INC.; RIVERKEEPER, INC.;
SIERRA CLUB; AND STOP THE PIPELINE,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

CONSTITUTION PIPELINE COMPANY, LLC; IROQUOIS GAS
TRANSMISSION SYSTEM, L.P.; AND NATURAL GAS SUPPLY
ASSOCIATION,

Intervenors.

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

BRIEF OF RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

Following extensive environmental review including multiple opportunities for public comment, the Federal Energy Regulatory Commission approved an application to construct and operate a new natural gas pipeline between Pennsylvania and New York, the Constitution Pipeline Project (“Project”), subject to compliance with dozens of environmental and regulatory conditions, as necessary to serve the natural gas needs of the region. The questions presented on review are:

1) Whether the Commission reasonably balanced the impacts on landowners and surrounding communities with the need for the Project to serve demand for natural gas in the Northeast, in compliance with its responsibilities under the Natural Gas Act;

2) Whether the Commission satisfied the procedural requirements of the National Environmental Policy Act, through a comprehensive review that thoroughly evaluated impacts of the Project on natural gas production, water quality, and greenhouse gas emissions, as well as the Project's combined impact with another potential pipeline project;

3) Whether the Commission's conditional authorization of the Project, subject to the receipt of all necessary federal and state approvals, complies with the Clean Water Act; and

4) Whether the Commission's long-standing practice of issuing tolling orders to prevent rehearing requests from being denied by operation of law is a valid "act" consistent with the Natural Gas Act and otherwise comports with due process.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are contained in Addendum B.

COUNTER-STATEMENT OF JURISDICTION

Pending before this Court is a related appeal brought by Constitution Pipeline Company, LLC (“Constitution”), the applicant for the Project before the Commission, to review the decision of the New York State Department of Environmental Conservation to deny a state water quality certification for the Project under section 401 of the Clean Water Act. *See Constitution Pipeline Co., LLC v. N.Y. State Dep’t of Env’tl. Conservation*, No. 16-1568 (2d Cir. filed May 16, 2016); *see also* Catskill Br. 5-6; Stop Br. 10. The Commission has no position on the merits of that appeal, but the Project cannot be constructed without New York’s action to either issue a valid water quality certification, or waive certification. *See Islander East Pipeline Co., LLC v. McCarthy*, 525 F.3d 141, 150 (2d Cir. 2008) (affirming state’s denial of water quality certification for a FERC-jurisdictional natural gas pipeline, and noting that “[t]here is no dispute that the . . . [d]enial would prevent the construction of the natural gas pipeline”); *see also* Opening Br. of Constitution Pipeline Co., LLC, at 6, No. 16-1568 (2d Cir. filed July 12, 2016) (noting that Project “cannot proceed” without New York’s water quality certification or a finding of waiver).

If the Court affirms the decision of the New York State Department of Environmental Conservation to deny Constitution’s water quality certification, it should dismiss the instant case for lack of ripeness. This and other courts have

consistently dismissed appeals of federal authorizations for infrastructure projects, where the possibility of the project ever being constructed is substantially called into question. *See Nat'l Wildlife Fed'n v. Goldschmidt*, 677 F.2d 259, 263 (2d Cir. 1982) (dismissing, as unripe, appeal of approval of one segment of highway, conditioned on approval of another segment, because “a project undergoing further study may ultimately be abandoned or substantially altered and adjudication of its legality in those circumstances would be premature”); *see also Oregon v. FERC*, 636 F.3d 1203, 1206 (9th Cir. 2011) (dismissing, as moot, appeal of natural gas infrastructure authorizations where applicant failed to obtain other federal authorizations and subsequently filed for bankruptcy); *City of Fall River v. FERC*, 507 F.3d 1, 6-8 (1st Cir. 2007) (dismissing, as unripe, appeal of FERC’s orders approving liquefied natural gas terminal and pipeline conditioned on receipt of federal and state authorizations, where applicant had been unable to obtain those authorizations).

Stop The Pipeline claims that the Court retains jurisdiction even if Constitution withdraws its application before the Commission, or if the Court affirms New York’s denial of the water quality certification. Stop Br. 10. But Stop The Pipeline and Catskill Mountainkeeper agree that denial of the water quality certification precludes construction of the project. Stop Br. 7, 10; Catskill Br. 6, 18. And Stop The Pipeline does not identify “any legal issue [that dismissal]

will foreclose from challenge if and when a decision to build [the pipeline] is made.” *Nat’l Wildlife Fed’n*, 677 F.2d at 263. Stop The Pipeline asserts that its stated injury is “capable of repetition, yet evading review.” Br. 10. But, here, if the Court affirms a state’s denial of water quality certification, and the project is later revived, the Court can fully consider the sequence of events on later review. And it does not “suffice to hypothesize the possibility that at some future time, and under circumstances that could only be guessed at now,” a new natural gas pipeline project will impact Petitioners’ members, the State will deny the water quality certification, or the same circumstances challenged by Petitioners here will exist. *See Knaust v. City of Kingston*, 157 F.3d 86, 88 (2d Cir. 1998) (dismissing appeal where there was no “reasonable expectation” that residents would confront similar situation in future, and where there were no pending or planned applications for similar actions).

STATEMENT OF THE CASE

I. INTRODUCTION

In the orders on review, the Commission issued to Constitution a conditional certificate of public convenience and necessity under section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c), authorizing it to build and operate the Constitution Pipeline Project. *See Constitution Pipeline Co., LLC*, 149 FERC ¶ 61,199 (2014), R. 2628, JA 5 (“Certificate Order”), *reh’g denied*, 154 FERC ¶ 61,046 (2016),

R. 2851, JA 62 (“Rehearing Order”). The Project consists of a 124-mile-long, 30-inch diameter interstate pipeline and related facilities, extending from Susquehanna County, Pennsylvania to a proposed interconnection with Iroquois Gas Transmission System, L.P. (“Iroquois”) in Schoharie County, New York. In the same orders, the Commission also authorized Iroquois to build and operate new compression facilities and modify facilities at its existing Wright Compressor Station to establish a point of interconnection with the Project and provide capacity to support the deliveries from Constitution’s Project. The Project is designed to meet continuing demand for domestic natural gas in the Northeast.

The Commission engaged in a lengthy, detailed review of the Project, culminating in a 460-page environmental impact statement (“EIS”). The final orders reflect the Commission’s consideration of all factors bearing upon the public interest, as required by Natural Gas Act section 7(e), 15 U.S.C. § 717f(e), including environmental issues. Ultimately, the Commission determined that the Project, upon the satisfaction of numerous environmental conditions and mitigation measures required in the orders, is consistent with the public convenience and necessity under section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c).

Petitioners Catskill Mountainkeeper and Stop The Pipeline participated throughout the Commission’s proceeding, raising numerous challenges to the Commission’s assessment of market need for the Project and its environmental

analysis. On the issue of market need, the Commission reasonably relied, consistent with Commission policy and precedent, on binding contracts for the full capacity of the Project as demonstrating need for the Project. *See* Certificate Order PP 22-29, JA 11-13; Rehearing Order PP 18-23, JA 68-71. With regard to the environmental impacts at issue, the Commission took the requisite hard look at each impacted resource, but declined to engage in speculative analysis or consider impacts that are unrelated to the Project. *See* Certificate Order PP 74-146, JA 28-49; Rehearing Order PP 24-184, JA 72-136. Finally, Petitioners challenged the Commission's timing in two respects, claiming that the Commission acted too soon in issuing the Certificate Order before the state water quality certifications, and too late on their requests for rehearing. But the Commission determined that it reasonably relied on long-standing practices, fully consistent with both the Natural Gas Act and the Clean Water Act. *See* Rehearing Order PP 9, 57-72, JA 65, 83-88.

This appeal followed.

II. STATEMENT OF THE FACTS

A. Statutory And Regulatory Background

1. Natural Gas Act

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

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.*; *see, e.g., Atl. Refining Co. v. Pub. Serv. Comm’n of N.Y.*, 360 U.S. 378, 391-92 (1959) (noting the Commission’s discretion to attach conditions to certificates as necessary). Section 7(h) of the NGA, 15 U.S.C. § 717f(h), delegates to the holder of a certificate of public convenience and necessity the “right of eminent domain” to obtain the “necessary right-of-way to construct, operate, and maintain” the pipeline. *Id.*; *see also Alliance Pipeline L.P. v. 4.360 Acres of Land, More or Less*, 746 F.3d 362 (8th Cir. 2014) (rejecting several challenges to condemnation action brought by pipeline).

Applicants seeking certification from FERC must comply with extensive application requirements, including public notice and comment and environmental review proceedings (discussed below). *See generally* 18 C.F.R. §§ 157.5, 157.6. In 2002, the Commission developed and implemented, through a FERC staff guidance document, a new pre-filing process for builders of interstate natural gas projects. *See Guidance: FERC Staff NEPA Pre-Filing Involvement In Natural Gas Projects* (Oct. 23, 2002). The Pre-Filing Guidance encouraged pipeline project sponsors “to engage in early project-development involvement with the public and agencies, as contemplated by the National Environmental Policy Act (NEPA).” *Id.* at 1. In 2005, pursuant to the Energy Policy Act of 2005, the

Commission developed rules for those that choose to use the pre-filing process. *See* 18 C.F.R. § 157.21(b). The Rules codified the process set forth in the Pre-Filing Guidance and are designed such that a prospective applicant will engage FERC staff, federal and state agencies, tribal authorities, and the public in identifying potential issues and developing additional information before the prospective applicant submits a formal application.

2. National Environmental Policy Act

The Commission’s consideration of an application for a certificate of public convenience and necessity triggers environmental review. *See* 42 U.S.C. §§ 4321, *et seq.* The National Environmental Policy Act (“NEPA”) sets out procedures to be followed by federal agencies to ensure that the environmental effects of proposed actions are “adequately identified and evaluated.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). “NEPA is a procedural statute; it ‘does not mandate particular results, but simply prescribes the necessary process.’” *Minisink Residents for Env’tl. Pres. and Safety v. FERC*, 762 F.3d 97, 111 (D.C. Cir. 2014) (quoting *Robertson*, 490 U.S. at 350); *see also Dep’t of Transp. v. Public Citizen*, 541 U.S. 752, 768 (2004) (same). Under NEPA, this Court’s role is to “insure that the agency considered the environmental consequences” of the federal action at issue. *Coalition for Responsible Growth and Res. Conservation v. FERC*, 485 F. App’x 472, 272 (2d Cir. 2012)

(unpublished opinion) (denying petition for review of FERC pipeline decision) (“Coalition”); see also *Theodore Roosevelt Conservation P’ship v. Salazar*, 616 F.3d 497, 503 (D.C. Cir. 2010) (NEPA ensures a “fully informed and well-considered decision, not necessarily the best decision”). Accordingly, an agency must take a “hard look” at “the environmental impact of its action[.]” *Minisink*, 762 F.3d at 111; see also *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983) (same).

Regulations implementing NEPA generally require agencies to consider the environmental effects of a proposed action by preparing either an environmental assessment, if supported by a finding of no significant impact, or a more comprehensive environmental impact statement. See 40 C.F.R. § 1501.4 (detailing when to prepare an environmental impact statement versus an environmental assessment).

Where the action agency determines that a proposed action may be a “major Federal action significantly affecting the quality of the human environment,” it must prepare an environmental impact statement. 42 U.S.C. § 4332(2)(C). Where an EIS is required, it must contain “a detailed statement by the responsible official on – (i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between

local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented." *Id.*; see *Nat'l Audubon Soc. v. Hoffman*, 132 F.3d 7, 12-13 (2d Cir. 1997) (discussing EIS requirements).

3. Clean Water Act

Section 401(a)(1) of the Clean Water Act requires that any applicant for a federal license or permit for an activity that "may result in any discharge" into the nation's navigable waters must provide the licensing or permitting agency with a water quality certification from the state in which the discharge will originate. 33 U.S.C. § 1341(a)(1). Under this section, the state certifies that the discharge will comply with other applicable provisions of the Clean Water Act, including a section that requires each state to adopt its own state water quality standards. See *S.D. Warren Co. v. Me. Bd. of Env'tl. Prot.*, 547 U.S. 370, 374 & n.1 (2006); *Pub. Util. Dist. No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 703 (1994). The "requirement for a state certification applies not only to applications for licenses from FERC, but to all federal licenses and permits for activities which may result in a discharge into the Nation's navigable waters." *Pub. Util. Dist. No. 1 of Jefferson Cnty.*, 511 U.S. at 723; see also *Gunpowder Riverkeeper v. FERC*, 807 F.3d 267, 275 (D.C. Cir. 2015) (Rogers, J., dissenting in part and concurring in

the judgment) (detailing Clean Water Act requirements for FERC-jurisdictional pipelines).

B. Factual Background

1. The Project

On June 13, 2013, Constitution filed an application to construct and operate the proposed Constitution Project. *See* Certificate Order P 1, JA 5. Constitution proposes to construct and operate an approximately 124-mile-long, 30-inch diameter interstate pipeline and related facilities extending from two receipt points in Susquehanna County, Pennsylvania, to a proposed interconnection in New York with Iroquois' Wright Interconnection, discussed below. *Id.* P 1, JA 5; *see* Map, Addendum A (attached). The Project also involves other construction activities, including meter stations, valve assemblies, and pig launcher/receiver (inspection) facilities. *Id.* P 6, JA 7 (listing proposed construction activities). The proposed pipeline is designed to provide up to 650,000 decatherms per day of firm natural gas transportation service, and is estimated to cost approximately \$683 million. *Id.*

Concurrently with Constitution's application, Iroquois filed a separate application to construct and operate compression facilities and modify existing facilities at its Wright Compressor Station in Schoharie County, NY (Wright Interconnection). Certificate Order P 2, JA 6. Constitution entered into an agreement with Iroquois that provides that Iroquois will construct the Wright

Interconnection so that gas delivered to the interconnection between Constitution and Iroquois at the existing Wright Compressor Station can be delivered into the Iroquois and Tennessee pipeline systems in Schoharie County, New York. *Id.* P 7, JA 7. The construction of the Wright Interconnection is estimated to cost \$75 million. *Id.* P 12, JA 8 (describing construction and modifications necessary for the Wright Interconnection).

Constitution held an open season for service on the Project from February 21 through March 12, 2012. As a result, Constitution executed binding precedent agreements with Cabot Oil & Gas Corporation for 500,000 decatherms per day of firm transportation service and with Southwestern Energy Services Company for 150,000 decatherms per day of firm transportation service, together equal to the full design capacity of the Project. Certificate Order P 8, JA 8.

2. The Commission's Environmental Review

The Commission initiated its environmental review of the Project on April 16, 2012 using its pre-filing process, and assigned Docket No. PF12-9-000 to that review. *See* Docket No. PF12-9-000 (containing numerous comments from stakeholders in advance of Constitution's Project Application, filed on June 13, 2013, R. 1, JA 986). The Commission solicited comments from stakeholders, including from Petitioners, in multiple open houses and public scoping meetings. *See* Certificate Order PP 65-67, JA 25 (describing pre-filing outreach on

environmental issues). A total of 101 speakers provided comments on the Project and more than 750 letters were filed providing written scoping comments. *Id.*

P 66, JA 25. Based on feedback, the Commission extended the scoping period and received additional comments. *Id.* P 67, JA 25-26; *see also* Notice of Public Scoping Meeting, 77 Fed. Reg. 63,309, FERC Docket No. PF12-9-000 (Oct. 16, 2012).

After Constitution filed its application on June 13, 2013, the Commission announced its intent to prepare an environmental impact statement for the Project. *Id.* P 69, JA 26; *see also* Notice of Intent to Prepare an Environmental Impact Statement, R. 124, JA 1131 (Jul. 10, 2013). The Notice was published in the Federal Register and mailed to 74 interested entities. Certificate Order P 69, JA 26. The U.S. Environmental Protection Agency, the U.S. Army Corps of Engineers, the Federal Highway Administration, and the New York State Department of Agriculture and Markets participated as cooperating agencies in the preparation of the environmental impact statement. *Id.*

During the comment period, the Commission heard from a total of 246 speakers at meetings, and more than 600 stakeholders submitted 884 letters in response to the draft EIS. Certificate Order P 70, JA 26. The Commission also held additional comment periods to receive additional comments on proposed route alternatives. *Id.* P 71, JA 27. On October 24, 2014, over two years after the initial

scoping began, the Commission issued its 460-page Final Environmental Impact Statement (“Final EIS”) for the Project. *Id.* P 72, JA 27. The Final EIS analyzed the Project’s direct, indirect, and cumulative impacts on the following resources: geology; soils; water resources; wetlands; vegetation; wildlife and fisheries; special status species; land use, recreation, and visual resources; socioeconomics; cultural resources; air quality and noise; and reliability and safety. *Id.* P 72, JA 27; *see also* Final EIS at 4-1 – 4-258, JA 305-564; *see also* Certificate Order PP 74-112, JA 28-39 (discussing environmental review). The Final EIS concludes that if the Project is constructed and operated in accordance with applicable laws and regulations, the Project will result in some adverse environmental impacts. *See* Final EIS at 5-1, JA 565. However, these impacts will be reduced to less-than-significant levels with the implementation of Constitution’s proposed mitigation and additional Commission conditions. *See id.*; *see also* Certificate Order P 73, JA 28.

3. The Challenged Orders

a. The Certificate Order

On December 2, 2014, the Commission issued an order conditionally authorizing Constitution to construct and operate the Project subject to 43 environmental conditions. Certificate Order P 1, Ordering PP (A)-(D) & App., JA 5, 49-50, 52-61 (listing conditions). The Certificate Order explained that the Commission undertakes a step-by-step analysis to balance the public benefits

of a proposed project against the potential adverse consequences of the project, which include unnecessary disruptions to the environment and unneeded exercise of eminent domain. *Id.* PP 22-23, JA 11-12 (citing *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000)).

First, the Commission considered the impacts to captive customers and landowners and surrounding communities, and found that Constitution has no captive customers and has otherwise taken sufficient steps to minimize adverse economic impacts. *See* Certificate Order PP 24-26, JA 12-13. Next, the Commission balanced those impacts against the demonstrated need for the Project to serve continuing demand for natural gas in New York and New England, as evidenced by precedent agreements for all of the proposed pipeline capacity. *Id.* P 27, JA 13. In addition, the Commission required Constitution to calculate its recourse rates (cost-of-service rates available to all shippers) based on designed capacity, thereby placing Constitution at risk for any unsubscribed capacity. *Id.* P 28, JA 13. Because it found that the benefits that the Project will provide to the market outweigh any adverse effects on landowners and surrounding communities, the Commission found that the Project satisfied the criteria in the Certificate Policy Statement. *Id.* P 29, JA 13. Subject to compliance with the environmental

conditions required in its Certificate Order, the Commission found that approval of the Project is in the public interest. *Id.*

As part of the process, the Commission also conducted a thorough environmental review of the Project, taking into account the Final EIS and all substantive comments on it. *See id.* PP 74-147, JA 28-49. After consideration of the information and analysis contained in the record regarding the potential environmental effects of the Project, the Commission concluded that the Project, as mitigated by the 43 environmental conditions required by its order, would be an environmentally acceptable action. *Id.* P 146, JA 49.

b. The Rehearing Order

Petitioners Catskill Mountainkeeper and Stop The Pipeline raised numerous arguments on rehearing concerning whether the Project was required by the public convenience and necessity, as well as numerous issues related to the adequacy of the Commission's environmental analysis. *See* Rehearing Order P 12, JA 66; *see also* Motion for Rehearing, Docket No. CP13-499-001 (Dec. 30, 2014) ("Catskill Mountainkeeper Rehearing Request"), R. 2643, JA 1992; Motion for Rehearing, Docket No. CP13-499-001 (Jan. 2, 2014) ("Stop The Pipeline Rehearing Request"), R. 2648, JA 2018.

On rehearing, the Commission rejected each of Petitioners' challenges. As relevant to this appeal, the Commission affirmed its determinations in the

Certificate Order: that the Project is required by the public convenience and necessity and that this finding is supported by substantial evidence (Rehearing Order PP 15-23, JA 66-71); that its environmental analysis complies with NEPA (*Id.* PP 24-184, JA 72-135); that its Certificate Order fully complies with the Clean Water Act (*Id.* PP 58-72, JA 83-88); and that its orders do not violate due process (*Id.* PP 9, 71-72, JA 65, 88).

4. Motions For Stay

On March 30, 2015, Stop The Pipeline petitioned this Court for an emergency stay of the Certificate Order. Stop The Pipeline also sought a writ of mandamus compelling the Commission to rule immediately on pending requests for agency rehearing. Without directing a response from the Commission, this Court denied the motion for emergency stay and petition for mandamus. *In re Stop The Pipeline*, No. 15-926 (2d Cir. Apr. 21, 2015) (denying motions for stay consistent with *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 381 (2004)).

The Commission issued its Rehearing Order on January 28, 2016. These appeals followed, and Catskill Mountainkeeper immediately filed for an emergency stay of construction pending review. The Court, following receipt of responsive pleadings, denied Catskill Mountainkeeper's motion. *Catskill Mountainkeeper, Inc. v. FERC*, No. 16-345 (2d Cir. Feb. 24, 2016).

5. Subsequent Proceedings

As part of the post-certificate process, Commission staff reviews Constitution's requests to proceed with pre-construction activities. On January 29, 2016, Commission staff authorized Constitution to commence limited tree-felling activities on the approximately 20 percent of the pipeline route located in Pennsylvania. Partial Notice to Proceed with Tree Felling, Docket No. CP13-499-000 (Jan. 29, 2016), R. 2852, JA 2237. The authorization was based on the Commission's determination that Constitution had met all of the environmental conditions necessary to engage in this pre-construction activity in Pennsylvania, including obtaining clearances from the relevant Pennsylvania agencies and acquiring landowner access. *Id.* at 1.

In contrast with the limited activities authorized in Pennsylvania, the Commission has not authorized tree-felling or ground-disturbing activities in New York. On May 13, 2016, the Attorney General for the State of New York made a filing styled as a complaint and petition against Constitution, in which he alleges that Constitution authorized or condoned tree and vegetation cutting and other ground-disturbing activities within the pipeline right of way. *See* NY Attorney General Complaint, Docket No. CP13-499-001 (May 13, 2016), JA 2247. In response to that filing, the Commission issued an order treating the New York Attorney General's pleading as a request for investigation, and referred the request

to Commission staff for further inquiry. *See Constitution Pipeline Co., LLC*, 156 FERC ¶ 61,035 (July 13, 2016), JA 2362, *reh'g pending*. Thus, the Commission is actively considering the allegations concerning tree-felling and other ground-disturbing activities in New York.

SUMMARY OF ARGUMENT

Balancing the need to meet continuing demand for domestic natural gas with potential adverse impacts on landowners and surrounding communities is a challenging task, but one ultimately entrusted to the Commission by Congress. Here, the Commission satisfied all of its statutory responsibilities in approving the Constitution Project. The Commission examined and balanced the many competing interests at stake, as it must under the Natural Gas Act, ultimately finding that the need for the Project to serve demand for natural gas in New York and New England outweighs any unmitigated impacts to landowners and surrounding communities. 43 conditions imposed by the Commission after its comprehensive environmental review, combined with mitigation measures required in other federal and state authorizations, ensure that the impacts of the Project will be reduced to less-than-significant levels.

Securing authorization of an interstate natural gas pipeline involves a complex integration of federal and state review. The Commission's environmental review under the National Environmental Policy Act typically provides a starting

point for other federal and state agencies to complete their own review. Likewise, the Commission's issuance of a certificate, which, by the operation of the Natural Gas Act confers eminent domain authority on the pipeline, is often essential to allowing the pipeline access to lands, as necessary to gather additional data needed to complete the review process with other federal and state agencies.

Each of Petitioner Catskill Mountainkeeper's and Stop The Pipeline's objections to the Commission's conditional authorization of the Project invites the Court not only to reorder this process, but to effectively conduct a *de novo* review of Project impacts. But this is unnecessary and at odds with the Court's deferential review under both NEPA and the Natural Gas Act.

Stop The Pipeline's objections to the Commission's assessment of market need are unpersuasive: two binding contracts for the full capacity of the Project adequately demonstrate market need for the Project. In the absence of evidence of affiliate abuse – and the Commission found none here – and as the D.C. Circuit recently confirmed, the Commission will not look behind contracts to evaluate shippers' needs. Downstream shippers, on Iroquois and Tennessee pipeline systems, may reasonably choose to ship Constitution gas, or release their capacity to new shippers seeking to do the same.

Catskill Mountainkeeper and Stop The Pipeline attack the Commission's comprehensive EIS from multiple directions, challenging the evaluation of the

impacts on natural gas production, water quality, greenhouse gas emissions and climate change, as well as the Commission's determination that its environmental review of the Project was not improperly segmented from another potential pipeline project. The Commission indeed assessed impacts on each of these resources, in significant detail, and included the potential project in its cumulative impacts analysis. But the Commission reasonably drew the line where Petitioners sought information and analysis that would not meaningfully inform or improve the Commission's decision-making. In multiple, recent challenges to natural gas infrastructure approvals in the D.C. Circuit, that court has rejected such efforts to "flyspeck" the Commission's NEPA review by requiring discussion of impacts that are not caused by the Project, or reasonably foreseeable, or by insisting on speculative analysis with tools not intended for this purpose. This Court should do the same.

In another challenge to the timing of regulatory review of this Project, Petitioners object to the Commission's decades-old practice of conditionally authorizing pipeline infrastructure projects, pending receipt of all applicable federal and state approvals, including state water quality certification. This conditional authorization is consistent with the Clean Water Act, and preserves a State's power to block the project. Indeed, New York's action to deny the water quality certification for, and thus effectively block, the Project here demonstrates

as much.

Finally, Stop The Pipeline raises yet one more objection to the timing of regulatory approvals for this Project, asserting that the Commission's use of tolling orders – to “toll” the time otherwise allotted under the Natural Gas Act for Commission action on rehearing – violates the Act and affords insufficient process. This argument is inconsistent with decisions of every court to address this issue.

Moreover, due process requires flexibility tailored to the circumstances. Given the complex nature of natural gas infrastructure development, the substantial (2.5 year) process before the Commission, the involvement of other federal and state agencies, the availability of injunctive relief from the courts (which Petitioners sought, unsuccessfully, in this case), and eminent domain proceedings requiring just compensation, due process is satisfied here.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews the substance of Commission actions under the Administrative Procedure Act, overturning the disputed orders only if they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). The “scope of review under the ‘arbitrary and capricious’ standard is narrow.” *FERC v. Elec. Power Supply Ass’n*, 136 S. Ct. 760, 782 (2016) (citing *Motor Vehicle Mfrs. Ass’n of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)). “A court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives.” *Elec. Power Supply Ass’n*, 136 S. Ct. at 782. Rather, a court evaluates “whether the decision was based on a ‘consideration of the relevant factors and whether there has been a clear error of judgment.’” *Friends of the Ompompanoosuc v. FERC*, 968 F.2d 1549, 1553 (2d Cir. 1992) (quoting *Allegheny Elec. Coop. Inc. v. FERC*, 922 F.2d 73, 80 (2d Cir. 1990)); see also *Central Hudson Gas & Elec. Corp. v. FERC*, 783 F.3d 92, 108 (2d Cir. 2015) (same).

The Commission’s findings of fact, if supported by substantial evidence, are conclusive. Natural Gas Act § 19(b), 15 U.S.C. § 717r(b); *Ompompanoosuc*, 968 F.2d at 1554 (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)). Because substantial evidence is more than a scintilla, but

something less than a preponderance of the evidence, the possibility that different conclusions may be drawn from the same evidence does not prevent an agency's finding from being supported by substantial evidence. *See Fund for Animals v. Kempthorne*, 538 F.3d 124, 132 (2d Cir. 2008) (when an agency makes a decision in the face of disputed technical facts, a court must be reluctant to alter the results).

II. THE COMMISSION'S DECISION TO AUTHORIZE THE PROJECT FULLY SATISFIED THE NATURAL GAS ACT

Consistent with its responsibilities under the Natural Gas Act and National Environmental Policy Act, the Commission was sensitive to all perspectives and responsive to all arguments, whether economic or environmental in nature. Catskill Mountainkeeper's and Stop The Pipeline's comments throughout the agency proceeding – like every commenter's concerns – were considered as part of the Commission's public interest balance under NGA section 7(c), 15 U.S.C. § 717f(c). The Commission satisfied its statutory responsibilities here by balancing the public benefits offered by the Project against its potential impacts. *See* Certificate Order PP 24-29 (balancing need for the Project against identified potential adverse consequences), JA 12-13.

In the challenged orders, the Commission found that the Project will increase transportation capacity from supply sources in Pennsylvania to interconnections with the Iroquois and Tennessee pipeline systems in New York. *Id.* PP 27-29, JA 13. The Commission fully examined impacts on landowners and

surrounding communities, and determined that the benefits of the Project outweigh the potential adverse impacts of the Project, subject to the environmental conditions imposed in the Certificate Order. *Id.* P 29, JA 13. In reaching this conclusion, the Commission fully satisfied its responsibilities under the Natural Gas Act. *See Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1309-11 (D.C. Cir. 2015) (holding that nothing in Commission precedent or policy required finding of need to be based on anything more than precedent agreements); *see also Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 967 (D.C. Cir. 2000) (provided that adverse environmental effects are identified and evaluated, FERC may decide that other values outweigh the environmental costs).

A. The Commission Appropriately Balanced The Public Benefits Of The Project With The Potential Adverse Effects

Section 7(e) of the Natural Gas Act grants the Commission exclusive authority to determine whether an application to construct natural gas facilities “is or will be required by the present or future public convenience and necessity.” 15 U.S.C. § 717f(e). This statutory provision confers broad authority upon the Commission. *See FPC v. Transcon. Gas Pipeline Corp.*, 365 U.S. 1, 7 (1961) (Commission is “the guardian of the public interest,” entrusted “with a wide range of discretionary authority”); *Columbia Gas Transmission Co. v. FERC*, 750 F.2d 105, 112 (D.C. Cir. 1984) (Commission vested with wide discretion to balance competing equities against the backdrop of the public interest).

The Commission’s Certificate Policy Statement establishes the framework for balancing the public benefits against the potential adverse consequences of authorizing a new pipeline. Certificate Order P 22, JA 11 (citing *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128 (2000), *clarified*, 92 FERC ¶ 61,094 (2000)); *see also Myersville*, 783 F.3d at 1309 (summarizing the Policy Statement criteria). Under this policy, the threshold requirement for pipelines proposing new projects is that the pipeline must be prepared to financially support the project without relying on subsidization from its existing customers. Certificate Order P 23, JA 12. The next step is to determine whether the applicant has made efforts to eliminate or minimize any adverse effects on existing customers, existing pipelines, or, as most relevant here, affected landowners and communities. *Id.* If there are residual adverse effects on these groups, “the Commission will evaluate the project by balancing the evidence of project benefits to be achieved against the residual adverse effects.” *Id.* This evaluation “is essentially an economic test. Only where the benefits outweigh the adverse effects on economic interests will the Commission proceed to complete the environmental analysis where other interests are considered.” *Id.*

Here, the Commission properly exercised its discretion in evaluating and balancing relevant factors under its established framework for determining whether

there is a need for the Project and whether it will serve the public interest. *See* Certificate Order PP 21-29, JA 11-13. In examining the impacts on affected landowners and communities, the Commission noted that Constitution had made changes to over 50 percent of the pipeline route to address concerns from landowners and as part of its negotiation of easement agreements. *Id.* P 26, JA 12; Rehearing Order P 23, JA 71; *see also* Application at 14-15, JA 1003-04; Final EIS at ES-12, 2-8 – 2-10, JA 170, 198-200. As a result, it was able to secure easement agreements, without the use of eminent domain authority, with approximately 50 percent of the landowners along the route before the Commission issued the Certificate Order. Rehearing Order PP 22-23, JA 70-71.

Moreover, Constitution proposed to locate the pipeline within or parallel to existing rights-of-way where feasible. Rehearing Order P 23, JA 71; Final EIS at ES-12, § 3.3, JA 170, 244. The Commission also considered several alternatives to collocate the Project with other existing or proposed pipeline systems, but rejected those alternatives based primarily on findings that each would result in greater total land disturbance, impacts on more landowners, and greater total environmental impacts relative to the proposed pipeline. Final EIS § 3.3, JA 244-51. Based on these facts, the Commission found that Constitution had taken “sufficient steps to minimize adverse economic impacts” on landowners. Rehearing Order P 23, JA 71.

The Commission next examined the need for the Project. As further discussed below, the record shows that the Project: (1) will increase transportation capacity from supply sources in Pennsylvania to interconnections with Iroquois and Tennessee pipelines in New York, *id.* P 27, JA 73; (2) is designed to serve natural gas demand in New York and New England, *id.* P 25, JA 72; and (3) is fully subscribed for 100 percent of its capacity in long-term precedent agreements, *id.* P 28, JA 73. Balancing the residual economic impacts on landowners and surrounding communities with the strong showing of need for the natural gas to be transported by the Project, the Commission concluded that the Project's benefits outweighed residual impacts. *See* Certificate Order P 29, JA 13; Rehearing Order P 23, JA 71.

B. Substantial Evidence Supports The Need For The Project To Satisfy Natural Gas Demand

Stop The Pipeline challenges one factor in the Commission's analysis of whether the Project will serve the public interest: whether there is market need for the Project. Stop The Pipeline claims, as it has since the start of the proceedings, that the precedent agreements are inadequate evidence of market demand here, and questions whether the Project is designed to serve the New York and New England markets. Stop Br. 40-43; *cf. id.* at 35; *but see* Catskill Br. 7, 9 (acknowledging continuing demand). The Commission determined that the precedent agreements and statements in support of the Project adequately demonstrated market need,

consistent with the Certificate Policy Statement. *See* Certificate Order PP 22-29, JA 11-13; Rehearing Order PP 18-23, JA 68-71. Stop The Pipeline’s claim that transportation contracts are inadequate to demonstrate market need has twice been rejected by the D.C. Circuit, and the same result is warranted here. *See Myersville*, 783 F.3d at 1308-11; *see also Minisink*, 762 F.3d at 112 n.10.

No additional evidence is necessary where, as here, market need is demonstrated by contracts for 100 percent of the Project’s capacity. *See* Rehearing Order P 21, JA 70; *see supra* p.14; *see* Application at 4-6, 7-8, 19-20, JA 993-97, 1008-09 (summarizing terms and explaining privileged nature of agreements). Stop The Pipeline misunderstands the Commission’s requirements for demonstrating market need. “The Certificate Policy Statement explains that precedent agreements will always be important, significant evidence of demand for a project.” Rehearing Order P 19, JA 68 (citing Certificate Policy Statement, 88 FERC ¶ 61,227 at 61,748). The Certificate Policy Statement permits – but does not require – applicants to submit other evidence of need, and does so in recognition of the fact that not all projects will be supported by long-term contracts. *Id.* (citing Certificate Policy Statement, 88 FERC ¶ 61,227 at 61,748) (eliminating the requirement that applicants present contracts to demonstrate project need).

The record further demonstrates need for the contracted-for capacity. Commission staff independently considered whether existing pipeline systems could, with or without modifications, meet the needs of this Project, and determined they could not. *See* Final EIS at 3-16, JA 240 (finding that even if additional pipeline were constructed to reach the required supply and delivery points, “there still is not sufficient available capacity on any of these existing pipeline systems to meet the . . . required delivery of natural gas”); *see also id.* § 3.2, JA 237. And, Stop The Pipeline neglects to mention that the Commission required Constitution to “execute firm contracts for the capacity levels and terms of service represented in the signed precedent agreements,” notably “prior to commencing construction.” Certificate Order P 28, JA 13.

As the D.C. Circuit has twice held in recent years, Stop The Pipeline “identified ‘nothing in the policy statement or in any precedent construing it to suggest that it requires, rather than permits, the Commission to assess a project’s benefits by looking beyond market need reflected by the applicant’s existing contracts with shippers.’” Rehearing Order P 21, JA 70 (quoting *Myersville*, 783 F.3d at 1311 (citing *Minisink*, 762 F.3d at 111 n.10)). Here, the Commission “found a strong showing of public benefit” based on the precedent agreements executed for the full capacity of the Project. Rehearing Order P 19, JA 68; *see also*

Midcoast Interstate, 198 F.3d at 968 (Court has “consistently required the Commission to give weight to the contracts . . . of the parties before it”).

Shippers that contracted with Constitution offered statements of support (and specifically, need) for the Project to serve additional natural gas supplies in New York and New England. *See* Cabot Motion to Intervene and Comments at 3-4, R. 167, JA 1142-43 (filed July 12, 2013) (stating support for Project in light of Cabot’s need to transport gas from high production areas to market); Leatherstocking Motion to Intervene and Comments at 1-2, R. 170, JA 1145-46 (filed July 12, 2013) (noting that Project will allow it to serve areas presently not receiving natural gas service). The State of Connecticut commented in support of the Project, explaining that constrained natural gas supplies contribute to high electricity prices in Connecticut, and the Project would significantly increase Connecticut’s access to “dependable, less costly, and cleaner energy” which is “needed to heat homes, run businesses, and generate electricity in the region.” Connecticut Attorney General, Comments at 1-2, R. 2639, JA 1990-91 (filed Dec. 17, 2014). Likewise, the New York Public Service Commission commented that, if the Project is approved, the New York Commission “would expect enhanced reliability and competition as a result of adding an additional interstate pipeline carrying 650,000 dekatherms per day of capacity.” New York Commission Comments at 4, R. 29, JA 1128 (filed July 1, 2013); *see also* Independent Power

Producers of New York Comments at 1, R. 1787, JA 1335 (filed Mar. 31, 2014) (commenting in support of Project benefits to power producers relying on natural gas, and noting significantly higher natural gas prices in New York as compared to Pennsylvania).

Stop The Pipeline urges the Court to look beyond the contracts because one of the two precedent agreements Constitution executed is with Cabot, a natural gas producer that is also a minority-owner of Constitution. Notably, Stop The Pipeline offers no argument directed to Constitution's precedent agreement with Southwestern, for over 23% of the Project's capacity. *See* Certificate Order P 8, JA 8. As to the contract with Cabot, Stop The Pipeline offers only an assertion that affiliate contracts are necessarily discriminatory, Stop Br. 52, but the Commission found "no evidence of self-dealing to support the need" for the Project. Certificate Order P 28, JA 13; Rehearing Order P 19, JA 69; *see also Transcontinental Pipe Line Co., LLC*, 143 FERC ¶ 61,132, at P 14 (2013) (rejecting unsubstantiated claims of affiliate abuse, noting that Commission regulations prohibit discriminatory behavior between a pipeline and its affiliate); *Millennium Pipeline*, 97 FERC ¶ 61,292, 62,318 ("we do not distinguish between pipelines' precedent agreements with affiliates or independent marketers in establishing the market need for a proposed project") (citing cases). As the D.C. Circuit recently explained, "it is Commission policy to not look behind precedent or service

agreements to make judgments about the needs of individual shippers.”

Myersville, 783 F.3d at 1311 (affirming Commission’s decision to dismiss, as irrelevant, market study), *cited in* Rehearing Order P 21, JA 70 (rejecting request to conduct a market study); *see also* Certificate Policy Statement, 88 FERC ¶ 61,227 at 61,744 (explaining that that Commission “does not look behind the contracts to determine whether the customer commitments represent genuine growth in market demand”).

In any event, even though the Project is fully subscribed, the Commission here required Constitution to calculate its recourse rates based on the design capacity of the Project, “thereby placing Constitution at risk for any unsubscribed capacity.” Certificate Order P 28, JA 13; *see also Koch Gateway Pipeline Co.*, 79 FERC ¶ 61,115, 61,515 (1997) (placing pipeline company at risk for project costs where a typical showing of market need, through contracts, was not practicable); *Questar Pipeline Co.*, 78 FERC ¶ 61,315, 62,349 (1997) (authorizing pipeline expansion supported by limited contracts, but placing pipeline at risk for project costs). Stop The Pipeline offers inadequate justification for the Commission to depart from well-established policy and precedent here.¹

¹ To the extent that Stop The Pipeline challenges various statements of the Project’s purposes, as described in the Final EIS, the Commission explained that this conflates the Commission’s assessment of market need under the Natural Gas Act with the statement of the Project’s purpose and need required by NEPA. Rehearing Order P 19 n.24, JA 68.

Stop The Pipeline claims that potential downstream capacity constraints are the “crux of the problem.” Br. 46. But the Commission explained that here, “as in most instances involving transportation along multiple pipelines,” when shippers reserve capacity, “they will need to confirm that arrangements for upstream and downstream transportation of the gas are in place.” Rehearing Order P 19, JA 69. Further, shippers on the Iroquois and Tennessee systems downstream of the interconnection with Constitution can either substitute Constitution gas for other supplies, or release their capacity to new shippers desiring access to Constitution gas. *Id.* P 19 n.26, JA 69; *see also* Certificate Order P 115, JA 40 (same). Stop The Pipeline essentially advocates a different model of pipeline development, requiring that all shippers must be local distribution companies, or that an applicant must guarantee downstream transportation rights with the development of any pipeline providing access to new supplies. *See* Stop Br. 44. But nothing in the Natural Gas Act or Commission precedent requires such a model. Here, shippers were on notice that service on Constitution would not include downstream transportation rights, and chose to execute binding precedent agreements for the full capacity of the pipeline in any event. Rehearing Order P 19, JA 69.

The Commission’s actions here and elsewhere make clear that it will not approve a transportation project based on speculation alone. Where market need is not demonstrated, either through binding agreements or other evidence permitted

by the Certificate Policy Statement, the Commission will reject a proposal. *See* Rehearing Order P 22, JA 70 (discussing *Turtle Bayou Gas Storage Co., LLC*, 135 FERC ¶ 61,233 (2011), where FERC rejected a project proposal based only on generalized assertions of need, without binding precedent agreements, and applicant owned virtually none of the necessary property rights); *see also* *Jordan Cove Energy Project, LP*, 154 FERC ¶ 61,190, at P 39 (2016) (rejecting proposal where no precedent agreements or “expressions of interest” resulting from an open season were included in the record). Here, the binding precedent agreements for the full capacity of the Project adequately demonstrate need, as corroborated by record evidence that the Project will serve continuing demand in New York and New England.

III. THE COMMISSION FULLY SATISFIED ITS NEPA OBLIGATIONS

A. Standard Of Review

Commission action taken pursuant to NEPA is entitled to a high degree of deference. *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 377-78 (1989); *see also Nat. Res. Def. Council, Inc. v. FAA*, 564 F.3d 549, 556 (2d Cir. 2009).

The Court's role is to ensure that NEPA's procedural requirements have been satisfied. *Fund for Animals*, 538 F.3d at 137 (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976) (Court's role is to ensure agency took a hard look at environmental consequences)); *see also Robertson*, 490 U.S. at 350-51 (NEPA merely prohibits uninformed – rather than unwise – agency action).

When reviewing factual determinations by an agency under NEPA, a court “must generally be at its most deferential.” *Balt. Gas & Elec. Co.*, 462 U.S. at 103; *see also Nat'l Audubon Soc'y*, 132 F.3d at 19 (role of reviewing court is to ensure NEPA compliance without infringing upon the agency's decisions in areas where it has expertise). A “rule of reason” guides an agency's implementation of NEPA. *Public Citizen*, 541 U.S. at 767.

B. The Commission’s Indirect And Cumulative Impacts Analyses Fully Complied With NEPA

1. Under NEPA, Potential Impacts From Increases In Natural Gas Production Are Not Indirect Impacts Of The Project

Catskill Mountainkeeper claims that the Commission refused to consider effects of potential increases in natural gas production arising from the Project. *See* Catskill Br. 18-25. Catskill Mountainkeeper overstates its case. The Commission did not ignore potential increases in natural gas production, or “bury its head in the sand.” Catskill Br. 27. Indeed, the Final EIS evaluated the environmental impacts of gas production in the region of influence around the Project facilities, and included this analysis in its cumulative impacts analysis. *See* Final EIS 4-232 – 4-258, JA 538-64; *see also* Rehearing Order PP 156-58, JA 125-26. For example, the Commission estimated the acreage that “might hypothetically be impacted,” assuming all of the gas transported by the Project is supplied by gas produced in the county where the pipeline begins. Final EIS at 4-233, JA 539. In addition, the Final EIS discussed “potential cumulative impacts associated with the general development of the Marcellus Shale” production region on each of the specific environmental resources (e.g., geology and soils, water resources, vegetation, and wildlife) throughout its cumulative impacts analysis. *Id.* at 4-241, JA 547; *see also id.* at 4-241 – 4-257, JA 547-63. Catskill Mountainkeeper does not challenge the sufficiency of the Commission’s cumulative impacts analysis, but

claims that the Commission should have considered the impacts of potential increases in gas production as an indirect impact. *See* Catskill Br. 18-25.

The Commission reasonably concluded, in a manner consistent with NEPA regulations and precedent, that increases, if any, in natural gas production are not indirect impacts of the Commission's approval of the Project. *See* Rehearing Order PP 147-52, JA 120-23. Indirect impacts "are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8(b). While indirect impacts may sometimes "include growth inducing effects," *id.*, here, Catskill Mountainkeeper's claimed induced increases in gas production are neither sufficiently causally related to the Project nor reasonably foreseeable to warrant further analysis. *See* Certificate Order PP 98-101, 107, JA 34-36, 38; Rehearing Order PP 133-35, 138, 147-52, JA 113-14, 115, 120-23.

The Commission's conclusion is consistent with this Court's previous holding in a factually similar case, as well as more recent decisions of the D.C. Circuit in cases brought by one of the Petitioners here, Sierra Club. *See Coalition*, 485 F. App'x at 474; *Sierra Club v. FERC*, No. 14-1275, 2016 WL 3524262, at *7 (D.C. Cir. June 28, 2016) ("*Sierra Club-Freeport*"); *Sierra Club v. FERC*, No. 14-1249, 2016 WL 3525562, at *6 (D.C. Cir. June 28, 2016) ("*Sierra Club-Sabine Pass*"). In each case, this Court and the D.C. Circuit affirmed the Commission's

determination that the projects at issue, pipeline facilities and LNG (liquefied natural gas) liquefaction and export facilities, were not sufficiently causally-related to a potential increase in natural gas production to warrant further analysis of that production as an indirect or cumulative impact. *E.g., Coalition*, 485 F. App'x at 474. As further discussed below, the same result is warranted here.

a. There Is No Causal Link Between Increased Gas Production And The Project

The Commission reasonably determined that natural gas development likely will continue with or without the Project; therefore, there is an insufficient causal link between additional shale gas production and the Commission's authorization of the Project. *See* Certificate Order PP 98-101, JA 34-36; Rehearing Order PP 138-50, JA 115-22. Catskill Mountainkeeper primarily argues that new natural gas production will be necessary to support commitments to transport gas on the Project, Catskill Br. 19, 21-25, and that there is inadequate record support for the Commission's finding that ongoing, existing natural gas production in Pennsylvania² fully supports the Project. *Id.* at 22-23.

As stated in the governing regulation, 40 C.F.R. § 1508.8(b), an indirect impact must be "caused by" the proposed action. Although the term "caused by" is

² Catskill Mountainkeeper does not appear to challenge the Commission's holding that, inasmuch as New York has banned hydraulic fracturing, there is an insufficient causal link between the Project and additional unconventional gas production in New York. Certificate Order P 99, JA 35.

not defined in NEPA or the implementing regulations, courts have provided ample guidance for determining whether an indirect impact is “caused by” a proposed action. *See, e.g., Sylvester v. U.S. Army Corps of Eng’rs*, 884 F.2d 394, 400 (9th Cir. 1989) (upholding agency conclusion that the indirect impacts of a golf course did not include other planned resort facilities because “each could exist without the other, although each would benefit from the other’s presence”); *City of Carmel-by-the Sea v. U.S. Dep’t of Transp.*, 123 F.3d 1142, 1162 (9th Cir. 1997) (acknowledging that existing development led to planned freeway, rather than the reverse, notwithstanding the project potential to induce further development). The test to determine whether a particular effect is caused by the federal action is not a “but for” inquiry, but rather whether the federal action was the “legally relevant cause” of the effect. *See Public Citizen*, 541 U.S. at 769.

In the context of pipeline development, the Commission has explained that a sufficient causal relationship “would only exist if the proposed pipeline would transport new production from a specified production area and that production would not occur in the absence of the proposed pipeline (i.e., there will be no other way to move the gas).” Rehearing Order P 138, JA 115. The Commission has yet to confront this circumstance because typically – as here – gas production precedes the pipeline. *Id.* Shippers are unlikely to support the development of a pipeline until after a demonstration of economically feasible gas production. *Id.*

The Commission reasonably relied on record evidence to find that existing, ongoing production supports the Project. In the Final EIS, Commission staff relied on a 2011 report by Pennsylvania estimating that, by 2015, Pennsylvania was forecast to produce approximately 7.5 billion cubic feet per day of natural gas, and 13.4 billion cubic feet per day by 2020. Certificate Order P 100, JA 35 (citing Final EIS at 4-232, JA 538). Actual production, however, outpaced the estimate: “In 2014, actual unconventional natural gas production in Pennsylvania exceeded 11.15 billion cubic feet per day, a 48 percent increase beyond the predicted 7.5 billion” originally estimated for 2015. Rehearing Order P 148, JA 121. Further, Commission staff determined that between 2009 and October 2013, 1,564 unconventional gas wells (i.e., wells employing horizontal drilling and hydraulic fracturing techniques) were permitted in Pennsylvania counties within 10 miles of the proposed projects. Certificate Order P 105, JA 37; *see also* Final EIS at 4-233, JA 539. As of October 1, 2013, companies reported drilling 760 (almost 50 percent) of those permitted wells in Pennsylvania. *Id.*; *see also* Rehearing Order P 148, JA 121.

Based on this record evidence, the Commission reasonably concluded that “existing and ongoing production could support the [Project] for many years, if not [its] entire useful life.” Rehearing Order P 148, JA 121. Catskill Mountainkeeper does not dispute this evidence, but asserts that production is likely to decline after

several years. *See* Catskill Br. 22-23. But the Commission explained that any number of factors, such as domestic natural gas prices and production costs, drive new drilling. Rehearing Order P 147, JA 120 (citing *Rockies Express Pipeline LLC*, 150 FERC ¶ 61,161, at P 39 (2015) (recognizing that “a number of factors—including natural gas prices, production costs, and transportation alternatives—drive new drilling)). Where production is driven by market demand, Commission and court precedent support a finding that production is not an indirect impact under NEPA. *See* Rehearing Order P 147, JA 120 (citing *Sierra Club v. Clinton*, 746 F. Supp. 2d 1025, 1045 (D. Minn. 2010) (holding that the U.S. Department of State, in its environmental analysis for an oil pipeline permit, properly decided not to assess the transboundary impacts associated with oil production because oil production is driven by multiple factors, including oil prices, market potential, and production costs); *Florida Wildlife Fed’n v. Goldschmidt*, 506 F. Supp. 350, 375 (S.D. Fla. 1981) (ruling that agency properly limited its consideration of indirect impacts when market demand, not a highway, would induce development)).

For this reason, Catskill Mountainkeeper’s reliance on *Mid States Coalition for Progress v. Surface Transportation Board*, 345 F.3d 520 (8th Cir. 2003), is misplaced. “[I]t is not merely the extent of production-related impacts that [the Commission] find[s] speculative, as was the case in *Mid States*, but also whether the projects at issue will have any such impacts.” Rehearing Order P 150, JA 122;

see also Sierra Club-Sabine Pass, 2016 WL 3525562, at *6; *Sierra Club-Freeport*, 2016 WL 3524262, at *8 (“Even assuming the correctness of a decision that does not bind this circuit, this case looks nothing like *Mid States*.”).

Further, if the Project were not constructed, the Commission found it “reasonable to assume that any new production spurred by such factors would reach intended markets through alternate pipelines or other modes of transportation.” Rehearing Order P 147, JA 120. Indeed, the Final EIS pointed to a number of potential modifications to existing systems that could serve all or some of the Project’s purpose. *See* Final EIS § 3.2, JA 237. Catskill Mountainkeeper relies on this analysis to assert that the Project is the only way to move the gas to market, but the statement it cites was limited to modifications to *existing* pipeline systems. *See* Final EIS at 3-16, JA 240. In any event, while each alternative had its drawbacks, this discussion supports the Commission’s finding that if this Project is not constructed, other pipelines could be pursued to bring the gas to market. *See* Final EIS at 3-17 (discussing two feasible alternatives, but dismissing them as likely having greater environmental impacts), 3-20 (discussing other system alternatives but rejecting them as likely infeasible due to constraints of development in the New York City area), JA 241, 244. This is the type of predictive judgment entrusted to an expert agency. *See Balt. Gas & Elec. Co.*, 462

U.S. at 103; *see also Central Hudson*, 783 F.3d at 109, 113 (deferring to FERC’s reasonable predictions).

Moreover, the Commission relied on the same reasoning in the orders affirmed by this Court in *Coalition*. *See Cent. N.Y. Oil and Gas Co., LLC*, 137 FERC ¶ 61,121 at PP 81-101 (2011), *order on reh’g*, 138 FERC ¶ 61,104 at PP 33-49 (2012), *aff’d Coalition*, 485 F. App’x 472. There, the Commission explained that the project at issue “is not merely a gathering system for delivery of gas from Marcellus Shale wells to interstate pipelines,” but that if the project “is not authorized, producers or developers of unregulated ‘midstream’ gathering assets will simply build longer gathering lines to connect wells in the three-county area to interstate pipelines, with no Commission regulation or NEPA oversight.” 137 FERC ¶ 61,121, at P 91. Catskill Mountainkeeper attempts to distinguish this Court’s decision in *Coalition* on the asserted basis that the Project is a new connection between a specific new supply and a new market. Catskill Br. 21-22. But the Commission reasonably concluded that both this Project and the one at issue in *Coalition* were not, in their separate proceedings, the only means for the gas to get to market. In *Coalition*, this Court held that “FERC reasonably concluded that the impacts of [Marcellus Shale development] are not sufficiently causally-related to the project to warrant a more in-depth analysis.” 485 F. App’x at 474. The Commission’s orders support the same conclusion here.

Finally, the recent *Freeport* and *Sabine Pass* decisions in the D.C. Circuit, issued two weeks before Petitioners filed their opening briefs here, corroborate this Court’s opinion in *Coalition*. See *Sierra Club-Freeport*, 2016 WL 3524262, at *7; *Sierra Club-Sabine Pass*, 2016 WL 3525562, at *6 (relying on *Freeport*). In both cases, the court examined whether the Commission reasonably determined that the facilities at issue would not – with or without exports – likely induce production of natural gas. And in both cases, applying the appropriate standard of review to the Commission’s technical judgment in the context of NEPA, the court deferred to the Commission’s judgment that the facilities at issue “did not necessitate an increase in domestic natural gas production.” *Sierra Club-Sabine Pass*, 2016 WL 3525562, at *6; see also *Sierra Club-Freeport*, 2016 WL 3524262, at *7 (same).

b. Potential Environmental Impacts From Gas Production Are Not Reasonably Foreseeable

Even if it were clear that the Project would induce additional gas production, impacts from any such future gas development are not reasonably foreseeable.

“An effect is ‘reasonably foreseeable’ if it is ‘sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision.’”

Rehearing Order P 135, JA 114 (quoting *Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992)). Here, the Commission considered the statements and reports submitted by all parties to the proceeding, and determined that information concerning the location, scale, and timing of additional natural gas wells “are

matters of speculation.” Rehearing Order P 151, JA 122; *see also* Rehearing Order PP 139, 151-53, JA 116, 122-23; Certificate Order P 107, JA 38; Final EIS at 4-232, JA 538.

In the Final EIS, the Commission reviewed a programmatic report on hydraulic fracturing prepared by the New York State Department of Environmental Conservation, which identifies: (1) the estimated output of a typical gas producing well (expressed in a broad range of 0.3 to 8.7 million cubic feet/day); (2) the average lifespan of a well (30 years); and (3) the average acres of land disturbance per well (4.8 acres during construction, 0.8 acres during operation). *See* Final EIS at 4-233, JA 539; Rehearing Order P 152, JA 122. Relying on this information, the Commission calculated that, in order to supply gas to the Project (650,000 decatherms/day), and assuming all the gas supply was strictly from shale production, 74 to 2,135 wells have been developed. Final EIS at 4-233, JA 539. Further, the Commission calculated that the estimated number of wells would disturb anywhere from 355 to 10,248 acres during well construction, with one-tenth of this acreage disturbed during well operation. Rehearing Order P 152, JA 122; Final EIS at 4-233, JA 539.

Ultimately, however, the Commission found this “scenario speculative and unlikely.” *See* Certificate Order P 107, JA 38. Given the complexities of the interstate natural gas system, including that gas may enter or exit the system

anywhere in the contiguous United States, and because the location, timing and scale of future facilities are unknown, the Commission concluded that it could not rely on this information to inform its decision-making. *See* Rehearing Order P 151, JA 122; Final EIS at 4-233, JA 539. Before the Commission, Catskill Mountainkeeper agreed with the Commission that the range of wells is “too broad to allow a meaningful analysis of their cumulative impacts.” Rehearing Order P 152 n.245, JA 123 (quoting Catskill Rehearing Request at 13, R. 2643, JA 2004)).

Nonetheless, Catskill Mountainkeeper claims that the Commission was required to build upon this speculative analysis with yet more speculative analysis. *See* Catskill Br. 25-27. But the Commission examined the reports and tools referenced by Catskill Mountainkeeper and others and found that they are “broad generic reports that do not show where or when additional development will occur because the projects were approved.” Rehearing Order P 151, JA 122; *see also id.* P 151 n.240, JA 122 (discussing reports provided by Catskill and others). Such reports, the Commission found, “will not yield information that would provide meaningful assistance to the Commission in its decision making, e.g., evaluating potential alternatives to the specific proposal before it.” Rehearing Order P 151, JA 122; *see also Pub. Citizen*, 541 U.S. at 767-69 (explaining that NEPA’s “‘rule of reason,’ . . . ensures that agencies determine whether and to what extent to

prepare an EIS based on the usefulness of any new potential information to the decisionmaking process”) (citing *Marsh*, 490 U.S. at 373–374).

Catskill Mountainkeeper is correct that NEPA requires “reasonable forecasting.” Br. 19-20, 25-26; see *N. Plains Res. Council v. Surface Transp. Bd.*, 668 F.3d 1067 (9th Cir. 2011). But NEPA does not require speculation, or for the agency “to do the impractical, if not enough information is available to permit meaningful consideration.” Rehearing Order P 135, JA 114 (quoting *N. Plains Res. Council*, 668 F.3d at 1078); see also Rehearing Order P 152, JA 122; *Nat. Res. Defense Council, Inc. v. Callaway*, 524 F.2d 79, 90 (2d Cir. 1975) (holding that an agency need not “consider other projects so far removed in time or distance from its own that the interrelationship, if any, between them is unknown or speculative”). Catskill Mountainkeeper highlights, Br. 19, 25-26, *Scientists’ Inst. for Pub. Info., Inc. v. Atomic Energy Comm’n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973), for the proposition that NEPA encourages speculation, but the same case also makes clear that “one of the functions of a NEPA statement is to indicate the extent to which environmental effects are essentially unknown.” *Id.*; see also *Fund for Animals*, 538 F.3d at 137 (“speculation in an EIS is not precluded, but the agency is not obliged to engage in endless hypothesizing as to remote possibilities”) (citation omitted).

Catskill Mountainkeeper’s differing assessment of the value of developing additional information on the impacts of natural gas production does not demonstrate a violation of NEPA or otherwise require judicial intervention. *See WildEarth Guardians v. Jewell*, 738 F.3d 298, 312 (D.C. Cir. 2013) (because the NEPA process “involves an almost endless series of judgment calls . . . [t]he line-drawing decisions . . . are vested in the agencies, not the courts”) (quoting *Duncan’s Point Lot Owners Ass’n, Inc. v. FERC*, 522 F.3d 371, 376 (D.C. Cir. 2008)); *see also Bear Lake Watch, Inc. v. FERC*, 324 F.3d 1071, 1077 (9th Cir. 2003) (court defers to agency expertise unless agency has “completely failed to address some factor, consideration of which was essential to a truly informed decision”) (quoting *Inland Empire Pub. Lands Council v. Schultz*, 992 F.2d 977, 981 (9th Cir. 1993)). There is nothing arbitrary about the Commission’s reasonable conclusion that potential impacts from future gas production activities are neither caused by the Project nor reasonably foreseeable, and further discussion would not meaningfully contribute to the Commission’s consideration of the Project. The Commission’s judgment is based upon its expertise and entitled to deference from this Court. *See Balt. Gas & Elec. Co.*, 462 U.S. at 103; *Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 90 (2d Cir. 2000); *see also Myersville*, 783 F.3d at 1308 (FERC’s evaluation of scientific data is afforded “an extreme degree of deference”).

2. The Commission Reasonably Analyzed The Project's Greenhouse Gas Emissions

The Commission also fulfilled its obligation to consider the Project's potential impacts on climate change. The Commission estimated the emissions associated with the Project and found that those emissions, together with emissions from certain other sources, would incrementally increase atmospheric concentrations of greenhouse gases in the Project's region. Final EIS at 4-181 – 4-183, JA 485-87; *see also id.* at 4-186, 4-256, JA 490, 562; Rehearing Order P 127, JA 109 (same); *see generally* Final EIS § 4.11.1.3, JA 484 (detailing projected emissions and impacts on air quality). Further, the Final EIS identified climate change-related environmental effects in the Northeast from overall greenhouse gas emissions, including higher temperatures, heavier precipitation, and sea level rise. Rehearing Order P 129, JA 111 (citing Final EIS at 4-255, JA 561). The Commission, however, found that it could not determine whether the Project's incremental contribution would result in physical effects on the environment because “there is no standard methodology” for such a determination. Final EIS at 4-256, JA 562; *see also* Rehearing Order P 130, JA 112. Nonetheless, because the estimated emissions from construction and operation of the Project, alone and as a matter of cumulative impact, are so small, the Commission concluded that there is no expected significant impact on local or regional air

quality. *See* Rehearing Order P 127, JA 110; Final EIS at 4-181 – 4-183, 4-186, JA 485-87, 490.

Catskill Mountainkeeper argues that the Commission was required to go further. Specifically, Catskill claims that the Commission: (1) arbitrarily refused to consider the full volume of the Project’s greenhouse gas emissions; (2) improperly dismissed the potential significance of the Project’s emissions based on their volume relative to total U.S. greenhouse gas emissions from major sources; and (3) refused to meaningfully consider the impacts of the Project’s emissions on the human environment. *See* Catskill Br. 28-39.

First, the Commission reasonably explained its calculation of greenhouse gas emissions, and its decision to exclude from that calculation the alleged loss of carbon sinks resulting from the Project’s impacts on vegetation. *See* Rehearing Order P 128, JA 110; *see also id.* P 127, JA 109 (summarizing calculations).

Catskill Mountainkeeper submitted to the Commission two reports it asserts would allow the Commission to calculate the impacts on greenhouse gas emissions from the alleged loss of carbon sinks. *See* Catskill Br. 30-31. The Commission reviewed both reports and determined that “neither source provides a reliable method to calculate” such impacts. Rehearing Order P 128, JA 110. The first, a working group report to the Intergovernmental Panel on Climate Change, considers the sink capacity of forests only at a global, regional and country scale, which the

Commission found disproportionate to the impacts at issue here. *Id.* P 128 n.198, JA 110. The second, the Council on Environmental Quality Revised Draft Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Reviews, cites a tool, developed by the U.S. Department of Agriculture, which in turn relies on the Intergovernmental Panel on Climate Change’s methodology. The Commission reasonably relied on the Department of Agriculture’s assessment of its own tool, which advised that “even at large scales (e.g., state-level) the power to detect statistically significant changes in forest carbon stocks is limited to major disturbances [e.g., insects, drought, wildfire].” *Id.* P 128 n.198, JA 111 (quoting Department of Agriculture report).

Catskill Mountainkeeper apparently faults the Commission for not developing a better tool to calculate impacts from the loss of carbon sinks – something the Council on Environmental Quality, the Intergovernmental Panel on Climate Change, and the Department of Agriculture apparently have not done. But, particularly here where the Commission has explained that greenhouse gas emissions were not determinative in its choice among alternatives analyzed in the Final EIS, *see* Rehearing Order P 132, JA 113, NEPA does not require such extraordinary efforts. *See Robertson*, 490 U.S. at 350; *see also Town Of Winthrop v. FAA*, 535 F.3d 1, 10 (1st Cir. 2008) (“the arbitrary and capricious standard of

review ‘requires substantial deference to the agency ... when [courts] review[] drafting decisions like how much discussion to include on each topic, and how much data is necessary to fully address each issue’”) (quoting *Sierra Club v. Van Antwerp*, 526 F.3d 1353, 1361 (11th Cir. 2008)).

Second, Catskill Mountainkeeper argues that the Commission improperly dismissed the potential significance of the Project’s emissions based solely on their volume relative to total U.S. greenhouse gas emissions from major sources. *See* Catskill Br. 33-35. The Final EIS noted that the Project’s greenhouse gas emissions are, in fact, “very small when compared with the U.S. Greenhouse Gas Inventory.” Rehearing Order P 129, JA 111 (citing Final EIS at 4-186, 4-256, JA 490, 562). But nothing in the Final EIS indicates that the Commission solely relied on this comparison in assessing the significance of the impact. Rather, the Final EIS’s alternatives and cumulative impacts analysis each considered greenhouse gas emissions in a comparative way. *See* Rehearing Order P 129, JA 112 (citing Final EIS at 3-1 (contrasted with fuel oil), 3-6 (with nuclear), 3-7 (with coal and fuel oil), 3-11, 4-256 (with fuel oil), JA 225, 230, 231, 235, 562). Catskill Mountainkeeper does not challenge the Commission’s comparative analysis.

Finally, Catskill Mountainkeeper claims that the Commission was required to calculate the Project’s actual incremental climate change impacts. Catskill

Br. 35-39. The D.C. Circuit recently rejected this same claim in a case involving another natural gas infrastructure project. *See EarthReports, Inc. v. FERC*, No. 15-1127, 2016 WL 3853830, at *4 (D.C. Cir. July 15, 2016) (addressing FERC approval of Dominion Cove Point liquefied natural gas export terminal). There, the court emphasized that: (1) the Commission considered the tool, but offered a reasoned basis for rejecting its use; (2) petitioners' acknowledgment of the limitations of the tool "belies their contention that the Commission acted unreasonably in finding the tool inadequately accurate;" and (3) petitioners urged the Commission to consider a different tool, but identified no such appropriate tool. *Id.* In the orders on review here, the Commission relied on the same approach, and Catskill Mountainkeeper offers the same objections. The Commission urges the Court to reach the same result.

The social cost of carbon refers to a calculation developed by the Environmental Protection Agency to provide monetized value, on a global level, of addressing climate change impacts. *See* Rehearing Order P 131, JA 112; *see generally* Fact Sheet: Social Cost of Carbon (Nov. 2013), available at <http://www3.epa.gov/climatechange/Downloads/EPAactivities/SCC-Fact-Sheet.pdf>. The tool's intended purpose is to estimate the climate benefits of rulemaking and policy alternatives using cost/benefit analyses. Rehearing Order P 131, JA 112; *see Zero Zone, Inc. v. U.S. Dep't of Energy*, No. 14-2147, 2016 WL

4177217, at *16 (7th Cir. Aug. 8, 2016) (affirming agency’s use of social cost of carbon as part of a cost-benefit analysis in a rulemaking).

Here, the Commission found that the EPA tool “would not be appropriate or informative” for assessing the impacts of a specific infrastructure project or for informing the Commission’s NEPA evaluation. Rehearing Order P 131, JA 113. First, because there is (by EPA’s own account) no consensus as to the appropriate discount rate for an analysis decades into the future, calculations can vary significantly. *See id.* (citing Fact Sheet, *supra*). Second, “the tool does not measure the actual incremental impacts of a project on the environment[.]” *Id.* Third, even if impacts were monetized using the calculator, “there are no established criteria identifying the monetized values that are to be considered significant for NEPA purposes.” *Id.* The D.C. Circuit, in *EarthReports*, found that the Commission did not act unreasonably in rejecting the use of the tool for these reasons. 2016 WL 3853830, at *4.

As did the petitioners in *EarthReports*, Catskill Mountainkeeper disputes the Commission’s judgment, pointing to a district court decision requiring the Forest Service to use the social cost of carbon in its NEPA analysis. Br. 36 (discussing *High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1190-91 (D. Colo. 2014)). There, the agency had used the social cost of carbon calculation in its draft environmental impact statement, then omitted it from the

final statement without explaining why the tool was no longer appropriate for the analysis. *Id.* at 1190-91. Here, by contrast, the Commission explained its reasoning. *See* Rehearing Order PP 131-32, JA 112-13. Moreover, “though NEPA does not require a cost-benefit analysis” (52 F. Supp. 3d at 1191), the Forest Service had explicitly relied on the quantified economic benefits of its action even as it disclaimed any quantification of costs. *See id.* at 1191-92.

Similarly, Catskill Mountainkeeper relies on *Center for Biological Diversity v. National Highway Traffic Safety Administration*, 538 F.3d 1172, 1200 (9th Cir. 2008), where the Ninth Circuit rebuked an agency for failing to account for the benefits of carbon emissions reduction — “whether quantitatively or qualitatively” — in the context of a cost-benefit analysis that extensively quantified the countervailing costs. 538 F.3d at 1200. Here, however, the Commission accounted for greenhouse gas emissions both qualitatively and quantitatively (and not in a monetized cost-benefit context), even though it ultimately concluded there was no appropriate methodology to gauge the significance of their impacts on the physical environment. *See* Final EIS §§ 4.11.1.1, 4.11.1.3, 4.13.6.10, JA 475, 484, 559; *see also id.* at 4-256, JA 562; Rehearing Order P 127, JA 109 (citing Final EIS). Two other district courts have recently upheld similar NEPA analyses by other agencies, where the agencies reasonably declined to quantify costs and engaged in a similar discussion of climate change impacts. *See WildEarth*

Guardians v. U.S. Forest Serv., 120 F. Supp. 3d 1237, 1269-74 (D. Wyo. 2015) (distinguishing *High Country*), *appeal pending*, No. 15-8109 (10th Cir. Oct. 7, 2015); *League of Wilderness Defenders/Blue Mtns. Biodiversity Proj. v. Connaughton*, No. 3:12-cv-02271-HZ, 2014 WL 6977611 at *26-*27 (D. Or. Dec. 9, 2014) (same).

Finally, the Commission notes that following Catskill Mountainkeeper's appeal here, the Council on Environmental Quality issued its Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Reviews. *See* Catskill Br. 28 (citing draft guidance). As the Commission explained with regard to CEQ's draft Guidance, the "CEQ's 2014 Draft GHG Guidance emphasizes that agencies have the discretion to determine the type and level of analysis that is appropriate and that the investment of time and resources should be reasonably proportional to the importance of climate change-related considerations." Rehearing Order P 128 n.198, JA 110 (citing 2014 CEQ Draft Guidance). The Final Guidance maintains this approach, and the Commission's detailed explanations for its approach to assessing climate change are consistent with CEQ's Final Guidance.

C. The Commission's Analysis Of Water Resources Impacts Fully Satisfies NEPA

The Commission's analysis of impacts on water resources satisfies NEPA's requirement to adequately consider and disclose the environmental impacts of its actions. *See* Certificate Order PP 77-79, JA 29; Rehearing Order PP 37-44, 48-53, 169-71, JA 76-79, 80-82, 131-33; Final EIS §§ 4.3, 4.6.2, 4.13.6.2, 5.1.3, JA 340, 396, 549, 567; *see also Robertson*, 490 U.S. at 350 (environmental analysis serves "to provide adequate notice of expected consequences and the opportunity to plan and implement corrective measures in a timely manner"). In narrow objections to the Commission's analysis, Catskill Mountainkeeper asserts that the Commission: (1) failed to adequately specify the methods and impacts, including cumulative impacts, of stream-crossings, Catskill Br. 41-47; (2) failed to adequately consider the site-specific impacts of in-stream blasting or risks associated with pipe burial, *id.* at 48-50; and (3) based its findings on invalid assumptions and mitigation measures, *id.* at 40, 51-53.

The Final EIS fully analyzed impacts on water resources, ultimately finding that the Project, as constructed in accordance with procedures required by the Commission, will have some temporary impacts, but will not adversely impact surface water resources. Final EIS at 4-58, 4-245, 4-243, § 5.1.3, JA 362, 551, 549, 567; *see also* Final EIS at 5-1, JA 565 (identifying vegetation and individual wildlife species as the only resources that will be adversely impacted). The Final

EIS lists the 289 surface waterbodies that would be crossed and the method Constitution proposed to cross them. Rehearing Order P 48, JA 80; Final EIS at 4-44, JA 348 (summary); *see also id.* App. K, JA 626 (list). In an effort to eliminate in-stream activity, Constitution proposed trenchless crossing methods (i.e., where the pipe is installed beneath the water feature) for 21 of the crossings. Certificate Order P 77, JA 29; Rehearing Order P 49, JA 80; Final EIS § 2.3.2.2 (describing all construction methods), 4.3.3.5 (proposed construction methods), 4.3.3.6 (impacts of construction methods), JA 210, 355, 358; *see also id.* at 2-22 – 2-25, 4-52, 4-56 – 4-57 (trenchless), JA 212-15, 356, 360-61. Dry crossing methods (i.e., where the water flow is temporarily obstructed with a dam or other method) that avoid in-stream construction impacts are proposed for the remaining 268 waterbodies. Certificate Order P 77, JA 29; Final EIS at 2-21, 4-52, JA 211, 356.

The Final EIS discusses the full range of potential impacts on water resources from Project construction and operation, including each stream-crossing method. *See* Final EIS at 4-54 – 4-58, JA 358-62. These include increased streambank erosion, sedimentation, and turbidity, as well as adverse impacts on aquatic organisms. *Id.*; *see also* Rehearing Order PP 48-49, JA 80-81.

Catskill Mountainkeeper misunderstands the nature of the Commission’s analysis and the requirements of the Certificate Order. The Commission’s analysis

of Project impacts is based on the stream-crossing methods identified in Appendix K to the final EIS, and the Certificate Order requires the use of those methods. *See* Certificate Order, Env'tl. Condition 1, JA 52 (requiring Constitution to follow the construction procedures and mitigation measures described in its application, as identified in the EIS and modified in the Certificate Order); *see also* Final EIS at 5-3, JA 567 (summarizing impacts based on 21 trenchless and 268 dry-stream crossings). Because Constitution was unable to obtain survey access for all streams crossed by the Project, the Commission required Constitution to complete geotechnical studies for those crossings after access is obtained. Rehearing Order P 49, JA 80 (citing Final EIS at 4-4, JA 308); *see* Certificate Order, Env'tl. Condition 14, JA 56 (requiring studies to be filed with the Commission prior to construction). If the studies demonstrate that the specified crossing method is not feasible or environmentally-preferable, further Commission approval will be required. *See* Certificate Order, Env'tl. Condition 1, JA 52 (requiring Constitution to seek approval of any modifications to construction procedures and mitigation measures, and explain how the modification provides equal or greater environmental protection).

To the extent that there is uncertainty regarding stream-crossing methods, the Commission's analysis of all potential methods and requirement that Constitution seek approval of changes in construction methods satisfy NEPA. *See*

Robertson, 490 U.S. at 352 (neither complete mitigation plans nor a worst-case analysis are required); *see also U.S. Dep't of Interior v. FERC*, 952 F.2d 538, 546 (D.C. Cir. 1992) (holding that FERC need not have “perfect information” before acting and need not definitively resolve all environmental concerns). The Commission “cannot be expected to wait until a perfect solution of environmental consequences of proposed action is devised before preparing and circulating an EIS.” *Callaway*, 524 F.2d at 88; *see LaFlamme v. FERC*, 945 F.2d 1124, 1130 (9th Cir. 1991) (Commission did not err in permitting post-order monitoring and studies of environmental impacts). Notably, the Ninth Circuit cases *Catskill Mountainkeeper* cites, Br. 45-46, in support of the requirement for a “worst-case” analysis each pre-date the elimination of that specific requirement from the NEPA implementing regulations, discussed at length in *Robertson*. *Compare Robertson*, 390 U.S. at 354-56 (discussing change in regulation, and finding that NEPA “itself does not mandate that uncertainty in predicting environmental harms be addressed exclusively in this manner”) with *Oregon Env'tl. Council v. Kunzman*, 817 F.2d 484, 495 (9th Cir. 1987), and *Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1244 (9th Cir. 1984).

The Commission explained that in-stream blasting is not anticipated to be necessary to construct the Project, based on identification of streams with shallow depth to bedrock. *See* Final EIS at 4-97, JA 401; *see also* Application, Env'tl.

Construction Plan, Att. 10, Blasting Plan for New York,³ JA 1052 (identifying areas of shallow depth to bedrock based on publicly available information). Nonetheless the Commission identified potential impacts of blasting and reviewed Constitution's Blasting Plan, which includes measures to avoid and minimize impacts, and requires compliance with applicable regulations. *See* Final EIS at 4-55 (discussing impacts of blasting including impacts on aquatic organisms, turbidity, and contamination), 4-97, JA 359, 401; *see also* Application, Env'tl. Construction Plan for New York, Att. 10, Blasting Plan, JA 1052. The requirement for Constitution to return to the Commission with a site-specific blasting plan in the event in-stream blasting becomes necessary reflects the requirement that Constitution employ blasting only when field conditions require it. *See* Certificate Order, Env'tl. Condition 27, JA 58 (requiring agency review and approval of site-specific Blasting Plan, which must be developed in consultation with state resource agencies). NEPA does not require the Commission to consider impacts of hypotheticals unlikely to inform the agency's decision. *See Fund for Animals*, 538 F.3d at 137.

Two of Catskill Mountainkeeper's claims were not preserved for this Court's review. *See* Br. 46-47 (cumulative impacts of multiple crossings of a single waterbody), 49-50 (site-specific risks in evaluation of pipe burial depths).

³ Constitution also prepared a separate Blasting Plan for Pennsylvania. *See* Application, Env'tl. Construction Plan for Pennsylvania, Att.10, JA 1031.

The Natural Gas Act limits the Court’s jurisdiction to issues “urged before the Commission in [an] application for rehearing.” *See* 15 U.S.C. § 717r(b) (limiting court’s jurisdiction to objections that are preserved on rehearing, “unless there is reasonable ground for failure to do so”); *see also Central Hudson*, 783 F.3d at 107 (statute limits a court’s review to the grounds for objection set forth with “specificity” in the petitioner’s request for agency rehearing). In any event, the Commission did consider impacts of all stream-crossings, *see supra* pp. 60-62, and discussed the required depth of cover based on location type, *see* Final EIS at 2-16, 4-56, JA 206, 360. Catskill Mountainkeeper does not explain how more specific information would be meaningful to the Commission’s decision-making.

Finally, the Commission appropriately relied on its own mitigation measures, and those proposed by Constitution in support of its application, in determining that the impacts of the Project, as mitigated, will be reduced to less-than-significant levels. *See* Certificate Order PP 73, 77, JA 28, 29; Rehearing Order PP 169-71, JA 131-33; Final EIS at 5-1, JA 565. The Commission reviewed Constitution’s Environmental Construction Plans, containing its mitigation measures, and found that they provide either equal or greater environmental protection than the Commission’s standard construction plans. *See* Rehearing Order PP 50-51, JA 81; Final EIS § 2.3, JA 203. As noted above, Constitution is required to follow the procedures for avoiding and mitigating

impacts, as specified in the Plan and modified in the Final EIS and the Commission's orders.

Under NEPA, this Court has held that an agency may use mitigation measures that are supported by substantial evidence to make a finding of no significant impact. *See Nat'l Audubon Soc'y*, 132 F.3d at 17 (citations omitted). Mitigation measures are supported by substantial evidence "when based on studies conducted by the agency or when they are likely to be adequately policed." *Id.* (citing, *e.g.*, *Ompompanoosuc*, 968 F.2d at 1556-57 (success of mitigation measures assured because they were mandatory conditions imposed in licenses)). Catskill Mountainkeeper does not claim that the mitigation measures are unsupported by substantial evidence. But, in any event, "the conditions imposed in the [Certificate] Order are mandatory," Constitution must employ environmental inspectors to ensure compliance with all mitigation measures, and the Commission will conduct regular field inspections. Rehearing Order P 171, JA 132.

D. The Commission Did Not Impermissibly Segment The Project From Other Potential Pipeline Proposals

Stop The Pipeline asserts that the Commission should have indefinitely delayed its review of a proposed, fully-subscribed natural gas pipeline project to await the formal proposal of another project, the Iroquois South to North Project, which could increase capacity downstream of Constitution's Project. *See Stop Br.* 53-59. But Stop The Pipeline fails to acknowledge that the Commission did, in

fact, include the South to North Project in its cumulative impacts analysis. *See* Rehearing Order P 97, JA 99 (citing Final EIS § 4.13.4, JA 542); *see also* Final EIS at 4-239, JA 545. Moreover, Stop The Pipeline’s argument is based on its claim that without the South to North Project, the Constitution Project lacks independent utility, because the Constitution Project alone cannot transport gas to New York and New England. Stop Br. 54-59. Stop The Pipeline misunderstands both NEPA’s requirements for assessing connected actions, and the Commission’s findings in support of the need for Constitution’s Project.

Under applicable NEPA regulations, the Commission is required to include “connected actions,” “cumulative actions,” and “similar actions” in an Environmental Impact Statement. 40 C.F.R. § 1508.25(a)(1)-(3). Stop The Pipeline contends that the Constitution Project and the Iroquois South to North Project are connected actions. “Connected actions” include actions that are “interdependent parts of a larger action and depend on the larger action for their justification.” 40 C.F.R. § 1508.25(a)(1)(iii).

“Segmentation is an attempt to circumvent NEPA by breaking up one project into smaller projects and not studying the overall impacts of the single overall project.” *Stewart Park & Reserve Coal., Inc. v. Slater*, 352 F.3d 545, 559 (2d Cir. 2003); *see also Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014) (same). Under NEPA, “proposals for . . . actions that will have

cumulative or synergistic environmental impact upon a region . . . pending concurrently before an agency . . . must be considered together. Only through comprehensive consideration of pending proposals can the agency evaluate different courses of action.” *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976).

When evaluating a segmentation claim, and specifically whether actions are “connected” under 40 C.F.R. § 1508.25(a)(1)(iii), courts consider whether the proposed segment (1) has substantial independent utility, (2) has logical termini, and (3) does not foreclose the opportunity to consider alternatives. *See Stewart Park*, 352 F.3d at 559; *see also Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 298 (D.C. Cir. 1987) (finding independent utility in four-mile section of mass transit project originally planned as 18.6 miles). Under the “independent utility” factor, the Court examines whether “each project would serve its respective purpose, regardless of whether the other is built.” *Stewart Park*, 352 F.3d at 560; *see Del. Riverkeeper Network v. FERC*, 753 F.3d at 1313 (same).

In assessing the cumulative impacts of the South to North Project with the Constitution Project, the Commission explained that the Iroquois South to North Project would use existing interconnects with Dominion Transmission in Canajoharie, New York and with Algonquin Gas Transmission in Brookfield, Connecticut, as well as with Iroquois in Wright, New York, to reverse flow up to 300,000 decatherms/day of natural gas to the U.S./Canada border. Final EIS at 4-

239, JA 545. At the time of the Final EIS, the South to North Project was under initial development, and Iroquois still has not submitted any project-related filings or applications to the Commission. *Id.*; *see also* Rehearing Order P 96, JA 98. In terms of potential impacts, the Final EIS noted that if, as it appears, the South to North Project “involves a simple flow reversal, the need for new infrastructure and resulting environmental impacts would be minimal.” Final EIS at 4-239, JA 545.

Here, the Commission reasonably determined that the Constitution Project has both substantial independent utility and a logical terminus. The Project is “designed to meet the market needs of all shippers who signed binding precedent agreements in response to the open season notice for the projects.” Rehearing Order P 95, JA 98. Stop The Pipeline essentially rehashes its capacity-constraint argument, *see supra* p. 36, in support of its segmentation claim. But the Commission has explained that natural gas can be transported from the terminus of the Constitution Project to downstream markets by any shipper holding capacity on either Iroquois’ or Tennessee’s systems. Rehearing Order P 95, JA 98; *see also Stewart Park*, 352 F.3d at 560 (rejecting claim of improper segmentation where highway projects had previously been discussed as phases of single project, but each had “distinct and independent purposes”). Stop The Pipeline takes a narrower view of whether a Project has substantial independent utility, asserting that a Project must increase capacity, even downstream from its terminus. Stop Br. 55.

But the Commission's determination the Project serves an important market need warrants this Court's deference. *See supra* pp. 26-37; *see also* Rehearing Order P 79, JA 91 (explaining the Commission's role in reviewing individual pipeline applications).

The Commission also appropriately relied on timing in explaining why the Constitution Project need not await the South to North Project. *See* Rehearing Order PP 90, 96, JA 96, 98. At this point, nearly two years after the Certificate Order, Iroquois has yet to file a certificate application for the South to North Project, nor has it asked the Commission to open a pre-filing docket to allow it to begin scoping and initial consultations. *See* Rehearing Order P 96, JA 98.

"NEPA, of course, does not require agencies to commence NEPA reviews of projects not actually proposed." *Del. Riverkeeper*, 753 F.3d at 1313 (citing *Weinberger v. Catholic Action of Haw.*, 454 U.S. 139, 146 (1981) (mere contemplation of an action is insufficient to support segmentation claim)). Both the Supreme Court and the D.C. Circuit (where, pursuant to 15 U.S.C. § 717r(b), all final Commission orders are subject to judicial review) have relied upon timing in defining the scope of projects that must be considered together in an EIS. *See Del. Riverkeeper*, 753 F.3d at 1313 (citing *Weinberger*, 454 U.S. at 146); *see also id.* at 1318 ("We emphasize here the importance we place on the timing of the four improvement projects."); *Minisink*, 762 F.3d at 113 n.11 (rejecting segmentation

claim and explaining that the “temporal nexus” was a “critical fact” in *Del. Riverkeeper*; *Myersville*, 783 F.3d at 1326-27 (following *Minisink*). The Commission cannot predict whether or when Iroquois might propose the South to North Project, or the type of facilities that might ultimately be proposed. *See* Rehearing Order P 86, JA 94.

Stop The Pipeline points to statements by Iroquois, post-dating the orders on review here, indicating that the South to North Project is on hold until the Constitution Project moves forward. *See* Stop Br. 57. Stop The Pipeline appears to read too much into this statement, given that the South to North Project would interconnect with the Project, and given New York’s denial of the state water quality certification for the Project. But, in any event, this Court has held that simply because “two projects are interrelated as part of an overall transportation plan does not mean that they do not individually contribute to alleviation of the traffic [or here, gas delivery] problems” *Stewart Park*, 352 F.3d at 560 (internal citation omitted); *see also Coal. on Sensible Transp. v. Dole*, 826 F.2d 60, 69 (D.C. Cir. 1987) (“But it is inherent in the very concept of a highway network that each segment will facilitate movement in many others; if such mutual benefits compelled aggregation, no project could be said to enjoy independent utility.”).

The Commission’s decision to proceed with its decision-making on this Project, after conducting a cumulative impacts analysis including available

information about the South to North Project, was reasonable. *See Nat'l Wildlife Fed'n v. Appalachian Reg'l Comm'n*, 677 F.2d 883, 891 (D.C. Cir. 1981) (court defers to agency's segmentation decisions).

IV. THE COMMISSION'S CONDITIONAL APPROVAL OF THE PROJECT COMPLIES WITH THE CLEAN WATER ACT

Catskill Mountainkeeper and Stop The Pipeline claim that the Commission's conditional authorization of the Project in the Certificate Order exceeded the Commission's authority and violated the Clean Water Act. *See* Catskill Br. 54-60, Stop Br. 15-23. The Certificate Order ensures that the Commission and other federal and state permitting agencies are able to fully exercise their respective authority over the Project. Until New York issues the water quality certification, "Constitution may not begin an activity, i.e., pipeline construction, which may result in a discharge into jurisdictional waterbodies." Rehearing Order P 63, JA 85; *Gunpowder Riverkeeper*, 807 F.3d 267, 275, 279-81 (Rogers, J., dissenting in part and concurring in the judgment) (addressing, and finding without merit, the same argument presented here). The Commission notes that this issue – whether the Commission's conditional authorization of a pipeline complies with the Clean Water Act – is currently pending before the D.C. Circuit in an appeal concerning a different pipeline. *See Del. Riverkeeper Network v. FERC*, No. 16-1092 (D.C. Cir. filed Mar. 8, 2016) (briefing completed; oral argument not yet scheduled).

A. Standard Of Review

Where a court is called upon to review an agency's construction of a statute it administers, such as the Commission's administration of the Natural Gas Act, well-settled principles apply. If Congress has directly spoken to the precise question at issue, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984). If the statute is silent or ambiguous on the question at issue, then the court must decide whether the agency's decision is based on a permissible construction of the statute and, if it is, defer to the agency's construction. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013); *see also Myersville*, 783 F.3d at 1315 ("[I]n evaluating the Commission's authority to issue the challenged certificate of public convenience and necessity," the court applies "the two-step analytical framework" of *Chevron*.).

The Commission's interpretation of other statutory authority, including the Clean Water Act, is reviewed *de novo*. *See Am. Rivers v. FERC*, 129 F.3d 99, 107 (2d Cir. 1997) ("[W]e review *de novo* the Commission's construction of the CWA"); *see also Alcoa Power Generating, Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011) (finding the Commission's interpretation "consistent with the plain text and statutory purpose of the provision").

B. The Certificate Order Requires Compliance With The Clean Water Act

1. The Conditional Authorization Appropriately Integrates Federal And State Authority

The Certificate Order expressly requires Constitution to obtain all applicable federal and state approvals before the Commission will authorize Project construction. *See* Certificate Order Env'tl. Condition 8, JA 55; Rehearing Order PP 62-72, JA84-88. Moreover, under the Certificate Order, all conditions imposed in applicable federal and state approvals are automatically imposed on Constitution. *See* Rehearing Order P 68, JA 87 (citing 33 U.S.C. § 1341(d)). This conditional authorization is a reasonable exercise of the Commission's broad authority to condition certificates for interstate pipelines on "such reasonable terms and conditions as the public convenience and necessity may require." Natural Gas Act § 7(e), 15 U.S.C. § 717f(e); *see also, e.g., ANR Pipeline Co. v. FERC*, 876 F.2d 124, 129 (D.C. Cir. 1989) (noting the Commission's "extremely broad" conditioning authority).

The Commission's approach, which ensures that a state's certification is given full force and effect, appropriately respects the integration of the various permitting requirements for interstate pipelines, as reflected in the Natural Gas Act and the Clean Water Act. "In designing the Clean Water Act, Congress plainly intended an integration of both state and federal authority." *Keating v. FERC*, 927

F.2d 616, 622 (D.C. Cir. 1991). Section 401(a)(1) of the Clean Water Act provides that no federal “license or permit shall be granted until the” state certifies that any activity “which may result in a discharge into the navigable waters” will comply with the applicable provisions of the Act. 33 U.S.C. § 1341(a)(1). This provision empowers states to condition and, where appropriate, block FERC-licensed energy projects. *See Islander East*, 482 F.3d at 84, 94; *see also e.g., Alcoa Power Generating*, 643 F.3d at 971. If a state imposes conditions in its water quality certification, those conditions are incorporated into the federal license. *Alcoa Power Generating*, 643 F.3d at 971; Rehearing Order P 68, JA 87.

Consistent with the language of Clean Water Act section 401, FERC’s orders assure that until the state water quality agency “issues the [water quality certification], Constitution may not begin an activity, i.e., pipeline construction, which may result in a discharge into jurisdictional waterbodies.” Rehearing Order P 63, JA 85; *see also id.* P 57, JA 83; Certificate Order, Env’tl. Condition 8, JA 55. Thus, to the extent any activity associated with the Project may result in a discharge for which a permit is required, Constitution must obtain a permit from the appropriate agency before it may engage in any such activity. *See AES Sparrows Point LNG, LLC*, 129 FERC ¶ 61,245, at P 67 (2009) (“If an agency decides a project does not merit authorization—a decision the Commission is without authority to impact or alter—then the project cannot go forward.”), *cited in*

Rehearing Order P 65, JA 86; *see also Broadwater Energy, LLC*, 124 FERC ¶ 61,225, at P 58 (2008) (“state agencies retain full authority to grant or deny the specific requests”), *cited in* Rehearing Order P 65, JA 86. And, as the Commission made clear, “[i]f and when [New York] issues a [water quality certification] for the projects, Constitution will be required to comply with the requirements of the” certification. Rehearing Order P 70, JA 88. This condition, the Commission determined, renders the Certificate Order “consistent with the Clean Water Act.” *Id.* P 63, JA 85.

As this Court is aware, the Commission’s long-standing practice is not to delay action on project proposals until all other federal and state authorizations have been issued. *See id.* P 43, JA 78; *see also Islander East*, 482 F.3d at 86-87 (noting that the Commission issued a conditional certificate to the project at issue, while New York later granted a water quality certification, and Connecticut later denied such certification); *Del. Dep’t of Nat. Res. and Env’tl. Control v. FERC*, 558 F.3d 575, 577 (D.C. Cir. 2009) (noting that final approval of pipeline was subject to condition requiring satisfaction of other federal permitting requirements); *Myersville*, 783 F.3d at 1308 (noting that Commission conditioned approval of pipeline compressors on receipt of all necessary federal authorizations, including Clean Air Act permits); *Pub. Utils. Comm’n of Cal.*, 900 F.2d at 282 (noting that Commission expressly conditioned pipeline on completion of environmental

review under the National Environmental Policy Act). Major energy infrastructure projects “take considerable time and effort to develop,” and are “subject to many significant variables whose outcome cannot be predetermined.” Rehearing Order P 43, JA 78; *see also Crown Landing, LLC*, 117 FERC ¶ 61,209, at P 28 (2006), *dismissed sub nom. Del. Dep’t of Natural Res.*, 558 F.3d 575. “[T]he Commission’s approach is a practical response to the reality that, in spite of the best efforts of those involved, it may be impossible for an applicant to obtain all approvals necessary to construct and operate a project in advance of the Commission’s issuance of its certificate without unduly delaying the project.” *Broadwater Energy*, 124 FERC ¶ 61,225, at P 59, *cited in* Rehearing Order P 65, JA 86.

This very issue was recently raised on appeal of Commission orders conditionally authorizing another pipeline project. *See Gunpowder Riverkeeper*, 807 F.3d 267 (D.C. Cir. 2015). There, the majority of the D.C. Circuit panel did not reach the merits of Gunpowder Riverkeepers’ claim, because it found that Riverkeeper lacked prudential standing under the Natural Gas Act, Clean Water Act, and NEPA. *See id.* at 273-75. In a concurring opinion, however, Judge Rogers addressed the merits and agreed with the Commission in all respects. *Id.* at 275-81.

The conditional authorization, Judge Rogers explained, “preserved the State’s ‘power to block the project’” under the Clean Water Act. *Gunpowder Riverkeeper*, 807 F.3d at 279 (Rogers, J., concurring in relevant part) (quoting *City of Tacoma v. FERC*, 460 F.3d 53, 67 (D.C. Cir. 2006)). There are “no activities authorized by the conditional certificate itself that may result in such discharge prior to the state approval and the Commission’s issuance of” subsequent orders authorizing construction. *Id.* at 279. Thus, “[t]he plain text of the Clean Water Act does not appear to prohibit the kind of conditional certificate the Commission issued here.” *Id.*; *see also id.* at 281 (noting that the Clean Water Act does not “appl[y] to all manner of regulated activities that do not affect water quality”).

In considering statutes structured similar to the Clean Water Act, courts have affirmed agency actions authorizing projects conditioned on subsequent receipt of all other necessary federal and state approvals. *See* Rehearing Order PP 65-66, JA 85-87; *see Gunpowder Riverkeeper*, 807 F.3d at 280 (Rogers, J., concurring in relevant part) (relying on same line of cases). In *City of Grapevine v. U.S. Department of Transportation*, 17 F.3d 1502 (D.C. Cir. 1994), the D.C. Circuit held that the agency’s conditional approval of an airport runway did not violate the National Historic Preservation Act, because the Act specifically prohibited only the approval of expenditures of federal funds, and not any other approval. *See* Rehearing Order P 66, JA 86-87 (quoting *City of Grapevine*, 17 F.3d at 1509) (“In

sum, because the [agency’s] approval of the West Runway was expressly conditioned upon completion of the [Preservation Act] process, we find here no violation of [that Act].”). As in *City of Grapevine*, if a certificate holder commits its own resources to further development activities prior to receipt of all federal approvals, it does so at the risk of losing its investment. Rehearing Order P 66, JA 86 (quoting *City of Grapevine*, 17 F.3d at 1509); *see also Gunpowder Riverkeeper*, 807 F.3d at 280 (Rogers, J., concurring in relevant part) (noting that risk of proceeding under a conditional authorization for the runway project “before the condition is satisfied” “echo[es] the circumstances here” of conditional authorization of pipeline projects).

In this case, as it has for over a decade, the Commission relied on *City of Grapevine* as consistent with the Commission’s practice of issuing conditional authorizations. *See* Rehearing Order P 65 & n.97, JA 85-86 (citing examples of cases: *AES Sparrows Point*, 129 FERC ¶ 61,245, at P 72; *Broadwater Energy*, 124 FERC ¶ 61,225, at P 60; *Georgia Strait Crossing Pipeline LP*, 108 FERC ¶ 61,053, at P 16 (2004)). The Commission has “likened the [National Historic Preservation Act] to the Clean Water Act” because the Preservation Act “expressly prohibits a federal agency from acting prior to compliance with its terms.” Rehearing Order P 65, JA 86 (citing cases).

Relying on similar reasoning, the D.C. Circuit has affirmed the Commission's ability to authorize pipeline projects conditioned on subsequent receipt of a Clean Air Act permit from the State. *See Myersville*, 783 F.3d at 1315, 1317-21 (holding that the Commission did not violate the Clean Air Act by issuing a similar conditional authorization prior to receipt of required Clean Air Act permit). Likewise, the D.C. Circuit has held that the Commission did not violate the National Environmental Policy Act by issuing a certificate conditioned on completion of its environmental review. *See Rehearing Order P 62*, JA 85 (citing *Pub. Utils. Comm'n of Cal.*, 900 F.2d at 282 (holding that an agency can make "even a final decision" —e.g. granting a certificate before completing the environmental review—as long as the agency assesses the environmental data before the certificate's effective date)); *see also Del. Dep't of Nat. Res. & Env'tl. Control*, 558 F.3d at 576 (rejecting claim that state's procedural rights were not adequately protected by FERC's conditional authorization, which was expressly conditioned on the state's action under the Coastal Zone Management Act, and dismissing for lack of standing). The Commission thus reasonably relied on this line of precedent, as it has for over a decade, in authorizing conditional approval of the Project pending receipt of outstanding federal and state approvals. *See Rehearing Order PP 65-66*, JA 85-87.

2. Petitioners' Contrary Arguments Lack Merit

Petitioners claim that the Clean Water Act requires the Commission to defer its review of pipeline applications pending receipt of a state's water quality certification. Catskill Br. 54-60; Stop Br. 15-22. But the cases on which Petitioners rely are inapplicable and do not limit the Commission's authority to conditionally approve pipeline projects prior to state action under the Clean Water Act. *See* Rehearing Order P 64, JA 85; *see* Catskill Br. 55-56 (citing cases); Stop Br. 17-18 (citing cases); *see also Gunpowder Riverkeeper*, 807 F.3d at 280-81 (Rogers, J., concurring in relevant part) (“The cases on which petitioner relies are inapposite because they do not involve certificates conditioned on state approval.”).

Some of the cases address the extent to which the Commission must verify that a state's water quality certification is valid. *See* Rehearing Order P 64, JA 85 (discussing *City of Tacoma*, 460 F.3d at 68); *see also Am. Rivers v. FERC*, 129 F.3d 99, 109 (2d Cir. 1997) (holding that FERC may not limit conditions in state water quality certifications). Others simply summarize the requirements of the Clean Water Act, confirming that state certification is, of course, necessary before the Commission authorizes “activities that may result in a discharge into the navigable waters.” *See Gunpowder Riverkeeper*, 807 F.3d at 280-81 (Rogers, J., concurring in relevant part) (discussing and finding consistent with the

Commission’s conditional pipeline authorization: *Pub. Util. Dist. No. 1 of Jefferson Cnty.*, 511 U.S. 700 (holding that a state may include minimum stream flow requirements in a water quality certification for a hydroelectric project), and *City of Tacoma*, 460 F.3d at 67-68)); *see also S.D. Warren Co.*, 547 U.S. at 384 (holding that FERC-licensed hydroelectric dams result in a discharge requiring state water quality certification).

Stop The Pipeline claims that because the Natural Gas Act grants eminent domain authority to holders of section 7 certificates of public convenience and necessity, *see supra* p. 9, the issuance of the conditional certificate must violate the Clean Water Act. Stop Br. 20. But the Commission made clear that, where Constitution has acquired the necessary property rights, whether through negotiated agreements or eminent domain, but has not yet received all necessary federal approvals, “Constitution may go so far as to survey and designate the bounds of an easement but no further, e.g., it cannot cut vegetation or disturb ground” Rehearing Order P 71, JA 88. Stop The Pipeline has acknowledged that the Commission has “forbidden any tree felling or disturbance of vegetation prior to [Constitution] obtaining a section 401 Water Quality Certification from New York State.” Stop The Pipeline Statement In Opposition at 1, JA 2242 (citing Rehearing Order P 71, JA 88) (filed Feb. 29, 2016).

In any event, to the extent Petitioners challenge tree-felling and other construction-related activities, those matters are not properly before this Court. *See* Catskill Br. 14-15, 18, 57-59; Stop Br. 7, 20-21. After the Rehearing Order, the Commission authorized limited tree-felling in Pennsylvania, where all necessary federal approvals had been obtained. *See supra* p. 20 (citing order). Neither Petitioner sought rehearing of that authorization, a statutory prerequisite to this Court’s review. 15 U.S.C. §§ 717r(a), (b); 18 C.F.R. § 385.1902 (governing requests for rehearing of delegated staff orders); *see Granholm ex rel. Michigan Dep’t of Nat. Res. v. FERC*, 180 F.3d 278, 280–81 (D.C. Cir. 1999) (“petition-for-rehearing requirement is mandatory”); *see also Murray Energy Corp. v. FERC*, 629 F.3d 231, 235 (D.C. Cir. 2011) (addressing appeal of delegated letter order and Commission rehearing order authorizing construction).

In New York, the Commission has not authorized tree-felling or ground-disturbing activities. On May 13, 2016, the Attorney General for the State of New York made a filing styled as a complaint and petition against Constitution, in which it alleges that Constitution authorized or condoned tree and vegetation cutting and other ground-disturbing activities within the right of way. On July 13, 2016, the Commission issued an order treating the New York Attorney General’s pleading as a request for investigation, and referring the request to Commission staff for further inquiry. *See Constitution Pipeline Co., LLC*, 156 FERC ¶ 61,035

(2016), JA 2362, *reh'g pending*. In that order, the Commission also reminded Constitution that it must comply with the Natural Gas Act, Commission regulations, and the terms of the Certificate Order, “or face potential sanctions.” *Id.* P 13, JA 2365; *see* Rehearing Order P 56, JA 83 (“If Constitution or Iroquois fails to comply with the conditions of the order, it is subject to sanctions and an assessment of civil penalties.”) (citing 15 U.S.C. § 717t-1)). In light of the Commission’s active consideration of these matters, any review by this Court would necessarily be premature. *See Occidental Chem. Corp. v. FERC*, 869 F.2d 127 (2d Cir. 1989) (dismissing appeal as unripe where Commission stayed the orders on review pending new rulemaking to address same issues).

Finally, Stop The Pipeline suggests that the Commission “assumed” that New York would issue a water quality certification and improperly relies on states to mitigate impacts on water quality. Stop Br. 18; *see also id.* at 20-22. Before the Commission, Stop The Pipeline argued that the Commission erred in failing to defer to the State on water quality issues. *See* Rehearing Order P 60, JA 84; Stop The Pipeline Rehearing Request at 8-11, R. 2648, JA 2026-29. The Commission’s orders strike the proper balance. Any terms and conditions of the water quality certification become terms and conditions of the Commission’s authorization by operation of law. Rehearing Order P 68, JA 87; *see also U.S. Dep’t of Interior v. FERC*, 952 F.2d 538, 548 (D.C. Cir. 1992) (“[W]e have no reason to doubt that

any valid conditions imposed by [the State] in its section 401 certificates must and will be respected by the Commission.”). To the extent Constitution is “required to materially modify its project to satisfy any conditions imposed by [New York], it would file a formal variance request with the Commission for any such modification.” Rehearing Order P 70, JA 88 (citing Final EIS at 2-31, JA 221). But, “[i]f an agency decides a project does not merit authorization—a decision the Commission is without authority to impact or alter—then the project cannot go forward.” *AES Sparrows Point*, 129 FERC ¶ 61,245, at P 67, *cited in* Rehearing Order P 65, JA 86; *see also Broadwater Energy*, 124 FERC ¶ 61,225, at P 58 (“state agencies retain full authority to grant or deny the specific requests”), *cited in* Rehearing Order P 65, JA 86.

V. THE COMMISSION WAS ENTITLED, CONSISTENT WITH THE NATURAL GAS ACT AND DUE PROCESS, TO EXPEND MORE THAN 30 DAYS IN ACTING ON REQUESTS FOR REHEARING OF ITS CERTIFICATE ORDER

A. Tolling Orders Comply With the Natural Gas Act

Parties aggrieved by a Commission order may apply for rehearing of that order within 30 days of issuance. 15 U.S.C. § 717r(a). Under section 19 of the Natural Gas Act, “unless the Commission acts upon the application for rehearing within 30 days after it is filed, such application” is deemed denied. *Id.* The Natural Gas Act further provides that a party cannot obtain judicial review of a Commission order unless that party has sought rehearing from the Commission.

Id. Significantly, the Natural Gas Act provides that the filing of a request for rehearing does not, unless specifically ordered by the Commission, stay the effectiveness of the Commission’s order; likewise, the commencement of judicial review does not, unless specifically ordered by the court, operate as a stay of the Commission’s order. *Id.* § 717r(c).

As the Commission explained, it routinely issues tolling orders within 30 days of applications for rehearing in order to afford it additional time necessary to fully consider matters raised on rehearing. Rehearing Order P 8, JA 64. This decades-old practice ensures that timely-filed rehearing requests will not be deemed denied by operation of law under section 19 of the Natural Gas Act and Rule 713 of the Commission’s Rules of Practice and Procedure. *Id.* (citing 15 U.S.C. § 717r(a); 18 C.F.R. § 385.713).

Stop The Pipeline argues broadly that the Commission’s use of tolling orders violates the Natural Gas Act. Stop Br. 38-40. However, as Stop The Pipeline obliquely acknowledges in a footnote (*see* Br. 39 n.6), at least three federal circuit courts of appeals have squarely rejected the contention that “act” means the Commission, when acting on rehearing, must act on the merits. “The statutory language [of an identical provision of the Federal Power Act] . . . although requiring FERC to ‘act’ within thirty days after filing . . . does not state, as the petitioner would have it, that FERC must ‘act on the merits.’” *Kokajko v. FERC*,

837 F.2d 524, 525 (1st Cir. 1988); *see also Cal. Co. v. FPC*, 411 F.2d 720, 721 (D.C. Cir. 1969) (holding that 15 U.S.C. § 717r(a) only requires the Commission to act upon the petition for rehearing – not to act on the merits); *Gen. Am. Oil Co. of Texas v. FPC*, 409 F.2d 597, 599 (5th Cir. 1969) (same). And a review of those cases indicates that at least three additional circuits have adopted the same approach. *See Cal. Co.*, 411 F.2d at 721 (finding that the Third, Ninth and Tenth Circuits reached a similar conclusion). Those courts reach the same result by holding that Commission tolling orders constitute a valid ‘act’ that satisfies the Natural Gas Act. *See Kokajko*, 837 F.2d at 524 (“at least two circuits, in reviewing [the Natural Gas Act,] have ruled that ‘tolling orders . . . are valid’”) (citing *Cal. Co.*, 411 F.2d 720; *Gen. Am.*, 409 F.2d 597).

In fact, courts have long accepted the Commission’s practice of using tolling orders. *See Cal. Co.*, 411 F.2d at 721-22 (holding that the Commission’s use of tolling orders is a “long standing” and “time honored interpretation” by the agency, and that the Commission “has the power to act on applications for rehearing beyond the 30-day period so long as it gives notice of [its] intent [through a tolling order]”). FERC’s interpretation of its authorizing statute on what it means to “act” within 30 days has been affirmed and is due deference. *See City of Arlington*, 133 S. Ct. at 1868 (“Statutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency.”)

(citing *Chevron*, 467 U.S. at 842-43); *see also New York v. FERC*, 783 F.3d 946, 953 (2d Cir. 2015) (explaining that the question on review of an agency’s statutory interpretation “is always, simply, whether the agency has stayed within the bounds of its statutory authority”) (quoting *City of Arlington*, 133 S. Ct. at 1868).

B. Tolling Orders Do Not Violate Due Process

Stop The Pipeline argues that, “[i]f FERC does not comply with statutory timeframes, the delay functions as a denial of due process because a party cannot petition for judicial review until FERC issues a final order.” Stop Br. 24 (citing 15 U.S.C. § 717r(a), (b)); *see also* Br. 37 (arguing that judicial review “should take place before eminent domain proceedings have been completed”). Yet what Stop The Pipeline seeks is entirely inconsistent with the Natural Gas Act. As stated above, Congress contemplated that the act of filing for rehearing and/or judicial review does not operate as an automatic stay of Commission orders. *See* 15 U.S.C. § 717r(c) (unless specifically ordered, rehearing and/or judicial review do not stay the effectiveness of Commission orders). The Natural Gas Act itself, 15 U.S.C. § 717f(h), confers the power of eminent domain on a certificate holder, *see supra* p. 9, and it is solely within the province of a court considering a request to grant eminent domain to determine if and when an eminent domain order should issue. *See* Rehearing Order P 72, JA 88 (eminent domain matters are for state or federal court); *see also Midcoast Interstate*, 198 F.3d at 973) (holding that “the

Commission does not have the discretion to deny a certificate holder the power of eminent domain”); *but see Mid-Atlantic Express, LLC v. Baltimore County, Md.*, 410 F. App’x 653, 657 (4th Cir. 2011) (acknowledging Commission may condition use of eminent domain authority). Therefore, a “*judicial* pre-deprivation hearing” (Br. 30 (emphasis in original)) that Stop The Pipeline seeks is plainly inconsistent with the process envisioned by Congress. *Cf.* Br. 35 (asserting that the NGA requires judicial review prior to taking of property), Br. 37 (arguing judicial review required to take place before eminent domain proceedings).

Congress envisioned a detailed FERC process, heard by a Commission of neutral arbiters, leading to an immediately effective Commission order. *See supra* pp. 13-19 (describing 2.5 year evidentiary process with multiple opportunities to be heard through written and oral comments); *see also* 42 U.S.C. § 7171(c) (each FERC Commissioner serves for a term of up to 5 years and is confirmed by the Senate, with no more than three Commissioners being from one political party). The combination of an extensive process at the Commission and the availability of appellate review fully satisfied due process. *See Krimstock v. Kelly*, 306 F.3d 40, 67 (2d Cir. 2002) (due process requires some kind of pre-deprivation or prompt post-deprivation hearing before a neutral judicial or administrative officer, at which some showing of the probable validity of the deprivation must be made); *see also Phillips v. Comm’r*, 283 U.S. 589, 596-97 (1931) (“Where only property

rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate”). Stop The Pipeline, like all parties to the FERC proceeding, received meaningful opportunity to make its objections. *See Myersville*, 783 F.3d at 1327 (due process objection to agency action on pipeline application is subject to prejudicial error rule; ability to make arguments prior to action on rehearing is sufficient); *Minisink*, 762 F.3d at 115 (same). And, notably, both Petitioners sought this Court’s early intervention in this proceeding – both unsuccessfully. *See Catskill Mountainkeeper, Inc. v. FERC*, No. 16-345 (2d Cir. Feb. 24, 2016) (denying motion for emergency stay of Project construction and tree-felling); *In re Stop The Pipeline*, No. 15-926 (2d Cir. Apr. 21, 2015) (denying emergency petition, filed under the All Writs Act, 28 U.S.C. § 1651, for stay of pipeline construction).

The Commission explained the special circumstances of natural gas infrastructure development in addressing Stop The Pipeline’s alternative due process argument, not raised here on appeal, that issuing a certificate conditioned on state water quality certifications does not violate due process. *See Rehearing Order PP 61, 71-72, JA 84, 88*. In particular, the Commission noted that although the pipeline can commence eminent domain proceedings, no construction is allowed on subject property “unless and until there is a favorable outcome on all

outstanding requests for necessary federal approvals, including a section 401 [Clean Water Act certification].” *Id.* P 71, JA 88. Additionally, a pipeline is required to compensate landowners for any property rights it acquires. *See id.* This process is necessary for the orderly development of necessary natural gas pipeline facilities. *See id.* P 72, JA 88 (explaining that delaying eminent domain proceedings could prevent project sponsors from obtaining access to property and to information necessary to satisfy conditions); *see also Constitution Pipeline Co., LLC v. A Permanent Easement for 1.80 Acres*, No. 3:14–CV–2049, 2015 WL 1638250, at *3 (N.D.N.Y. Feb. 23, 2015) (explaining that many of the environmental conditions in the Certificate Order can only be satisfied if Constitution has possession of the rights of way).

As the cases cited by Stop The Pipeline (Br. 23-37) demonstrate, “[d]ue process is flexible and calls for such procedural protections as the particular situation demands.” *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *see also Mathews v. Eldridge*, 424 U.S. 319, 343 (1976) (“ordinary principle . . . that something less than an evidentiary hearing is sufficient prior to adverse administrative action”). The significant administrative process before the Commission, combined with further process before other agencies with permitting authority and eminent domain proceedings, provide sufficient due process protections under these circumstances. *See Kokajko*, 837 F.2d at 525-26 (rejecting

argument that extending, in this manner, the time to act on a request for rehearing, in order to permit full consideration of arguments raised, violates due process).

CONCLUSION

For the foregoing reasons, the petitions for review should be denied and the challenged orders should be affirmed in all respects.

Respectfully submitted,

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Final Brief: October 17, 2016

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a), I certify that the Brief of Respondent Federal Energy Regulatory Commission uses a proportionally spaced typeface, Times New Roman, in 14 point font, and contains 20,704 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ Holly E. Cafer

Holly E. Cafer

Attorney for Federal Energy
Regulatory Commission

October 17, 2016

ADDENDUM A

PROJECT MAP

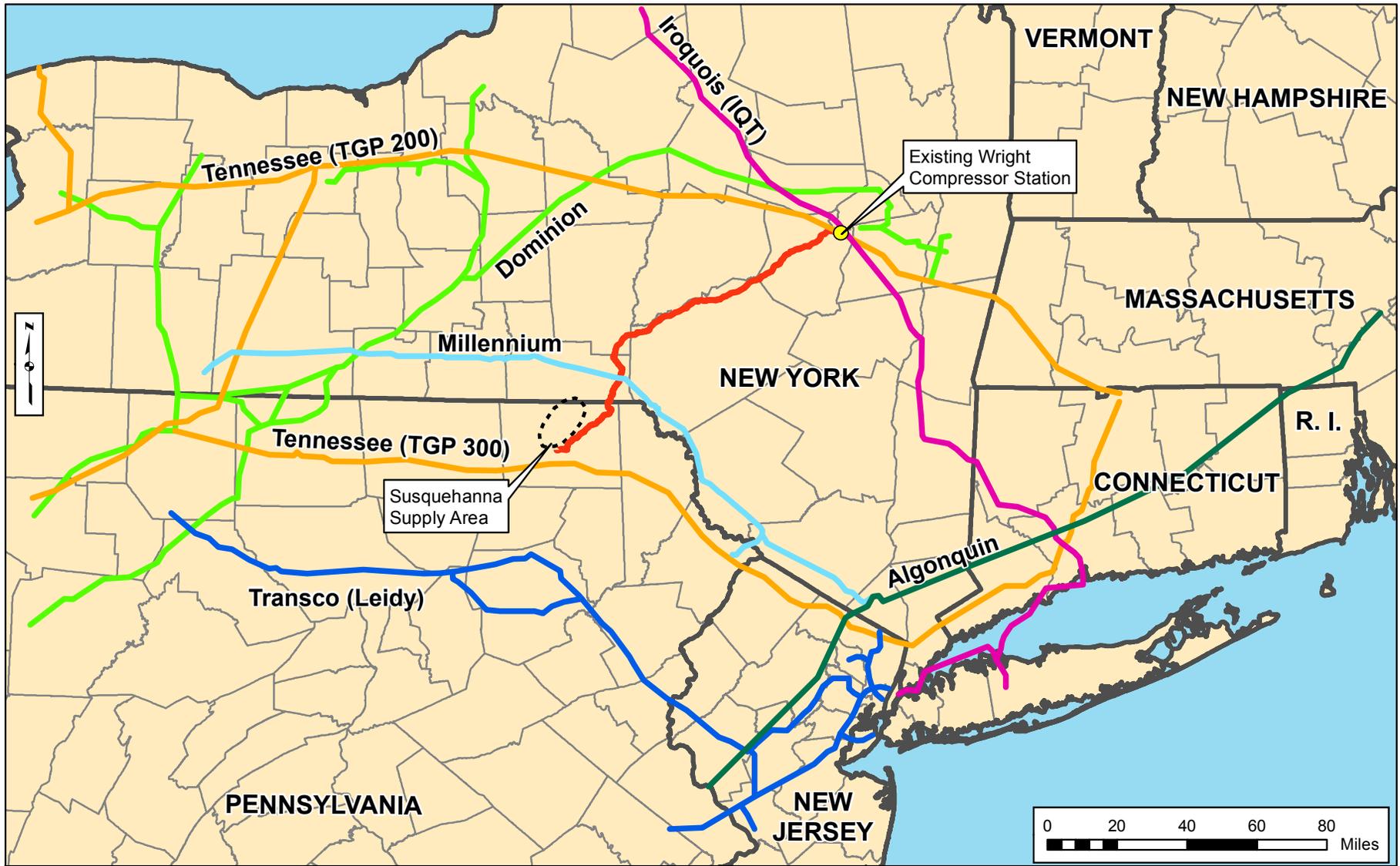


Figure 3.2.1-1
Constitution Pipeline Project
 Relative Location to Other Projects Overview Map

 Proposed Pipeline
 Susquehanna Supply Area

Source: Final EIS at 3-15, JA 239

ADDENDUM B

STATUTES AND REGULATIONS

TABLE OF CONTENTS

PAGE

STATUTES:

Administrative Procedure Act

5 U.S.C. § 706(2)(A) A-1

All Writs Act

28 U.S.C. § 1651 A-2

Clean Water Act

Section 401, 33 U.S.C. § 1341 A-3

Department of Energy Organization Act

42 U.S.C. § 7171 A-5

Natural Gas Act

Section 1, 15 U.S.C. § 717 A-7

Section 7, 15 U.S.C. § 717f A-8

Section 19, 15 U.S.C. § 717r A-10

Section 21, 15 U.S.C. § 717t-1 A-12

National Environmental Policy Act

42 U.S.C. § 4321 A-13

42 U.S.C. § 4332 A-15

TABLE OF CONTENTS

PAGE

REGULATIONS:

18 C.F.R. § 157.5..... A-17

18 C.F.R. § 157.6..... A-18

18 C.F.R. § 157.21..... A-21

18 C.F.R. § 385.713..... A-26

18 C.F.R. § 385.1902..... A-28

40 C.F.R. § 1501.4..... A-30

40 C.F.R. § 1508.8..... A-32

40 C.F.R. § 1508.25..... A-33

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

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
.....	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

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
.....	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

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
.....	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

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
.....	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.
- 802. Congressional disapproval procedure.
- 803. Special rule on statutory, regulatory, and judicial deadlines.

CHAPTER 111—GENERAL PROVISIONS

- Sec.
1651. Writs.
1652. State laws as rules of decision.
1653. Amendment of pleadings to show jurisdiction.
1654. Appearance personally or by counsel.
1655. Lien enforcement; absent defendants.
1656. Creation of new district or division or transfer of territory; lien enforcement.
1657. Priority of civil actions.
1658. Time limitations on the commencement of civil actions arising under Acts of Congress.
1659. Stay of certain actions pending disposition of related proceedings before the United States International Trade Commission.

AMENDMENTS

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

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

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

§ 1651. Writs

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

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

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

HISTORICAL AND REVISION NOTES

1948 ACT

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

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

Such section 342 provided:

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

Such section 376 provided:

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

Such section 377 provided:

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

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

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

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

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

1949 ACT

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

AMENDMENTS

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

WRIT OF ERROR

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

§ 1652. State laws as rules of decision

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

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

HISTORICAL REVISION NOTES

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

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

Changes were made in phraseology.

§ 1653. Amendment of pleadings to show jurisdiction

Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.

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

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §399 (Mar. 3, 1911, ch. 231, §274c, as added Mar. 3, 1915, ch. 90, 38 Stat. 956).

Section was extended to permit amendment of all jurisdictional allegations instead of merely allegations of diversity of citizenship as provided by section 399 of title 28, U.S.C., 1940 ed.

Changes were made in phraseology.

§ 1654. Appearance personally or by counsel

In all courts of the United States the parties may plead and conduct their own cases person-

“(7) while the cleanup of Boston Harbor will contribute significantly to improving the overall environmental quality of Massachusetts Bay, expanded efforts encompassing the entire ecosystem will be necessary to ensure its long-term health;

“(8) the concerted efforts of all levels of Government, the private sector, and the public at large will be necessary to protect and enhance the environmental integrity of Massachusetts Bay; and

“(9) the designation of Massachusetts Bay as an Estuary of National Significance and the development of a comprehensive plan for protecting and restoring the Bay may contribute significantly to its long-term health and environmental integrity.

“(b) PURPOSE.—The purpose of this title is to protect and enhance the environmental quality of Massachusetts Bay by providing for its designation as an Estuary of National Significance and by providing for the preparation of a comprehensive restoration plan for the Bay.

“SEC. 1005. FUNDING SOURCES.

“Within one year of enactment [Nov. 14, 1988], the Administrator of the United States Environmental Protection Agency and the Governor of Massachusetts shall undertake to identify and make available sources of funding to support activities pertaining to Massachusetts Bay undertaken pursuant to or authorized by section 320 of the Clean Water Act [33 U.S.C. 1330], and shall make every effort to coordinate existing research, monitoring or control efforts with such activities.”

PURPOSES AND POLICIES OF NATIONAL ESTUARY PROGRAM

Pub. L. 100-4, title III, §317(a), Feb. 4, 1987, 101 Stat. 61, provided that:

“(1) FINDINGS.—Congress finds and declares that—

“(A) the Nation’s estuaries are of great importance for fish and wildlife resources and recreation and economic opportunity;

“(B) maintaining the health and ecological integrity of these estuaries is in the national interest;

“(C) increasing coastal population, development, and other direct and indirect uses of these estuaries threaten their health and ecological integrity;

“(D) long-term planning and management will contribute to the continued productivity of these areas, and will maximize their utility to the Nation; and

“(E) better coordination among Federal and State programs affecting estuaries will increase the effectiveness and efficiency of the national effort to protect, preserve, and restore these areas.

“(2) PURPOSES.—The purposes of this section [enacting this section] are to—

“(A) identify nationally significant estuaries that are threatened by pollution, development, or overuse;

“(B) promote comprehensive planning for, and conservation and management of, nationally significant estuaries;

“(C) encourage the preparation of management plans for estuaries of national significance; and

“(D) enhance the coordination of estuarine research.”

SUBCHAPTER IV—PERMITS AND LICENSES

§ 1341. Certification

(a) Compliance with applicable requirements; application; procedures; license suspension

(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdic-

tion over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371(c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

(2) Upon receipt of such application and certification the licensing or permitting agency shall immediately notify the Administrator of such application and certification. Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after receipt of such notification, such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirements in such State, and within such sixty-day period notifies the Administrator and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing. The Administrator shall at such hearing submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency. Such agency, based upon the recommendations of such State, the Administrator, and upon any additional evidence, if any, presented to the agency at the hearing, shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.

(3) The certification obtained pursuant to paragraph (1) of this subsection with respect to the construction of any facility shall fulfill the

requirements of this subsection with respect to certification in connection with any other Federal license or permit required for the operation of such facility unless, after notice to the certifying State, agency, or Administrator, as the case may be, which shall be given by the Federal agency to whom application is made for such operating license or permit, the State, or if appropriate, the interstate agency or the Administrator, notifies such agency within sixty days after receipt of such notice that there is no longer reasonable assurance that there will be compliance with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title because of changes since the construction license or permit certification was issued in (A) the construction or operation of the facility, (B) the characteristics of the waters into which such discharge is made, (C) the water quality criteria applicable to such waters or (D) applicable effluent limitations or other requirements. This paragraph shall be inapplicable in any case where the applicant for such operating license or permit has failed to provide the certifying State, or, if appropriate, the interstate agency or the Administrator, with notice of any proposed changes in the construction or operation of the facility with respect to which a construction license or permit has been granted, which changes may result in violation of section 1311, 1312, 1313, 1316, or 1317 of this title.

(4) Prior to the initial operation of any federally licensed or permitted facility or activity which may result in any discharge into the navigable waters and with respect to which a certification has been obtained pursuant to paragraph (1) of this subsection, which facility or activity is not subject to a Federal operating license or permit, the licensee or permittee shall provide an opportunity for such certifying State, or, if appropriate, the interstate agency or the Administrator to review the manner in which the facility or activity shall be operated or conducted for the purposes of assuring that applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated. Upon notification by the certifying State, or if appropriate, the interstate agency or the Administrator that the operation of any such federally licensed or permitted facility or activity will violate applicable effluent limitations or other limitations or other water quality requirements such Federal agency may, after public hearing, suspend such license or permit. If such license or permit is suspended, it shall remain suspended until notification is received from the certifying State, agency, or Administrator, as the case may be, that there is reasonable assurance that such facility or activity will not violate the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(5) Any Federal license or permit with respect to which a certification has been obtained under paragraph (1) of this subsection may be suspended or revoked by the Federal agency issuing such license or permit upon the entering of a judgment under this chapter that such facility or activity has been operated in violation of the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(6) Except with respect to a permit issued under section 1342 of this title, in any case

where actual construction of a facility has been lawfully commenced prior to April 3, 1970, no certification shall be required under this subsection for a license or permit issued after April 3, 1970, to operate such facility, except that any such license or permit issued without certification shall terminate April 3, 1973, unless prior to such termination date the person having such license or permit submits to the Federal agency which issued such license or permit a certification and otherwise meets the requirements of this section.

(b) Compliance with other provisions of law setting applicable water quality requirements

Nothing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements. The Administrator shall, upon the request of any Federal department or agency, or State or interstate agency, or applicant, provide, for the purpose of this section, any relevant information on applicable effluent limitations, or other limitations, standards, regulations, or requirements, or water quality criteria, and shall, when requested by any such department or agency or State or interstate agency, or applicant, comment on any methods to comply with such limitations, standards, regulations, requirements, or criteria.

(c) Authority of Secretary of the Army to permit use of spoil disposal areas by Federal licensees or permittees

In order to implement the provisions of this section, the Secretary of the Army, acting through the Chief of Engineers, is authorized, if he deems it to be in the public interest, to permit the use of spoil disposal areas under his jurisdiction by Federal licensees or permittees, and to make an appropriate charge for such use. Moneys received from such licensees or permittees shall be deposited in the Treasury as miscellaneous receipts.

(d) Limitations and monitoring requirements of certification

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

(June 30, 1948, ch. 758, title IV, §401, as added Pub. L. 92-500, §2, Oct. 18, 1972, 86 Stat. 877; amended Pub. L. 95-217, §§61(b), 64, Dec. 27, 1977, 91 Stat. 1598, 1599.)

AMENDMENTS

1977—Subsec. (a). Pub. L. 95-217 inserted reference to section 1313 of this title in pars. (1), (3), (4), and (5), struck out par. (6) which provided that no Federal

565, as amended, known as the Department of Energy Organization Act, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 7101 of this title and Tables.

AMENDMENTS

1999—Pub. L. 106-65 struck out subsec. (a) designation before “The Division of Naval Reactors”, substituted “Under Secretary for Nuclear Security” for “Assistant Secretary to whom the Secretary has assigned the function listed in section 7133(a)(2)(E) of this title”, and struck out subsec. (b) which read as follows: “The Division of Military Application, established by section 2035 of this title, and the functions of the Energy Research and Development Administration with respect to the Military Liaison Committee, established by section 2037 of this title, are transferred to the Department under the Assistant Secretary to whom the Secretary has assigned those functions listed in section 7133(a)(5) of this title, and such organizational units shall be deemed to be organizational units established by this chapter.”

EFFECTIVE DATE OF 1999 AMENDMENT

Amendment by Pub. L. 106-65 effective Mar. 1, 2000, see section 3299 of Pub. L. 106-65, set out as an Effective Date note under section 2401 of Title 50, War and National Defense.

TRANSFER OF FUNCTIONS

All national security functions and activities performed immediately before Oct. 5, 1999, by the Office of Naval Reactors transferred to the Administrator for Nuclear Security of the National Nuclear Security Administration of the Department of Energy, and the Deputy Administrator for Naval Reactors of the Administration to be assigned the responsibilities, authorities, and accountability for all functions of the Office of Naval Reactors under Executive Order No. 12344, set out as a note under section 2511 of Title 50, War and National Defense, see sections 2406 and 2481 of Title 50.

Pub. L. 98-525, title XVI, §1634, Oct. 19, 1984, 98 Stat. 2649, which was formerly set out as a note under this section, was renumbered section 4101 of Pub. L. 107-314, the Bob Stump National Defense Authorization Act for Fiscal Year 2003, by Pub. L. 108-136, div. C, title XXXI, §3141(d)(2), Nov. 24, 2003, 117 Stat. 1757, and is set out as a note under section 2511 of Title 50, War and National Defense.

§ 7159. Transfer to Department of Transportation

Notwithstanding section 7151(a) of this title, there are transferred to, and vested in, the Secretary of Transportation all of the functions vested in the Administrator of the Federal Energy Administration by section 6361(b)(1)(B) of this title.

(Pub. L. 95-91, title III, §310, Aug. 4, 1977, 91 Stat. 582.)

SUBCHAPTER IV—FEDERAL ENERGY REGULATORY COMMISSION

§ 7171. Appointment and administration

(a) Federal Energy Regulatory Commission; establishment

There is established within the Department an independent regulatory commission to be known as the Federal Energy Regulatory Commission.

(b) Composition; term of office; conflict of interest; expiration of terms

(1) The Commission shall be composed of five members appointed by the President, by and

with the advice and consent of the Senate. One of the members shall be designated by the President as Chairman. Members shall hold office for a term of 5 years and may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office. Not more than three members of the Commission shall be members of the same political party. Any Commissioner appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the remainder of such term. A Commissioner may continue to serve after the expiration of his term until his successor is appointed and has been confirmed and taken the oath of Office, except that such Commissioner shall not serve beyond the end of the session of the Congress in which such term expires. Members of the Commission shall not engage in any other business, vocation, or employment while serving on the Commission.

(2) Notwithstanding the third sentence of paragraph (1), the terms of members first taking office after April 11, 1990, shall expire as follows:

(A) In the case of members appointed to succeed members whose terms expire in 1991, one such member's term shall expire on June 30, 1994, and one such member's term shall expire on June 30, 1995, as designated by the President at the time of appointment.

(B) In the case of members appointed to succeed members whose terms expire in 1992, one such member's term shall expire on June 30, 1996, and one such member's term shall expire on June 30, 1997, as designated by the President at the time of appointment.

(C) In the case of the member appointed to succeed the member whose term expires in 1993, such member's term shall expire on June 30, 1998.

(c) Duties and responsibilities of Chairman

The Chairman shall be responsible on behalf of the Commission for the executive and administrative operation of the Commission, including functions of the Commission with respect to (1) the appointment and employment of hearing examiners in accordance with the provisions of title 5, (2) the selection, appointment, and fixing of the compensation of such personnel as he deems necessary, including an executive director, (3) the supervision of personnel employed by or assigned to the Commission, except that each member of the Commission may select and supervise personnel for his personal staff, (4) the distribution of business among personnel and among administrative units of the Commission, and (5) the procurement of services of experts and consultants in accordance with section 3109 of title 5. The Secretary shall provide to the Commission such support and facilities as the Commission determines it needs to carry out its functions.

(d) Supervision and direction of members, employees, or other personnel of Commission

In the performance of their functions, the members, employees, or other personnel of the Commission shall not be responsible to or subject to the supervision or direction of any officer, employee, or agent of any other part of the Department.

(e) Designation of Acting Chairman; quorum; seal

The Chairman of the Commission may designate any other member of the Commission as Acting Chairman to act in the place and stead of the Chairman during his absence. The Chairman (or the Acting Chairman in the absence of the Chairman) shall preside at all sessions of the Commission and a quorum for the transaction of business shall consist of at least three members present. Each member of the Commission, including the Chairman, shall have one vote. Actions of the Commission shall be determined by a majority vote of the members present. The Commission shall have an official seal which shall be judicially noticed.

(f) Rules

The Commission is authorized to establish such procedural and administrative rules as are necessary to the exercise of its functions. Until changed by the Commission, any procedural and administrative rules applicable to particular functions over which the Commission has jurisdiction shall continue in effect with respect to such particular functions.

(g) Powers of Commission

In carrying out any of its functions, the Commission shall have the powers authorized by the law under which such function is exercised to hold hearings, sign and issue subpoenas, administer oaths, examine witnesses, and receive evidence at any place in the United States it may designate. The Commission may, by one or more of its members or by such agents as it may designate, conduct any hearing or other inquiry necessary or appropriate to its functions, except that nothing in this subsection shall be deemed to supersede the provisions of section 556 of title 5 relating to hearing examiners.

(h) Principal office of Commission

The principal office of the Commission shall be in or near the District of Columbia, where its general sessions shall be held, but the Commission may sit anywhere in the United States.

(i) Commission deemed agency; attorney for Commission

For the purpose of section 552b of title 5, the Commission shall be deemed to be an agency. Except as provided in section 518 of title 28, relating to litigation before the Supreme Court, attorneys designated by the Chairman of the Commission may appear for, and represent the Commission in, any civil action brought in connection with any function carried out by the Commission pursuant to this chapter or as otherwise authorized by law.

(j) Annual authorization and appropriation request

In each annual authorization and appropriation request under this chapter, the Secretary shall identify the portion thereof intended for the support of the Commission and include a statement by the Commission (1) showing the amount requested by the Commission in its budgetary presentation to the Secretary and the Office of Management and Budget and (2) an assessment of the budgetary needs of the Commis-

sion. Whenever the Commission submits to the Secretary, the President, or the Office of Management and Budget, any legislative recommendation or testimony, or comments on legislation, prepared for submission to Congress, the Commission shall concurrently transmit a copy thereof to the appropriate committees of Congress.

(Pub. L. 95-91, title IV, § 401, Aug. 4, 1977, 91 Stat. 582; Pub. L. 101-271, § 2(a), (b), Apr. 11, 1990, 104 Stat. 135.)

REFERENCES IN TEXT

This chapter, referred to in subsecs. (i) and (j), was in the original "this Act", meaning Pub. L. 95-91, Aug. 4, 1977, 91 Stat. 565, as amended, known as the Department of Energy Organization Act, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 7101 of this title and Tables.

AMENDMENTS

1990—Subsec. (b). Pub. L. 101-271 designated existing provisions as par. (1), substituted "5 years" for "four years", struck out after third sentence "The terms of the members first taking office shall expire (as designated by the President at the time of appointment), two at the end of two years, two at the end of three years, and one at the end of four years.", substituted "A Commissioner may continue to serve after the expiration of his term until his successor is appointed and has been confirmed and taken the oath of Office, except that such Commissioner shall not serve beyond the end of the session of the Congress in which such term expires." for "A Commissioner may continue to serve after the expiration of his term until his successor has taken office, except that he may not so continue to serve for more than one year after the date on which his term would otherwise expire under this subsection.", and added par. (2).

EFFECTIVE DATE OF 1990 AMENDMENT

Pub. L. 101-271, § 2(c), Apr. 11, 1990, 104 Stat. 136, provided that: "The amendments made by this section [amending this section] apply only to persons appointed or reappointed as members of the Federal Energy Regulatory Commission after the date of enactment of this Act [Apr. 11, 1990]."

RENEWABLE ENERGY AND ENERGY CONSERVATION INCENTIVES

Pub. L. 101-549, title VIII, § 808, Nov. 15, 1990, 104 Stat. 2690, provided that:

"(a) DEFINITION.—For purposes of this section, 'renewable energy' means energy from photovoltaic, solar thermal, wind, geothermal, and biomass energy production technologies.

"(b) RATE INCENTIVES STUDY.—Within 18 months after enactment [Nov. 15, 1990], the Federal Energy Regulatory Commission, in consultation with the Environmental Protection Agency, shall complete a study which calculates the net environmental benefits of renewable energy, compared to nonrenewable energy, and assigns numerical values to them. The study shall include, but not be limited to, environmental impacts on air, water, land use, water use, human health, and waste disposal.

"(c) MODEL REGULATIONS.—In conjunction with the study in subsection (b), the Commission shall propose one or more models for incorporating the net environmental benefits into the regulatory treatment of renewable energy in order to provide economic compensation for those benefits.

"(d) REPORT.—The Commission shall transmit the study and the model regulations to Congress, along with any recommendations on the best ways to reward renewable energy technologies for their environmental

Sec.	
717a.	Definitions.
717b.	Exportation or importation of natural gas; LNG terminals.
717b-1.	State and local safety considerations.
717c.	Rates and charges.
717c-1.	Prohibition on market manipulation.
717d.	Fixing rates and charges; determination of cost of production or transportation.
717e.	Ascertainment of cost of property.
717f.	Construction, extension, or abandonment of facilities.
717g.	Accounts; records; memoranda.
717h.	Rates of depreciation.
717i.	Periodic and special reports.
717j.	State compacts for conservation, transpor- tation, etc., of natural gas.
717k.	Officials dealing in securities.
717l.	Complaints.
717m.	Investigations by Commission.
717n.	Process coordination; hearings; rules of pro- cedure.
717o.	Administrative powers of Commission; rules, regulations, and orders.
717p.	Joint boards.
717q.	Appointment of officers and employees.
717r.	Rehearing and review.
717s.	Enforcement of chapter.
717t.	General penalties.
717t-1.	Civil penalty authority.
717t-2.	Natural gas market transparency rules.
717u.	Jurisdiction of offenses; enforcement of li- abilities and duties.
717v.	Separability.
717w.	Short title.
717x.	Conserved natural gas.
717y.	Voluntary conversion of natural gas users to heavy fuel oil.
717z.	Emergency conversion of utilities and other facilities.

§ 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, regulation, 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

(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 Feb-

ruary 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 application 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. (1)(B) and added 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 accounts, records, and memoranda of natural-gas companies; and it shall be the duty of such natural-gas companies to furnish to the Commission,

Commission is authorized, under such rules and regulations as it shall prescribe, to hold joint hearings with any State commission in connection with any matter with respect to which the Commission is authorized to act. The Commission is authorized in the administration of this chapter to avail itself of such cooperation, services, records, and facilities as may be afforded by any State commission.

(c) Information and reports available to State commissions

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

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

§ 717q. Appointment of officers and employees

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

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

CODIFICATION

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

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

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

“Chapter 51 and subchapter III of chapter 53 of title 5” substituted in text for “the Classification Act of

1949, as amended” on authority of Pub. L. 89-554, §7(b), Sept. 6, 1966, 80 Stat. 631, the first section of which enacted Title 5.

AMENDMENTS

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

REPEALS

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

§ 717r. Rehearing and review

(a) Application for rehearing; time

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

(b) Review of Commission order

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported

by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which is supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission order

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

(d) Judicial review

(1) In general

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

(2) Agency delay

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

(3) Court action

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

(4) Commission action

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

(5) Expedited review

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

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

REFERENCES IN TEXT

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

CODIFICATION

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

AMENDMENTS

2005—Subsec. (d). Pub. L. 109-58 added subsec. (d).
1958—Subsec. (a). Pub. L. 85-791, §19(a), inserted sentence providing that until record in a proceeding has been filed in a court of appeals, Commission may modify or set aside any finding or order issued by it.

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

CHANGE OF NAME

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

§ 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, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices or concerning apparent violations of the Federal antitrust laws to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings.

(b) Mandamus

Upon application of the Commission the district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this chapter or any rule, regulation, or order of the Commission thereunder.

(c) Employment of attorneys by Commission

The Commission may employ such attorneys as it finds necessary for proper legal aid and service of the Commission or its members in the conduct of their work, or for proper representation of the public interest in investigations made by it, or cases or proceedings pending before it, whether at the Commission's own instance or upon complaint, or to appear for or represent the Commission in any case in court; and the expenses of such employment shall be paid out of the appropriation for the Commission.

(d) Violation of market manipulation provisions

In any proceedings under subsection (a), the court may prohibit, conditionally or unconditionally, and permanently or for such period of time as the court determines, any individual who is engaged or has engaged in practices constituting a violation of section 717c-1 of this title (including related rules and regulations) from—

- (1) acting as an officer or director of a natural gas company; or
- (2) engaging in the business of—
 - (A) the purchasing or selling of natural gas; or
 - (B) the purchasing or selling of transmission services subject to the jurisdiction of the Commission.

(June 21, 1938, ch. 556, § 20, 52 Stat. 832; June 25, 1948, ch. 646, § 1, 62 Stat. 875, 895; Pub. L. 109-58, title III, § 318, Aug. 8, 2005, 119 Stat. 693.)

CODIFICATION

The words “the District Court of the United States for the District of Columbia” in subsec. (a) following “district court of the United States” and in subsec. (b) following “district courts of the United States” omitted as superfluous in view of section 132(a) of Title 28, Judiciary and Judicial Procedure, which states that “There shall be in each judicial district a district court which shall be a court of record known as the United States District Court for the district”, and section 88 of title 28 which states that “The District of Columbia constitutes one judicial district”.

AMENDMENTS

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

§ 717t. General penalties

(a) Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished by a fine of not more than \$1,000,000 or by imprisonment for not more than 5 years, or both.

(b) Any person who willfully and knowingly violates any rule, regulation, restriction, condition, or order made or imposed by the Commission under authority of this chapter, shall, in addition to any other penalties provided by law, be punished upon conviction thereof by a fine of not exceeding \$50,000 for each and every day during which such offense occurs.

(June 21, 1938, ch. 556, § 21, 52 Stat. 833; Pub. L. 109-58, title III, § 314(a)(1), Aug. 8, 2005, 119 Stat. 690.)

AMENDMENTS

2005—Subsec. (a). Pub. L. 109-58, § 314(a)(1)(A), substituted “\$1,000,000” for “\$5,000” and “5 years” for “two years”.

Subsec. (b). Pub. L. 109-58, § 314(a)(1)(B), substituted “\$50,000” for “\$500”.

§ 717t-1. Civil penalty authority

(a) In general

Any person that violates this chapter, or any rule, regulation, restriction, condition, or order made or imposed by the Commission under authority of this chapter, shall be subject to a civil penalty of not more than \$1,000,000 per day per violation for as long as the violation continues.

(b) Notice

The penalty shall be assessed by the Commission after notice and opportunity for public hearing.

(c) Amount

In determining the amount of a proposed penalty, the Commission shall take into consideration the nature and seriousness of the violation and the efforts to remedy the violation.

(June 21, 1938, ch. 556, § 22, as added Pub. L. 109-58, title III, § 314(b)(1)(B), Aug. 8, 2005, 119 Stat. 691.)

PRIOR PROVISIONS

A prior section 22 of act June 21, 1938, was renumbered section 24 and is classified to section 717u of this title.

§ 717t-2. Natural gas market transparency rules

(a) In general

(1) The Commission is directed to facilitate price transparency in markets for the sale or transportation of physical natural gas in interstate commerce, having due regard for the public interest, the integrity of those markets, fair competition, and the protection of consumers.

Congress shall consider the amount of any funds received by the Commission in addition to those funds appropriated to it by the Congress.

(Pub. L. 86-380, §9, as added Pub. L. 89-733, §6, Nov. 2, 1966, 80 Stat. 1162.)

CODIFICATION

Section was formerly classified to section 2379 of Title 5 prior to the general revision and enactment of Title 5, Government Organization and Employees, by Pub. L. 89-554, §1, Sept. 6, 1966, 80 Stat. 378.

CHAPTER 54—CABINET COMMITTEE ON OPPORTUNITIES FOR SPANISH-SPEAKING PEOPLE

§§ 4301 to 4312. Omitted

CODIFICATION

Sections 4301 to 4312 of this title, Pub. L. 91-181, §§1-12, Dec. 30, 1969, 83 Stat. 838, were omitted pursuant to section 4312 of this title which provided that Pub. L. 91-181 shall expire five years after Dec. 30, 1969.

Section 4301, Pub. L. 91-181, §1, Dec. 30, 1969, 83 Stat. 838, related to Congressional declaration of purpose.

Section 4302, Pub. L. 91-181, §2, Dec. 30, 1969, 83 Stat. 838, related to establishment of Cabinet Committee on Opportunities for Spanish-Speaking People, its composition, appointment of Chairman.

Section 4303, Pub. L. 91-181, §3, Dec. 30, 1969, 83 Stat. 838, related to functions of Committee.

Section 4304, Pub. L. 91-181, §4, Dec. 30, 1969, 83 Stat. 839, related to administrative powers of the Committee.

Section 4305, Pub. L. 91-181, §5, Dec. 30, 1969, 83 Stat. 839, related to utilization of services and facilities of governmental agencies.

Section 4306, Pub. L. 91-181, §6, Dec. 30, 1969, 83 Stat. 839, related to compensation of personnel and transfer of personnel from other Federal departments and agencies.

Section 4307, Pub. L. 91-181, §7, Dec. 30, 1969, 83 Stat. 839, related to establishment of an Advisory Council on Spanish-Speaking Americans.

Section 4308, Pub. L. 91-181, §8, Dec. 30, 1969, 83 Stat. 840, related to nonimpairment of existing powers of other Federal departments and agencies.

Section 4309, Pub. L. 91-181, §9, Dec. 30, 1969, 93 Stat. 840, related to restrictions on political activities of Committee and Advisory Council.

Section 4310, Pub. L. 91-181, §10, Dec. 30, 1969, 83 Stat. 840; Pub. L. 92-122, Aug. 16, 1971, 85 Stat. 342, related to authorization of appropriations.

Section 4311, Pub. L. 91-181, §11, Dec. 30, 1969, 83 Stat. 840, related to submission of reports to the President and Congress.

Section 4312, Pub. L. 91-181, §12, Dec. 30, 1969, 83 Stat. 840, provided that this chapter shall expire five years after Dec. 30, 1969.

CHAPTER 55—NATIONAL ENVIRONMENTAL POLICY

- Sec.
4321. Congressional declaration of purpose.
- SUBCHAPTER I—POLICIES AND GOALS**
4331. Congressional declaration of national environmental policy.
4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts.
- 4332a. Accelerated decisionmaking in environmental reviews.
4333. Conformity of administrative procedures to national environmental policy.
4334. Other statutory obligations of agencies.
4335. Efforts supplemental to existing authorizations.

Sec.

SUBCHAPTER II—COUNCIL ON ENVIRONMENTAL QUALITY

4341. Omitted.
4342. Establishment; membership; Chairman; appointments.
4343. Employment of personnel, experts and consultants.
4344. Duties and functions.
4345. Consultation with Citizens' Advisory Committee on Environmental Quality and other representatives.
4346. Tenure and compensation of members.
- 4346a. Travel reimbursement by private organizations and Federal, State, and local governments.
- 4346b. Expenditures in support of international activities.
4347. Authorization of appropriations.

SUBCHAPTER III—MISCELLANEOUS PROVISIONS

- 4361, 4361a. Repealed.
- 4361b. Implementation by Administrator of Environmental Protection Agency of recommendations of "CHESS" Investigative Report; waiver; inclusion of status of implementation requirements in annual revisions of plan for research, development, and demonstration.
- 4361c. Staff management.
4362. Interagency cooperation on prevention of environmental cancer and heart and lung disease.
- 4362a. Membership of Task Force on Environmental Cancer and Heart and Lung Disease.
4363. Continuing and long-term environmental research and development.
- 4363a. Pollution control technologies demonstrations.
4364. Expenditure of funds for research and development related to regulatory program activities.
4365. Science Advisory Board.
4366. Identification and coordination of research, development, and demonstration activities.
- 4366a. Omitted.
4367. Reporting requirements of financial interests of officers and employees of Environmental Protection Agency.
4368. Grants to qualified citizens groups.
- 4368a. Utilization of talents of older Americans in projects of pollution prevention, abatement, and control.
- 4368b. General assistance program.
4369. Miscellaneous reports.
- 4369a. Reports on environmental research and development activities of Agency.
4370. Reimbursement for use of facilities.
- 4370a. Assistant Administrators of Environmental Protection Agency; appointment; duties.
- 4370b. Availability of fees and charges to carry out Agency programs.
- 4370c. Environmental Protection Agency fees.
- 4370d. Percentage of Federal funding for organizations owned by socially and economically disadvantaged individuals.
- 4370e. Working capital fund in Treasury.
- 4370f. Availability of funds after expiration of period for liquidating obligations.
- 4370g. Availability of funds for uniforms and certain services.
- 4370h. Availability of funds for facilities.

§ 4321. Congressional declaration of purpose

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will pre-

vent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

(Pub. L. 91-190, §2, Jan. 1, 1970, 83 Stat. 852.)

SHORT TITLE

Section 1 Pub. L. 91-190 provided: "That this Act [enacting this chapter] may be cited as the 'National Environmental Policy Act of 1969'."

TRANSFER OF FUNCTIONS

Enforcement functions of Secretary or other official in Department of the Interior related to compliance with system activities requiring coordination and approval under this chapter, and enforcement functions of Secretary or other official in Department of Agriculture, insofar as they involve lands and programs under jurisdiction of that Department, related to compliance with this chapter 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(e), (f), 203(a), 44 F.R. 33663, 33666, 93 Stat. 1373, 1376, effective July 1, 1979, set out in the Appendix to Title 5, Government Organization and Employees. 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 Title 15, Commerce and Trade. Functions and authority vested in Secretary of Energy subsequently transferred to Federal Coordinator for Alaska Natural Gas Transportation Projects by section 720d(f) of Title 15.

EMERGENCY PREPAREDNESS FUNCTIONS

For assignment of certain emergency preparedness functions to Administrator of Environmental Protection Agency, see Parts 1, 2, and 16 of Ex. Ord. No. 12656, Nov. 18, 1988, 53 F.R. 47491, set out as a note under section 5195 of this title.

ENVIRONMENTAL PROTECTION AGENCY HEADQUARTERS

Pub. L. 112-237, §2, Dec. 28, 2012, 126 Stat. 1628, provided that:

"(a) *Redesignation.*—The Environmental Protection Agency Headquarters located at 1200 Pennsylvania Avenue N.W. in Washington, D.C., known as the Ariel Rios Building, shall be known and redesignated as the 'William Jefferson Clinton Federal Building'.

"(b) *References.*—Any reference in a law, map, regulation, document, paper, or other record of the United States to the Environmental Protection Agency Headquarters referred to in subsection (a) shall be deemed to be a reference to the 'William Jefferson Clinton Federal Building'."

MODIFICATION OR REPLACEMENT OF EXECUTIVE ORDER No. 13423

Pub. L. 111-117, div. C, title VII, §742(b), Dec. 16, 2009, 123 Stat. 3216, provided that: "Hereafter, the President may modify or replace Executive Order No. 13423 [set out as a note under this section] if the President determines that a revised or new executive order will achieve equal or better environmental or energy efficiency results."

Pub. L. 111-8, div. D, title VII, §748, Mar. 11, 2009, 123 Stat. 693, which provided that Ex. Ord. No. 13423 (set out as a note under this section) would remain in effect on and after Mar. 11, 2009, except as otherwise provided

by law after Mar. 11, 2009, was repealed by Pub. L. 111-117, div. C, title VII, §742(a), Dec. 16, 2009, 123 Stat. 3216.

NECESSITY OF MILITARY LOW-LEVEL FLIGHT TRAINING TO PROTECT NATIONAL SECURITY AND ENHANCE MILITARY READINESS

Pub. L. 106-398, §1 [[div. A], title III, §317], Oct. 30, 2000, 114 Stat. 1654, 1654A-57, provided that: "Nothing in the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) or the regulations implementing such law shall require the Secretary of Defense or the Secretary of a military department to prepare a programmatic, nation-wide environmental impact statement for low-level flight training as a precondition to the use by the Armed Forces of an airspace for the performance of low-level training flights."

POLLUTION PROSECUTION

Pub. L. 101-593, title II, Nov. 16, 1990, 104 Stat. 2962, provided that:

"SEC. 201. SHORT TITLE.

"This title may be cited as the 'Pollution Prosecution Act of 1990'.

"SEC. 202. EPA OFFICE OF CRIMINAL INVESTIGATION.

"(a) The Administrator of the Environmental Protection Agency (hereinafter referred to as the 'Administrator') shall increase the number of criminal investigators assigned to the Office of Criminal Investigations by such numbers as may be necessary to assure that the number of criminal investigators assigned to the office—

"(1) for the period October 1, 1991, through September 30, 1992, is not less than 72;

"(2) for the period October 1, 1992, through September 30, 1993, is not less than 110;

"(3) for the period October 1, 1993, through September 30, 1994, is not less than 123;

"(4) for the period October 1, 1994, through September 30, 1995, is not less than 160;

"(5) beginning October 1, 1995, is not less than 200.

"(b) For fiscal year 1991 and in each of the following 4 fiscal years, the Administrator shall, during each such fiscal year, provide increasing numbers of additional support staff to the Office of Criminal Investigations.

"(c) The head of the Office of Criminal Investigations shall be a position in the competitive service as defined in 2102 of title 5 U.S.C. or a career reserve [reserved] position as defined in 3132(A) [3132(a)] of title 5 U.S.C. and the head of such office shall report directly, without intervening review or approval, to the Assistant Administrator for Enforcement.

"SEC. 203. CIVIL INVESTIGATORS.

"The Administrator, as soon as practicable following the date of the enactment of this Act [Nov. 16, 1990], but no later than September 30, 1991, shall increase by fifty the number of civil investigators assigned to assist the Office of Enforcement in developing and prosecuting civil and administrative actions and carrying out its other functions.

"SEC. 204. NATIONAL TRAINING INSTITUTE.

"The Administrator shall, as soon as practicable but no later than September 30, 1991 establish within the Office of Enforcement the National Enforcement Training Institute. It shall be the function of the Institute, among others, to train Federal, State, and local lawyers, inspectors, civil and criminal investigators, and technical experts in the enforcement of the Nation's environmental laws.

"SEC. 205. AUTHORIZATION.

"For the purposes of carrying out the provisions of this Act [probably should be "this title"], there is authorized to be appropriated to the Environmental Protection Agency \$13,000,000 for fiscal year 1991, \$18,000,000

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

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

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

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

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

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

COMMISSION ON POPULATION GROWTH AND THE AMERICAN FUTURE

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

EXECUTIVE ORDER NO. 11507

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

EXECUTIVE ORDER NO. 11752

Ex. Ord. No. 11752, Dec. 17, 1973, 38 F.R. 34793, which related to the prevention, control, and abatement of

environmental pollution at Federal facilities, was revoked by Ex. Ord. No. 12088, Oct. 13, 1978, 43 F.R. 47707, set out as a note under section 4321 of this title.

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

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

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

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

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

(i) the environmental impact of the proposed action,

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

(iii) alternatives to the proposed action,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

AMENDMENTS

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

CERTAIN COMMERCIAL SPACE LAUNCH ACTIVITIES

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

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

tional Environmental Policy Act of 1969 (42 U.S.C. 4332(C)) if—

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

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

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

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

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

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

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

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

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

(i) facilitates cooperative conservation;

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

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

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

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

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

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

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

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

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

GEORGE W. BUSH.

Federal Energy Regulatory Commission

§ 157.5

Subpart C [Reserved]

Subpart D—Exemption of Natural Gas Service for Drilling, Testing, or Purging from Certificate Requirements

157.53 Testing.

Subpart E [Reserved]

Subpart F—Interstate Pipeline Blanket Certificates and Authorization Under Section 7 of the Natural Gas Act for Certain Transactions and Abandonment

- 157.201 Applicability.
- 157.202 Definitions.
- 157.203 Blanket certification.
- 157.204 Application procedure.
- 157.205 Notice procedure.
- 157.206 Standard conditions.
- 157.207 General reporting requirements.
- 157.208 Construction, acquisition, operation, replacement, and miscellaneous rearrangement of facilities.
- 157.209 Temporary compression facilities.
- 157.210 Mainline natural gas facilities.
- 157.211 Delivery points.
- 157.212 Synthetic and liquefied natural gas facilities.
- 157.213 Underground storage field facilities.
- 157.214 Increase in storage capacity.
- 157.215 Underground storage testing and development.
- 157.216 Abandonment.
- 157.217 Changes in rate schedules.
- 157.218 Changes in customer name.

APPENDIX I TO SUBPART F OF PART 157—PROCEDURES FOR COMPLIANCE WITH THE ENDANGERED SPECIES ACT OF 1973 UNDER §157.206(b)(3)(i)

APPENDIX II TO SUBPART F OF PART 157—PROCEDURES FOR COMPLIANCE WITH THE NATIONAL HISTORIC PRESERVATION ACT OF 1966 UNDER §157.206(b)(3)(ii)

Subpart G—Natural Gas Producer Blanket Authorization for Sales and Abandonment [Reserved]

AUTHORITY: 15 U.S.C. 717–717z.

Subpart A—Applications for Certificates of Public Convenience and Necessity and for Orders Permitting and Approving Abandonment under Section 7 of the Natural Gas Act, as Amended, Concerning Any Operation, Sales, Service, Construction, Extension, Acquisition or Abandonment

§ 157.1 Definitions.

For the purposes of this part—

For the purposes of §157.21 of this part, *Director* means the Director of the Commission's Office of Energy Projects.

Indian tribe means, in reference to a proposal or application for a certificate or abandonment, an Indian tribe which is recognized by treaty with the United States, by federal statute, or by the U.S. Department of the Interior in its periodic listing of tribal governments in the FEDERAL REGISTER in accordance with 25 CFR 83.6(b), and whose legal rights as a tribe may be affected by the proposed construction, operation or abandonment of facilities or services (as where the construction or operation of the proposed facilities could interfere with the tribe's hunting or fishing rights or where the proposed facilities would be located within the tribe's reservation).

Resource agency means a Federal, state, or interstate agency exercising administration over the areas of recreation, fish and wildlife, water resource management, or cultural or other relevant resources of the state or states in which the facilities or services for which a certificate or abandonment is proposed are or will be located.

[Order 608, 64 FR 51220, Sept. 22, 1999, as amended by Order 665, 70 FR 60440, Oct. 18, 2005]

§ 157.5 Purpose and intent of rules.

(a) Applications under section 7 of the Natural Gas Act shall set forth all information necessary to advise the

Commission fully concerning the operation, sales, service, construction, extension, or acquisition for which a certificate is requested or the abandonment for which permission and approval is requested. Some applications may be of such character that an abbreviated application may be justified under the provisions of §157.7. Applications for permission and approval to abandon pursuant to section 7(b) of the Act shall conform to §157.18 and to such other requirements of this part as may be pertinent. However, every applicant shall file all pertinent data and information necessary for a full and complete understanding of the proposed project, including its effect upon applicant's present and future operations and whether, and at what docket, applicant has previously applied for authorization to serve any portion of the market contemplated by the proposed project and the nature and disposition of such other project.

(b) Every requirement of this part shall be considered as a forthright obligation of the applicant which can only be avoided by a definite and positive showing that the information or data called for by the applicable rules is not necessary for the consideration and ultimate determination of the application.

(c) This part will be strictly applied to all applications as submitted and the burden of adequate presentation in intelligible form as well as justification for omitted data or information rests with the applicant.

[17 FR 7386, Aug. 14, 1952, as amended by Order 280, 29 FR 4876, Apr. 7, 1964]

§ 157.6 Applications; general requirements.

(a) *Applicable rules*—(1) *Submission required to be furnished by applicant under this subpart.* Applications, amendments thereto, and all exhibits and other submissions required to be furnished by an applicant to the Commission under this subpart must be submitted in an original and 7 conformed copies. To the extent that data required under this subpart has been provided to the Commission, this data need not be duplicated. The applicant must, however, include a statement identifying the forms and records containing the required infor-

mation and when that form or record was submitted.

(2) *Maps and diagrams.* An applicant required to submit a map or diagram under this subpart must submit one paper copy of the map or diagram.

(3) The following must be submitted in electronic format as prescribed by the Commission:

(i) Applications filed under this part 157 and all attached exhibits;

(ii) Applications covering acquisitions and all attached exhibits;

(iii) Applications for temporary certificates and all attached exhibits;

(iv) Applications to abandon facilities or services and all attached exhibits;

(v) The progress reports required under §157.20(c) and (d);

(vi) Applications submitted under subpart E of this part and all attached exhibits;

(vii) Applications submitted under subpart F of this part and all attached exhibits;

(viii) Requests for authorization under the notice procedures established in §157.205 and all attached exhibits;

(ix) The annual report required by §157.207;

(x) The report required under §157.214 when storage capacity is increased;

(xi) Amendments to any of the foregoing.

(4) All filings must be signed in compliance with the following.

(i) The signature on a filing constitutes a certification that: The signer has read the filing signed and knows the contents of the paper copies and electronic filing; the paper copies contain the same information as contained in the electronic filing; the contents as stated in the copies and in the electronic filing are true to the best knowledge and belief of the signer; and the signer possesses full power and authority to sign the filing.

(ii) A filing must be signed by one of the following:

(A) The person on behalf of whom the filing is made;

(B) An officer, agent, or employee of the governmental authority, agency, or instrumentality on behalf of which the filing is made; or,

(C) A representative qualified to practice before the Commission under

§ 385.2101 of this chapter who possesses authority to sign.

(5) *Other requirements.* Applications under section 7 of the Natural Gas Act must conform to the requirements of §§ 157.5 through 157.14. Amendments to or withdrawals of applications must conform to the requirements of §§ 385.215 and 385.216 of this chapter. If the application involves an acquisition of facilities, it must conform to the additional requirements prescribed in §§ 157.15 and 157.16. If the application involves an abandonment of facilities or service, it must conform to the additional requirements prescribed in § 157.18.

(b) *General content of application.* Each application filed other than an application for permission and approval to abandon pursuant to section 7(b) shall set forth the following information:

(1) The exact legal name of applicant; its principal place of business; whether an individual, partnership, corporation, or otherwise; State under the laws of which organized or authorized; and the name, title, and mailing address of the person or persons to whom communications concerning the application are to be addressed.

(2) The facts relied upon by applicant to show that the proposed service, sale, operation, construction, extension, or acquisition is or will be required by the present or future public convenience and necessity.

(3) A concise description of applicant's existing operations.

(4) A concise description of the proposed service, sale, operation, construction, extension, or acquisition, including the proposed dates for the beginning and completion of construction, the commencement of operations and of acquisition, where involved.

(5) A full statement as to whether any other application to supplement or effectuate applicant's proposals must be or is to be filed by applicant, any of applicant's customers, or any other person, with any other Federal, State, or other regulatory body; and if so, the nature and status of each such application.

(6) A table of contents which shall list all exhibits and documents filed in compliance with §§ 157.5 through 157.18,

as well as all other documents and exhibits otherwise filed, identifying them by their appropriate titles and alphabetical letter designations. The alphabetical letter designations specified in §§ 157.14, 157.16, and 157.18 must be strictly adhered to and extra exhibits submitted at the volition of applicant shall be designated in sequence under the letter Z (Z1, Z2, Z3, etc.).

(7) A form of notice of the application suitable for publication in the FEDERAL REGISTER in accordance with the specifications in § 385.203(d) of this chapter.

(8) For applications to construct new facilities, detailed cost-of-service data supporting the cost of the expansion project, a detailed study showing the revenue responsibility for each firm rate schedule under the pipeline's currently effective rate design and under the pipeline's proposed rates, a detailed rate impact analysis by rate schedule (including by zone, if applicable), and an analysis reflecting the impact of the fuel usage resulting from the proposed expansion project (including by zone, if applicable).

(c) *Requests for shortened procedure.* If shortened procedure is desired a request therefor shall be made in conformity with § 385.802 of this chapter and may be included in the application or filed separately.

(d) *Landowner notification.* (1) For all applications filed under this subpart which include construction of facilities or abandonment of facilities (except for abandonment by sale or transfer where the easement will continue to be used for transportation of natural gas), the applicant shall make a good faith effort to notify all affected landowners and towns, communities, and local, state and federal governments and agencies involved in the project:

(i) By certified or first class mail, sent within 3 business days following the date the Commission issues a notice of the application; or

(ii) By hand, within the same time period; and

(iii) By publishing notice twice of the filing of the application, no later than 14 days after the date that a docket number is assigned to the application, in a daily or weekly newspaper of general circulation in each county in which the project is located.

(2) All affected landowners includes owners of property interests, as noted in the most recent county/city tax records as receiving the tax notice, whose property:

(i) Is directly affected (*i.e.*, crossed or used) by the proposed activity, including all facility sites (including compressor stations, well sites, and all above-ground facilities), rights of way, access roads, pipe and contractor yards, and temporary workspace;

(ii) Abuts either side of an existing right-of-way or facility site owned in fee by any utility company, or abuts the edge of a proposed facility site or right-of-way which runs along a property line in the area in which the facilities would be constructed, or contains a residence within 50 feet of the proposed construction work area;

(iii) Is within one-half mile of proposed compressors or their enclosures or LNG facilities; or

(iv) Is within the area of proposed new storage fields or proposed expansions of storage fields, including any applicable buffer zone.

(3) The notice shall include:

(i) The docket number of the filing;

(ii) The most recent edition of the Commission's pamphlet that explains the Commission's certificate process and addresses the basic concerns of landowners. Except: pipelines are not required to include the pamphlet in notifications of abandonments or in the published newspaper notice. Instead, they should provide the title of the pamphlet and indicate its availability at the Commission's Internet address;

(iii) A description of the applicant and the proposed project, its location (including a general location map), its purpose, and the timing of the project;

(iv) A general description of what the applicant will need from the landowner if the project is approved, and how the landowner may contact the applicant, including a local or toll-free phone number and a name of a specific person to contact who is knowledgeable about the project;

(v) A brief summary of what rights the landowner has at the Commission and in proceedings under the eminent domain rules of the relevant state. Except: pipelines are not required to include this information in the published

newspaper notice. Instead, the newspaper notice should provide the Commission's Internet address and the telephone number for the Commission's Office of External Affairs; and

(vi) Information on how the landowner can get a copy of the application from the company or the location(s) where a copy of the application may be found as specified in §157.10.

(vii) A copy of the Commission's notice of application, specifically stating the date by which timely motions to intervene are due, together with the Commission's information sheet on how to intervene in Commission proceedings. Except: pipelines are not required to include the notice of application and information sheet in the published newspaper notice. Instead, the newspaper notice should indicate that a separate notice is to be mailed to affected landowners and governmental entities.

(4) If the notice is returned as undeliverable, the applicant will make a reasonable attempt to find the correct address and notify the landowner.

(5) Within 30 days of the date the application was filed, applicant shall file an updated list of affected landowners, including information concerning notices that were returned as undeliverable.

(6) If paragraph (d)(3) of this section requires an applicant to reveal Critical Energy Infrastructure Information (CEII), as defined by §388.113(c) of this chapter, to any person, the applicant shall follow the procedures set out in §157.10(d).

[17 FR 7386, Aug. 14, 1952]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting §157.6, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at www.fdsys.gov.

§ 157.7 Abbreviated applications.

(a) *General.* When the operations sales, service, construction, extensions, acquisitions or abandonment proposed by an application do not require all the data and information specified by this part to disclose fully the nature and extent of the proposed undertaking, an abbreviated application may be filed in the manner prescribed in §385.2011 of this chapter, provided it contains all

Federal Energy Regulatory Commission

§ 157.21

the issue date of the Commission's order issuing the certificate. Applicant shall notify the Commission in writing no later than 10 days after expiration of this time period that the end-user/shipper is unable to meet the imposed timetable to commence service.

(c) Applicant must file with the Commission, in writing and under oath, an original and four conformed copies, as prescribed in §385.2011 of this chapter and, upon request must furnish an intervener with a single copy, of the following:

(1) Within ten days after the bona fide beginning of construction, notice of the date of such beginning;

(2) Within ten days after authorized facilities have been constructed and placed in service or any authorized operation, sale, or service has commenced, notice of the date of such placement and commencement and

(3) Within six months after authorized facilities have been constructed, a statement showing, on the basis of all costs incurred to that date and estimated to be incurred for final completion of the project, the cost of constructing authorized facilities, such total costs to be classified according to the estimates submitted in the certificate proceeding and compared therewith and any significant differences explained.

(d) With respect to an acquisition authorized by the certificate, applicant must file with the Commission, in writing and under oath, an original and four conformed copies as prescribed in §385.2011 of this chapter the following:

(1) Within 10 days after acquisition and the beginning of authorized operations, notice of the dates of acquisition and the beginning of operations; and

(2) Within 10 days after authorized facilities have been constructed and within 10 days after such facilities have been placed in service or any authorized operation, sale, or service has commenced, notice of the date of such completion, placement, and commencement, and

(e) The certificate issued to applicant is not transferable in any manner and shall be effective only so long as applicant continues the operations authorized by the order issuing such certifi-

cate and in accordance with the provisions of the Natural Gas Act, as well as applicable rules, regulations, and orders of the Commission.

(f) In the interest of safety and reliability of service, facilities authorized by the certificate shall not be operated at pressures exceeding the maximum operating pressure set forth in Exhibit G-II to the application as it may be amended prior to issuance of the certificate. In the event the applicant thereafter wishes to change such maximum operating pressure it shall file an appropriate petition for amendment of the certificate. Such petition shall include the reasons for the proposed change. Nothing contained herein authorizes a natural gas company to operate any facility at a pressure above the maximum prescribed by state law, if such law requires a lower pressure than authorized hereby.

(Sec. 20, 52 Stat. 832; 15 U.S.C. 717s)

[17 FR 7389, Aug. 14, 1952, as amended by Order 280, 29 FR 4879, Apr. 7, 1964; Order 317, 31 FR 432, Jan. 13, 1966; Order 324, 31 FR 9348, July 8, 1966; Order 493, 53 FR 15030, Apr. 27, 1988; Order 493-B, 53 FR 49653, Dec. 9, 1988; Order 603, 64 FR 26606, May 14, 1999]

§157.21 Pre-filing procedures and review process for LNG terminal facilities and other natural gas facilities prior to filing of applications.

(a) *LNG terminal facilities and related jurisdictional natural gas facilities.* A prospective applicant for authorization to site, construct and operate facilities included within the definition of "LNG terminal," as defined in §153.2(d), and any prospective applicant for related jurisdictional natural gas facilities must comply with this section's pre-filing procedures and review process. These mandatory pre-filing procedures also shall apply when the Director finds in accordance with paragraph (e)(2) of this section that prospective modifications to an existing LNG terminal are modifications that involve significant state and local safety considerations that have not been previously addressed. Examples of such modifications include, but are not limited to, the addition of LNG storage tanks; increasing throughput requiring additional tanker arrivals or the use of larger vessels; or changing the purpose

of the facility from peaking to base load. When a prospective applicant is required by this paragraph to comply with this section's pre-filing procedures:

(1) The prospective applicant must make a filing containing the material identified in paragraph (d) of this section and concurrently file a Letter of Intent pursuant to 33 CFR 127.007, and a Preliminary Waterway Suitability Assessment (WSA) with the U.S. Coast Guard (Captain of the Port/Federal Maritime Security Coordinator). The latest information concerning the documents to be filed with the Coast Guard should be requested from the U.S. Coast Guard. For modifications to an existing or approved LNG terminal, this requirement can be satisfied by the prospective applicant's certifying that the U.S. Coast Guard did not require such information.

(2) An application:

(i) Shall not be filed until at least 180 days after the date that the Director issues notice pursuant to paragraph (e) of this section of the commencement of the prospective applicant's pre-filing process; and

(ii) Shall contain all the information specified by the Commission staff after reviewing the draft materials filed by the prospective applicant during the pre-filing process, including required environmental material in accordance with the provisions of part 380 of this chapter, "Regulations Implementing the National Environmental Policy Act."

(3) The prospective applicant must provide sufficient information for the pre-filing review of any pipeline or other natural gas facilities, including facilities not subject to the Commission's Natural Gas Act jurisdiction, which are necessary to transport regassified LNG from the subject LNG terminal facilities to the existing natural gas pipeline infrastructure.

(b) *Other natural gas facilities.* When a prospective applicant for authorization for natural gas facilities is not required by paragraph (a) of this section to comply with this section's pre-filing procedures, the prospective applicant may file a request seeking approval to use the pre-filing procedures.

(1) A request to use the pre-filing procedures must contain the material identified in paragraph (d) of this section unless otherwise specified by the Director as a result of the Initial Consultation required pursuant to paragraph (c) of this subsection; and

(2) If a prospective applicant for non-LNG terminal facilities is approved to use this section's pre-filing procedures:

(i) The application will normally not be filed until at least 180 days after the date that the Director issues notice pursuant to paragraph (e)(3) of this section approving the prospective applicant's request to use the pre-filing procedures under this section and commencing the prospective applicant's pre-filing process. However, a prospective applicant approved by the Director pursuant to paragraph (e)(3) of this section to undertake the pre-filing process is not prohibited from filing an application at an earlier date, if necessary; and

(ii) The application shall contain all the information specified by the Commission staff after reviewing the draft materials filed by the prospective applicant during the pre-filing process, including required environmental material in accordance with the provisions of part 380 of this chapter, "Regulations Implementing the National Environmental Policy Act."

(c) *Initial consultation.* A prospective applicant required or potentially required or requesting to use the pre-filing process must first consult with the Director on the nature of the project, the content of the pre-filing request, and the status of the prospective applicant's progress toward obtaining the information required for the pre-filing request described in paragraph (d) of this section. This consultation will also include discussion of the specifications for the applicant's solicitation for prospective third-party contractors to prepare the environmental documentation for the project, and whether a third-party contractor is likely to be needed for the project.

(d) *Contents of the initial filing.* A prospective applicant's initial filing pursuant to paragraph (a)(1) of the section for LNG terminal facilities and related jurisdictional natural gas facilities or paragraph (b)(1) of this section for

other natural gas facilities shall include the following information:

(1) A description of the schedule desired for the project including the expected application filing date and the desired date for Commission approval.

(2) For LNG terminal facilities, a description of the zoning and availability of the proposed site and marine facility location.

(3) For natural gas facilities other than LNG terminal facilities and related jurisdictional natural gas facilities, an explanation of why the prospective applicant is requesting to use the pre-filing process under this section.

(4) A detailed description of the project, including location maps and plot plans to scale showing all major plant components, that will serve as the initial discussion point for stakeholder review.

(5) A list of the relevant federal and state agencies in the project area with permitting requirements. For LNG terminal facilities, the list shall identify the agency designated by the governor of the state in which the project will be located to consult with the Commission regarding state and local safety considerations. The filing shall include a statement indicating:

(i) That those agencies are aware of the prospective applicant's intention to use the pre-filing process (including contact names and telephone numbers);

(ii) Whether the agencies have agreed to participate in the process;

(iii) How the applicant has accounted for agency schedules for issuance of federal authorizations; and

(iv) When the applicant proposes to file with these agencies for their respective permits or other authorizations.

(6) A list and description of the interest of other persons and organizations who have been contacted about the project (including contact names and telephone numbers).

(7) A description of what work has already been done, *e.g.*, contacting stakeholders, agency consultations, project engineering, route planning, environmental and engineering contractor engagement, environmental surveys/studies, and open houses. This description shall also include the identification of

the environmental and engineering firms and sub-contractors under contract to develop the project.

(8) For LNG terminal projects, proposals for at least three prospective third-party contractors from which Commission staff may make a selection to assist in the preparation of the requisite NEPA document.

(9) For natural gas facilities other than LNG terminal facilities and related jurisdictional natural gas facilities, proposals for at least three prospective third-party contractors from which Commission staff may make a selection to assist in the preparation of the requisite NEPA document, or a proposal for the submission of an applicant-prepared draft Environmental Assessment as determined during the initial consultation described in paragraph (c) of this section.

(10) Acknowledgement that a complete Environmental Report and complete application are required at the time of filing.

(11) A description of a Public Participation Plan which identifies specific tools and actions to facilitate stakeholder communications and public information, including a project website and a single point of contact. This plan shall also describe how the applicant intends to respond to requests for information from federal and state permitting agencies, including, if applicable, the governor's designated agency for consultation regarding state and local safety considerations with respect to LNG facilities.

(12) Certification that a Letter of Intent and a Preliminary WSA have been submitted to the U.S. Coast Guard or, for modifications to an existing or approved LNG terminal, that the U.S. Coast Guard did not require such information.

(e) *Director's notices.* (1) When the Director finds that a prospective applicant for authority to site and construct a new LNG terminal has adequately addressed the requirements of paragraphs (a), (c) and (d) of this section, the Director shall issue a notice of such finding. Such notice shall designate the third-party contractor. The pre-filing process shall be deemed to have commenced on the date of the Director's notice, and the date of such

notice shall be used in determining whether the date an application is filed is at least 180 days after commencement of the pre-filing process.

(2) When the Director finds that a prospective applicant for authority to make modifications to an existing or approved LNG terminal has adequately addressed the requirements of paragraphs (a), (c) and (d) of this section, the Director shall issue a notice making a determination whether prospective modifications to an existing LNG terminal shall be subject to this section's pre-filing procedures and review process. Such notice shall designate the third-party contractor, if appropriate. If the Director determines that the prospective modifications are significant modifications that involve state and local safety considerations, the Director's notice will state that the pre-filing procedures shall apply, and the pre-filing process shall be deemed to have commenced on the date of the Director's notice in determining whether the date an application is filed is at least 180 days after commencement of the pre-filing process.

(3) When a prospective applicant requests to use this section's pre-filing procedures and review for facilities not potentially subject to this section's mandatory requirements, the Director shall issue a notice approving or disapproving use of the pre-filing procedures of this section and determining whether the prospective applicant has adequately addressed the requirements of paragraphs (b), (c) and (d) of this section. Such notice shall designate the third-party contractor, if appropriate. The pre-filing process shall be deemed to have commenced on the date of the Director's notice, and the date of such notice shall be used in determining whether the date an application is filed is at least 180 days after commencement of the pre-filing process.

(f) Upon the Director's issuance of a notice commencing a prospective applicant's pre-filing process, the prospective applicant must:

(1) Within seven days and after consultation with Commission staff, establish the dates and locations at which the prospective applicant will conduct open houses and meetings with stake-

holders (including agencies) and Commission staff.

(2) Within 14 days, conclude the contract with the selected third-party contractor.

(3) Within 14 days, contact all stakeholders not already informed about the project, including all affected landowners as defined in paragraph §157.6(d)(2) of this section.

(4) Within 30 days, submit a stakeholder mailing list to Commission staff.

(5) Within 30 days, file a draft of Resource Report 1, in accordance with §380.12(c), and a summary of the alternatives considered or under consideration.

(6) On a monthly basis, file status reports detailing the applicant's project activities including surveys, stakeholder communications, and agency meetings.

(7) Be prepared to provide a description of the proposed project and to answer questions from the public at the scoping meetings held by OEP staff.

(8) Be prepared to attend site visits and other stakeholder and agency meetings arranged by the Commission staff, as required.

(9) Within 14 days of the end of the scoping comment period, respond to issues raised during scoping.

(10) Within 60 days of the end of the scoping comment period, file draft Resource Reports 1 through 12.

(11) At least 60 days prior to filing an application, file revised draft Resource Reports 1 through 12, if requested by Commission staff.

(12) At least 90 days prior to filing an application, file draft Resource Report 13 (for LNG terminal facilities).

(13) Certify that a Follow-on WSA will be submitted to the U.S. Coast Guard no later than the filing of an application with the Commission (for LNG terminal facilities and modifications thereto, if appropriate). The applicant shall certify that the U.S. Coast Guard has indicated that a Follow-On WSA is not required, if appropriate.

(g) Commission staff and third-party contractor involvement during the pre-filing process will be designed to fit each project and will include some or all of the following:

(1) Assisting the prospective applicant in developing initial information about the proposal and identifying affected parties (including landowners, agencies, and other interested parties).

(2) Issuing an environmental scoping notice and conducting such scoping for the proposal.

(3) Facilitating issue identification and resolution.

(4) Conducting site visits, examining alternatives, meeting with agencies and stakeholders, and participating in the prospective applicant's public information meetings.

(5) Reviewing draft Resource Reports.

(6) Initiating the preparation of a preliminary Environmental Assessment or Draft Environmental Impact Statement, the preparation of which may involve cooperating agency review.

(h) A prospective applicant using the pre-filing procedures of this section shall comply with the procedures in §388.112 of this chapter for the submission of documents containing privileged materials or critical energy infrastructure information.

[Order 665, 70 FR 60440, Oct. 18, 2005, as amended by Order 756, 77 FR 4894, Feb. 1, 2012; Order 769, 77 FR 65475, Oct. 29, 2012]

§ 157.22 Schedule for final decisions on a request for a Federal authorization

For an application under section 3 or 7 of the Natural Gas Act that requires a Federal authorization—*i.e.*, a permit, special use authorization, certification, opinion, or other approval—from a Federal agency or officer, or State agency or officer acting pursuant to delegated Federal authority, a final decision on a request for a Federal authorization is due no later than 90 days after the Commission issues its final environmental document, unless a schedule is otherwise established by Federal law.

[Order 687, 71 FR 62921, Oct. 27, 2006]

Subpart B—Open Seasons for Alaska Natural Gas Transportation Projects

SOURCE: Order 2005, 70 FR 8286, Feb. 18, 2005, unless otherwise noted.

§ 157.30 Purpose.

This subpart establishes the procedures for conducting open seasons for the purpose of making binding commitments for the acquisition of initial or voluntary expansion capacity on Alaska natural gas transportation projects, as defined herein.

§ 157.31 Definitions.

(a) “Alaska natural gas transportation project” means any natural gas pipeline system that carries Alaska natural gas to the international border between Alaska and Canada (including related facilities subject to the jurisdiction of the Commission) that is authorized under the Alaska Natural Gas Transportation Act of 1976 or section 103 of the Alaska Natural Gas Pipeline Act.

(b) “Commission” means the Federal Energy Regulatory Commission.

(c) “Voluntary expansion” means any expansion in capacity of an Alaska natural gas transportation project above the initial certificated capacity, including any increase in mainline capacity, any extension of mainline pipeline facilities, and any lateral pipeline facilities beyond those certificated in the initial certificate order, voluntarily made by the pipeline. An expansion done pursuant to section 105 of the Alaska Natural Gas Pipeline Act is not a voluntary expansion.

§ 157.32 Applicability.

These regulations shall apply to any application to the Commission for a certificate of public convenience and necessity or other authorization for an Alaska natural gas transportation project, whether filed pursuant to the Natural Gas Act, the Alaska Natural Gas Transportation Act of 1976, or the Alaska Natural Gas Pipeline Act, and to applications for expansion of such projects. Absent a Commission order to the contrary, these regulations are not applicable in the case of an expansion ordered by the Commission pursuant to section 105 of the Alaska Natural Gas Pipeline Act.

§ 157.33 Requirement for open season.

(a) Any application for a certificate of public convenience and necessity or

Federal Energy Regulatory Commission

§ 385.713

(d) *Failure to take exceptions results in waiver*—(1) *Complete waiver*. If a participant does not file a brief on exceptions within the time permitted under this section, any objection to the initial decision by the participant is waived.

(2) *Partial waiver*. If a participant does not object to a part of an initial decision in a brief on exceptions, any objections by the participant to that part of the initial decision are waived.

(3) *Effect of waiver*. Unless otherwise ordered by the Commission for good cause shown, a participant who has waived objections under paragraph (d)(1) or (d)(2) of this section to all or part of an initial decision may not raise such objections before the Commission in oral argument or on rehearing.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 375, 49 FR 21316, May 21, 1984; Order 575, 60 FR 4860, Jan. 25, 1995]

§ 385.712 Commission review of initial decisions in the absence of exceptions (Rule 712).

(a) *General rule*. If no briefs on exceptions to an initial decision are filed within the time established by rule or order under Rule 711, the Commission may, within 10 days after the expiration of such time, issue an order staying the effectiveness of the decision pending Commission review.

(b) *Briefs and argument*. When the Commission reviews a decision under this section, the Commission may require that participants file briefs or present oral arguments on any issue.

(c) *Effect of review*. After completing review under this section, the Commission will issue a decision which is final for purposes of rehearing under Rule 713.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 375, 49 FR 21316, May 21, 1984; Order 575, 60 FR 4860, Jan. 25, 1995]

§ 385.713 Request for rehearing (Rule 713).

(a) *Applicability*. (1) This section applies to any request for rehearing of a final Commission decision or other final order, if rehearing is provided for by statute, rule, or order.

(2) For the purposes of rehearing under this section, a final decision in any proceeding set for hearing under

subpart E of this part includes any Commission decision:

(i) On exceptions taken by participants to an initial decision;

(ii) When the Commission presides at the reception of the evidence;

(iii) If the initial decision procedure has been waived by consent of the participants in accordance with Rule 710;

(iv) On review of an initial decision without exceptions under Rule 712; and

(v) On any other action designated as a final decision by the Commission for purposes of rehearing.

(3) For the purposes of rehearing under this section, any initial decision under Rule 709 is a final Commission decision after the time provided for Commission review under Rule 712, if there are no exceptions filed to the decision and no review of the decision is initiated under Rule 712.

(b) *Time for filing; who may file*. A request for rehearing by a party must be filed not later than 30 days after issuance of any final decision or other final order in a proceeding.

(c) *Content of request*. Any request for rehearing must:

(1) State concisely the alleged error in the final decision or final order;

(2) Conform to the requirements in Rule 203(a), which are applicable to pleadings, and, in addition, include a separate section entitled “Statement of Issues,” listing each issue in a separately enumerated paragraph that includes representative Commission and court precedent on which the party is relying; any issue not so listed will be deemed waived; and

(3) Set forth the matters relied upon by the party requesting rehearing, if rehearing is sought based on matters not available for consideration by the Commission at the time of the final decision or final order.

(d) *Answers*. (1) The Commission will not permit answers to requests for rehearing.

(2) The Commission may afford parties an opportunity to file briefs or present oral argument on one or more issues presented by a request for rehearing.

(e) *Request is not a stay*. Unless otherwise ordered by the Commission, the filing of a request for rehearing does

§ 385.714

not stay the Commission decision or order.

(f) *Commission action on rehearing.* Unless the Commission acts upon a request for rehearing within 30 days after the request is filed, the request is denied.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 375, 49 FR 21316, May 21, 1984; Order 575, 60 FR 4860, Jan. 25, 1995; 60 FR 16567, Mar. 31, 1995; Order 663, 70 FR 55725, Sept. 23, 2005; 71 FR 14642, Mar. 23, 2006]

§ 385.714 Certified questions (Rule 714).

(a) *General rule.* During any proceeding, a presiding officer may certify or, if the Commission so directs, will certify, to the Commission for consideration and disposition any question arising in the proceeding, including any question of law, policy, or procedure.

(b) *Notice.* A presiding officer will notify the participants of the certification of any question to the Commission and of the date of any certification. Any such notification may be given orally during the hearing session or by order.

(c) *Presiding officer's memorandum; views of the participants.* (1) A presiding officer should solicit, to the extent practicable, the oral or written views of the participants on any question certified under this section.

(2) The presiding officer must prepare a memorandum which sets forth the relevant issues, discusses all the views of participants, and recommends a disposition of the issues.

(3) The presiding officer must append to any question certified under this section the written views submitted by the participants, the transcript pages containing oral views, and the memorandum of the presiding officer.

(d) *Return of certified question to presiding officer.* If the Commission does not act on any certified question within 30 days after receipt of the certification under paragraph (a) of this section, the question is deemed returned to the presiding officer for decision in accordance with the other provisions of this subpart.

(e) *Certification not suspension.* Unless otherwise directed by the Commission or the presiding officer, certification

18 CFR Ch. I (4-1-16 Edition)

under this section does not suspend the proceeding.

§ 385.715 Interlocutory appeals to the Commission from rulings of presiding officers (Rule 715).

(a) *General rule.* A participant may not appeal to the Commission any ruling of a presiding officer during a proceeding, unless the presiding officer under paragraph (b) of this section, or the motions Commissioner, under paragraph (c) of this section, finds extraordinary circumstances which make prompt Commission review of the contested ruling necessary to prevent detriment to the public interest or irreparable harm to any person.

(b) *Motion to the presiding officer to permit appeal.* (1) Any participant in a proceeding may, during the proceeding, move that the presiding officer permit appeal to the Commission from a ruling of the presiding officer. The motion must be made within 15 days of the ruling of the presiding officer and must state why prompt Commission review is necessary under the standards of paragraph (a) of this section

(2) Upon receipt of a motion to permit appeal under subparagraph (a)(1) of this section, the presiding officer will determine, according to the standards of paragraph (a) of this section, whether to permit appeal of the ruling to the Commission. The presiding officer need not consider any answer to this motion.

(3) Any motion to permit appeal to the Commission of an order issued under Rule 604, or appeal of a ruling under paragraph (a) or (b) of Rule 905, must be granted by the presiding officer.

(4) A presiding officer must issue an order, orally or in writing, containing the determination made under paragraph (b)(2) of this section, including the date of the action taken.

(5) If the presiding officer permits appeal, the presiding officer will transmit to the Commission:

(i) A memorandum which sets forth the relevant issues and an explanation of the rulings on the issues; and

(ii) the participant's motion under paragraph (b)(1) of this section and any answer permitted to the motion.

§ 385.1902

18 CFR Ch. I (4–1–16 Edition)

(g) *The interpretation*—1) Except as provided in paragraph (g)(2) of this section, the General Counsel will provide a copy of his or her written interpretation of the NGPA or rule as applied to the act, transaction, or circumstance presented upon the person who made the request for the interpretation and upon persons named in the request as direct participants in the act, transaction, or circumstance.

(2) The General Counsel may determine not to issue an interpretation, in which case the person who made the request and direct participants as specified in the request will be notified in writing of the decision not to issue an interpretation, and the reason for the decision.

(3) Only those persons to whom an interpretation is specifically addressed and other persons who are named in the request, who have been informed by the applicant for an interpretation of the pendency of the request and who are direct participants in the act, transaction or circumstance presented, may rely upon it. The effectiveness of an interpretation depends entirely on the accuracy of the facts presented to the General Counsel. If a material or relevant fact has been misrepresented or omitted or if any material or relevant fact changes after an interpretation is issued or if the action taken differs from the facts presented in the request, the interpretation may not be relied upon by any person.

(4) An interpretation may be rescinded or modified prospectively at any time. A rescission or modification is effected by notifying persons entitled to rely on the interpretation at the address contained in the original request.

(5) Any interpretation based on the NGPA or a rule issued thereunder in effect at the time of issuance may be relied upon only to the extent such law or rule remains in effect.

(6) Except as provided in paragraphs (g)(3), (g)(4) and (g)(5) of this section, the Staff will not recommend any action to the Commission which is inconsistent with the position espoused in the interpretation. The interpretation of the General Counsel is not the interpretation of the Commission. An interpretation provided by the General

Counsel is given without prejudice to the Commission's authority to consider the same or like question and to issue a declaratory order to take other action which has the effect of rescinding, revoking, or modifying the interpretation of the General Counsel.

(h) *Appeal*. There is no appeal to the Commission of an interpretation.

(i) *Interpretative rules*. Upon the petition of any person or upon its own motion, the Commission may publish in the FEDERAL REGISTER an interpretative rule regarding any question arising under the NGPA or a rule promulgated thereunder. Any person is entitled to rely upon an interpretative rule.

(j) *Applications for adjustments treated as requests for interpretations*. Except for the notification provisions of paragraph (d)(5) of this section, the provisions of this section apply to any petition for an adjustment which is deemed a request for an interpretation under Rule 1117. Notice to all parties to an adjustment proceeding under subpart K of this part that is deemed to be a request for an interpretation will be given under Rule 1117(d)(1).

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 394, 49 FR 35366, Sept. 7, 1984; Order 737, 75 FR 43405, July 26, 2010]

§ 385.1902 Appeals from action of staff (Rule 1902).

(a) Any staff action (other than a decision or ruling of presiding officer, as defined in Rule 102(e)(1), made in a proceeding set for hearing under subpart E of this part) taken pursuant to authority delegated to the staff by the Commission is a final agency action that is subject to a request for rehearing under Rule 713 (request for rehearing).

(b) All appeals of staff action that were timely filed prior to December 3, 1990 and that had not been acted upon by the Commission on their substantive merits are deemed to be timely filed requests for rehearing of final agency action. All notices issued by the Commission prior to December 3, 1990 stating the Commission's intent to act on appeals of staff action such that they are not deemed denied by the expiration of a 30-day period after the filing of the appeal, are deemed to be orders granting rehearing of final agency

action for the sole purpose of further consideration, unless the Commission issued an order on the substantive merits of the appeal prior to December 3, 1990. No later than January 2, 1991, persons who had timely filed appeals of staff action prior to December 3, 1990 which were pending before the Commission on that date may file additional pleadings to update or supplement those appeals.

[Order 530, 55 FR 50682, Dec. 10, 1990, as amended by Order 606, 64 FR 44405, Aug. 16, 1999]

§ 385.1903 Notice in rulemaking proceedings (Rule 1903).

Before the adoption of rule of general applicability or the commencement of hearing on such a proposed rulemaking, the Commission will cause general notice to be given by publication in the FEDERAL REGISTER, such notice to be published therein not less than 15 days prior to the date fixed for the consideration of the adoption of a proposed rule or rules or for the commencement of the hearing, if any, on the proposed rulemaking, except where a shorter period is reasonable and good cause exists therefor; *Provided however*, That:

(a) When the Commission, for good cause, finds it impracticable, unnecessary, or contrary to the public interest to give such notice, it may proceed with the adoption of rules without notice by incorporating therein a finding to such effect and a concise statement of the reasons therefor;

(b) Except when notice or hearing is required by statute, the Commission may issue at any time rules of organization, procedure or practice, or interpretative rules, or statements of policy, without notice or public proceedings; and

(c) This section is not to be construed as applicable to the extent that there may be involved any military, naval, or foreign affairs function of the United States, or any matter relating to the Commission's management or personnel, or to United States property, loans, grants, benefits, or contracts.

§ 385.1904 Copies of transcripts (Rule 1904).

The Commission will cause to be made a stenographic record of public hearings and such copies of the transcript thereof as it requires for its own purposes. Participants desiring copies of such transcript may obtain the same from the official reporter upon payment of the fees fixed therefor.

§ 385.1907 Reports of compliance (Rule 1907).

When any licensee, permittee, or any other person subject to the jurisdiction of the Commission is required to do or perform any act by Commission order, permit, or license provision, there must be filed with the Commission within 30 days following the date when such requirement became effective, a notice, under oath, stating that such requirement has been met or complied with; *Provided, however*, That the Commission, by rule or order, or by making specific provision therefor in a license or permit, may provide otherwise for the giving of such notice of compliance. Five conformed copies of such notice must be filed in lieu of the fourteen conformed copies required by Rule 2004 (copies of filings).

Subpart T—Formal Requirements for Filings in Proceedings Before the Commission

§ 385.2001 Filings (Rule 2001).

(a) *Filings with the Commission.* (1) Except as otherwise provided in this chapter, any document required to be filed with the Commission must comply with Rules 2001 to 2005 and must be submitted to the Secretary by:

(i) Mailing the document to the Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426;

(ii) Hand delivering the document to Room 1A, 888 First Street, NE., Washington, DC; or

(iii) By filing via the Internet pursuant to Rule 2003 through the links provided at <http://www.ferc.gov>.

NOTE TO PARAGRAPH (a)(1): Assistance for filing via the Internet is available by calling (202) 502-6652 or 1-866-208-3676 (toll free), or by e-mail to FERCOnlineSupport@ferc.gov.

§ 1501.2

§ 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

40 CFR Ch. V (7–1–15 Edition)

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:

Council on Environmental Quality

§ 1501.6

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

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

§ 1501.5 Lead agencies.

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

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

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

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

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

(1) Magnitude of agency's involvement.

(2) Project approval/disapproval authority.

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

(4) Duration of agency's involvement.

(5) Sequence of agency's involvement.

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

(e) If Federal agencies are unable to agree on which agency will be the lead agency or if the procedure described in paragraph (c) of this section has not resulted within 45 days in a lead agency

designation, any of the agencies or persons concerned may file a request with the Council asking it to determine which Federal agency shall be the lead agency.

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

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

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

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

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

§ 1501.6 Cooperating agencies.

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

(a) The lead agency shall:

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

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

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

(b) Each cooperating agency shall:

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

§ 1508.6

§ 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

40 CFR Ch. V (7-1-15 Edition)

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

§ 1508.20

(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

40 CFR Ch. V (7-1-15 Edition)

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

consequencies together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.

(b) Alternatives, which include:

(1) No action alternative.

(2) Other reasonable courses of actions.

(3) Mitigation measures (not in the proposed action).

(c) Impacts, which may be: (1) Direct; (2) indirect; (3) cumulative.

§ 1508.26 Special expertise.

Special expertise means statutory responsibility, agency mission, or related program experience.

§ 1508.27 Significantly.

Significantly as used in NEPA requires considerations of both context and intensity:

(a) *Context*. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) *Intensity*. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and

scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

[43 FR 56003, Nov. 29, 1978; 44 FR 874, Jan. 3, 1979]

§ 1508.28 Tiering.

Tiering refers to the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basinwide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement

Catskill Mountainkeeper, Inc., et al.
v. FERC

Docket Nos. CP13-499, CP13-502

2nd Cir. Nos. 16-345 and 16-361

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d) and Circuit Rule 25.1(h), I hereby certify that I have, this 17th day of October, 2016, filed the foregoing via the Court's CM/ECF system and served it upon the counsel listed below through the Court's CM/ECF system:

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