ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

No. 20-1132

FOOD & WATER WATCH AND
BERKSHIRE ENVIRONMENTAL ACTION TEAM,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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September 25, 2020

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties

The parties and intervenors before this Court and before the Federal Energy Regulatory Commission in the underlying agency docket are as stated in Petitioners' opening brief, except Intervenor for Respondent, Bay State Gas Company, d/b/a Columbia Gas of Massachusetts.

B. Rulings Under Review

1. *Tennessee Gas Pipeline Co., L.L.C.*, 169 FERC ¶ 61,230 (2019) ("Certificate Order"), R. 155, JA ___-___; and

2. *Tennessee Gas Pipeline Co., L.L.C.*, 170 FERC ¶ 61,142 (2020) ("Rehearing Order"), R. 169, JA ___-___.

C. Related Cases

This case has not previously been before this Court or any other court.

/s/ Susanna Y. Chu
Susanna Y. Chu
Attorney

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TABLE OF AUTHORITIES

COURT CASES:

Authorities upon which we chiefly rely are marked by asterisks.

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GLOSSARY

Berkshire	Petitioner Berkshire Environmental Action Team
Certificate Order	*Tennessee Gas Pipeline Co., L.L.C.*, 169 FERC ¶ 61,230 (2019), R. 155, JA ___-___
Columbia Gas	Intervenor for Respondent Bay State Gas Company, d/b/a Columbia Gas of Massachusetts
Commission or FERC	Respondent Federal Energy Regulatory Commission
EPA	Environmental Protection Agency
Food and Water	Petitioner Food & Water Watch
NEPA	National Environmental Policy Act
Pet. Br.	Petitioners' Opening Brief
Policy Integrity	Amicus Curiae the Institute for Policy Integrity at New York University School of Law
Rehearing Order	*Tennessee Gas Pipeline Co., L.L.C.*, 170 FERC ¶ 61,142 (2020), R. 169, JA ___-___
Tennessee	Intervenor for Respondent Tennessee Gas Pipeline Co., L.L.C.
Upgrade Project	Tennessee Gas Pipeline Company, L.L.C., 261 Upgrade Project, FERC Docket No. CP19-7-000

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STATEMENT OF THE ISSUES

Respondent Federal Energy Regulatory Commission ("FERC" or "Commission") authorized an upgrade project in southern Massachusetts by Intervenor Tennessee Gas Pipeline Co., L.L.C. ("Tennessee"), comprising a new 2.1-mile pipeline loop and replacement of two compressor units with a single, higher-efficiency compressor unit (the "Upgrade Project"). The Upgrade Project is designed to improve

reliability of service and operational flexibility for one of Tennessee's customers, a local distribution company, during peak demand periods.

Consistent with its obligations under the Natural Gas Act, 15 U.S.C. § 717f, and the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, *et seq*., the Commission performed an environmental analysis of the Upgrade Project and estimated (among other things) the greenhouse gas emissions that would arise from construction and operation of the 2.1-mile pipeline loop and new compressor unit. The Commission also considered whether it could meaningfully estimate potential "indirect" environmental effects of the Upgrade Project—i.e., "upstream" inducement of additional natural gas production, and "downstream" emissions from gas combustion. Based on information in the record, including Tennessee's responses to Commission data requests to supplement Tennessee's application, the Commission concluded that it could not meaningfully forecast such indirect impacts.

Petitioners Food and Water Watch ("Food and Water") and Berkshire Environmental Action Team ("Berkshire") (collectively, "Petitioners") now challenge the Commission's development of the

record regarding indirect greenhouse gas impacts—along with other issues not presented to the Commission—for the first time on appeal.

The petition presents the following issues for review:

(1) Assuming jurisdiction, whether the Commission reasonably assessed indirect greenhouse gas impacts of the Upgrade Project, and their significance;

(2) Whether the Commission reasonably addressed community health and pipeline safety concerns presented in the FERC proceeding; and

(3) Whether the Commission should have considered impacts of Tennessee's Longmeadow meter station in its environmental review of the Upgrade Project.

JURISDICTIONAL STATEMENT

The Court generally has jurisdiction to review final FERC orders under the Natural Gas Act, 15 U.S.C. § 717r(b). That provision also states that the Court lacks jurisdiction to consider any objection not "urged before the Commission" in an application for rehearing. *Id.*

As discussed in Argument section II, Petitioners failed to challenge the Commission's development of the record concerning

indirect greenhouse gas impacts, and their significance, on rehearing before the Commission. And as discussed in Argument section III, Petitioners largely failed to raise the community health and pipeline safety arguments they now present to the Court. The Court lacks jurisdiction to consider these arguments. *See* 15 U.S.C. § 717r(b).

STATUTORY AND REGULATORY PROVISIONS

Pertinent statutes and regulations are reproduced in the Addendum.

STATEMENT OF THE CASE

I. STATUTORY AND REGULATORY BACKGROUND

A. The Natural Gas Act

The "principal purpose" of the Natural Gas Act is to "'encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices.'" *Pub. Utils. Comm'n v. FERC*, 900 F.2d 269, 281 (D.C. Cir. 1990) (quoting *NAACP v. FPC*, 425 U.S. 662, 670 (1976)). The Act declares that "the business of transporting and selling natural gas for ultimate distribution to the public" is affected with the public interest. 15 U.S.C. § 717(a). To that end, Congress vested the Commission with jurisdiction over the transportation and wholesale sale of natural gas in interstate commerce. *Id.* §§ 717(b), (c).

A company seeking to construct a natural gas pipeline must first obtain from the Commission a certificate of "public convenience and necessity" under section 7 of the Natural Gas Act, 15 U.S.C. § 717f(c). Under Natural Gas Act section 7, the Commission shall issue a certificate to any qualified applicant upon finding that the proposed 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.*

B. The National Environmental Policy Act

The Commission's consideration of an application for a certificate of public convenience and necessity triggers review under NEPA, 42 U.S.C. §§ 4321, *et seq.* NEPA requires that federal agencies ensure that the environmental effects of proposed actions are "adequately identified and evaluated." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). "NEPA imposes only procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and

actions." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 756-57 (2004). Thus, an agency must "take a 'hard look' at the environmental consequences before taking a major action." *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983).

The Council on Environmental Quality's regulations implementing NEPA 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.

II. FACTUAL BACKGROUND

A. The Commission's Environmental Review

Tennessee operates an approximately 11,000-mile natural gas pipeline system that extends from Texas, Louisiana, and the Gulf of Mexico, through Mississippi, Alabama, Arkansas, Tennessee, Kentucky, West Virginia, Ohio, Pennsylvania, New Jersey, New York, Connecticut, Rhode Island, Massachusetts, and New Hampshire. *Tennessee Gas Pipeline Co., L.L.C.*, 169 FERC ¶ 61,230, P 3 (2019) ("Certificate Order"), R. 155, JA ___, *on reh'g*, 170 FERC ¶ 61,142, P 17

(2020) ("Rehearing Order"), R. 169, JA ___.

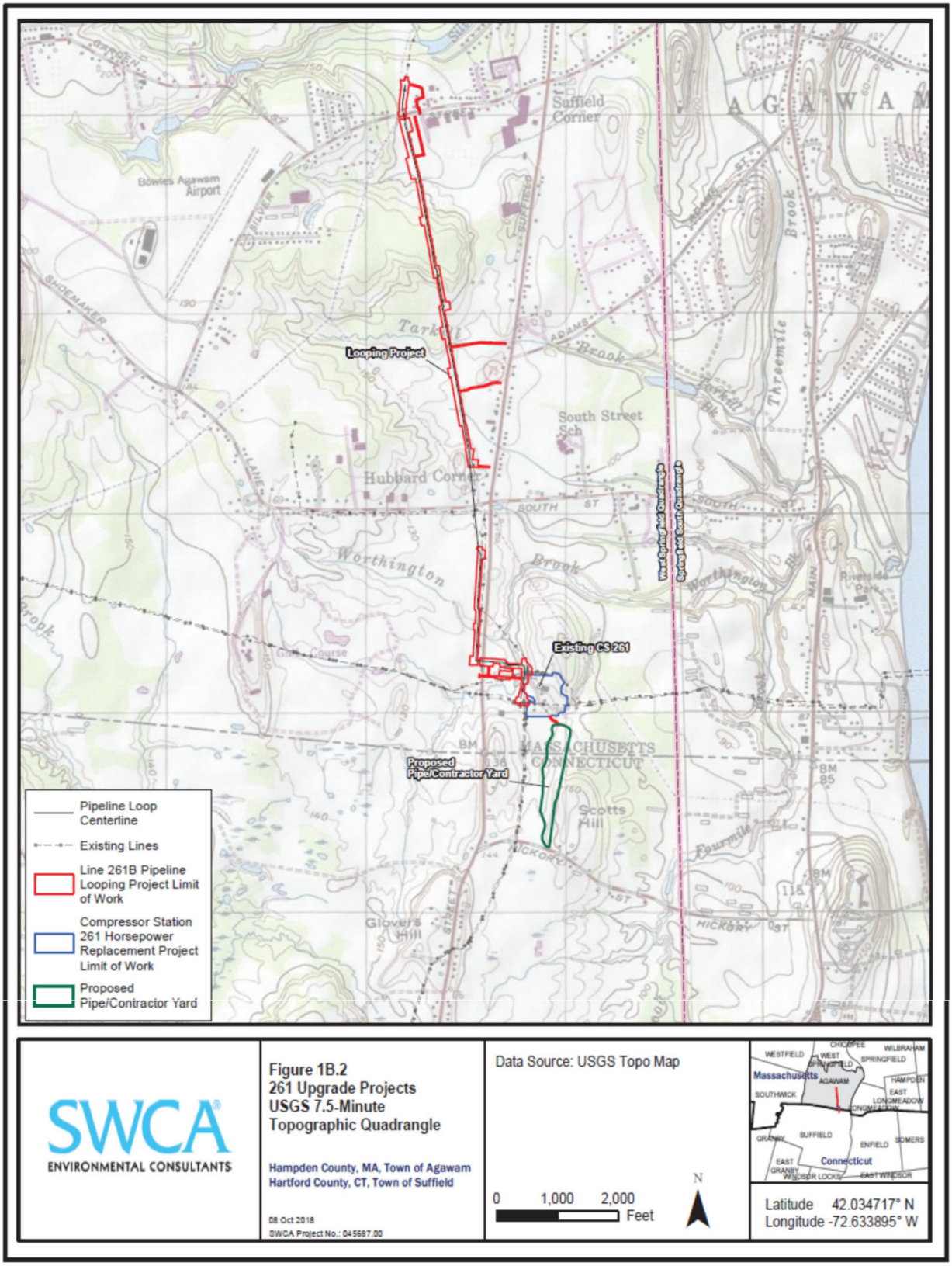
In October 2018, Tennessee applied to the Commission for approval of a project to enhance reliability and operational flexibility during times of peak demand on the system of its customer Columbia Gas of Massachusetts ("Columbia Gas"), a retail distribution company. *See* Tennessee Gas Pipeline Co., Application for a Certificate of Public Convenience and Necessity, Oct. 9, 2018 ("Application"), at 1-2, 4-9, R. 1, JA ___-___, ___-___.

The Upgrade Project involves the addition of a 2.1-mile, 12-inch diameter pipeline loop,[1] constructed, for the most part, parallel to existing Tennessee pipeline. *Id.* at 4, JA ___. The project also contemplates the replacement of two older compressor units (installed in 1965 and 1991) at Compressor Station 261 in Hampden County, Massachusetts, with a single, higher-efficiency and more reliable unit. *Id.* at 6-7, JA ___-___; *see also* Certificate Order PP 5-6, JA ___-___.

[1] A pipeline loop is a segment of pipe constructed parallel to an existing pipeline to increase capacity. Environmental Assessment, 261 Upgrade Project, FERC Office of Energy Projects, May 2019, at 2 n.2, R. 125, JA ___.

As the Commission explained, the Upgrade Project is designed to enhance reliability for Columbia Gas's existing customers through the provision of firm natural gas transportation service and a compressor unit upgrade that would enable Columbia Gas to "meet[] peak flow conditions and other operational needs." Rehearing Order P 8, JA ___; *see also* Application at 5-7, JA ___-___ (upgrades will "increase the design delivery pressure to [Columbia Gas]'s distribution system, which will . . . enhance [Columbia Gas]'s ability to provide reliable service to its customers, and will also enhance the reliability of Tennessee's [system]" by enabling Tennessee "to maintain deliveries to Columbia Gas's system in the event that the existing pipeline in the area . . . is taken out of service for maintenance"). Also, replacement of the older compressor units with a "more efficient, newer, cleaner burning, and lower emission compressor unit" helps "meet current and anticipated operational needs, including peak flow conditions." Application at 2, JA ___; *see also* Certificate Order P 15 n.19, JA ___-___ (compressor unit will provide operational flexibility during periods of peak demand).

The Upgrade Project is shown on the map below:


Looping Project
Existing CS 261
Proposed Pipe/Contractor Yard
Suffield Corner
Bowles Agawam Airport
South Street Sch
Hubbard Corner
Worthington
Scotts Hill
Glovers Hill
Pipeline Loop Centerline
Existing Lines
Line 261B Pipeline Looping Project Limit of Work
Compressor Station 261 Horsepower Replacement Project Limit of Work
Proposed Pipe/Contractor Yard
SWCA ENVIRONMENTAL CONSULTANTS
Figure 1B.2
261 Upgrade Projects
USGS 7.5-Minute
Topographic Quadrangle
Hampden County, MA, Town of Agawam
Hartford County, CT, Town of Suffield
08 Oct 2018
SWCA Project No.: 045687.00
Data Source: USGS Topo Map
0 1,000 2,000
Feet
N
Massachusetts
Connecticut
Latitude 42.034717° N
Longitude -72.633895° W

Environmental Assessment at 4, JA ___.

Following notice and an opportunity for comment, Commission staff prepared an Environmental Assessment for the Upgrade Project. *Id.*, JA ___-___. The Environmental Assessment explained that the new 2.1-mile pipeline loop would be co-located with existing Tennessee facilities, other utilities, and roadways, and would temporarily impact 46.4 acres of land, 5.4 of them permanently. *Id.* at 7, JA ___. The compressor unit replacement would take place within the existing fenced area at Compressor Station 261. *Id.* at 7-8, JA ___-___.

The Environmental Assessment analyzed impacts of the Upgrade Project with respect to geology, soils, water resources, wetlands, vegetation, fisheries, wildlife, threatened and endangered species, land use, recreation, visual resources, cultural resources, air quality, noise, safety, cumulative impacts, and alternatives. Certificate Order P 50, JA ___. In particular, the Environmental Assessment discussed and disclosed the greenhouse gas emissions associated with construction and operation of the Upgrade Project. Environmental Assessment, 53-55, JA ___-___ (finding that construction would result in "temporary" and "intermittent" air quality impacts that would be further minimized

by Tennessee's mitigation measures, and that operational emissions would be "minimal"). The Environmental Assessment also discussed the effects of climate change, acknowledging that quantified greenhouse gas emissions from construction and operation of the Upgrade Project would "contribute incrementally to future climate change impacts." *See id.* at 66-69, JA ___-___.

In light of the small scope and limited environmental impacts associated with construction and operation of the Upgrade Project, the Environmental Assessment determined that the project, with appropriate mitigation measures, "would not constitute a major federal action significantly affecting the quality of the human environment." *Id.* at 74, JA ___.

B. The Certificate Order

On December 19, 2019, the Commission issued an order authorizing the project, subject to specific regulatory and environmental conditions. Certificate Order, ordering paragraphs & App. B (environmental conditions), JA ___-___, ___-___. Applying and

balancing the criteria set forth in its Certificate Policy Statement,[2] the Commission concluded that the Project is needed and would serve the public interest. Certificate Order PP 12-13, JA ___-___, PP 18-29, JA ___-___. (On appeal, Petitioners do not challenge the Commission's market need analysis.)

The Certificate Order discussed environmental impacts related to the Upgrade Project, including, as relevant here, indirect and cumulative greenhouse gas impacts (*id.* PP 57-64, JA ___-___), and climate change impacts (*id.* PP 65-68, JA ___-___). The Commission also addressed arguments that Tennessee's Longmeadow meter station should have been considered in the Environmental Assessment as a "connected action" under NEPA. *Id.* PP 76-83, JA ___-___. In addition, the Commission responded to concerns regarding safety issues on the Columbia Gas distribution system. *Id.* P 10, JA ___. Ultimately, the Commission agreed with staff's conclusion that "approval of the project would not constitute a major federal action significantly affecting the

[2] *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128 (2000), *further clarified*, 92 FERC ¶ 61,094 (2000).

quality of the human environment." *Id.* PP 51-53, 84, JA ___-___, ___.

Commissioner Glick filed a partial dissent, voicing disagreement with the environmental analysis contained in the majority opinion. JA ___-___. Commissioner McNamee filed a concurring statement concerning the Commission's statutory authority to grant or deny a pipeline certificate for environmental reasons. JA ___-___.

C. The Order on Rehearing

Addressing the arguments presented to it on rehearing, the Commission reaffirmed its authorization of the Upgrade Project. Rehearing Order, JA ___-___. As relevant here, the Commission explained and upheld its determinations concerning: indirect greenhouse gas impacts of the Upgrade Project and their significance (*id.* PP 14-23, JA ___-___); cumulative impacts and alleged improper segmentation of project review (*id.* PP 24-27, JA ___-___); and community health issues (*id.* PP 22-23, JA ___-___).

In addition, the Commission dismissed Berkshire's request for rehearing for failing to specifically identify the issues on which it was seeking rehearing by the Commission, contrary to Rule 713 of the Commission's Rules of Practice and Procedure, 18 C.F.R.

§§ 385.713(c)(1), (2). Rehearing Order P 5 & n.14, JA ___-___. Rule 713 requires that requests for rehearing "[s]tate concisely the alleged error in the final decision" and "include a separate section entitled 'Statement of Issues,' listing each issue in a separately enumerated paragraph." Rehearing Order P 5 & n.14, JA ___-___ (quoting 18 C.F.R. §§ 385.713(c)(1), (2)). Further, "any issue not so listed will be deemed waived." *Id.* Although Berkshire failed to comply with this rule, the Commission nevertheless addressed Berkshire's concerns, to the extent it understood them. *Id.*

Commissioner Glick again dissented in part. JA ___-___.

SUMMARY OF ARGUMENT

In approving Tennessee's proposed reliability enhancements, the Commission reasonably addressed the environmental, health, and safety arguments presented to it in the course of the agency proceeding. On appeal, Petitioners seek to expand their claims to include matters not presented to the agency. The Natural Gas Act precludes this tactic. *See* 15 U.S.C. § 717r(b). Because the Commission reasonably responded

to the arguments presented to it, the petition for review should be dismissed or denied.

Here, Petitioners challenge the Commission's record-based determination that upstream gas production activities and downstream emissions from combustion are not indirect effects of the Upgrade Project. In particular, Petitioners challenge the Commission's development of the record concerning indirect greenhouse gas impacts. But in the agency proceeding, the Commission issued data requests to Tennessee seeking additional information regarding the downstream end-use of the gas that would be transported over the Upgrade Project. On rehearing before the Commission, Petitioners failed to challenge the adequacy of the Commission's development of the record. Thus, here—as in *Birckhead v. FERC*, 925 F.3d 510 (D.C. Cir. 2019)—the Court lacks jurisdiction to consider record development arguments Petitioners failed to advance in the agency proceeding.

Likewise, Petitioners failed to raise before the Commission the community health and pipeline safety arguments now presented to the Court. But the Commission reasonably addressed the community health and pipeline safety issues that were raised to it in the agency

proceeding. Finally, the Commission reasonably determined, based on the record before it, that Tennessee's planned Longmeadow meter station, located across the Connecticut River from the Upgrade Project, is independent of the Upgrade Project and not a connected action for environmental review purposes.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews Commission actions under the Administrative Procedure Act's narrow "arbitrary and capricious" standard. 5 U.S.C. § 706(2)(A). Under that standard, the question is not "whether a regulatory decision is the best one possible or even whether it is better than the alternatives." *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016). Rather, the reviewing court must uphold the Commission's determination "if the agency has examined the relevant considerations and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." *Id.* (internal quotation marks omitted). The Commission's factual findings, if supported by substantial evidence, are conclusive. 15 U.S.C. § 717r(b).

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

The arbitrary and capricious standard also applies to NEPA challenges. *Nevada v. Dep't of Energy*, 457 F.3d 78, 87 (D.C. Cir. 2006). "[T]he court's role is 'simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious.'" *Nat'l Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323, 1327 (D.C. Cir. 2004) (quoting *Balt. Gas & Elec.*, 462 U.S. at 97-98)).

This Court evaluates agency compliance with NEPA under a "rule of reason" standard, and has consistently declined to "flyspeck" the Commission's environmental analysis. *City of Boston Delegation v. FERC*, 897 F.3d 241, 251 (D.C. Cir. 2018); *see also Myersville*, 783 F.3d at 1322-23; *Minisink Residents for Envtl. Pres. & Safety v. FERC*, 762

F.3d 97, 112 (D.C. Cir. 2014). "[A]s long as the agency's decision is fully informed and well-considered, it is entitled to judicial deference and a reviewing court should not substitute its own policy judgment." *Nat. Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288, 294 (D.C. Cir. 1988) (internal quotation marks omitted).

II. ASSUMING JURISDICTION, THE COMMISSION REASONABLY ASSESSED INDIRECT GREENHOUSE GAS EMISSIONS AND THEIR SIGNIFICANCE

This Court has held that the Commission must consider both the "direct" and "indirect" environmental effects of a proposed pipeline project. *Birckhead*, 925 F.3d at 516 (citing *Sierra Club v. FERC*, 867 F.3d 1357, 1371 (D.C. Cir. 2017)). "Indirect effects are those that '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), meaning that 'they are sufficiently likely to occur [such] that a person of ordinary prudence would take [them] into account in reaching a decision." *Birckhead*, 925 F.3d at 516-17 (citing 40 C.F.R. § 1508.8(b) and *Sierra Club*, 867 F.3d at 1371).

However, not all effects are "indirect" effects. NEPA "requires a reasonably close causal relation between the environmental effect and

the alleged cause," akin to the "familiar doctrine of proximate cause from tort law." *Pub. Citizen*, 541 U.S. at 767 (internal quotation marks omitted). A "but for" causal relationship is not enough. As a result, "[s]ome effects that are 'caused by' a change in the physical environment in the sense of 'but for' causation" will not constitute an indirect impact of agency action "if the causal chain is too attenuated." *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983). Under NEPA, the Commission's examination of the "reasonably foreseeable indirect effects" of a particular project involves a "case-by-case examination . . . of discrete factors." *Birckhead*, 925 F.3d at 519 (quoting *Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1122 (D.C. Cir. 1971)).

Consistent with its obligations, the Commission analyzed potential greenhouse gas impacts relating to the new 2.1-mile pipeline loop and replacement compressor unit comprising the Upgrade Project, along with potential regional impacts. *See* Certificate Order PP 66-68, JA ___-___; Environmental Assessment at 53-58, 62-64, JA ___-___, ___-___, and App. E (Cumulative Impact Table), JA ___-___. As discussed below, the Commission estimated the direct environmental effects of

construction and operation of the Upgrade Project, and included a qualitative discussion of the effects of climate change. Certificate Order PP 65-68, JA ___-___; Environmental Assessment at 53-55, 66-69, JA ___-___, ___-___. The Commission also considered whether "upstream" inducement of additional natural gas production activities, or "downstream" emissions from combustion of gas transported by the project, were reasonably foreseeable indirect effects of the Upgrade Project, but concluded they were not. *See* Rehearing Order PP 16-20, JA ___-___; Certificate Order PP 61-64, JA ___-___.

Petitioners challenge the Commission's determinations concerning potential "indirect" effects of the Upgrade Project, and their significance (Pet. Br. 26-44), but the Court lacks jurisdiction to consider these claims. Even if properly before the Court, they lack merit.

A. Petitioners Forfeited Arguments Concerning the Commission's Determination Not to Quantify Indirect Greenhouse Gas Impacts

Citing *Birckhead*, Petitioners contend, on review, that the Commission failed to satisfy its NEPA responsibility to develop the record concerning indirect upstream and downstream greenhouse gas impacts associated with the Upgrade Project. *See* Pet. Br. 5, 26-37.

With respect to upstream impacts, Petitioners assert that the Commission "failed to press for vital information pinpointing the production area of the gas supplying this Project." Pet. Br. 35. As for downstream impacts, they challenge the Commission's conclusion regarding the sufficiency of Tennessee's responses to FERC data requests concerning the end-use of the gas. Pet. Br. 30-34 (citing *Sierra Club*, 867 F.3d at 1374, and *Birckhead*, 925 F.3d at 519).

But because petitioners "failed to raise this record-development issue in the proceedings before the Commission," the Court "lacks jurisdiction to decide whether the Commission acted arbitrarily or capriciously . . . by failing to further develop the record." *Birckhead*, 925 F.3d at 520-21 (citing 15 U.S.C. § 717r(b)); *see also* Rehearing Order P 20, JA ___ (noting that Food and Water's rehearing request did not challenge the adequacy of the Commission's development of the record).

Under the Natural Gas Act's judicial review provision, 15 U.S.C. § 717r(b), "[n]o 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 to do so." As this Court has explained,

"[t]he Supreme Court held that [15 U.S.C. § 717r(b)] must be applied punctiliously. We adhere to that approach." *N.J. Zinc Co. v. FERC*, 843 F.2d 1497, 1503 (D.C. Cir. 1988) (citing *FPC v. Colorado Interstate Gas Co.*, 348 U.S. 492, 499, 501 (1955)).

"Whether petitioners have complied with this unusually strict [exhaustion] requirement . . . hinges on whether their request for rehearing alerted the Commission to the legal arguments they now raise on judicial review." *Ameren Servs. Co. v. FERC*, 893 F.3d 786, 793 (D.C. Cir. 2018) (construing identical provision in section 313 of the Federal Power Act, 16 U.S.C. § 825*l*(b)) (citation and internal quotation marks omitted). Petitioners' arguments must be raised with "specificity" and "objections may not be preserved either 'indirectly' or 'implicitly.'" *Ameren*, 893 F.3d at 793 (citations and internal quotation marks omitted). The rehearing requirement "enables the Commission to correct its own errors, which might obviate judicial review, or to explain why in its expert judgment the party's objection is not well taken, which facilitates judicial review." *Save Our Sebasticook v. FERC*, 431 F.3d 379, 381 (D.C. Cir. 2005) (citations omitted).

Petitioners' rehearing requests are devoid of any objection to the Commission's development of the record concerning the upstream source and downstream end-use of the natural gas to be transported by the Upgrade Project. *See* Food and Water, Petition for Rehearing of the Order Issuing Certificate for the 261 Upgrade Project, Jan. 17, 2020, R. 159, JA ___-___; Berkshire Request for Rehearing, Jan. 17, 2020, R. 160, JA ___-___. Indeed, neither rehearing request even mention *Birckhead*.

There is no excuse for Petitioners' failure to raise this issue. The Certificate Order discusses both the *Birckhead* decision (which issued six months prior to the Certificate Order), and FERC's supplemental data requests to Tennessee asking for additional information regarding the end-use of the gas that would be transported over the Upgrade Project. *See* Certificate Order P 64 & nn.103-104, JA ___ (citing May 16, 2019 data request, R. 124, JA ___-___, and Tennessee's May 20, 2019 response, R. 127, JA ___-___); Rehearing Order P 20 & nn.59-60, JA ___ (citing Dec. 19, 2018 data request, R. 75, JA ___-___, and Tennessee's Jan. 8, 2019 response, R. 89, JA ___-___).

Yet, on rehearing, neither Food and Water nor Berkshire took issue with the Commission's supplemental data requests, or the conclusions drawn by the Commission concerning Tennessee's responses. In particular, Petitioners entirely failed to argue that the Commission should have requested additional or different information regarding upstream greenhouse gas impacts, or had sufficient information to prepare a meaningful estimate of downstream impacts, as they do now.

At best, Food and Water asserted on rehearing that the Commission "completely neglected to provide an adequate assessment of the quantity and impacts of greenhouse gas emissions that would occur as a result of this Project." Food and Water Rehearing Req. at 3, JA ___; *see also id.* at 13 ("[I]t is entirely inexplicable why FERC gives no consideration to whether the Project will lead to an increase in upstream and downstream [greenhouse gas] emissions . . . . "). Likewise, Berkshire's dismissed request for rehearing (*see* pp. 13-14, *supra*) states, in passing, "[a]t the very least, any new project should be required to account for *all* emissions, including downstream use by customers." Berkshire Rehearing Req. at 5, JA ___.

These generalized assertions effectively ignore the Commission's explanation in the Certificate Order as to why upstream and downstream indirect effects are not reasonably foreseeable on the record before it, including the supplemental data requests issued to Tennessee, and Tennessee's responses. Certificate Order PP 61-64, JA ___-___. *See Pub. Citizen*, 541 U.S. at 767 ("Persons challenging an agency's compliance with NEPA must structure their participation so that it alerts the agency to the parties' position and contentions."). As a result of Petitioners' failure to object to the Commission's development of the record concerning indirect effects of the Upgrade Project, the Commission was not "alert[ed] . . . to the legal arguments they now raise on judicial review." *Ameren Servs.*, 893 F.3d at 793. The arguments are waived. *See* 15 U.S.C. § 717r(b); *Birckhead*, 925 F.3d at 520-21.

American Gas Ass'n v. FERC, 593 F.3d 14, 16 (D.C. Cir. 2010), does not help Petitioners. Pet. Br. 33. Petitioners contend that the Commission majority failed to respond to Commissioner Glick's dissenting views on this issue, "which in itself renders the decision arbitrary and capricious." *Id.* Although the Court in *American Gas*

faulted the Commission for not responding to concerns raised by a dissenting Commissioner, petitioners in that case preserved objections to a proposed rule-making by raising them in the agency proceeding. *See id.* at 18-19.

Here, by contrast, Petitioners failed to raise the arguments they now advance on appeal in the agency proceeding. As in *Birckhead*, "taking the record as it currently stands, [there is] no basis for concluding that the Commission acted unreasonably in declining to evaluate downstream [and upstream] combustion impacts as part of its indirect effects analysis." 925 F.3d at 521. In any event, as discussed below, the Commission reasonably found that it could not quantify emissions from increased natural gas production or downstream consumption here, because such effects were not reasonably foreseeable on the record before it.

B. The Commission Reasonably Concluded that Upstream Production Activities and Downstream End-Use Were Not Indirect Impacts of the Upgrade Project

This Court has rejected the position that "emissions from downstream gas combustion are, as a categorical matter, always a reasonably foreseeable indirect effect of a pipeline project." *Birckhead*,

925 F.3d at 519 (citing *Sierra Club*, 867 F.3d at 1374-75, and *Calvert Cliffs'*, 449 F.2d at 1122). Rather than a categorical approach, "NEPA compels a case-by-case examination . . . of discrete factors." *Calvert Cliffs'*, 449 F.2d at 1122.

Here, the Commission performed such a case-by-case examination. Based on the factual record—including information solicited by the agency—the Commission concluded that upstream natural gas production and downstream end-use were not reasonably foreseeable, indirect impacts of the Upgrade Project. *See* Rehearing Order PP 16-20, JA ___-___; Certificate Order PP 61-64, JA ___-___. The Commission's case-specific assessment is consistent with NEPA and governing precedents.

As the Commission explained, the Upgrade Project "is adding a small amount of incremental capacity on Tennessee's existing 11,000-mile interstate pipeline system," and there is "no evidence that the project will spur additional production or downstream consumption." Rehearing Order P 17, JA ___ (distinguishing cases cited by Food and Water); *see also supra* pp. 7-8 (explaining that small amount of incremental capacity from Upgrade Project will enhance reliability and

operational flexibility for retail distribution customer).

With respect to upstream impacts, the Commission concluded that the "environmental impacts of upstream natural gas production are not an indirect effect" of the Upgrade Project. Certificate Order P 62, JA ___. This is because the "specific source of natural gas to be transported via the . . . Upgrade Project has not been identified with any precision and will likely change throughout the project's operation." Certificate Order P 61, JA ___. In particular, the Upgrade Project "will receive gas from other interstate pipelines," i.e., Maritimes & Northeast Pipeline and Portland Natural Gas Transmission System's joint facilities in Dracut, Massachusetts, and Iroquois Gas Transmission System's facilities in Wright, New York. *Id.* PP 2, 62, JA ___, ___.

Thus, the Commission explained, "there is no evidence in the record that would help predict the number and location of any additional wells that would be drilled as a result of any production demand associated with the project." *Id.* P 62 & n.100, JA ___. Because "there is not even an identified general supply area for the gas that will be transported on the project, any analysis of production impacts would be so generalized it would be meaningless." *Id.*; *see also* Rehearing

Order P 18, JA ___ (same).

Contrary to Petitioners' contention (Pet. Br. 35), the Commission's conclusion on upstream indirect impacts is consistent with *Birckhead*. *See* 925 F.3d at 517-18 (upholding Commission's determination that upstream impacts were not foreseeable, in part because petitioners "identified no record evidence that would help the Commission predict the number and location of any additional wells that would be drilled as a result of production demand created by the Project"); *see also Sierra Club v. U.S. Dep't of Energy*, 867 F.3d 189, 198-99 (D.C. Cir. 2017) (upholding agency determination that increased natural gas production was not a reasonably foreseeable result of its authorization of liquefied natural gas exports, where agency explained that it could not predict where export-induced production would occur on a local level; agency is "not required to foresee the unforeseeable") (citation and internal quotation marks omitted).

With respect to downstream impacts, the Commission applied *Birckhead*—which issued while FERC was considering Tennessee's application—and sought additional information from Tennessee regarding the end-use of the gas that would be transported via the

Upgrade Project. Certificate Order P 64 & nn.103-104, JA ___; Rehearing Order P 20 & nn.59-60, JA ___; *see Birckhead*, 925 F.3d at 519-20 (NEPA requires Commission to seek meaningful information concerning the destination and end-use of gas for purposes of its indirect effects analysis).

The Commission observed that the Upgrade Project is "expected to serve [Columbia Gas]'s existing customers." Rehearing Order P 20, JA ___. The Commission explained, however, that it found Tennessee's data responses insufficiently detailed as to "exactly how the gas would be used." *Id.* P 20, JA ___. The Commission noted that Tennessee's "generalized statements contrast with *Sierra Club*, 867 F.3d at 1372, where the court relied on record evidence that the gas would be used in two identified power plants." *Id.*

It is unsurprising that the Commission determined that increased end-use consumption was not "reasonably foreseeable" in this context and on this record. Natural gas-fired power plants, of the type at issue in *Sierra Club*, can have relatively fixed, foreseeable fuel needs. *See, e.g.*, 867 F.3d at 1374. By contrast, local distribution companies, such as Columbia Gas (the beneficiary of the Upgrade Project) face

"extremely variable retail demand." FERC, Energy Primer: A Handbook of Energy Market Basics 122 (2020), *available at*: https://www.ferc.gov/sites/default/files/2020-05/energy-primer.pdf; *see also id.* at 32 (local distribution companies typically have marketing affiliates that facilitate the resale of any gas that is not needed to meet customer demand).

Moreover, the localized circumstances affecting local distribution companies can make it difficult for the Commission to assess whether a project will result in increased end-use consumption, even where it is known that a project will provide a certain amount of incremental capacity. Here, the Upgrade Project contemplated "adding a small amount of incremental capacity on Tennessee's existing 11,000-mile interstate pipeline system." Rehearing Order P 17, JA ___. Tennessee's responses to the agency's supplemental data requests did not supply sufficient clarity regarding whether downstream use of the gas would result in increased greenhouse gas emissions. *See id.* P 20, JA ___. But Columbia Gas filed comments explaining, among other things, that the Upgrade Project would replace 44,500 dekatherms/day of its existing "secondary delivery point capacity" with "reliable firm primary delivery

point capacity" for the benefit of existing customers. Columbia Gas, Response to Supplemental Information submitted by Pipe Line Awareness Network for the Northeast, Apr. 29, 2019, at 2, R. 120, JA ___ (explaining that it was replacing the secondary capacity because it is "increasingly becoming more costly and less reliable"); *see also* Massachusetts Dep't of Pub. Utils. Order, May 31, 2018, at 55, Application, App. 10B, R. 1, JA ___-___ (finding "no additional greenhouse gas emissions" would result from replacement capacity). On the facts before it, the Commission reasonably distinguished this case from the facts of *Sierra Club*, 867 F.3d at 1372. There is "no basis" for revisiting those determinations here. *See Birckhead*, 925 F.3d at 521; *see also N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1078-82 (9th Cir. 2011) (NEPA requires "reasonable forecasting," but an agency "is not required to engage in speculative analysis" or "to do the impractical, if not enough information is available to permit meaningful consideration") (citations omitted).

C. Petitioners' Challenge to the Commission's Assessment of the Significance of Greenhouse Gas Emissions Likewise Fails

Petitioners contend that, in addition to calculating the estimated volume of greenhouse gas emissions arising from the Upgrade Project, the Commission should have quantified the "significance" of those emissions and "their resultant impact on climate change." Pet. Br. 37 (quoting *Sierra Club*, 867 F.3d at 1374).

On appeal, Petitioners challenge the Commission's explanation that it could not quantify the significance of such emissions because "there is no universally accepted methodology to attribute discrete, quantifiable, physical effects on the environment [from] the Project's incremental contribution to [greenhouse gases]." Pet. Br. 38 (quoting Environmental Assessment at 68, JA ___). The Court lacks jurisdiction to review Petitioners' quantification challenge because, on rehearing, Petitioners did not challenge the Commission's determination that it lacks a methodology to quantify climate change damage associated with increased greenhouse gas emissions. *See Birckhead*, 925 F.3d at 520; *Ameren Servs.*, 893 F.3d at 793.

Food and Water Watch's rehearing request generally asserted that the Certificate Order "lacked any meaningful discussion of the Project's contribution to climate change," and took the position that the Commission "blatantly refused to address the proposed pipeline's contribution to climate change." Food and Water Rehearing Req. at 9, 13, JA ___. But that is not true. The Environmental Assessment addresses cumulative environmental impacts, including climate change impacts. *See* Environmental Assessment at 62-69, JA ___-___. In particular, the Commission disclosed greenhouse gas emissions associated with construction and operation of the Upgrade Project, discussed the effects of climate change, and "acknowledge[d] that the quantified greenhouse gas emissions from the construction and operation of the [Upgrade] [P]roject will contribute incrementally to climate change." Certificate Order P 68, JA ___; Environmental Assessment at 53-55, 66-69, JA ___-___, ___-___.

It is not clear if Petitioners intend to suggest, on review, that the Commission should have used the Social Cost of Carbon tool to assess the significance of indirect greenhouse gas emissions. *See* Pet. Br. 40 (citing discussion of Social Cost of Carbon in Commissioner McNamee's

concurring opinion, JA ___).[3] Before the Commission, Food and Water's request for rehearing was silent on the issue of the Social Cost of Carbon. Berkshire's request for rehearing mentions the Social Cost of Carbon only in passing—in sections entitled "Climate impacts of the project are in violation of recommendations by the [Intergovernmental Panel on Climate Change] and Massachusetts State Law" and "Health impacts to lower Pioneer Valley population would be substantial"—but did not argue that the Commission was required to employ that particular tool here. *See* Berkshire Rehearing Req. at 5-6, JA ___-___. Indeed, the Commission dismissed Berkshire's request for rehearing for failing to clearly identify the issues on which it was seeking rehearing, contrary to Rule 713 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §§ 385.713(c)(1)-(2). Rehearing Order P 5 & n.14, JA ___-___ (rule "benefits the Commission by clarifying the issues it needs to address on rehearing, and benefits the party by preventing its

[3] The Social Cost of Carbon tool seeks to estimate the monetized climate change damage associated with an incremental increase in carbon dioxide emissions in a given year. *Fla. Se. Connection, LLC*, 162 FERC ¶ 61,233, P 30 (2018). It can be thought of as the cost today of future climate change damage, represented as a series of annual costs per metric ton of emissions discounted to a present-day value. *Id.*

claims from being denied on appeal for failure to clearly raise the issue at the administrative level"). Berkshire's passing references—in a dismissed rehearing request that failed to comply with a rule specifically designed to help clarify the issues raised on rehearing by a party—are insufficient to preserve the issue for appeal. *See Ameren*, 893 F.3d at 793 (arguments must be raised to the agency with "specificity" and may not be preserved "indirectly" or "implicitly").

Amicus the Institute for Policy Integrity at New York University School of Law ("Policy Integrity") does argue that the Commission should have used the Social Cost of Carbon. *See* Am. Br. 15-28. However, Policy Integrity may not raise an issue not raised by Petitioners, and thus, its arguments are not properly before the Court. *See EarthReports*, 828 F.3d at 956.

Even if properly presented to the Court, Petitioners' and Policy Integrity's arguments do not support a finding that the Commission acted arbitrarily or capriciously in determining that it could not quantify the climate change impacts of greenhouse gas emissions associated with the Upgrade Project. The Commission reasonably explained that it could not make this determination because it lacks "an

established framework or threshold for assessing those costs." Rehearing Order P 21, JA ___ (addressing Berkshire's reference to a study citing the Social Cost of Carbon, and observing that Berkshire "fails to demonstrate why these cited costs should be determinative here"); *see also* Environmental Assessment at 68, JA ___ (describing staff's review of various models and mathematical techniques, and finding that "there is no universally accepted methodology to attribute discrete, quantifiable, physical effects on the environment to the Project's incremental contribution to [greenhouse gases].").

Petitioners' opening brief fails to address the Commission's reasoning, and also fails to identify a methodology that the Commission could have used to assess the significance of project-level climate change impacts. Petitioners thus have "provide[d] no reason to doubt the reasonableness of the Commission's conclusion." *EarthReports*, 828 F.3d at 956; *see also Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199, at *2 (D.C. Cir. Feb. 19, 2019) (unpublished) ("Not only do petitioners offer no alternative to the Social Cost of Carbon tool . . . , but their opening brief also fails to address . . . the reasons FERC gave for rejecting the Social Cost of Carbon tool").

Moreover, Policy Integrity's arguments concerning the Social Cost of Carbon are unavailing. This Court has upheld the Commission's decision not to use the Social Cost of Carbon in assessing project-level climate change impacts. *See Appalachian Voices*, 2019 WL 847199, at *2; *EarthReports*, 828 F.3d at 956; *see also Fla. Se.*, 162 FERC ¶ 61,233, PP 30-51, *on reh'g*, 164 FERC ¶ 61,099, PP 26-37 (explaining on remand from *Sierra Club*, 867 F.3d 1357, why the Social Cost of Carbon tool does not "meaningfully inform the Commission's decisions on natural gas transportation infrastructure projects"). Moreover, the Social Cost of Carbon methodology is no longer representative of government policy. *See Columbia Gas Transmission, LLC*, 170 FERC ¶ 61,247, P 17 n.43 (2020) (citing Exec. Order No. 13,783, Promoting Energy Independence and Economic Growth, 82 Fed. Reg. 16,093 (Mar. 28, 2017) (disbanding the Interagency Working Group on Social Cost of Carbon and withdrawing its reports and supporting documents as no longer representative of government policy)).

III. THE COMMISSION REASONABLY EVALUATED COMMUNITY HEALTH AND PIPELINE SAFETY ISSUES

A. The Commission Reasonably Addressed the Community Health Issues Raised to It

Petitioners challenge the Commission's evaluation of community health impacts related to the Upgrade Project, citing asthma rates in Hampden County, Massachusetts, the location of the Upgrade Project. Pet. Br. 48-50 (contending that Environmental Assessment did not support conclusion that Upgrade Project would have no significant impact on the human environment despite Hampden County's non-attainment with certain National Ambient Air Quality Standards).

In particular, Petitioners argue that the Commission reached its finding of "no significant impact" based on "incomplete emissions calculations"—i.e., emissions figures that did not include end-use combustion (Pet. Br. 49). However, neither Food and Water nor Berkshire argued to the Commission that its evaluation of community health impacts was based on "incomplete" data. This argument is therefore waived. *See Birckhead*, 925 F.3d at 520; *Ameren Servs.*, 893 F.3d at 793.

On rehearing, only Berkshire raised the issue of community health impacts, but in a limited manner. Berkshire Rehearing Req. at 6, JA ___ (asserting that Upgrade Project will adversely affect the health of Hampden County residents because methane emissions would increase ozone levels and exacerbate asthma rates). The Rehearing Order addressed Berkshire's concerns. *See* Rehearing Order PP 22-23, JA ___-___. The Commission explained that the Environmental Protection Agency ("EPA") regulates emissions of volatile organic chemicals that can lead to the formation of ozone under the Clean Air Act. *Id.* P 22, JA ___. And the EPA's regulations governing such volatile organic chemicals, 40 C.F.R. § 51.100(s)(1), exempt methane as having "negligible photochemical reactivity." *See* Rehearing Order P 22, JA ___.

The Commission also explained, "[a]lthough Hampden County is in moderate ozone nonattainment, the project is not expected to impede the state's ability to attain required National Ambient Air Quality Standards or negatively impact human health." *Id.* P 23, JA ___ (citing Environmental Assessment at 53, 66, JA ___, ___). The Commission reached this conclusion based on the minimal emissions associated with

construction and operation of the Upgrade Project. *See id.*

As described in the Environmental Assessment, construction of the Upgrade Project would result in "short-term increases in emissions of some pollutants from the use of fossil fuel-fired equipment and the generation of fugitive dust due to earthmoving activities." Environmental Assessment at 54-55, JA ___-___. In light of mitigation measures to be implemented by Tennessee, and the "temporary," "intermittent" nature of construction, such emissions "would not be expected to cause or significantly contribute to a violation of any applicable ambient air quality standard, or significantly affect local or regional air quality." *Id.* In addition, the "minimal" operational emissions arising from the compressor station upgrades "would not have a significant impact on air quality." *Id.* (noting that emissions from the Upgrade Project are "expected to be well below" the threshold that would trigger reporting requirements under EPA regulations applicable to the natural gas industry).

B. The Commission Reasonably Addressed the Pipeline Safety Issues Raised to It

Petitioners challenge the Commission's authorization of Tennessee's Upgrade Project, in light of safety issues within the

distribution system of Tennessee's customer, Columbia Gas. Pet. Br. 50-53. In an effort to satisfy the jurisdictional requirement that this issue be presented first to the Commission on rehearing, Petitioners contend that Berkshire "challenge[d] the Commission's failure to consider the impact of Columbia Gas's operating record on the safety of the overall project and future operation of their distribution network," and further contend that the Commission failed to respond. Pet. Br. 52 (citing Berkshire Rehearing Req. at 3, JA ___).

But Berkshire's rehearing request did not articulate any such challenge—and certainly not with the specificity required by the Natural Gas Act, 15 U.S.C. § 717r(b). *See Ameren Servs.*, 893 F.3d at 793. Berkshire's comment regarding safety issues within the Columbia Gas distribution network appears in a section entitled "There is no substantial need for the project," and in a subsection introduced by the following sentence, in bold: "The ability of Columbia Gas to expand its system in question." Berkshire Rehearing Req. at 1, 3, JA ___, ___. In this context, Berkshire's comment regarding Columbia Gas's safety record did not "alert[] the Commission to the legal argument . . . now raise[d] on judicial review." *Ameren Servs.*, 893 F.3d at 793. The

argument is therefore waived. 15 U.S.C. § 717r(b); *see also* Rehearing Order P 5 & n.14, JA ___-___ (dismissing Berkshire's request for rehearing for failing to specifically identify the issues on which it was seeking rehearing).

In any event, the Certificate Order addresses the Columbia Gas safety issue, in response to another party's request to hold the proceeding in abeyance pending completion of an investigation of Columbia Gas by the National Transportation Safety Board. Certificate Order P 10, JA ___. The Commission explained that local distribution companies are not under FERC's jurisdiction, and that the National Transportation Safety Board's investigation of Columbia Gas "does not impact" the Commission's evaluation of Tennessee's Upgrade Project. *Id.*; *see also* Environmental Assessment at 61, JA ___ (noting safety concerns regarding Columbia Gas's local distribution system, and explaining the federal safety standards applicable to FERC-jurisdictional pipeline facilities).

Petitioners also seek to challenge a FERC letter order permitting construction to proceed on portions of the Upgrade Project, in light of a February 2020 announcement by federal prosecutors of a guilty plea by

Columbia Gas concerning its maintenance of its distribution system. Pet. Br. 52. However, judicial review of the construction order is foreclosed.

First, Petitioners may not challenge events occurring after the close of the record on review. *See Brooklyn Union Gas v. FERC*, 409 F.3d 404, 406-407 (D.C. Cir. 2005) ("We will not reach out to examine a decision made after the one actually under review . . . . ") (citation omitted). Petitioners filed a letter in the FERC docket regarding the Columbia Gas announcement on February 27, 2020—six days after the Rehearing Order issued and the record closed. Food and Water and Berkshire, Comment on Docket No: CP19-7-000; Notice of Changed Conditions, Feb. 27, 2020, FERC Dkt. CP19-7.[4] The construction order subsequently issued in March 2020. FERC Notice to Proceed with Construction of the Horsepower Replacement Project, March 4, 2020, FERC Dkt. CP19-7. Because both Petitioners' letter and the construction order post-date the close of the record in this proceeding, they are not properly before the Court. *See Brooklyn Union Gas*, 409

[4] Filings in FERC proceedings are available at: https://elibrary.ferc.gov/eLibrary/search.

F.3d at 406-407.

In addition, Petitioners did not seek agency rehearing of the construction order, and also did not petition for judicial review of the order. *See Del. Riverkeeper Network v. FERC*, 857 F.3d 388, 395, 397 (D.C. Cir. 2017) (challenge to FERC letter orders issued after certificate order authorizing project was "not properly before [the Court]" because petitioners failed to request agency rehearing and also failed to "specify the challenged orders in a petition for judicial review") (citing 15 U.S.C. §§ 717r(a), (b)).

IV. ON THE RECORD BEFORE IT, THE COMMISSION REASONABLY DECLINED TO CONSIDER THE LONGMEADOW METER STATION IN ITS ENVIRONMENTAL REVIEW OF THE UPGRADE PROJECT

NEPA regulations require the Commission to include actions that are "connected," "cumulative," or "similar" in an Environmental Assessment. *Myersville*, 783 F.3d at 1326. "An agency impermissibly 'segments' NEPA review when it divides connected, cumulative, or similar federal actions into separate projects and thereby fails to address the true scope and impact of the activities that should be under consideration." *Id.* (quoting *Del. Riverkeeper Network v. FERC,* 753 F.3d 1304, 1313 (D.C. Cir. 2014)).

Petitioners contend that the Commission "improperly segmented" Tennessee's planned meter station in Longmeadow, Massachusetts (located on the east side of the Connecticut River) from its environmental review of the Upgrade Project (located on the west side of the Connecticut River). Pet. Br. 44-48.[5] According to Petitioners, the Upgrade Project and Longmeadow meter station are "part and parcel of a larger development," and should have been considered together in the Commission's environmental analysis. Br. 45.

On the record before it, the Commission made a fact-based determination that Tennessee's Upgrade Project and Longmeadow meter station are not "connected actions" for environmental review purposes. Certificate Order PP 76-83, JA ___-___; Rehearing Order PP 24-27, JA ___-___; Environmental Assessment at 2-3, 63, JA ___-___, ___. As the Commission explained, "[e]ach action comprises discrete facilities in separate locations." Certificate Order P 82, JA ___. The Longmeadow meter station has "independent utility," "will be

[5] Tennessee is constructing the Longmeadow meter station under its "blanket certificate" authority. Certificate Order P 83, n.148, JA ___ (citing 18 C.F.R. §§ 157.211).

constructed whether or not the . . . Upgrade Project proceeds," and will be constructed "along a separate timeline." *Id.* P 81 & n.144, JA ___ (citing Tennessee Gas Pipeline Co., Response to Comments Submitted on the Environmental Assessment, July 17, 2019, R. 143, JA ___-___); *see also* Rehearing Order PP 24-27, JA ___-___ (explaining, among other things, that the Longmeadow meter station was not "within the geographic or temporal scope of any resources analyzed," for purposes of a cumulative impacts analysis); Environmental Assessment at 63, JA ___ (same).

The Commission found that Tennessee's Longmeadow meter station addressed a very specific reliability need on the Columbia Gas system. *See* Certificate Order P 80, JA ___ (noting that "natural gas service is provided to [Columbia Gas] customers on the east side of the Connecticut River by a single pipe," and the new meter station would "reduce the risk of disruption and enhance reliability and redundancy" by providing a new delivery point east of the Connecticut River).

The Commission also observed that the gas for the Longmeadow meter station would be supplied from Tennessee's existing pipeline system. *Id.* P 81, JA ___; *see also* Application at 14-15, n.11, JA ___

("The volume of natural gas supplied to the proposed Longmeadow Meadow Station will come from Tennessee's existing mainline system and is not influenced by the [Upgrade Project]."). Moreover, because Columbia Gas had requested that the Longmeadow meter station be operational by November 2019, whereas the Upgrade Project was anticipated to be placed in service in November 2020, the projects were proceeding on "separate timeline[s]." Certificate Order P 81, JA ___. Thus, the Commission concluded that the Longmeadow meter station is "completely independent from the need for additional capacity created by the Upgrade Project." *Id.* at P 80, JA ___; *see also id.* P 83, JA ___ ("Although the two actions both involve [Columbia Gas], they have different timelines and address separate needs.").

On this record, there is no basis for finding that the Commission acted arbitrarily or capriciously in declining to include the Longmeadow meter station in its environmental review of the Upgrade Project. *See, e.g.*, *Myersville*, 783 F.3d at 1326-27 (rejecting improper segmentation claim based on Commission's factual findings that projects at issue were independent, and noting "[t]he absence of evidence that would compel a finding of connectedness"); *compare Del. Riverkeeper Network*, 753 F.3d

at 1308-1309 (finding that FERC improperly segmented its environmental review, where separately considered pipeline upgrades would result in a single "linear and physically interdependent" pipeline that would "function[] as a unified whole").

None of the items cited by Petitioners at pages 45-46 of their brief undermines the Commission's record-based findings. For example, the Columbia Gas handout cited at page 45 of Petitioners' opening brief states, "Columbia Gas has asked [Tennessee], our interstate natural gas supplier, to undertake three *separate projects*" to enhance reliability for Columbia Gas customers. Columbia Gas, Reliability Project Update, Oct. 11, 2019, *available at*: https://www.columbiagasma.com/docs/librariesprovider3/email-documents/reliability-project-update.pdf (emphasis added). Nothing in the handout "compel[s] a finding of connectedness." *See Myersville*, 783 F.3d at 1326-27.

Inclusion of capacity for both the Upgrade Project and Longmeadow meter station in a "single firm transportation contract" between Tennessee and Columbia Gas (*see* Pet. Br. 45) likewise does not compel the conclusion that the Commission should have reviewed them

together. Moreover, Petitioners did not raise this argument to the Commission on rehearing. At best, Food and Water stated, in its rehearing request, that "Columbia [Gas] *already has* a precedent agreement to receive 6,000 [dekatherms]/day from Tennessee through its Longmeadow Meter Station." *See* Food and Water Rehearing Req. at 14 & n.47, JA ___ (citing Pipe Line Awareness Network, Comment, June 28, 2019 at 3-4, R. 141, JA ___-___) (emphasis added). However, neither Food and Water's rehearing request nor the cited comment alerted the Commission to the argument Petitioners now advance on appeal—i.e., that the Longmeadow meter station should have been considered in the environmental review of the Upgrade Project because both are part of the *same* transportation service agreement between Tennessee and Columbia Gas. *See Ameren Servs.*, 893 F.3d at 793.

Petitioners' assertion that Tennessee previously considered seeking approval for the Longmeadow meter station as part of a now-withdrawn, broader regional project also does not show that the Upgrade Project and Longmeadow meter station are connected and interdependent. *See* Pet. Br. 46 (citing FERC dockets). Moreover, Petitioners did not identify this withdrawn regional project to the

Commission in support of their arguments on rehearing. *See Ameren Servs.*, 893 F.3d at 793.

V. IN THE EVENT THE COURT REMANDS ANY ASPECT OF THE COMMISSION'S ORDERS, VACATUR IS NOT WARRANTED

For all the above reasons, the petition should be dismissed or denied in its entirety. However, in the event the Court remands any aspect of the challenged orders, such remand should be without vacatur. As the Court has explained, "The decision to vacate depends on two factors: the likelihood that 'deficiencies' in an order can be redressed on remand, even if the agency reaches the same result, and the 'disruptive consequences' of vacatur." *City of Oberlin v. FERC*, 937 F.3d 599, 611 (D.C. Cir. 2019) (quoting *Black Oak Energy, LLC v. FERC*, 725 F.3d 230, 244 (D.C. Cir. 2013)) (remanding certificate order without vacatur, where it was "plausible that the Commission will be able to supply the explanations required, and vacatur of the Commission's orders would be quite disruptive" because the pipeline was already operational). It is the Commission's understanding that construction of the Upgrade Project is underway, in advance of the winter season in New England; vacatur of the challenged orders

potentially would be extremely disruptive and detrimental to Massachusetts residents. *See* Tennessee Gas, Weekly Status Report (filed July 1, 2020), FERC Dkt. No. CP19-7.

CONCLUSION

The petition for review should be dismissed (where Court lacks jurisdiction to consider new issues) or denied (on the merits).

Respectfully submitted,

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September 25, 2020

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) and Circuit Rule 32(e), I certify that this brief complies with Fed. R. App. P. 32(a)(7)(B) because this brief contains 8,973 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

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

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September 25, 2020

ADDENDUM

STATUTES
AND
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Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

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

HISTORICAL AND REVISION NOTES

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

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

AMENDMENTS

1976—Pub. L. 94–574 provided that if no special statu-tory review proceeding is applicable, the action for ju-dicial review may be brought against the United States, the agency by its official title, or the appro-priate officer as defendant.

§ 704. Actions reviewable

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

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

HISTORICAL AND REVISION NOTES

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

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

§ 705. Relief pending review

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

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

HISTORICAL AND REVISION NOTES

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

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

§ 706. Scope of review

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

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

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

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

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

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

(D) without observance of procedure required by law;

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

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

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

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

HISTORICAL AND REVISION NOTES

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

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

ABBREVIATION OF RECORD

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

CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

Sec.

Stat. 417 [31 U.S.C. 686, 686b])'' on authority of Pub. L. 97–258, § 4(b), Sept. 13, 1982, 96 Stat. 1067, the first sec-tion of which enacted Title 31, Money and Finance.

§ 825*l*. Review of orders

(a) Application for rehearing; time periods; modification of order

Any person, electric utility, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, electric utility, 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 entity unless such entity 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) of this section, 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) Judicial review

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 United States court of appeals for any circuit wherein the licensee or public utility 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, if 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's order

The filing of an application for rehearing under subsection (a) of this section 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.

(June 10, 1920, ch. 285, pt. III, § 313, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 860; amended June 25, 1948, ch. 646, § 32(a), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Pub. L. 85–791, § 16, Aug. 28, 1958, 72 Stat. 947; Pub. L. 109–58, title XII, § 1284(c), Aug. 8, 2005, 119 Stat. 980.)

CODIFICATION

In subsec. (b), ''section 1254 of title 28'' substituted for ''sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 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. (a). Pub. L. 109–58 inserted ''electric utility,'' after ''Any person,'' and ''to which such person,'' and substituted ''brought by any entity unless such entity'' for ''brought by any person unless such person''.

1958—Subsec. (a). Pub. L. 85–791, § 16(a), inserted sentence to provide that Commission may modify or set aside findings or orders until record has been filed in court of appeals.

Subsec. (b). Pub. L. 85–791, § 16(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 ''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''.

§ 825m. Enforcement provisions

(a) Enjoining and restraining violations

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

clude, in addition to the President, any agency, officer, or employee who may be designated by the President for the execution of any of the powers and functions vested in the President under this chapter.

(Feb. 22, 1935, ch. 18, § 11, 49 Stat. 33.)

DELEGATION OF FUNCTIONS

Ex. Ord. No. 6979, Feb. 28, 1935, which designated and appointed Secretary of the Interior to execute powers and functions vested in President by this chapter except those vested in him by section 715c of this title, was superseded by Ex. Ord. No. 10752, set out below.

Ex. Ord. No. 7756, Dec. 1, 1937, 2 F.R. 2664, which delegated to Secretary of the Interior powers and functions vested in President under this chapter except those vested in him by section 715c of this title, and authorized Secretary to establish a Petroleum Conservation Division in Department of the Interior, the functions and duties of which shall be: (1) to assist, in such manner as may be prescribed by Secretary of the Interior, in administering said act, (2) to cooperate with oil and gas-producing States in prevention of waste in oil and gas production and in adoption of uniform oil- and gas-conservation laws and regulations, and (3) to keep informed currently as to facts which may be required for exercise of responsibility of President under section 715c of this title, was superseded by Ex. Ord. No. 10752, set out below.

EX. ORD. NO. 10752. DELEGATION OF FUNCTIONS TO THE SECRETARY OF THE INTERIOR

Ex. Ord. No. 10752, Feb. 12, 1958, 23 F.R. 973, provided:

SECTION 1. The Secretary of the Interior is hereby designated and appointed as the agent of the President for the execution of all the powers and functions vested in the President by the act of February 22, 1935, 49 Stat. 30, entitled ''An Act to regulate interstate and foreign commerce in petroleum and its products by prohibiting the shipment in such commerce of petroleum and its products produced in violation of State law, and for other purposes,'' as amended (15 U.S.C. 715 *et seq.*), except those vested in the President by section 4 of the act (15 U.S.C. 715c).

SEC. 2. The Secretary of the Interior may make such provisions in the Department of the Interior as he may deem appropriate to administer the said act.

SEC. 3. This Executive order supersedes Executive Order No. 6979 of February 28, 1935, Executive Order No. 7756 of December 1, 1937 (2 F.R. 2664), Executive Order No. 9732 of June 3, 1946 (11 F.R. 5985), and paragraph (q) of section 1 of Executive Order No. 10250 of June 5, 1951 (16 F.R. 5385).

DWIGHT D. EISENHOWER.

§ 715k. Saving clause

If any provision of this chapter, or the application thereof to any person or circumstance, shall be held invalid, the validity of the remainder of the chapter and the application of such provision to other persons or circumstances shall not be affected thereby.

(Feb. 22, 1935, ch. 18, § 12, 49 Stat. 33.)

§ 715*l*. Repealed. June 22, 1942, ch. 436, 56 Stat. 381

Section, acts Feb. 22, 1935, ch. 18, § 13, 49 Stat. 33; June 14, 1937, ch. 335, 50 Stat. 257; June 29, 1939, ch. 250, 53 Stat. 927, provided for expiration of this chapter on June 30, 1942.

§ 715m. Cooperation between Secretary of the Interior and Federal and State authorities

The Secretary of the Interior, in carrying out this chapter, is authorized to cooperate with Federal and State authorities.

(June 25, 1946, ch. 472, § 3, 60 Stat. 307.)

CODIFICATION

Section was not enacted as a part act Feb. 22, 1935, which comprises this chapter.

DELEGATION OF FUNCTIONS

Delegation of President's authority to Secretary of the Interior, see note set out under section 715j of this title.

CHAPTER 15B—NATURAL GAS

Sec.

§ 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

Section 404(b) of Pub. L. 102–486 provided that: ''The transportation or sale of natural gas by any person who is not otherwise a public utility, within the meaning of State law—

''(1) in closed containers; or

''(2) otherwise to any person for use by such person as a fuel in a self-propelled vehicle,

shall not be considered to be a transportation or sale of natural gas within the meaning of any State law, regu-lation, or order in effect before January 1, 1989. This subsection shall not apply to any provision of any State law, regulation, or order to the extent that such provision has as its primary purpose the protection of public safety.''

EMERGENCY NATURAL GAS ACT OF 1977

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

EXECUTIVE ORDER NO. 11969

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

PROCLAMATION NO. 4485

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

PROCLAMATION NO. 4495

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

§ 717a. Definitions

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

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

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

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

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

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

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

(7) ''Interstate commerce'' means commerce between any point in a State and any point

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

(b) Inventory of property; statements of costs

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

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

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

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

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

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

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

(c) Certificate of public convenience and necessity

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

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

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

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

(B) natural gas produced by such person.

(d) Application for certificate of public convenience and necessity

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

(e) Granting of certificate of public convenience and necessity

Except in the cases governed by the provisos contained in subsection (c)(1) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such 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), des-ignated existing first paragraph as par. (1)(A) and exist-ing 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 sec-tion 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(a), 203(a), 44 F.R. 33663, 33666, 93 Stat. 1373, 1376, ef-fective 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 Sec-retary 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 au-thority vested in Secretary of Energy subsequently transferred to Federal Coordinator for Alaska Natural Gas Transportation Projects by section 720d(f) of this title.

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

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

(b) Access to and inspection of accounts and records

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

neys, 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) of this section, 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) of this section 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) of this section, 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

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

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 MILI-TARY 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

Code of Federal Regulations
Title 18. Conservation of Power and Water Resources
Chapter I. Federal Energy Regulatory Commission, Department of Energy
Subchapter X. Procedural Rules
Part 385. Rules of Practice and Procedure (Refs & Annos)
Subpart G. Decisions

18 C.F.R. § 385.713

§ 385.713 Request for rehearing (Rule 713).

Effective: March 23, 2006
Currentness

(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 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.

Credits

[49 FR 21316, May 21, 1984; 60 FR 4860, Jan. 25, 1995; 60 FR 16567, March 31, 1995; Order 663, 70 FR 55725, Sept. 23, 2005; 71 FR 14642, March 23, 2006]

SOURCE: Order 225, 47 FR 19022, May 3, 1982; 52 FR 28467, July 30, 1987; 52 FR 35909, Sept. 24, 1987; 53 FR 15032, April 27, 1988; 53 FR 16408, May 9, 1988; 53 FR 32039, Aug. 23, 1988; 55 FR 50682, Dec. 10, 1990; 57 FR 21734, May 22, 1992; 58 FR 7987, Feb. 11, 1993; 58 FR 38528, July 19, 1993; 59 FR 63247, Dec. 8, 1994; Order 639, 65 FR 20371, April 17, 2000; Order 620, 65 FR 81344, Dec. 26, 2000; Order 692, 67 FR 52412, Aug. 12, 2002; Order 685, 71 FR 65051, Nov. 7, 2006; 72 FR 11287, March 13, 2007; Order 756, 77 FR 4895, Feb. 1, 2012; Order 826, 81 FR 43941, July 6, 2016; Order 834, 82 FR 8139, Jan. 24, 2017; Order 854, 84 FR 3983, Feb. 14, 2019; Order 865, 85 FR 2018, Jan. 14, 2020, unless otherwise noted.

AUTHORITY: 5 U.S.C. 551–557; 15 U.S.C. 717–717w, 3301–3432; 16 U.S.C. 791a–825v, 2601–2645; 28 U.S.C. 2461; 31 U.S.C 3701, 9701; 42 U.S.C. 7101–7352, 16441, 16451–16463; 49 U.S.C. 60502; 49 App. U.S.C. 1–85 (1988); 28 U.S.C. 2461 note (1990); 28 U.S.C. 2461 note (2015).

Notes of Decisions (90)

Current through September 17, 2020, 85 FR 58167.

End of Document

TABLE 2a TO APPENDIX A OF SUBPART A—FACILITY INVENTORY[1] DATA ELEMENTS FOR REPORTING EMISSIONS FROM POINT SOURCES, WHERE REQUIRED BY 40 CFR 51.30—Continued

Data elements
(22) Release Point Apportionment Percent.
(23) Release Point Type.
(24) Control Measure and Control Pollutant (where applicable).
(25) Percent Control Approach Capture Efficiency (where applicable).
(26) Percent Control Measures Reduction Efficiency (where applicable).

TABLE 2a TO APPENDIX A OF SUBPART A—FACILITY INVENTORY[1] DATA ELEMENTS FOR REPORTING EMISSIONS FROM POINT SOURCES, WHERE REQUIRED BY 40 CFR 51.30—Continued

Data elements
(27) Percent Control Approach Effectiveness (where applicable).

[1] Facility Inventory data elements need only be reported once to the EIS and then revised if needed. They do not need to be reported for each triennial or every-year emissions inventory.

TABLE 2b TO APPENDIX A OF SUBPART A—DATA ELEMENTS FOR REPORTING EMISSIONS FROM POINT, NONPOINT, ONROAD MOBILE AND NONROAD MOBILE SOURCES, WHERE REQUIRED BY 40 CFR 51.30

Data elements	Point	Nonpoint	Onroad	Nonroad
(1) Emissions Year	Y	Y	Y	Y
(2) FIPS code	Y	Y	Y	Y
(3) Shape Identifiers (where applicable)	.....	Y		
(4) Source Classification Code	.....	Y	Y	Y
(5) Emission Type (where applicable)	.....	Y	Y	Y
(8) Emission Factor	Y	Y		
(9) Throughput (Value, Material, Unit of Measure, and Type)	Y	Y	Y	
(10) Pollutant Code	Y	Y	Y	Y
(11) Annual Emissions and Unit of Measure	Y	Y	Y	Y
(12) Reporting Period Type (Annual)	Y	Y	Y	Y
(13) Emission Operating Type (Routine)	Y	.....		
(14) Emission Calculation Method	Y	Y		
(15) Control Measure and Control Pollutant (where applicable)	.....	Y		
(16) Percent Control Measures Reduction Efficiency (where applicable)	.....	Y		
(17) Percent Control Approach Effectiveness (where applicable)	.....	Y		
(18) Percent Control Approach Penetration (where applicable)	.....	Y	.....	.....

[73 FR 76552, Dec. 17, 2008, as amended at 80 FR 8796, Feb. 19, 2015; 81 FR 58149, Aug. 24, 2016; 83 FR 63031, Dec. 6, 2018]

Subparts B–E [Reserved]

Subpart F—Procedural Requirements

AUTHORITY: 42 U.S.C. 7401, 7411, 7412, 7413, 7414, 7470–7479, 7501–7508, 7601, and 7602.

§51.100 Definitions.

As used in this part, all terms not defined herein will have the meaning given them in the Act:

(a) *Act* means the Clean Air Act (42 U.S.C. 7401 *et seq.*, as amended by Pub. L. 91–604, 84 Stat. 1676 Pub. L. 95–95, 91 Stat., 685 and Pub. L. 95–190, 91 Stat., 1399.)

(b) *Administrator* means the Administrator of the Environmental Protection Agency (EPA) or an authorized representative.

(c) *Primary standard* means a national primary ambient air quality standard promulgated pursuant to section 109 of the Act.

(d) *Secondary standard* means a national secondary ambient air quality standard promulgated pursuant to section 109 of the Act.

(e) *National standard* means either a primary or secondary standard.

(f) *Owner or operator* means any person who owns, leases, operates, controls, or supervises a facility, building, structure, or installation which directly or indirectly result or may result in emissions of any air pollutant for which a national standard is in effect.

(g) *Local agency* means any local government agency other than the State

agency, which is charged with responsibility for carrying out a portion of the plan.

(h) *Regional Office* means one of the ten (10) EPA Regional Offices.

(i) *State agency* means the air pollution control agency primarily responsible for development and implementation of a plan under the Act.

(j) *Plan* means an implementation plan approved or promulgated under section 110 of 172 of the Act.

(k) *Point source* means the following:

(1) For particulate matter, sulfur oxides, carbon monoxide, volatile organic compounds (VOC) and nitrogen dioxide—

(i) Any stationary source the actual emissions of which are in excess of 90.7 metric tons (100 tons) per year of the pollutant in a region containing an area whose 1980 *urban place* population, as defined by the U.S. Bureau of the Census, was equal to or greater than 1 million.

(ii) Any stationary source the actual emissions of which are in excess of 22.7 metric tons (25 tons) per year of the pollutant in a region containing an area whose 1980 *urban place* population, as defined by the U.S. Bureau of the Census, was less than 1 million; or

(2) For lead or lead compounds measured as elemental lead, any stationary source that actually emits a total of 4.5 metric tons (5 tons) per year or more.

(l) *Area source* means any small residential, governmental, institutional, commercial, or industrial fuel combustion operations; onsite solid waste disposal facility; motor vehicles, aircraft vessels, or other transportation facilities or other miscellaneous sources identified through inventory techniques similar to those described in the ''AEROS Manual series, Vol. II AEROS User's Manual,'' EPA–450/2–76–029 December 1976.

(m) *Region* means an area designated as an air quality control region (AQCR) under section 107(c) of the Act.

(n) *Control strategy* means a combination of measures designated to achieve the aggregate reduction of emissions necessary for attainment and maintenance of national standards including, but not limited to, measures such as:

(1) Emission limitations.

(2) Federal or State emission charges or taxes or other economic incentives or disincentives.

(3) Closing or relocation of residential, commercial, or industrial facilities.

(4) Changes in schedules or methods of operation of commercial or industrial facilities or transportation systems, including, but not limited to, short-term changes made in accordance with standby plans.

(5) Periodic inspection and testing of motor vehicle emission control systems, at such time as the Administrator determines that such programs are feasible and practicable.

(6) Emission control measures applicable to in-use motor vehicles, including, but not limited to, measures such as mandatory maintenance, installation of emission control devices, and conversion to gaseous fuels.

(7) Any transportation control measure including those transportation measures listed in section 108(f) of the Clean Air Act as amended.

(8) Any variation of, or alternative to any measure delineated herein.

(9) Control or prohibition of a fuel or fuel additive used in motor vehicles, if such control or prohibition is necessary to achieve a national primary or secondary air quality standard and is approved by the Administrator under section 211(c)(4)(C) of the Act.

(o) *Reasonably available control technology (RACT)* means devices, systems, process modifications, or other apparatus or techniques that are reasonably available taking into account:

(1) The necessity of imposing such controls in order to attain and maintain a national ambient air quality standard;

(2) The social, environmental, and economic impact of such controls; and

(3) Alternative means of providing for attainment and maintenance of such standard. (This provision defines RACT for the purposes of § 51.341(b) only.)

(p) *Compliance schedule* means the date or dates by which a source or category of sources is required to comply with specific emission limitations contained in an implementation plan and with any increments of progress toward such compliance.

(q) *Increments of progress* means steps toward compliance which will be taken by a specific source, including:

(1) Date of submittal of the source's final control plan to the appropriate air pollution control agency;

(2) Date by which contracts for emission control systems or process modifications will be awarded; or date by which orders will be issued for the purchase of component parts to accomplish emission control or process modification;

(3) Date of initiation of on-site construction or installation of emission control equipment or process change;

(4) Date by which on-site construction or installation of emission control equipment or process modification is to be completed; and

(5) Date by which final compliance is to be achieved.

(r) *Transportation control measure* means any measure that is directed toward reducing emissions of air pollutants from transportation sources. Such measures include, but are not limited to, those listed in section 108(f) of the Clean Air Act.

(s) *Volatile organic compounds (VOC)* means any compound of carbon, excluding carbon monoxide, carbon dioxide, carbonic acid, metallic carbides or carbonates, and ammonium carbonate, which participates in atmospheric photochemical reactions.

(1) This includes any such organic compound other than the following, which have been determined to have negligible photochemical reactivity: Methane; ethane; methylene chloride (dichloromethane); 1,1,1-trichloroethane (methyl chloroform); 1,1,2-trichloro-1,2,2-trifluoroethane (CFC–113); trichlorofluoromethane (CFC–11); dichlorodifluoromethane (CFC–12); chlorodifluoromethane (HCFC–22); trifluoromethane (HFC–23); 1,2-dichloro 1,1,2,2-tetrafluoroethane (CFC–114); chloropentafluoroethane (CFC–115); 1,1,1-trifluoro 2,2-dichloroethane (HCFC–123); 1,1,1,2-tetrafluoroethane (HFC–134a); 1,1-dichloro 1-fluoroethane (HCFC–141b); 1-chloro 1,1-difluoroethane (HCFC–142b); 2-chloro-1,1,1,2-tetrafluoroethane (HCFC–124); pentafluoroethane (HFC–125); 1,1,2,2-tetrafluoroethane (HFC–134); 1,1,1-trifluoroethane (HFC–143a); 1,1-difluoroethane (HFC–152a); parachlorobenzotrifluoride (PCBTF); cyclic, branched, or linear completely methylated siloxanes; acetone; perchloroethylene (tetrachloroethylene); 3,3-dichloro-1,1,1,2,2-pentafluoropropane (HCFC–225ca); 1,3-dichloro-1,1,2,2,3-pentafluoropropane (HCFC–225cb); 1,1,1,2,3,4,4,5,5,5-decafluoropentane (HFC 43–10mee); difluoromethane (HFC–32); ethylfluoride (HFC–161); 1,1,1,3,3,3-hexafluoropropane (HFC–236fa); 1,1,2,2,3-pentafluoropropane (HFC–245ca); 1,1,2,3,3-pentafluoropropane (HFC–245ea); 1,1,1,2,3-pentafluoropropane (HFC–245eb); 1,1,1,3,3-pentafluoropropane (HFC–245fa); 1,1,1,2,3,3-hexafluoropropane (HFC–236ea); 1,1,1,3,3-pentafluorobutane (HFC–365mfc); chlorofluoromethane (HCFC–31); 1 chloro-1-fluoroethane (HCFC–151a); 1,2-dichloro-1,1,2-trifluoroethane (HCFC–123a); 1,1,1,2,2,3,3,4,4-nonafluoro-4-methoxy-butane ($C_4F_9OCH_3$ or HFE–7100); 2-(difluoromethoxymethyl)-1,1,1,2,3,3,3-heptafluoropropane ($(CF_3)_2CFCF_2OCH_3$); 1-ethoxy-1,1,2,2,3,3,4,4,4-nonafluorobutane ($C_4F_9OC_2H_5$ or HFE–7200); 2-(ethoxydifluoromethyl)-1,1,1,2,3,3,3-heptafluoropropane ($(CF_3)_2CFCF_2OC_2H_5$); methyl acetate; 1,1,1,2,2,3,3-heptafluoro-3-methoxy-propane (n-C3F7OCH3, HFE–7000); 3-ethoxy- 1,1,1,2,3,4,4,5,5,6,6,6-dodecafluoro-2-(trifluoromethyl) hexane (HFE–7500); 1,1,1,2,3,3,3-heptafluoropropane (HFC 227ea); methyl formate (HCOOCH3); 1,1,1,2,2,3,4,5,5,5-decafluoro-3-methoxy-4-trifluoromethyl-pentane (HFE–7300); propylene carbonate; dimethyl carbonate; *trans*-1,3,3,3-tetrafluoropropene; HCF_2OCF_2H (HFE–134); $HCF_2OCF_2OCF_2H$ (HFE–236cal2); $HCF_2OCF_2CF_2OCF_2H$ (HFE–338pcc13); $HCF_2OCF_2OCF_2CF_2OCF_2H$ (H-Galden 1040x or H-Galden ZT 130 (or 150 or 180)); *trans* 1-chloro-3,3,3-trifluoroprop-1-ene; 2,3,3,3-tetrafluoropropene; 2-amino-2-methyl-1-propanol; t-butyl acetate; 1,1,2,2- Tetrafluoro -1-(2,2,2-trifluoroethoxy) ethane; *cis*-1,1,1,4,4,4-hexafluorobut-2-ene (HFO–1336mzz-Z); and perfluorocarbon compounds which fall into these classes:

(i) Cyclic, branched, or linear, completely fluorinated alkanes;

(ii) Cyclic, branched, or linear, completely fluorinated ethers with no unsaturations;

(iii) Cyclic, branched, or linear, completely fluorinated tertiary amines with no unsaturations; and

(iv) Sulfur containing perfluorocarbons with no unsaturations and with sulfur bonds only to carbon and fluorine.

(2) For purposes of determining compliance with emissions limits, VOC will be measured by the test methods in the approved State implementation plan (SIP) or 40 CFR part 60, appendix A, as applicable. Where such a method also measures compounds with negligible photochemical reactivity, these negligibility-reactive compounds may be excluded as VOC if the amount of such compounds is accurately quantified, and such exclusion is approved by the enforcement authority.

(3) As a precondition to excluding these compounds as VOC or at any time thereafter, the enforcement authority may require an owner or operator to provide monitoring or testing methods and results demonstrating, to the satisfaction of the enforcement authority, the amount of negligibly-reactive compounds in the source's emissions.

(4) For purposes of Federal enforcement for a specific source, the EPA shall use the test methods specified in the applicable EPA-approved SIP, in a permit issued pursuant to a program approved or promulgated under title V of the Act, or under 40 CFR part 51, subpart I or appendix S, or under 40 CFR parts 52 or 60. The EPA shall not be bound by any State determination as to appropriate methods for testing or monitoring negligibly-reactive compounds if such determination is not reflected in any of the above provisions.

(5) [Reserved]

(6) For the purposes of determining compliance with California's aerosol coatings reactivity-based regulation, (as described in the California Code of Regulations, Title 17, Division 3, Chapter 1, Subchapter 8.5, Article 3), any organic compound in the volatile portion of an aerosol coating is counted towards that product's reactivity-based limit. Therefore, the compounds identified in paragraph (s) of this section as negligibly reactive and excluded from EPA's definition of VOCs are to be counted towards a product's reactivity limit for the purposes of determining compliance with California's aerosol coatings reactivity-based regulation.

(7) For the purposes of determining compliance with EPA's aerosol coatings reactivity based regulation (as described in 40 CFR part 59—National Volatile Organic Compound Emission Standards for Consumer and Commercial Products) any organic compound in the volatile portion of an aerosol coating is counted towards the product's reactivity-based limit, as provided in 40 CFR part 59, subpart E. Therefore, the compounds that are used in aerosol coating products and that are identified in paragraphs (s)(1) or (s)(5) of this section as excluded from EPA's definition of VOC are to be counted towards a product's reactivity limit for the purposes of determining compliance with EPA's aerosol coatings reactivity-based national regulation, as provided in 40 CFR part 59, subpart E.

(t)–(w) [Reserved]

(x) *Time period* means any period of time designated by hour, month, season, calendar year, averaging time, or other suitable characteristics, for which ambient air quality is estimated.

(y) *Variance* means the temporary deferral of a final compliance date for an individual source subject to an approved regulation, or a temporary change to an approved regulation as it applies to an individual source.

(z) *Emission limitation* and *emission standard* mean a requirement established by a State, local government, or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirements which limit the level of opacity, prescribe equipment, set fuel specifications, or prescribe operation or maintenance procedures for a source to assure continuous emission reduction.

(aa) *Capacity factor* means the ratio of the average load on a machine or equipment for the period of time considered to the capacity rating of the machine or equipment.

(bb) *Excess emissions* means emissions of an air pollutant in excess of an emission standard.

(cc) *Nitric acid plant* means any facility producing nitric acid 30 to 70 percent in strength by either the pressure or atmospheric pressure process.

(dd) *Sulfuric acid plant* means any facility producing sulfuric acid by the contact process by burning elemental sulfur, alkylation acid, hydrogen sulfide, or acid sludge, but does not include facilities where conversion to sulfuric acid is utilized primarily as a means of preventing emissions to the atmosphere of sulfur dioxide or other sulfur compounds.

(ee) *Fossil fuel-fired steam generator* means a furnance or bioler used in the process of burning fossil fuel for the primary purpose of producing steam by heat transfer.

(ff) *Stack* means any point in a source designed to emit solids, liquids, or gases into the air, including a pipe or duct but not including flares.

(gg) *A stack in existence* means that the owner or operator had (1) begun, or caused to begin, a continuous program of physical on-site construction of the stack or (2) entered into binding agreements or contractual obligations, which could not be cancelled or modified without substantial loss to the owner or operator, to undertake a program of construction of the stack to be completed within a reasonable time.

(hh)(1) *Dispersion technique* means any technique which attempts to affect the concentration of a pollutant in the ambient air by:

(i) Using that portion of a stack which exceeds good engineering practice stack height:

(ii) Varying the rate of emission of a pollutant according to atmospheric conditions or ambient concentrations of that pollutant; or

(iii) Increasing final exhaust gas plume rise by manipulating source process parameters, exhaust gas parameters, stack parameters, or combining exhaust gases from several existing stacks into one stack; or other selective handling of exhaust gas streams so as to increase the exhaust gas plume rise.

(2) The preceding sentence does not include:

(i) The reheating of a gas stream, following use of a pollution control system, for the purpose of returning the gas to the temperature at which it was originally discharged from the facility generating the gas stream;

(ii) The merging of exhaust gas streams where:

(A) The source owner or operator demonstrates that the facility was originally designed and constructed with such merged gas streams;

(B) After July 8, 1985 such merging is part of a change in operation at the facility that includes the installation of pollution controls and is accompanied by a net reduction in the allowable emissions of a pollutant. This exclusion from the definition of *dispersion techniques* shall apply only to the emission limitation for the pollutant affected by such change in operation; or

(C) Before July 8, 1985, such merging was part of a change in operation at the facility that included the installation of emissions control equipment or was carried out for sound economic or engineering reasons. Where there was an increase in the emission limitation or, in the event that no emission limitation was in existence prior to the merging, an increase in the quantity of pollutants actually emitted prior to the merging, the reviewing agency shall presume that merging was significantly motivated by an intent to gain emissions credit for greater dispersion. Absent a demonstration by the source owner or operator that merging was not significantly motivated by such intent, the reviewing agency shall deny credit for the effects of such merging in calculating the allowable emissions for the source;

(iii) Smoke management in agricultural or silvicultural prescribed burning programs;

(iv) Episodic restrictions on residential woodburning and open burning; or

(v) Techniques under §51.100(hh)(1)(iii) which increase final exhaust gas plume rise where the resulting allowable emissions of sulfur dioxide from the facility do not exceed 5,000 tons per year.

(ii) *Good engineering practice* (GEP) stack height means the greater of:

(1) 65 meters, measured from the ground-level elevation at the base of the stack:

(2)(i) For stacks in existence on January 12, 1979, and for which the owner or operator had obtained all applicable permits or approvals required under 40 CFR parts 51 and 52.

$H_g = 2.5H$,

provided the owner or operator produces evidence that this equation was actually relied on in establishing an emission limitation:

(ii) For all other stacks,

$H_g = H + 1.5L$

where:

H_g = good engineering practice stack height, measured from the ground-level elevation at the base of the stack,

H = height of nearby structure(s) measured from the ground-level elevation at the base of the stack.

L = lesser dimension, height or projected width, of nearby structure(s)

provided that the EPA, State or local control agency may require the use of a field study or fluid model to verify GEP stack height for the source; or

(3) The height demonstrated by a fluid model or a field study approved by the EPA State or local control agency, which ensures that the emissions from a stack do not result in excessive concentrations of any air pollutant as a result of atmospheric downwash, wakes, or eddy effects created by the source itself, nearby structures or nearby terrain features.

(jj) *Nearby* as used in §51.100(ii) of this part is defined for a specific structure or terrain feature and

(1) For purposes of applying the formulae provided in §51.100(ii)(2) means that distance up to five times the lesser of the height or the width dimension of a structure, but not greater than 0.8 km (½ mile), and

(2) For conducting demonstrations under §51.100(ii)(3) means not greater than 0.8 km (½ mile), except that the portion of a terrain feature may be considered to be nearby which falls within a distance of up to 10 times the maximum height (H_t) of the feature, not to exceed 2 miles if such feature achieves a height (H_t) 0.8 km from the stack that is at least 40 percent of the GEP stack height determined by the formulae provided in §51.100(ii)(2)(ii) of this part or 26 meters, whichever is greater, as measured from the ground-level elevation at the base of the stack. The height of the structure or terrain feature is measured from the ground-level elevation at the base of the stack.

(kk) *Excessive concentration* is defined for the purpose of determining good engineering practice stack height under §51.100(ii)(3) and means:

(1) For sources seeking credit for stack height exceeding that established under §51.100(ii)(2) a maximum ground-level concentration due to emissions from a stack due in whole or part to downwash, wakes, and eddy effects produced by nearby structures or nearby terrain features which individually is at least 40 percent in excess of the maximum concentration experienced in the absence of such downwash, wakes, or eddy effects and which contributes to a total concentration due to emissions from all sources that is greater than an ambient air quality standard. For sources subject to the prevention of significant deterioration program (40 CFR 51.166 and 52.21), an excessive concentration alternatively means a maximum ground-level concentration due to emissions from a stack due in whole or part to downwash, wakes, or eddy effects produced by nearby structures or nearby terrain features which individually is at least 40 percent in excess of the maximum concentration experienced in the absence of such downwash, wakes, or eddy effects and greater than a prevention of significant deterioration increment. The allowable emission rate to be used in making demonstrations under this part shall be prescribed by the new source performance standard that is applicable to the source category unless the owner or operator demonstrates that this emission rate is infeasible. Where such demonstrations are approved by the authority administering the State implementation plan, an alternative emission rate shall be established in consultation with the source owner or operator.

(2) For sources seeking credit after October 11, 1983, for increases in existing stack heights up to the heights established under §51.100(ii)(2), either (i) a maximum ground-level concentration due in whole or part to downwash, wakes or eddy effects as provided in paragraph (kk)(1) of this section, except that the emission rate specified by any applicable State implementation plan (or, in the absence of such a limit, the actual emission rate) shall be used, or (ii) the actual presence of a local nuisance caused by the existing stack, as determined by the authority administering the State implementation plan; and

(3) For sources seeking credit after January 12, 1979 for a stack height determined under §51.100(ii)(2) where the authority administering the State implementation plan requires the use of a field study or fluid model to verify GEP stack height, for sources seeking stack height credit after November 9, 1984 based on the aerodynamic influence of cooling towers, and for sources seeking stack height credit after December 31, 1970 based on the aerodynamic influence of structures not adequately represented by the equations in §51.100(ii)(2), a maximum ground-level concentration due in whole or part to downwash, wakes or eddy effects that is at least 40 percent in excess of the maximum concentration experienced in the absence of such downwash, wakes, or eddy effects.

(ll)–(mm) [Reserved]

(nn) Intermittent control system (ICS) means a dispersion technique which varies the rate at which pollutants are emitted to the atmosphere according to meteorological conditions and/or ambient concentrations of the pollutant, in order to prevent ground-level concentrations in excess of applicable ambient air quality standards. Such a dispersion technique is an ICS whether used alone, used with other dispersion techniques, or used as a supplement to continuous emission controls (*i.e.*, used as a supplemental control system).

(oo) *Particulate matter* means any airborne finely divided solid or liquid material with an aerodynamic diameter smaller than 100 micrometers.

(pp) *Particulate matter emissions* means all finely divided solid or liquid material, other than uncombined water, emitted to the ambient air as measured by applicable reference methods, or an equivalent or alternative method, specified in this chapter, or by a test method specified in an approved State implementation plan.

(qq) PM_{10} means particulate matter with an aerodynamic diameter less than or equal to a nominal 10 micrometers as measured by a reference method based on appendix J of part 50 of this chapter and designated in accordance with part 53 of this chapter or by an equivalent method designated in accordance with part 53 of this chapter.

(rr) PM_{10} *emissions* means finely divided solid or liquid material, with an aerodynamic diameter less than or equal to a nominal 10 micrometers emitted to the ambient air as measured by an applicable reference method, or an equivalent or alternative method, specified in this chapter or by a test method specified in an approved State implementation plan.

(ss) *Total suspended particulate* means particulate matter as measured by the method described in appendix B of part 50 of this chapter.

[51 FR 40661, Nov. 7, 1986]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting §51.100, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.govinfo.gov*.

§51.101 Stipulations.

Nothing in this part will be construed in any manner:

(a) To encourage a State to prepare, adopt, or submit a plan which does not provide for the protection and enhancement of air quality so as to promote the public health and welfare and productive capacity.

(b) To encourage a State to adopt any particular control strategy without taking into consideration the cost-effectiveness of such control strategy in relation to that of alternative control strategies.

(c) To preclude a State from employing techniques other than those specified in this part for purposes of estimating air quality or demonstrating the adequacy of a control strategy,

§ 1501.2 Apply NEPA early in the process.

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

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

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

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

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

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

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

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

§ 1501.3 When to prepare an environmental assessment.

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

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

§ 1501.4 Whether to prepare an environmental impact statement.

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

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

(1) Normally requires an environmental impact statement, or

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

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

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

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

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

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

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

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

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

§ 1501.5 Lead agencies.

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

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

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

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

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

(1) Magnitude of agency's involvement.

(2) Project approval/disapproval authority.

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

(4) Duration of agency's involvement.

(5) Sequence of agency's involvement.

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

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

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

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

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

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

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

§ 1501.6 Cooperating agencies.

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

(a) The lead agency shall:

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

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

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

(b) Each cooperating agency shall:(1) Participate in the NEPA process at the earliest possible time.

§ 1508.6 Council.

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

§ 1508.7 Cumulative impact.

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

§ 1508.8 Effects.

Effects include:

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

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

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

§ 1508.9 Environmental assessment.

Environmental assessment:

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

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

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

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

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

§ 1508.10 Environmental document.

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

§ 1508.11 Environmental impact statement.

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

§ 1508.12 Federal agency.

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

§ 1508.13 Finding of no significant impact.

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

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Presidential Documents

Title 3—

The President

Executive Order 13783 of March 28, 2017

Promoting Energy Independence and Economic Growth

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. *Policy.* (a) It is in the national interest to promote clean and safe development of our Nation's vast energy resources, while at the same time avoiding regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation. Moreover, the prudent development of these natural resources is essential to ensuring the Nation's geopolitical security.

(b) It is further in the national interest to ensure that the Nation's electricity is affordable, reliable, safe, secure, and clean, and that it can be produced from coal, natural gas, nuclear material, flowing water, and other domestic sources, including renewable sources.

(c) Accordingly, it is the policy of the United States that executive departments and agencies (agencies) immediately review existing regulations that potentially burden the development or use of domestically produced energy resources and appropriately suspend, revise, or rescind those that unduly burden the development of domestic energy resources beyond the degree necessary to protect the public interest or otherwise comply with the law.

(d) It further is the policy of the United States that, to the extent permitted by law, all agencies should take appropriate actions to promote clean air and clean water for the American people, while also respecting the proper roles of the Congress and the States concerning these matters in our constitutional republic.

(e) It is also the policy of the United States that necessary and appropriate environmental regulations comply with the law, are of greater benefit than cost, when permissible, achieve environmental improvements for the American people, and are developed through transparent processes that employ the best available peer-reviewed science and economics.

Sec. 2. *Immediate Review of All Agency Actions that Potentially Burden the Safe, Efficient Development of Domestic Energy Resources.* (a) The heads of agencies shall review all existing regulations, orders, guidance documents, policies, and any other similar agency actions (collectively, agency actions) that potentially burden the development or use of domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear energy resources. Such review shall not include agency actions that are mandated by law, necessary for the public interest, and consistent with the policy set forth in section 1 of this order.

(b) For purposes of this order, ''burden'' means to unnecessarily obstruct, delay, curtail, or otherwise impose significant costs on the siting, permitting, production, utilization, transmission, or delivery of energy resources.

(c) Within 45 days of the date of this order, the head of each agency with agency actions described in subsection (a) of this section shall develop and submit to the Director of the Office of Management and Budget (OMB Director) a plan to carry out the review required by subsection (a) of this section. The plans shall also be sent to the Vice President, the Assistant to the President for Economic Policy, the Assistant to the President for Domestic Policy, and the Chair of the Council on Environmental Quality. The head of any agency who determines that such agency does not have

agency actions described in subsection (a) of this section shall submit to the OMB Director a written statement to that effect and, absent a determination by the OMB Director that such agency does have agency actions described in subsection (a) of this section, shall have no further responsibilities under this section.

(d) Within 120 days of the date of this order, the head of each agency shall submit a draft final report detailing the agency actions described in subsection (a) of this section to the Vice President, the OMB Director, the Assistant to the President for Economic Policy, the Assistant to the President for Domestic Policy, and the Chair of the Council on Environmental Quality. The report shall include specific recommendations that, to the extent permitted by law, could alleviate or eliminate aspects of agency actions that burden domestic energy production.

(e) The report shall be finalized within 180 days of the date of this order, unless the OMB Director, in consultation with the other officials who receive the draft final reports, extends that deadline.

(f) The OMB Director, in consultation with the Assistant to the President for Economic Policy, shall be responsible for coordinating the recommended actions included in the agency final reports within the Executive Office of the President.

(g) With respect to any agency action for which specific recommendations are made in a final report pursuant to subsection (e) of this section, the head of the relevant agency shall, as soon as practicable, suspend, revise, or rescind, or publish for notice and comment proposed rules suspending, revising, or rescinding, those actions, as appropriate and consistent with law. Agencies shall endeavor to coordinate such regulatory reforms with their activities undertaken in compliance with Executive Order 13771 of January 30, 2017 (Reducing Regulation and Controlling Regulatory Costs).

Sec. 3. *Rescission of Certain Energy and Climate-Related Presidential and Regulatory Actions.* (a) The following Presidential actions are hereby revoked:

(i) Executive Order 13653 of November 1, 2013 (Preparing the United States for the Impacts of Climate Change);

(ii) The Presidential Memorandum of June 25, 2013 (Power Sector Carbon Pollution Standards);

(iii) The Presidential Memorandum of November 3, 2015 (Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment); and

(iv) The Presidential Memorandum of September 21, 2016 (Climate Change and National Security).

(b) The following reports shall be rescinded:

(i) The Report of the Executive Office of the President of June 2013 (The President's Climate Action Plan); and

(ii) The Report of the Executive Office of the President of March 2014 (Climate Action Plan Strategy to Reduce Methane Emissions).

(c) The Council on Environmental Quality shall rescind its final guidance entitled ''Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews,'' which is referred to in ''Notice of Availability,'' 81 *Fed. Reg.* 51866 (August 5, 2016).

(d) The heads of all agencies shall identify existing agency actions related to or arising from the Presidential actions listed in subsection (a) of this section, the reports listed in subsection (b) of this section, or the final guidance listed in subsection (c) of this section. Each agency shall, as soon as practicable, suspend, revise, or rescind, or publish for notice and comment proposed rules suspending, revising, or rescinding any such actions, as appropriate and consistent with law and with the policies set forth in section 1 of this order.

Sec. 4. *Review of the Environmental Protection Agency's ''Clean Power Plan'' and Related Rules and Agency Actions.* (a) The Administrator of the Environmental Protection Agency (Administrator) shall immediately take all steps necessary to review the final rules set forth in subsections (b)(i) and (b)(ii) of this section, and any rules and guidance issued pursuant to them, for consistency with the policy set forth in section 1 of this order and, if appropriate, shall, as soon as practicable, suspend, revise, or rescind the guidance, or publish for notice and comment proposed rules suspending, revising, or rescinding those rules. In addition, the Administrator shall immediately take all steps necessary to review the proposed rule set forth in subsection (b)(iii) of this section, and, if appropriate, shall, as soon as practicable, determine whether to revise or withdraw the proposed rule.

(b) This section applies to the following final or proposed rules:

(i) The final rule entitled ''Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units,'' 80 *Fed. Reg.* 64661 (October 23, 2015) (Clean Power Plan);

(ii) The final rule entitled ''Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units,'' 80 *Fed. Reg.* 64509 (October 23, 2015); and

(iii) The proposed rule entitled ''Federal Plan Requirements for Greenhouse Gas Emissions From Electric Utility Generating Units Constructed on or Before January 8, 2014; Model Trading Rules; Amendments to Framework Regulations; Proposed Rule,'' 80 *Fed. Reg.* 64966 (October 23, 2015).

(c) The Administrator shall review and, if appropriate, as soon as practicable, take lawful action to suspend, revise, or rescind, as appropriate and consistent with law, the ''Legal Memorandum Accompanying Clean Power Plan for Certain Issues,'' which was published in conjunction with the Clean Power Plan.

(d) The Administrator shall promptly notify the Attorney General of any actions taken by the Administrator pursuant to this order related to the rules identified in subsection (b) of this section so that the Attorney General may, as appropriate, provide notice of this order and any such action to any court with jurisdiction over pending litigation related to those rules, and may, in his discretion, request that the court stay the litigation or otherwise delay further litigation, or seek other appropriate relief consistent with this order, pending the completion of the administrative actions described in subsection (a) of this section.

Sec. 5. *Review of Estimates of the Social Cost of Carbon, Nitrous Oxide, and Methane for Regulatory Impact Analysis.* (a) In order to ensure sound regulatory decision making, it is essential that agencies use estimates of costs and benefits in their regulatory analyses that are based on the best available science and economics.

(b) The Interagency Working Group on Social Cost of Greenhouse Gases (IWG), which was convened by the Council of Economic Advisers and the OMB Director, shall be disbanded, and the following documents issued by the IWG shall be withdrawn as no longer representative of governmental policy:

(i) Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866 (February 2010);

(ii) Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis (May 2013);

(iii) Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis (November 2013);

(iv) Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis (July 2015);

(v) Addendum to the Technical Support Document for Social Cost of Carbon: Application of the Methodology to Estimate the Social Cost of Methane and the Social Cost of Nitrous Oxide (August 2016); and

(vi) Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis (August 2016).

(c) Effective immediately, when monetizing the value of changes in greenhouse gas emissions resulting from regulations, including with respect to the consideration of domestic versus international impacts and the consideration of appropriate discount rates, agencies shall ensure, to the extent permitted by law, that any such estimates are consistent with the guidance contained in OMB Circular A–4 of September 17, 2003 (Regulatory Analysis), which was issued after peer review and public comment and has been widely accepted for more than a decade as embodying the best practices for conducting regulatory cost-benefit analysis.

Sec. 6. *Federal Land Coal Leasing Moratorium.* The Secretary of the Interior shall take all steps necessary and appropriate to amend or withdraw Secretary's Order 3338 dated January 15, 2016 (Discretionary Programmatic Environmental Impact Statement (PEIS) to Modernize the Federal Coal Program), and to lift any and all moratoria on Federal land coal leasing activities related to Order 3338. The Secretary shall commence Federal coal leasing activities consistent with all applicable laws and regulations.

Sec. 7. *Review of Regulations Related to United States Oil and Gas Development.* (a) The Administrator shall review the final rule entitled ''Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources,'' 81 *Fed. Reg.* 35824 (June 3, 2016), and any rules and guidance issued pursuant to it, for consistency with the policy set forth in section 1 of this order and, if appropriate, shall, as soon as practicable, suspend, revise, or rescind the guidance, or publish for notice and comment proposed rules suspending, revising, or rescinding those rules.

(b) The Secretary of the Interior shall review the following final rules, and any rules and guidance issued pursuant to them, for consistency with the policy set forth in section 1 of this order and, if appropriate, shall, as soon as practicable, suspend, revise, or rescind the guidance, or publish for notice and comment proposed rules suspending, revising, or rescinding those rules:

(i) The final rule entitled ''Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands,'' 80 *Fed. Reg.* 16128 (March 26, 2015);

(ii) The final rule entitled ''General Provisions and Non-Federal Oil and Gas Rights,'' 81 *Fed. Reg.* 77972 (November 4, 2016);

(iii) The final rule entitled ''Management of Non-Federal Oil and Gas Rights,'' 81 *Fed. Reg.* 79948 (November 14, 2016); and

(iv) The final rule entitled ''Waste Prevention, Production Subject to Royalties, and Resource Conservation,'' 81 *Fed. Reg.* 83008 (November 18, 2016).

(c) The Administrator or the Secretary of the Interior, as applicable, shall promptly notify the Attorney General of any actions taken by them related to the rules identified in subsections (a) and (b) of this section so that the Attorney General may, as appropriate, provide notice of this order and any such action to any court with jurisdiction over pending litigation related to those rules, and may, in his discretion, request that the court stay the litigation or otherwise delay further litigation, or seek other appropriate relief consistent with this order, until the completion of the administrative actions described in subsections (a) and (b) of this section.

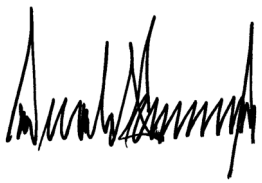
Sec. 8. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) 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, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,
March 28, 2017.

[FR Doc. 2017–06576
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Billing code 3295–F7–P

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that, on September 25, 2020, I served the foregoing on all parties to this proceeding through the Court's CM/ECF system.

/s/ Susanna Y. Chu
Susanna Y. Chu
Attorney