ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

No. 10-1407

DEFENDERS OF WILDLIFE, *ET AL.*,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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JULY 5, 2011

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and *Amici*

The parties before this Court are identified in Petitioners' opening brief.

B. Rulings Under Review

1. *Ruby Pipeline, LLC*, "Order Issuing Certificate and Granting In Part And Denying In Part Requests For Rehearing And Clarification," 131 F.E.R.C. ¶ 61,007 (2010), JA __; and

2. *Ruby Pipeline, LLC*, "Order Denying Rehearing," 133 F.E.R.C. ¶ 61,015 (2010), JA __.

C. Related Cases

This case has not previously been before this Court or any other court. On November 12, 2010, Summit Lake Paiute Tribe and its Chairman, Warner Barlese, filed a petition with this Court seeking review of the same two orders challenged here, which was assigned Case No. 10-1389. On June 1, 2011, this Court – after earlier denying a motion for stay and, separately, a motion to hold the petition in abeyance – granted the Tribe's motion to voluntarily dismiss its petition for review.

In addition, there are a number of actions currently pending in the U.S. Court of Appeals for the Ninth Circuit – including petitions for review filed by the Petitioners here – which challenge various authorizations and permits granted by the Bureau of Land Management, the U.S. Fish and Wildlife Service, and the Army Corps of Engineers in connection with the proposed natural gas pipeline at

issue in this case. *See Center for Biological Diversity v. BLM*, 10-72356 (9th Cir.); *Coalition of Local Governments v. BLM, et al*., No. 10-72552 (9th Cir.); *Warner Barlese v. BLM, et al*., No. 10-72762 (9th Cir.); *Fort Bidwell Indian Community v. BLM, et al*., No. 10-72768 (9th Cir.); *Defenders of Wildlife, et al. v. BLM, et al*., No. 10-72775 (9th Cir.). The Ninth Circuit consolidated these petitions for purposes of briefing and argument.

In January 2011, the Summit Lake Paiute Tribe filed a separate petition for review in the Ninth Circuit challenging the Bureau of Land Management's approval of a rerouting of the pipeline at issue in this case. *Warner Barlese v. BLM*, No. 11-70336 (9th Cir.). That petition has not been consolidated with the Ninth Circuit appeals noted above.

/s/ Robert M. Kennedy
Attorney

July 5, 2011

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

---

* Cases chiefly relied upon are market with an asterisk.

ADMINISTRATIVE CASES AND ORDERS

STATUTES

REGULATIONS

GLOSSARY

BLM	Bureau of Land Management
Commission or FERC	Federal Energy Regulatory Commission
Certificate Order	*Ruby Pipeline, LLC*, 131 F.E.R.C. ¶ 61,007 (2010) (JA __)
Defenders	collectively, Defenders of Wildlife, Sierra Club and Great Basin Resource Watch
EIS	Environmental Impact Statement
FEIS	Final Environmental Impact Statement
Great Basin	Petitioner Great Basin Resource Watch
NEPA	National Environmental Policy Act
Preliminary Determination Order	*Ruby Pipeline, LLC*, 128 F.E.R.C. ¶ 61,224 (2009) (JA __)
Project	Ruby Pipeline Project, consisting of facilities capable of transporting up to 1.5 million dekatherms per day of natural gas from Wyoming to Oregon.
Rehearing Order	*Ruby Pipeline, LLC*, 133 F.E.R.C. ¶ 61,015 (2010) (JA __)
Ruby	Ruby Pipeline, LLC

IN THE UNITED STATES COURT OF APPEALS
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DEFENDERS OF WILDLIFE, *ET AL.*,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUE

Whether the Federal Energy Regulatory Commission's ("Commission" or "FERC") approval of an application for the construction and operation of an interstate natural gas pipeline, issued after an environmental review process that spanned 24 months, resulted in a environmental impact statement totaling nearly 500 pages, and imposed 46 environmental mitigation conditions, complied with the obligations imposed by the National Environmental Policy Act.

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes and regulations are contained in the Addendum.

COUNTERSTATEMENT OF JURISDICTION

Petitioner Great Basin Resource Watch ("Great Basin") did not intervene as a party in the Commission's proceedings, nor seek rehearing of the Commission's April 5, 2010 order granting a certificate of public convenience and necessity for the pipeline at issue in this case. *See Ruby Pipeline, LLC*, 128 F.E.R.C. ¶ 61,224, Appendix B (2009) ("Preliminary Determination Order") (R. 530) (listing interventions), JA __-__.[1] As a result, this Court lacks jurisdiction to entertain any claim raised by Great Basin. *See* 15 U.S.C. §§ 717r(a) ("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."), 717r(b) (limiting judicial review to "[a]ny party to a proceeding under this act aggrieved by an order").

The Court also lacks jurisdiction to address many of the arguments now raised by Petitioners Defenders of Wildlife and Sierra Club because they were not presented to the Commission on rehearing. *See* Defenders of Wildlife Request for Rehearing at 2-4 (listing issues) (R. 696), JA __-__; Sierra Club Request for Rehearing at 3-5 (listing issues) (R. 697), JA __-__. In particular, Petitioners failed to raise their current contentions that the Commission violated the National

[1] Citations to "JA" refers to the joint appendix. "R" refers to the item number in the certified index to the record, and "Br." refers to Petitioners' Opening Brief.

Environmental Policy Act ("NEPA") by:

- failing to independently verify the project sponsor's cost estimates, *see* Br. 26-28;
- failing to adequately analyze the project's cumulative impacts on sagebrush steppe vegetation, wildlife and habitat, grazing and mining activities in the project area, *see* Br. 28-33; and
- failing to obtain complete data regarding, and to finalize mitigation measures for, the project's impact upon waterbodies and wetlands, *see* Br. 33-36.

As a result, the Court lacks jurisdiction to consider these arguments. *See* 15 U.S.C. § 717r(b) (limiting the Court's jurisdiction to those objections "urged before the Commission in the application for rehearing unless there is reasonable ground for failure to do so"); *see also* Parts II.A.3.a, II.B.1, and II.C.1 of Argument, *infra*.

INTRODUCTION

In the orders on review, the Commission granted Ruby Pipeline, LLC ("Ruby") a certificate of public convenience and necessity to construct and operate a new interstate pipeline that would run from Wyoming to Oregon (the "Project"). *See Ruby Pipeline, LLC*, 131 F.E.R.C. ¶ 61,007, PP 2, 16 (2010) ("Certificate Order") (R. 681), JA __, __. In the course of its consideration of Ruby's application, the Commission held numerous meetings with state and federal resources agencies, and Native American tribes, and prepared voluminous draft and final environmental impact statements ("EIS"). The final EIS concluded that, with the implementation of proposed mitigation measures, the construction and

operation of the Project would have limited adverse impacts upon the environment. *Id*. P 107, JA __. The Commission balanced these potential adverse impacts against the public benefits provided by the Project, including the delivery of domestic gas supplies to West Coast markets that are currently dependent upon declining Canadian imports. *See*, *e.g*., Preliminary Determination Order P 37, JA __. In order to ensure that these public benefits would not be outweighed by undue environmental harm, the Commission conditioned its approval upon the fulfillment of 46 environmental conditions, many of which had to be satisfied before construction activities could take place. *See* Certificate Order, Appendix A, JA __-__.

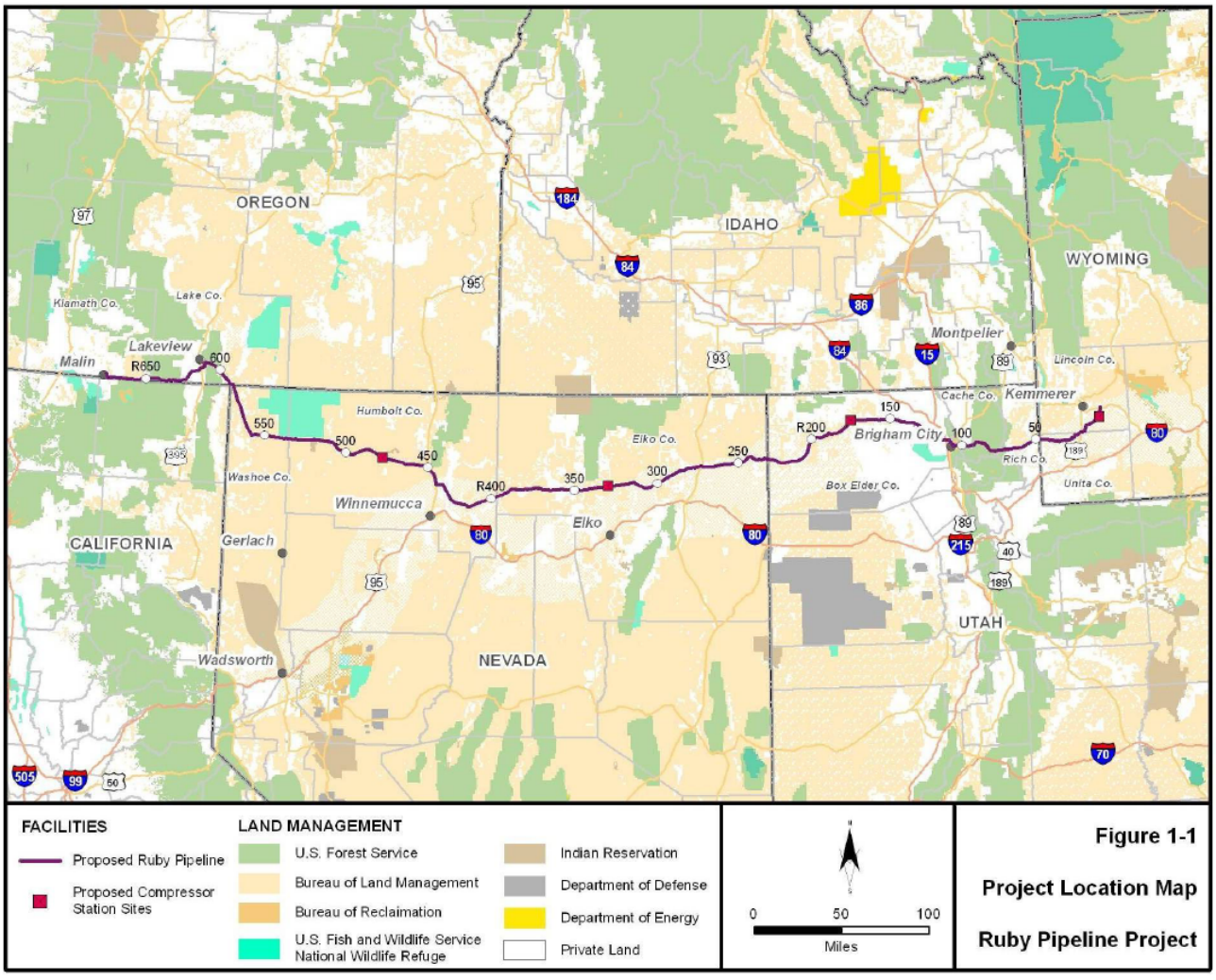
The sole challenge to FERC's approval is that brought by Defenders of Wildlife, Sierra Club and Great Basin (collectively, "Defenders"), who contend that certain aspects of the Commission's environmental analysis failed to comply with NEPA. Br. 18-36. Many of the arguments underlying Defenders' challenge were never raised to the Commission on rehearing. To the extent they were, the Commission addressed and rejected these arguments in the challenged orders. *See*, *e.g*., *Ruby Pipeline, LLC*, 133 F.E.R.C. ¶ 61,015, PP 38-55 (2010) ("Rehearing Order") (R. 881), JA __-__.

This appeal followed.

STATEMENT OF FACTS

I. THE RUBY PROJECT

The Ruby Pipeline Project involves the construction and operation of approximately 675 miles of 42-inch diameter pipeline and related facilities that would be capable of transporting up to 1.5 million dekatherms per day of natural gas. *See* Preliminary Determination Order P 6, JA __. The pipeline would run from a hub in western Wyoming, through northern Utah and Nevada, to an interconnection with existing facilities near Malin, Oregon:



See Final Environmental Impact Statement ("FEIS") at 1-3, JA __. The Project is intended to provide a reliable means of natural gas transportation service from suppliers in the Rocky Mountain region to customers in Nevada and on the West Coast that now depend on declining imports of Canadian gas supplies. Preliminary Determination Order P 37, JA__.

II. THE FEDERAL REVIEW AND APPROVAL PROCESS

A. FERC Approval Under The Natural Gas Act

The Natural Gas Act "confers upon FERC exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300-01 (1988). *See also* 15 U.S.C. § 717(b). Under Section 7(c) of the Act, natural gas companies seeking to construct or extend pipeline facilities must apply to the Commission for a "certificate of public convenience and necessity." 15 U.S.C. § 717f(c)(1)(A). Such a certificate "shall be issued" if the "proposed service . . . is or will be required by the present or future public convenience and necessity." *Id*. § 717f(e).

On September 4, 2009, the Commission preliminarily determined that the Project would further the public interest by, among other things, "provid[ing] direct access for producers in the Rockies to the California, Nevada, and Pacific Northwest markets." Preliminary Determination Order P 41, JA__. Such direct access "will improve the reliability and flexibility of service available to gas

customers in California and the Pacific Northwest by providing those customers with access to an abundant supply of competitively priced domestic gas from Rocky Mountain production areas." *Id*. The Commission stressed, however, that its preliminary determination did "not consider or evaluate any of the environmental issues in this proceeding," which would be addressed in subsequent orders. *Id*. P 2, JA__. As a result, "final authorization for Ruby's proposal depends on a favorable environmental analysis." *Id*.

B. NEPA Review Process

Under NEPA, any federal agency proposing to authorize an action that may "significantly affect[] the quality of the human environment" must first prepare an EIS evaluating the impacts of the proposed action and alternatives. 42 U.S.C. § 4332(2)(C). *See also* 40 C.F.R. § 1501.4. NEPA only imposes procedural requirements. So long as "the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

Here, the Commission took the lead in preparing an EIS for the Project, with the Bureau of Land Management ("BLM"), the U.S. Fish and Wildlife Service, and a number of other state and federal agencies participating as "cooperating agencies." *See* 15 U.S.C. § 717n(b)(1) (designating FERC as lead agency for

NEPA review of pipeline applications); *see also* 40 C.F.R. §§ 1501.5 & 1501.6 (defining role of lead and cooperating agencies); Certificate Order P 45, JA __ (listing cooperating agencies).[2]

The Commission issued a final EIS on January 8, 2010, after an extensive public outreach that included numerous scoping and public comment meetings, and lengthy consultations with Native American tribes. *See, e.g.*, FEIS at 1-7 – 1-12, 4-242 – 4-255 (discussing consultation process) (R. 609), JA__-__, __-__. The final EIS examined, among other things, (a) 15 route alternatives to that proposed by Ruby, (b) potential geologic hazards, (c) water appropriation issues, (d) sensitive habitat and species that may be affected by the Project, and (e) the Project's potential impact on historic and cultural resources. *See, e.g.*, Certificate Order at PP 52-79 (discussing major environmental issues examined in the final EIS), JA__-__. The final EIS also addressed numerous comments received through the Commission's consultation process, including those from Defenders. *See, e.g.*, FEIS, Appendix AA at N-100 – N-127 (addressing Sierra Club comments), JA __-__, *id.* at N-161 – N-168 (addressing Defenders of Wildlife

[2] "Cooperating agencies" may, among other things, participate in the environmental scoping process, assume responsibility for preparing environmental analyses concerning their areas of expertise, and make staff available to enhance the lead agency's interdisciplinary capability. 40 C.F.R. §§ 1501.6(b), 1508.5.

comments), JA __-__; *id*. at N-169 – N-171, JA __-__ (addressing Great Basin comments).

The final EIS concluded that, if constructed and operated in accordance with applicable laws and regulations, the Project would result in some adverse impacts. Certificate Order P 51, JA__. Most of these impacts would be reduced to less than significant levels with the implementation of Ruby's proposed mitigation and the additional measures recommended by Commission Staff. *Id*.

C. Bureau of Land Management Approval

Because approximately 368 miles of the Project will cross federal lands, Ruby also needed, in addition to FERC approval, temporary use permits and rights-of-way from the relevant federal land management agencies. BLM, in consultation with the affected agencies, has authority to grant such authorizations for all federal lands involved. *See* 30 U.S.C. §§ 185(a), (c). On July 12, 2010, BLM issued its record of decision, which announced the agency's grant of the requisite rights-of-way and temporary use permits for the Project. Record of Decision at 1-4 (R. 754), JA __ - __.

III. THE ORDERS ON REVIEW

A. The Certificate Order

On April 5, 2010, after completion of its environmental analysis, the Commission conditionally approved the Project. In doing so, the Commission

balanced the competing interest of the Project sponsor, state and federal resource agencies, natural gas consumers, Native American tribes, and environmental groups, among others. The Commission also attempted to reconcile the potential conflicts between the Nation's energy needs and its environmental resources.

In the end, the Commission found that the Project would serve the public interest by enhancing access to domestic gas supplies for customers in Nevada and on the West Coast, without placing undue burdens upon existing natural gas transportation service providers, landowners, and communities. Certificate Order PP 14-15, JA __-__ The Commission further determined that the Project would be "an environmentally acceptable action" if constructed in accordance with the numerous environmental conditions and mitigation measures imposed by the order, "which will reduce most environmental impacts to less-than-significant levels." *Id*. P 107, JA __. To that end, the Commission imposed 46 environmental conditions governing the construction and operation of the Project. *Id*., Appendix A, JA __-__.

In the Certificate Order, the Commission explained that it had evaluated and recommended three route alternatives and 15 minor route variations that would "confer an environmental advantage over the proposed route." *Id*. P 62, JA __ Ruby subsequently modified its proposal to incorporate these recommendations into its proposed action. *Id*. The Commission also analyzed several major route

alternatives in order to determine whether impacts to environmentally and culturally sensitive areas could be minimized further. The Commission ultimately concluded that these alternatives were either not feasible or would not offer environmental advantages over the proposed route. *Id*. PP 63-66, JA __-__.

The Commission made clear that the Project would likely have an adverse effect upon sagebrush steppe habitat and sagebrush-dependent species such as the greater sage-grouse and pygmy rabbit. *Id*. P 55, JA __. Ruby agreed to undertake a number of measures to minimize such impacts, such as realigning the pipeline, using construction buffers and timing restrictions, engaging in revegetation activities, and funding state conservation efforts. *Id*. P 56, JA __.

B. The Rehearing Order

The Commission reaffirmed its approval of the Project in the Rehearing Order, issued on October 6, 2010. In doing so, the Commission rejected the assertion that it failed to sufficiently analyze reasonable alternatives to the proposed pipeline route. The Commission explained that it had "thoroughly considered, compared, and explained" a variety of route alternatives. Rehearing Order P 44, JA __. Indeed, "the EIS process successfully fostered the adoption of many alterations to Ruby's originally proposed route in response to landowner, agency, and stakeholder concerns for particular resources." *Id*. P 46, JA __.

The Commission also rejected the contention that it failed to adequately study the cumulative impacts of the Project. The "final EIS thoroughly discusses all known and reasonably foreseeable Commission, other federal agency, state and local agency, or private projects." *Id*. P 40, JA __. The Commission further noted that there are a number of mitigation plans associated with the Project that are binding on Ruby and "will serve to reduce the potential level of cumulative strain on the covered resources." *Id*. P 41, JA __.

IV. CURRENT STATUS OF THE PROJECT

On January 14, 2011, the Summit Lake Paiute Tribe filed an emergency motion seeking a stay of construction pending judicial review. The Court denied that request, noting that the Tribe had failed to "satisf[y] the stringent standards for a stay," and had "apparently waived [many of its] arguments by not raising them" on rehearing before the Commission. *Summit Lake Paiute Tribe of Nevada v. FERC*, No. 10-1389 (D.C. Cir. Jan. 28, 2011). Two weeks later, Defenders themselves asked this Court, on an emergency basis, to halt construction pending review of their claims. The Court denied that request, finding that Defenders too had failed to justify the extraordinary relief they sought. Order dated February 22, 2011.

Construction of the Project is nearing completion. The vast majority of the pipeline has been welded, lowered into the ground, and backfilled. At this stage,

Ruby's efforts are primarily focused on laying the remaining miles of pipeline, cleaning up its work areas, and beginning habitat restoration efforts. *See* Weekly Construction Status Report No. 56, filed June 29, 2011, at Attachment 1.[3]

SUMMARY OF ARGUMENT

The Natural Gas Act charges the Commission with the responsibility for balancing the exploitation of the Nation's natural gas resources with the protection of environmental, historic, cultural and other resources. In the challenged orders – which were preceded by more than two years of environmental analysis and consultation among stakeholders – the Commission has done just that and granted a certificate of public convenience and necessity for the Project.

Only Defenders protest the Commission's action. They contend that, in three limited aspects, the Commission's environmental analysis fails to comply with NEPA. But that contention is largely built upon new arguments that were never presented to the Commission for consideration on rehearing. As a result, the Court lacks jurisdiction to consider them. In any event, Defenders' claims fare no better on the merits.

First, the Commission studied numerous alternatives to the pipeline route originally proposed by Ruby. Rather than being "designed to ensure the failure" of

[3] This document is publicly available through the Commission's docketing system: http://elibrary.ferc.gov/idmws/File_list.asp?document_id=13932537.

those alternatives (Br. 14), the Commission's analysis resulted in the adoption of three major route alternatives and 15 minor variations. The Commission did not recommend the incorporation of two alternative routes – the Black Rock and Jungo-Tuscarora Alternatives – apparently preferred by Defenders. After setting forth a detailed, comparative analysis of those alternatives, the Commission explained the factors underlying its determination that neither alternative offered clear environmental advantages over the proposed route. The Commission also explained that the additional pipeline length required by these alternatives would greatly increase the cost of the Project, and may render it economically infeasible.

Second, Defenders' assertion that the Commission engaged in an "unsubstantiated" cumulative impacts analysis is based upon a selective and misinformed reading of the final EIS. Consistent with this Court's precedent, the Commission identified (a) the Project's likely impacts, (b) the area where those impacts would occur, (c) other past, present and reasonably foreseeable projects that could impact the same area, (d) the nature of those impacts, and (e) the incremental impact of the Project in conjunction with those other actions. Such information was sufficient to permit informed decisionmaking regarding the Project.

Third, Defenders' claims regarding "missing data" regarding the flow type and width of waterbodies to be crossed by the pipeline are vastly overstated. The

data at issue concern intermittent or ephemeral streams that were dry when surveyed, making it impossible to determine their flow type or width. Only seven of the streams support fish populations, and none contain any sensitive fish species. The missing data thus have little bearing on the Project's potential environmental impacts.

Similarly overstated are Defenders' assertions of incomplete mitigation measures for wetland crossings. The final EIS describes the Project's potential impacts upon wetlands and details a number of measures that will mitigate those impacts. While certain of those mitigation plans had not yet been finalized when the final EIS was published, NEPA does not require "that a complete mitigation plan be actually formulated and adopted." *Methow Valley*, 490 U.S. at 352. And by barring any construction until those plans were finalized and approved, the Commission ensured that the environment would be fully protected.

ARGUMENT

I. STANDARD OF REVIEW

Judicial review of FERC certification decisions is limited to determining whether the Commission's action was arbitrary and capricious, and whether the underlying factual findings were supported by substantial evidence. *See Nat'l Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323, 1327 (D.C. Cir. 2004) (affirming Commission's environmental review of approved pipeline). Under this

deferential standard, the Commission's judgment will be upheld so long as it has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins*., 463 U.S. 29, 43 (1983) (citation omitted). *See also Murray Energy Corp. v. FERC*, 629 F.3d 231, 235 (D.C. Cir. 2011) (affirming Commission's safety review of approved pipeline).

The Commission's factual findings are conclusive if supported by substantial evidence. 15 U.S.C. § 717r(b). This standard "requires more than a scintilla," but "can be satisfied by something less than a preponderance of the evidence." *B&J Oil & Gas v. FERC*, 353 F.3d 71, 77 (D.C. Cir. 2004) (internal quotation omitted). In addition, "[w]hen an agency 'is evaluating scientific data within its technical expertise,' an 'extreme degree of deference to the agency' is warranted." *Nat'l Comm. for the New River*, 373 F.3d at 1327 (quoting *B&J Oil & Gas*, 353 F.3d at 76).

When reviewing claims under NEPA, the Court's task is "simply to ensure that the agency has adequately considered and disclosed the environmental impact" of its decision. *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 97-98 (1983). Once it is determined that "the agency took a 'hard look' at the environmental consequences of its decision to go forward," the Court's review is at

an end. *City of Grapevine v. Dep't of Transp*., 17 F.3d 1502, 1503-04 (D.C. Cir. 1994). *See also Nevada v. Dep't of Energy*, 457 F.3d 78, 93 (D.C. Cir. 2006) ("It is well settled that the court will not 'flyspeck' an agency's environmental analysis, looking for any deficiency no matter how minor."). The Court may not "substitute its judgment for that of the agency as to the environmental consequences of its actions." *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976).

II. THE COMMISSION'S ENVIRONMENTAL ANALYSIS FULLY COMPLIES WITH NEPA.

Defenders contend that the Commission's environmental analysis was unduly circumscribed and failed to adequately consider the impacts of the Ruby Project. Br. 14. In fact, the Commission's environmental review spanned 24 months. It included ten public scoping meetings, seven public comment meetings regarding the draft EIS, and numerous meetings and conference calls with key federal and state agencies and Native American tribes. *See* FEIS at 1-7 – 1-9 (discussing public and agency participation), JA __-__; *id*. at 4-243 – 245 (listing Native American consultations), JA __-__. The process culminated in a final EIS which totaled nearly 500 pages (along with numerous appendices) and addressed 144 sets of written comments. *Id*. at 1-12, JA __. The record belies any assertion that the Commission failed to take a "hard look" at the environmental impacts of the Project.

Defenders' complaints – most of which were never presented to the

Commission on rehearing and have thus been waived – are limited to three discrete aspects of the Commission's analysis: route alternatives, cumulative impacts, and waterbody and wetland crossings. As set forth below, each is meritless.

A. FERC's Analysis Of Project Alternatives Complied With NEPA.

NEPA requires federal agencies to "study, develop and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4322(2)(E). The breadth of the agency's analysis is dictated by the nature and scope of the proposed action. *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196-97 (D.C. Cir. 1991). And a "rule of reason governs 'both which alternatives the agency must discuss, and the extent to which it must discuss them.'" *Id*. at 195 (quoting *Alaska v. Andrus*, 580 F.2d 465, 475 (D.C. Cir. 1978)).

Here, the Commission conducted an extensive analysis to identify alternatives that would be feasible and environmentally preferable to the pipeline system originally proposed by Ruby. That analysis included a review of a no action alternative, increased efficiency and conservation, energy alternatives (such as renewable resources, nuclear energy, and fossil fuels), the use of existing or proposed natural gas transmission systems, 15 major route alternatives, and 16 minor route variations. *See* FEIS at 3-1 – 3-81 (describing alternatives analysis), JA __-__.

The Commission looked closely at the routing of the pipeline from the very start. Indeed, the route proposed in Ruby's application was shaped by pre-filing consultations with the Commission which resulted in modifications to the company's original concept. *See* Request for Approval of Pre-Filing Review, filed Jan. 28, 2008, at Tab 1 (R. 1) (map of original route concept), JA __. After the filing of Ruby's application, alternatives and variations were recommended for inclusion in the Project's design if they conferred a clear environmental advantage over the proposed route. In the absence of such an advantage, "an alternative merely represents a shift in impacts from one area or resource to another." FEIS at 3-10, JA __. The Commission ultimately recommended three major route alternatives and 15 minor variations to the proposed route, which Ruby subsequently agreed to adopt. *See id*. at 3-9 – 3-11 (discussing adopted route alternatives), JA __-__; *id*. at 3-56 (discussing adopted route variations), JA __. The final EIS also sets forth considerable detail regarding the other 12 route alternatives and reasons why they were not recommended for inclusion. Such a process complies with the Commission's obligations under NEPA. *See, e.g., Nat'l Comm. for the New River*, 373 F.3d at 1331-32 (rejecting NEPA challenge where "FEIS considered 13 major route alternatives in detail, but did not recommend any of them").

Defenders nonetheless suggest that the Commission's analysis "seemed

specially designed to ensure the failure of each alternative." Br. 14. This "facile implication" should be rejected. *See City of Grapevine*, 17 F.3d at 1506-07 ("We pass over the facile implication that the FAA harbored an improper motive" in defining the alternatives to be considered.). As the Commission explained, it "evaluated, without prejudice, several route alternatives and variations … to address specific landowner and/or environmental concerns with the proposed route." FEIS, Appendix AA at PM-55, JA __. And that evaluation resulted in major alterations to Ruby's proposed route. *See id*. at 3-9 – 3-11, JA __-__.

At bottom, Defenders simply contend that additional details should have been provided regarding the Black Rock and Jungo-Tuscarora Alternatives. But as explained below, the final EIS provides considerable detail regarding both alternatives and afforded a sufficient basis for the Commission to engage in reasoned decisionmaking.

1. FERC reasonably analyzed the Black Rock Alternative.

The Black Rock Alternative was identified by the Nevada Department of Wildlife as a route that could potentially reduce impacts to wildlife habitat by following existing roads south of the proposed route through Nevada. *See* FEIS at 3-42, JA __; *see also id*. at 3-44 (map of Black Rock Alternative), JA __. Defenders concede that the final EIS contains a "significant discussion" of this alternative, including its impact upon "environmental resources, wildlife, quality of

habitat, geology, topography, archeological and cultural sites." Br. 20. *See also* FEIS at 3-42 – 3-51, JA __-__. This discussion included a mile-by-mile analysis of the quality of habitat for greater sage-grouse, pygmy rabbit, and mule deer potentially impacted by the Black Rock Alternative. *See* FEIS at 3-45 – 3-46, JA __-__; *id*. at Appendix M, JA __-__. *See also* Rehearing Order P 53 (noting mile-by-mile analysis), JA __.

Defenders' contention that the Commission unfairly evaluated this alternative is built upon a number of mischaracterizations. For instance, Defenders assert that the Black Rock Alternative would avoid "'greater sage-grouse habitat that is especially high quality and unfragmented.'" Br. 23 (quoting FEIS at 3-42, JA __). In fact, the Commission's mile-by-mile analysis determined that the Black Rock Alternative crossed 125 miles of greater sage-grouse habitat (as compared to 84.7 for the proposed route), including 20.1 miles of high quality habitat (as compared 27.4 for the proposed route). FEIS at 3-45, JA __.

Similarly, Defenders claim that the final EIS "reasoned that … the Black Rock alternative would avoid impacts to sage-grouse and mule deer habitat." Br. 22 (citing FEIS at 3-46, JA __). Actually, the Commission's environmental analysis determined that "the Black Rock Route Alternative crosses more greater sage-grouse habitat, mule deer habitat, and pygmy rabbit sites than the proposed route, although the greater sage-grouse habitat and mule deer habitat is generally of

lower quality." FEIS at 3-45, JA __.

Defenders likewise assert that the Commission "summarily rejected" the Black Rock Alternative "without ever presenting the relative impacts in comparative form." Br. 23. This claim ignores not only the text of the final EIS, which compares the impacts associated with the Black Rock Alternative and the proposed route, but also detailed charts summarizing that analysis:

TABLE 3.4.13-1

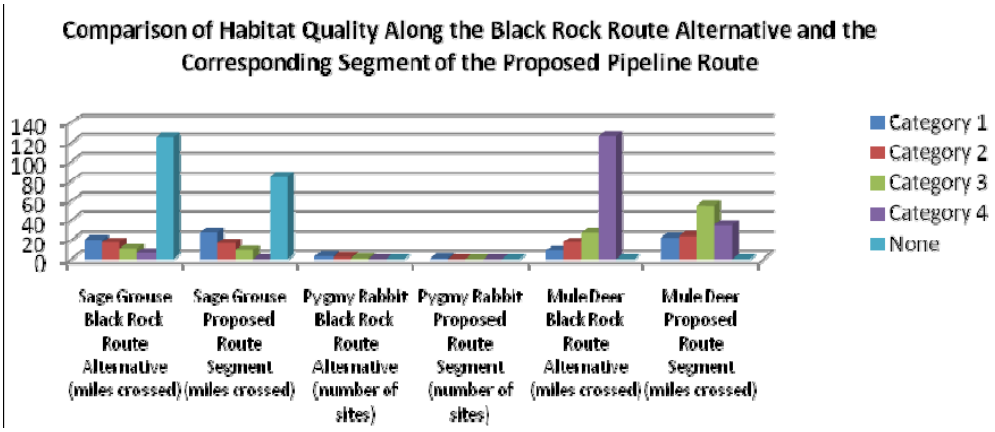
Black Rock Route Alternative Comparison

Environmental Factor	Black Rock Route	Corresponding Segment of the Proposed Route
Length (miles)	180.0	138.1
Amount of Extra Workspace, *etc.* Required (acres)	755.3	506.9
Amount of Access Roads Required (acres)	293.5	220.0
Parallel to Existing Rights-of-Way (miles within 500' of centerline)	52.4	30.1
Landowners Crossed (number)	55	34
Private Lands Crossed (miles)	17.0	30.2
BLM NCAs Crossed (miles)	3.7	0.0
National Historic Trail Crossings (number)	3	0
Greater Sage-Grouse Winter Habitat Crossed (miles)	62.3	55.7
Greater Sage-Grouse Leks (within 2 miles of the centerline)	6	9
Pronghorn Crucial Winter Habitat Crossed (miles)	18.8	0.0
Category 1 and 2 Mule Deer Habitat Crossed (miles)	26.3	46.7
Perennial Waterbodies Crossed (number)	2	3
Wetland Habitat Crossed (miles crossed)	10.5	3.6
Cultural Resource Sites Crossed (no. from Class I records review)	102	21
Additional Compression Required	Yes	No
Mineral Resources within 1,500 feet (number)	24	11
Springs/Seeps within 300 feet (number)	0	4
Wells within 300 feet (number)	0	2
Moderate to High Landslides (number of areas)	2	2
Geologic Faults within 1,500 feet(number)	20	9
Areas of Shallow Groundwater Crossed (number)	0	2
Earthquakes within 100 miles (number)	58	8
Shallow Rock potentially requiring Blasting (miles)	38.0	87.0
Karst/pseudokarst terrain (miles)	22.0	8.0

TABLE 3.4.13-2

Habitat Quality Along the Black Rock Route Alternative and the Corresponding Segment of the Proposed Pipeline Route

Species	Category 1	Category 2	Category 3	Category 4	None
Greater Sage-Grouse (miles crossed)					
Black Rock Route Alternative	20.1	17.4	10.8	6.2	125
Proposed Route Segment	27.4	16.5	9	0	84.7
Pygmy Rabbit (number of sites)					
Black Rock Route Alternative	3	2	1	-	-
Proposed Route Segment	1	-	-	-	-
Mule Deer (miles crossed)					
Black Rock Route Alternative	8.7	17.6	27.2	126.2	-
Proposed Route Segment	22.5	24.2	55.2	35	-



FEIS at 3-43, 3-45 – 3-46, JA __, __-__.

Defenders further assert that the Commission "kept its thought processes under wraps" (Br. 19), and rejected the Black Rock Alternative "in one sentence" without "explaining the basis of the choice made." *Id*. 23-24. This too ignores the numerous findings set forth in the final EIS:

- "[B]ecause the alternative is considerably longer than the corresponding segment of the proposed route, the impacts of construction and operation (*e.g*., amount of soil exposed to erosion, volume of water needed for hydrostatic testing, amount of routine vegetation clearing during operation) would be greater." FEIS at 3-43, JA __;

- "The Black Rock Route Alternative, when compared to the proposed route has … 11 more geologic faults, has experienced 50 more earthquake events, and has 18 more miles of karst/psuedokarst terrain, [and] has 13 more mines/pits/quarries within 1,500 feet of the right-of-way."[4] *Id*. at 3-45, JA __;

- "The Black Rock Route Alternative would cross the Black Rock [National Conservation Area] at two locations for a total distance of about 3.7 miles …. The corresponding segment of the proposed route does not cross the Black Rock NCA or any of [its] trails." *Id*. at 3-47, JA __.

- "According to Ruby, the [compressor] station modifications and pipeline length" required for the Black Rock Alternative "would add approximately $154 million to the project cost," which may render the alternative "economically infeasible." *Id*. at 3-48, JA __.

On the basis of its extensive comparative analysis, the final EIS concluded that, on balance, the Black Rock Alternative was not an environmentally preferable route:

> We do not believe that the reduction in impacts on greater sage-grouse leks, Category 1 and 2 mule deer habitat, and perennial streams provided by the Black Rock Route Alternative would necessarily confer an environmental advantage over the proposed route because of the added impacts on pygmy rabbit habitat, pronghorn crucial winter habitat, wetlands, national historic trails, recreation, and air quality.

FEIS at 3-48, JA __. *See* Rehearing Order P 54 (affirming conclusion that "reduction in impacts" on certain species would not "confer an environmental advantage over the proposed route because of the added impacts" on other species,

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[4] Karst and psuedokarst are types of topography characterized by sinkholes, caves, and underground drainage systems. FEIS at 4-20, JA __.

"wetlands, national historic trails, recreation and air quality"), JA __.

Defenders might have struck the balance differently, based on their view that, for example, pronghorn antelope can tolerate a certain degree of habitat disturbances. Br. 22. But their disagreement does not demonstrate that the Commission's conclusion – derived from an evaluation of numerous factors – was unreasonable. *See City of Olmstead Falls v. FAA*, 292 F.3d 261, 273 (D.C. Cir. 2002) ("Although the petitioner may disagree with the substantive decisions made by the various agencies involved in an EIS, neither NEPA nor any other statute confers jurisdiction on this Court to hear such challenges as part of this proceeding").

2. FERC reasonably analyzed the Jungo-Tuscarora Alternative.

The Jungo-Tuscarora Alternative was identified by federal and state resource agencies as one possible way to reduce the Project's impact on wildlife habitat in Nevada. *See* FEIS at 3-48, JA __. The Jungo-Tuscarora Alternative follows the first half of the Black Rock Alternative, before turning northwesterly into California. *Id*. at 3-49 (map of Jungo-Tuscarora Alternative), JA __.

Defenders charge that the Commission gave only "cursory substantive consideration" to this alternative. Br. 21. In support, they point to a table comparing the Jungo-Tuscarora Alternative and the proposed route with respect to 13 pertinent factors (FEIS at 3-50, JA __), and note that a larger number of factors

are discussed in a table relating to a different route alternative. Br. 21. But that difference stems from the Commission's decision not to employ a simple, mechanical analysis of potential route alternatives. Instead, "[t]he evaluation of alternatives attempted to focus on resources where impacts would be different, not similar, so as to be able to draw conclusions regarding the merits and drawbacks of each alternative." FEIS, Appendix AA at N-15, JA __. The tables in the final EIS were intended to identify those factors most pertinent to an evaluation of the advantages and disadvantages of each alternative. *See* 40 C.F.R. § 1502.14 (alternatives analysis "should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options").[5]

Defenders alternatively contend that the Commission's analysis was "specially designed to ensure the failure" of the Jungo-Tuscarora Alternative. Br. 22. The final EIS, however, identifies a number of advantages associated with this route, including the need for less greenfield rights-of-way, fewer impacts to greater sage-grouse winter habitat, less disturbance of greater sage-grouse leks, fewer

[5] In addition, because the first half of the Jungo-Tuscarora Alternative follows the Black Rock Alternative, much of the analysis set forth in the final EIS with respect to the Black Rock Alternative is applicable to the Jungo-Tuscarora Alternative as well. In this regard, when discussing the Jungo-Tuscarora Alternative, the final EIS refers the reader to the discussion of the Black Rock Alternative. *See* FEIS at 3-48, JA __.

perennial stream crossings, and less impacts upon wetlands. FEIS at 3-50, JA __.

Defenders also assert that the Commission should have found that the Jungo-Tuscarora Alternative would have "less-destructive impacts to cultural sites" and would have been easier to construct in light of "the soils' geology." Br. 21. But they offer nothing to support either assertion. Nor did Defenders make these claims in their comments on the draft EIS or in their petitions for rehearing.[6] As a result, this Court is without jurisdiction to consider them. 15 U.S.C. § 717r(b). *See also Anderson v. FERC*, 333 Fed. Appx. 575, 578, 2009 U.S. App. LEXIS 10304, at *7 (D.C. Cir. May 13, 2009) ("Their only additional [NEPA] argument is that the calculation of necessary acreage for Alternative B was inflated, but they failed to raise this objection before the agency and therefore may not raise it now.").

In any event, the Commission determined that there were significant factors that, on balance, weighed against the Jungo-Tuscarora Alternative. While the route would lessen impacts to certain species, it would increase impacts to others:

> The overall footprint of the alternative (51.9 extra miles; 18.7 extra miles of pronghorn crucial winter habitat; 50.0 extra miles of mule deer crucial winter habitat; and an additional compressor facility) would

[6] *See* FEIS, Appendix AA at N-100 – N-127 (Sierra Club comments on draft EIS), JA __-__; *id*. at N-161 – N-168 (Defenders of Wildlife comments on draft EIS), JA __-__; id. at N-169 – 171 (Great Basin comments on draft EIS); Defenders of Wildlife Request for Rehearing, JA __-__; Sierra Club Request for Rehearing, JA __-__.

> create a larger environmental footprint which we conclude would not outweigh the benefits to be gained in certain individual resource areas. We do not believe that the reduction in impacts on greater sage-grouse winter habitat, greater sage-grouse leks, perennial streams and wetlands would confer a significant environmental advantage over the added impacts on pronghorn crucial winter habitat, national historic trails, [Wilderness Study Areas], [National Wildlife Refuges], recreation or air quality.

FEIS at 3-51, JA __. In the absence of a clear environmental advantage, the Jungo-Tuscarora Alternative "merely represents a shift in impacts from one area or resource to another." *Id*. at 3-10, JA __. *See also* Rehearing Order P 55, JA __ (affirming findings in final EIS regarding Jungo-Tuscarora Alternative).

In addition, the additional pipeline length and compression required by the Jungo-Tuscarora Alternative would increase the total Project cost by an estimated $271 million. FEIS at 3-50, JA __. In light of these increased costs, the Commission found that "it appears that [this] route alternative is not economically feasible" (FEIS at 3-51, JA __), which is a permissible consideration when evaluating alternatives. *See, e.g., Mt. Lookout-Mt. Nebo Property Protection Ass'n v. FERC*, 143 F.3d 165, 172-73 (4th Cir. 1998) (affirming FERC orders rejecting alternatives under NEPA that were not economically feasible); *City of Grapevine*, 17 F.3d at 1506 (rejecting argument that "it was improper for the [agency] … to consider the economic goals of the project's sponsor"). The economic infeasibility of the route further justifies any apparent difference in the depth of discussion given to the Jungo-Tuscarora Alternative as compared to more viable alternatives.

See Citizens Against Burlington, 938 F.2d at 196 (a "rule of reason" governs "the extent to which" an agency must discuss alternatives); *Biodiversity Conservation Alliance v. BLM*, 608 F.3d 709, 715 (10th Cir. 2010) (agencies may eliminate alternatives that are impractical or do not meet the purposes and needs of the project).

3. Defenders waived their claims regarding FERC's review of Ruby's cost estimates which, in any event, lack merit.

a. The Court lacks jurisdiction to consider Defenders' claims.

Defenders contend that the Commission's analysis of the Black Rock and Jungo-Tuscarora Alternatives violated NEPA because it "unquestioningly accept[ed]" cost estimates provided by Ruby. Br. 26. Defenders did not raise this claim in their comments on the draft EIS, or later on rehearing. This Court therefore lacks jurisdiction to consider it. *See* 15 U.S.C. § 717r(b); *Nat'l Comm. for the New River*, 373 F.3d at 1332 (court "need not consider whether the Commission adequately analyzed this alternative route because New River has waived this contention by failing to raise it before the Commission on rehearing"). *See also Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 764 (2004) ("respondents did not raise these particular objections to the [Environmental Assessment] …. Respondents have therefore forfeited any objection to the EA on [these particular] ground[s]").

b. FERC independently reviewed Ruby's cost estimates.

In any event, Defenders' claim fails on the merits. First, it obscures the Commission's conclusion (explained *supra*) that, regardless of any increased cost, the Black Rock and Jungo-Tuscarora Alternatives would not confer clear environmental advantages over the proposed route. Second, it is belied by the record. Rather than placing "blind reliance on Ruby's cost estimates" (Br. 26), the Commission, on at least three occasions, probed the cost information submitted by Ruby.[7] And in the draft EIS, the Commission questioned whether Ruby adequately accounted for some potential cost savings associated with the Black Rock Alternative. FEIS at 3-48, JA __. Ruby addressed those concerns and demonstrated why the potential cost savings would not materialize if the Black Rock Alternative were to proceed. *See id.*, Appendix AA at A-7 – 8, JA __-__. The record thus demonstrates that the Commission did not "just accept[] self-serving data provided by Ruby" (Br. 26); instead, the Commission put Ruby's

[7] *See*, *e.g.*, FERC Staff's Comments on Revised Draft Resource Reports 1-10, filed Dec. 28, 2008 (R. 255) at 28-29 (asking Ruby to "provide a more detailed estimate of the costs associated" with the Black Rock and Jungo-Tuscarora Alternatives, and to "explain how the cost estimate was derived"), JA __-__; Response to FERC Data Request, filed Apr. 2, 2009 (R. 341) at 12 (responding to FERC request to address "the expected additional construction costs with the Black Rock 7 Alternative"), JA __; Response to FERC Data Request, filed May 20, 2009 (R. 363) at 10-11 (providing information in response to FERC's request for "an explanation of how Ruby developed the cost estimates" and "any work papers supporting these estimates"), JA __-__.

estimates to the test.

Defenders now belatedly assert that Ruby "failed to explain" how its cost estimates were derived. Br. 26-27. But this ignores the detailed descriptions accompanying Ruby's estimates. *See, e.g.*, Resource Report No. 10 (R. 268) at 10-30 – 10-40, JA __-__; Response to FERC Data Request, filed Apr. 2, 2009 (R. 341) at 12, JA __. And Defenders' charge of "wildly-divergent" cost estimates for the Black Rock Alternative (Br. 27 n.9) is explained by the fact the estimates related to different iterations of that route. *See* FEIS at 3-42 ("Ruby went though several iterations of the Black Rock Route Alternative"), JA __. The $290 million cost estimate highlighted by Defenders was for a significantly longer alternative route than the $154 million estimate set forth in the final EIS. *See* Resource Report No. 10 at 10-31 (noting that early version of Black Rock Alternative would add 62.6 miles), JA __; FEIS at 3-43 (noting that final Black Rock Alternative would add 41.9 miles), JA __.

The NEPA regulations explain that an agency's obligation to independently evaluate information does not mean "that acceptable work … be redone, but that it be verified by the agency." 40 C.F.R. § 1506.5(a). The Commission complied with this obligation by independently reviewing and questioning Ruby's cost estimates, and ultimately relying upon Ruby's certified responses. *See* 18 C.F.R. § 157.6(a)(4) (requiring applicants to certify that their submissions "are true to the

best knowledge and belief of the signer"). In the end, Defenders have "not pointed to any inaccuracies in the disputed data, but [have] merely speculated that the data are unreliable due to the interests of the proponents of the evidence. Such a speculation, without more, is insufficient to undermine the Commission's independent determination that the data were reliable." *Nat'l Wildlife Fed. v. FERC*, 912 F.2d 1471, 1485-86 (D.C. Cir. 1990).

4. Defenders' reliance upon initial comments to drafts of the EIS is misplaced.

Defenders attempt to bolster their claim by pointing to comments from certain BLM staff members, some apparently circulated internally at BLM and most upon non-final drafts of the EIS distributed to cooperating agencies. *See, e.g.*, Br. 4, 24-25, 27. As an initial matter, these comments from agency staff members were not part of the administrative record and are not properly before the Court. *See, e.g., Theodore Roosevelt Conversation P'ship v. Salazar*, 616 F.3d 497, 514 (D.C. Cir. 2010) ("The APA limits judicial review to the administrative record except when there has been a strong showing of bad faith or improper behavior or when the record is so bare that it prevents effective judicial review.") (internal quotations omitted).

In any event, the fact that certain agency staff members raised issues with respect to drafts of the EIS does not establish that the final EIS is somehow deficient. *See, e.g., Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551

U.S. 644, 659 (2007) ("the fact that a preliminary determination by a local agency representative is later overruled at a higher level … does not render the decisionmaking process arbitrary and capricious"). Moreover, the materials demonstrate that Commission staff members gave close consideration to these initial comments regarding the alternatives analysis. *See, e.g.*, FERC Responses to BLM Comments on Administrative FEIS, at 39-48 (noting, on many occasions, "We will evaluate and make this revision, if warranted"), JA __-__. Indeed, BLM's formal comments on the published draft EIS do not take issue with the Commission's alternatives analysis. *See* FEIS, Appendix AA at F-1 – F-4 (BLM comments), JA __-__. And, in July 2010, BLM formally adopted the final EIS when it issued its record of decision granting the requisite rights-of-way for the Project. *See* BLM Record of Decision at 1, JA __. *Cf. PLMRS Narrowband Corp. v. FCC*, 182 F.3d 995, 1001-02 (D.C. Cir. 1999) ("agency opinions … speak for themselves" and are not impeached by earlier views expressed during decisionmaking process). Thus, the notion that initial comments on drafts of the EIS reveal fatal flaws in the final document is belied by the record.

B. FERC's Analysis Of The Project's Cumulative Impacts Complied With NEPA.

1. The Court lacks jurisdiction to consider Defenders' claims.

Defenders contend that the Commission's analysis of the Project's cumulative impacts on sagebrush steppe vegetation, wildlife and habitat, as well as

the Project's interrelationship with grazing and mining activities in the project area, is conclusory and unsupported. Br. 28-33. None of these issues was presented to the Commission on rehearing. Indeed, Defenders of Wildlife did not raise any cumulative impacts arguments at all. And Sierra Club simply made the general assertion that the Commission lacked sufficient information to judge the Project's cumulative impacts. *See* Sierra Club Request for Rehearing at 14, JA __.[8] Such a general charge is insufficient to preserve the specific arguments Defenders now seek to press on appeal. *See* 15 U.S.C. § 717r(a) ("The application for rehearing shall set forth specifically the ground or grounds upon which such application is based."); *Office of the Consumers' Counsel v. FERC*, 914 F.2d 290, 295 (D.C. Cir. 1990) (court lacks jurisdiction to consider arguments that were not "specifically urge[d]" on rehearing, even though they were "broadly charged," "Defenders cannot preserve an objection indirectly"). In any event, as explained below, Defenders' arguments must fail as the Commission reasonably analyzed the

[8] Sierra Club argued on rehearing that the following documents were not submitted to, or not considered by, the Commission in connection with its cumulative impacts analysis: (1) Greater Sage-Grouse Conservation Plan for Nevada and Eastern California; (2) 2008 Memorandum of Understanding among Western Association of Fish and Wildlife Agencies and the Departments of Interior and Agriculture; and (3) the most recent Sage Grouse population assessment, released by the U.S. Fish and Wildlife Service on November 4, 2009. *See* Sierra Club Rehearing Petition at 14-15, JA __-__. *See also* Rehearing Order PP 38-41 (responding to cumulative impacts arguments raised on rehearing), JA __-__.

Project's cumulative impacts.

2. The Commission reasonably analyzed the Project's cumulative impacts.

The determination of cumulative impacts "is a task assigned to the special competency of the appropriate agenc[y]" and is not disturbed "[a]bsent a showing of arbitrary action." *Kleppe*, 427 U.S. at 412-14. Here, the Commission concluded that the "majority of cumulative impacts … would be temporary and minor," but that there could be "long-term and permanent loss of sagebrush and timber resources and an incremental increase in habitat fragmentation." FEIS at 4-312, JA __.

a. Sagebrush steppe habitat

Defenders assert that the Commission's analysis of the Project's cumulative impact upon sagebrush steppe vegetation and wildlife dependent upon that habitat lacks of "any quantified or detailed data." Br. 30. But the final EIS contains considerable detail supporting the conclusion that the cumulative impact of the pipeline and future projects upon sagebrush habitat and wildlife would be "relatively small compared to the abundance of similar habitat in the region." FEIS at 4-302, JA __.

For instance, the final EIS identifies the number of acres of sagebrush in each state affected by various aspects of construction and operation of the Project (*id*. at 4-77 – 4-79, JA __-__), and how many miles of pipeline cross the various

qualities of sensitive species habitat (including that of the sage-grouse) in each state (*id*. at 4-85 – 4-86, JA __-__). *See also id*. at 4-141 – 4-146 (discussing Project's potential impacts upon sage-grouse). The final EIS concludes that the Project would impact 0.9 percent of sage-grouse habitat within 10 miles of the pipeline (or less than 0.01 percent of the habitat within the sage-grouse's range). *Id*. at 4-145, JA __. Operation of the pipeline would impact 0.3 percent of the sage-grouse habitat within 10 miles of the pipeline and less than 0.003 percent of the land within its range. *Id*.

Defenders similarly claim that the Commission failed to engage in any "meaningful analysis" of the Project's cumulative impact upon wildlife and habitat. Br. 29. But the final EIS explains that the Project (along with other anticipated projects) will "fragment habitats," increase "the width of habitat discontinuities," and result in "habitat disturbances." *Id*. at 4-303, JA __. *See also id*. at 4-99 – 101 (discussing habitat fragmentation and mitigation of same), JA __-__. In particular, "the removal of shrublands would result in long-term reduction of wildlife habitat because the regeneration of wood species is typically slow in the project region." *Id*. at 4-303, JA __. These habitat modifications would have a variety of associated impacts on wildlife species, particularly those "that have limited habitat in the project area or are otherwise more sensitive to disturbance." *Id*.

But because "most of the project area is relatively open sagebrush, and habitat types crossed are widely available for wildlife use outside of the immediate area of project disturbance," the Commission concluded that the Project would not "result in significant cumulative impacts on wildlife." *Id*. at 4-304, JA __. Apart from a generalized call for "more," Defenders offer nothing to demonstrate that this analysis was inadequate. *See TOMAC, Taxpayers of Michigan v. Norton*, 433 F.3d 852, 864 (D.C. Cir. 2006) (identifying issues to be addressed in cumulative impact analysis).

b. Grazing activities

Defenders also contend that the Commission did not "meaningfully examine the effects of grazing." Br. 30. The final EIS explains, however, that grazing has long been occurring, and will continue to occur, in the project area. FEIS at 4-297, JA __. It can result in the "destruction of native vegetation, increased spread of invasive weeds and species, damage to topsoil, exposure of soil to erosion," and water quality and quantity degradation. *Id*., Appendix AA at N-21. *See also id*. at 4-79 (noting grazing impacts to sagebrush steppe habitat), JA __; *id*. at 4-303, JA __ (noting grazing impacts upon riparian areas in the western United States).

Livestock grazing is thus "part of the ecological regime" and "environmental baseline of the area." *Id*. Accordingly, the Commission needed only to "consider the 'incremental impact' of" the Project on the resources affected by grazing.

Coalition on Sensible Transp. v. Dole, 826 F.2d 60, 70 (D.C. Cir. 1987).[9] And the "impacts of the proposed project on the same resources affected by grazing are … evaluated throughout" the final EIS. FEIS at 4-297, JA __. *See also id*. at 4-75 – 4-77 (discussing impacts to vegetation resources, including grasslands used for grazing), JA __-__, *id*. at 4-82 – 4-83 (discussing impacts to riparian habitats), JA __-__; *id*. at 4-52 – 4-64 (discussing impacts to surface waters), JA __-__.

c. Mining activities

Defenders further argue that the Commission's cumulative impacts analysis improperly focused on mining activities within 1,500 feet of the Project and the impact of those activities upon mineral resources. Br. 32. The geographic scope of the Commission's analysis – *i.e*., a consideration of mineral extraction sites within 1,500 feet – was dictated by the fact that, once constructed, the pipeline will only limit the extraction of some resources within its immediate vicinity. *See* FEIS at 4-10 ("mineral resources directly under the [50 foot] permanent right-or-way would become irretrievable for future mining operations"), JA __. The Project would thus have no impact upon sites outside of the 1,500 foot boundary. Nor was there a need to separately address the "ecosystem-level impacts mining has had on the sagebrush steppe." Br. 32. The impact of past mining activities on sagebrush

[9] The Project would not have any effect on grazing practices after construction, "except perhaps for allowing vegetation on the right-or-way to become established before reintroducing livestock." FEIS at 4-297, JA __.

steppe habitat and wildlife is subsumed in the discussion of the current status of those resources. *See*, *e.g.*, FEIS 4-75 – 4-82, 4-141 – 4-149, 4-152 – 4-153, JA __-__, __-__, __-__.

Defenders also contend that the Commission "arbitrarily" limited the temporal scope of its analysis to "planned mining sties," and thus failed to account for "several future mining operations." Br. 33. This contention is premised on a letter from Newmont Mining Corp., submitted after issuance of the final EIS, which claims some additional "mineral prospects in Nevada adjacent to the project area." Ltr. From Newmont Mining Corp. to BLM, dated Feb. 11, 2010, at 3 (R. 636), JA __. But the final "EIS does not presume to be an exhaustive list of all" areas for current and future exploration. Certificate Order P 97, JA __. It simply "represents the information available at the time of publication." *Id.* Moreover, Defenders have not shown that these "mineral prospects" – even if located within 1,500 feet of the pipeline – were "reasonably foreseeable future actions" susceptible to meaningful analysis. 40 C.F.R. § 1508.7. As the Commission has explained, there must be some evidence "that a coal mine will actually be operated close to a proposed pipeline" in order to conclude that it is "reasonably foreseeable" and will have "a significant effect." *Tex. E. Transmission, L.P.*, 131 F.E.R.C. ¶ 61,164, P 32 (2010). A mere "incipient notion" of future projects does "not establish reasonable foreseeability of the incremental impact of those projects

in connection with the [subject action] for purposes of § 1508.7" of the NEPA regulations. *Theodore Roosevelt Conservation P'ship*, 616 F.3d at 513. *See also Habitat Education Ctr. v. U.S. Forest Serv.*, 609 F.3d 897, 902 (7th Cir. 2010) ("We agree with our sister circuits that an agency decision may not be reversed for failure to mention a project not capable of meaningful discussion.").[10]

C. FERC's Analysis of Waterbody and Wetlands Crossings Complied with NEPA.

1. The Court lacks jurisdiction to consider Defenders' claims.

Defenders contend that the Commission's environmental analysis violates NEPA because it is "fraught with data gaps" regarding waterbody crossings and purportedly relied upon incomplete mitigation measures. Br. 34, 35. Neither in their comments on the draft EIS nor in their petitions for rehearing did Defenders raise any arguments regarding incomplete data relating to waterbody or wetland crossings. Indeed, their petitions for rehearing raise no arguments whatsoever regarding waterbodies or wetlands. *See* Petition for Rehearing of Defenders of Wildlife, JA __-__; Petition for Rehearing of Sierra Club, JA __-__. As a result, this Court lacks jurisdiction to consider Defenders' claims. *See* 15 U.S.C.

[10] In the event the pipeline actually impacts mining activities, Ruby may propose minor route adjustments and/or negotiate damages, access rights, and easements with mining claim owners. Certificate Order PP 96-97, JA __-__. Consistent with that process, Ruby agreed to make adjustments in the pipeline route in order to accommodate some of Newport's existing mining operations. *See* BLM Record of Decision at 22 (discussing Newmont Route Variation), JA __.

§ 717r(b). *See also Vermont Yankee Nuclear Power v. Natural Res. Def. Council*, 435 U.S. 519, 553 (1978) ("intervenors who wish to participate [must] structure their [NEPA] participation so that it is meaningful, so that it alerts the agency to the intervenors' position and contentions").

Nor did Defenders contend on rehearing that the Commission improperly relied upon incomplete mitigation measures for wetland crossings. The only specific mitigation measures challenged were those relating to sage grouse habitat and mating sites – a matter which is not raised in Defenders' opening brief. *See* Petition for Rehearing of Defenders of Wildlife at 8, JA __; Sierra Club Petition for Rehearing at 12, JA __. The rehearing requests also make the broad claim that the final EIS "does not give any explanation of how any of the undefined mitigation measures are going to be of any benefit to any of the impacted species." Defenders of Wildlife Petition for Rehearing at 7, JA __; *see also* Sierra Club Petition for Rehearing at 11, JA __. But as the Commission explained, the absence of any "specific description of the error alleged" makes it "impossible to know to which species and mitigation measures they are referring." Rehearing Order P 35, n.48, JA __. The failure to specifically urge their claims regarding wetland mitigation measures before the Commission bars Defenders from presenting them to this Court. *See* 15 U.S.C. § 717r(a) (parties must "set forth specifically" their grounds for rehearing); *Intermountain Mun. Gas Agency v. FERC*, 326 F.3d 1281,

1285 (D.C. Cir. 2003) ("so general and vague a statement … does not satisfy [15 U.S.C. § 717r(b)] which requires that an objection must be specifically urged, … so as to put the Commission on notice of the ground on which rehearing was being sought").

2. FERC reasonably analyzed impacts arising from waterbody crossings.

On the merits, Defenders' claim fares no better. The final EIS identified the potential impacts arising from pipeline construction across waterbodies and wetlands, along with the means to minimize those impacts. The document explains that "[p]ipeline construction could affect surface waters in several ways," such as modification of aquatic habitat, increased sedimentation and turbidty, and decreased dissolved oxygen concentrations. FEIS at 4-60, JA __. The likelihood of such impacts, however, is minimized because "[t]he majority of the waterbodies that would be crossed by the pipeline are intermittent drainages or washes that are expected to be dry at the time of construction" and "do not typically support fisheries" or "migratory passage for aquatic organisms." *Id*. at 4-61, JA __.

The state of the waterbody at the time of construction – *i.e*., whether it is wet or dry – will determine the crossing method employed by Ruby. For dry waterbodies, Ruby is required to employ conventional upland construction methods, which will reduce sedimentation and other impacts. *Id*. When crossing wet waterbodies, Ruby will typically utilize an open-cut crossing method, which

involves construction in the waterbody while water flows through it. *Id*. *See also id*. at 2-21 (describing open-cut method), JA __. But if the waterbody potentially contains special status fish species, Ruby will utilize a dry-ditch crossing method, whereby the water is diverted around the work area in order to minimize sedimentation. *Id*. at 4-62, JA __; *see also id*. at 2-22 – 2-23 (describing dry-ditch crossing method), JA __ -__. Because the dry-ditch method is impracticable for waterbodies more than 30-feet wide at the time of construction, a wet open-cut method would likely be employed for such longer crossings in areas of special status fish. *Id*. at 4-62 – 4-63, JA __-__. In addition, for each crossing method, Ruby will be required to implement a variety of mitigation and stream restoration measures to minimize the effects of construction. *Id*. at 4-61 – 4-64, JA __-__. *See also id*., Appendix F at 1-10 (discussing waterbody crossing procedures, including adherence to state in-water work windows established by fishery agencies), JA __-__.

Appendix Q of the final EIS identifies the location, name, type, fishery classification, state water quality/use classification, and impaired water quality designation for each of the 1,069 waterbodies crossed by the Project. *See id*., Appendix Q, JA __-___; *see also id*. at 4-55 (summarizing waterbody research found in Appendix Q), JA __. Defenders assert that "on every one of its pages," the appendix is missing "extremely important data" regarding waterbody flow and

width at crossing, which "defines in large part the crossing method to be used." Br. 34. While Defenders are correct that some flow or width data is missing for approximately 200 of the crossings, they overstate the import of that missing data.

The waterbodies at issue were dry when surveyed. As a result, their width (which is defined as wetted width) could not be determined. Resource Report No. 2, dated Jan. 2009, at 2-2 (R. 268), JA __. And based on the fact that most are unnamed, it appears that they are likely intermittent or ephemeral streams. *See, e.g.*, FEIS, Appendix Q at Q-1, Q-2, Q-9, Q-26, Q-33, JA __, __, __, __, __. More important, only seven support fish populations. And none present any risk to sensitive fish species. *Id*. at Q-5, Q-6, Q-8, Q-9, Q-21, JA __, __, __, __, __. Given the absence of fish in the waterbodies at issue, the missing flow and width data have little bearing on the Project's potential environmental impacts.

Defenders attempt to support their claim by pointing to preliminary comments from various agencies regarding waterbody crossing issues. Br. 34. But in their comments on the published draft EIS none of those agencies raised any concern with the fact that flow and width data were missing for certain intermittent or ephemeral streams.[11] Defenders nonetheless contend that such data is

[11] *See* Comments to draft EIS of U.S. Fish and Wildlife Service, FEIS, Appendix AA at F-15 – F-18, F-24 – F-28, F-52 (commenting on waterbody crossing issues and draft Appendix M, the precursor to Appendix Q in the final EIS), JA __-__, __-__, __; Comments to draft EIS of Wyoming Game and Fish Dep't,

"extremely important" because it "defines in large part the crossing method to be used and the ultimate environmental impacts of the crossing." Br. 34. But this is incorrect. The crossing method is primarily determined by whether the waterbody is wet at the time of construction, a fact which is difficult to determine in advance given the arid environment and the many intermittent and ephemeral waterbodies crossed by the Project. FEIS at 4-61 – 4-62 (addressing wet and dry crossing methods), JA __-__. Defenders have thus failed to establish that the missing data impair in any manner the Commission's analysis of the Project's potential environmental impacts.

3. Mitigation measures for wetland crossings are reasonably developed in the final EIS.

Defenders argue that the Commission was incapable of evaluating the Project's potential impact on wetlands because it "did not yet know many important mitigation measures." Br. 35. But "NEPA does not require a fully developed plan detailing what steps will be taken to mitigate adverse environmental impacts" before an agency can act. *Methow Valley*, 490 U.S. at 359. Rather, it requires that "mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated." *Id*. at 352. The Commission's detailed analysis of the Project's potential impacts upon wetlands,

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FEIS, Appendix AA at S-42 – S-45 (commenting on waterbody crossing issues), JA __-__.

and mitigation measures designed to limit those impacts, satisfies this standard.

a. Wetland construction mitigation

The final EIS identifies all wetlands crossed by the Project and the potential environmental impacts of that crossing (such as reduced ability to moderate flood flow and alterations in species composition and vegetation). FEIS at 4-70, JA __. The document notes that for herbaceous wetlands (which comprise nearly 80% of the wetlands affected by the Project), "the effects of pipeline construction would be considered temporary because the … hydrology would not be altered," and vegetation would attain "functionality similar to that of the wetland prior to construction (typically within 1 to 3 years)." *Id*.

While Defenders claim that the "FERC did not yet know" how wetland impacts would be minimized (Br. 35), the final EIS set forth various wetland mitigation measures designed to minimize the overall area and duration of pipeline disturbance and to enhance restoration. *See* FEIS at 4-71 – 4-74, JA __-__; *id*., Appendix F at 11-17 (setting forth wetland construction and restoration procedures), JA __-__. The final EIS addresses 12 specific construction procedures to be employed in order to limit impacts to wetlands, and 15 restoration techniques identified by Ruby for potential inclusion in its final wetland restoration plan. *Id*. at 4-71 – 4-74 (discussing construction and restoration techniques), JA __-__. And before any construction can begin, the final wetland restoration plan –

developed in consultation with expert federal and state resource agencies – must be approved by the Commission. Certificate Order, Appendix A at P 29, JA __. *See also Citizens Against Burlington*, 938 F.2d at 205-06 (agency not required to finish mitigation studies or execute mitigation plans before project begins).

b. Blasting mitigation

Defenders also claim that the Commission lacked sufficient information regarding the manner in which blasting impacts upon fish would be mitigated. Br. 35. The final EIS discusses the potential impacts of explosives used during construction upon fish and other aquatic species. FEIS at 4-119, JA __. It further identifies several techniques that have been proven to minimize those impacts based on the Commission's extensive experience with pipeline construction. *Id*. at 4-120, JA __. The Fish and Wildlife Service indicated that some of those techniques may be better than others in minimizing harm to special status fish. *Id*. Accordingly, the Commission directed Ruby – before any construction in areas that potentially contain special status fish – to finalize and file its blasting mitigation procedures in consultation with the Fish and Wildlife Service. *See* Certificate Order, Appendix A at P 33, JA __. In doing so, the Commission acted reasonably.[12]

[12] *See, e.g., Wetlands Action Network v. U.S. Army Corps of Engineers*, 222 F.3d 1105, 1121 (9th Cir. 2000) (upholding issuance of permit "before all the details of the mitigation plan had been finalized" where "Corps placed special

c. Access road mitigation

Defenders also point to the fact that restoration designs for wetland access roads were not finalized. Br. 36. But as the final EIS explains, "it is impossible to determine precisely" what access roads would be used, and thus which would need to be restored to their original state (FEIS at 4-71, JA __), until Ruby's construction contractor identifies which roads it prefers to use. *Id*. at 2-7, 4-9 (discussing access road improvements and restoration), JA __, __.

In light of this uncertainty, the Commission reasonably required Ruby to obtain FERC approval for its finalized access road restoration plans before commencing any wetland construction activities. Certificate Order, Appendix A at P 27, JA __. *See City of Alexandria v. Slater*, 198 F.3d 862, 870 (D.C. Cir. 1999) (holding, in a challenge to the adequacy of a traffic mitigation plan, that although "appellees would prefer the Administration to set forth in the Final EIS a comprehensive plan detailing precisely which streets will be closed, and which alternative routes will be established, . . . that is not mandated by NEPA"); *Pub. Util. Comm'n of California v. FERC*, 900 F.2d 269, 282-83 (D.C. 1990) ("the

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conditions in the permit requiring [applicant] to develop the plans according to the guidelines" and preventing "any work on the project until the plans were submitted to and approved by the Corps"); *cf. Dep't of Interior v. FERC*, 952 F.2d 538, 546 (D.C. Cir. 1992) (FERC need not "have perfect information before it takes any action," and may appropriately rely upon license conditions and post-licensing studies to develop mitigation measures).

Commission's deferral of decision on specific mitigation steps until the start of construction, when a more detailed right-of-way would be known, was both eminently reasonable and embraced in the procedures promulgated under NEPA").

d. Clean Water Act permit conditions

Finally, Defenders take issue with the final EIS's observation that permits issued by the U.S. Army Corps of Engineers and state agencies under the Clean Water Act would also likely impose wetland mitigation measures. Br. 36 (citing FEIS at 4-74, JA __). While these agencies had not yet developed their preferred mitigation measures, the Commission was not required to wait for the issuance of all associated permits before acting on matters within its jurisdiction. *See Methow Valley,* 490 U.S. at 352-53 ("it would be incongruous to conclude that the Forest Service has no power to act until the local agencies have reached a final conclusion on what mitigating measures they would consider necessary"). Here, the Commission acted reasonably in noting the likely existence of such measures and concluding that they would only serve to enhance the mitigation associated with the detailed wetland construction and restoration procedures outlined in the final EIS. *See, e.g., Murray Energy,* 629 F.3d at 242 ("FERC took seriously – and addressed – the need for post-construction mitigation measures" when noting that pipeline company would have to comply with measures to be imposed by state agency). On the basis of this assumption, the Commission reasonably concluded

that the Project could proceed in a manner that would not "result in any significant impacts on the wetlands." FEIS at 4-74, JA __.

CONCLUSION

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

Respectfully submitted,

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July 5, 2011

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C), I hereby certify that this brief contains 10,884 words, not including the cover page, tables of contents and authorities, the glossary, the certificate of counsel, and this certificate.

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July 5, 2011

ADDENDUM

STATUTES
AND
REGULATIONS

TABLE OF CONTENTS

§ 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

§ 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.

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

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

§ 717e. Ascertainment of cost of property

(a) Cost of property

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

(b) Inventory of property; statements of costs

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

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

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

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

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

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

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

(c) Certificate of public convenience and necessity

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

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

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

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

(B) natural gas produced by such person.

(d) Application for certificate of public convenience and necessity

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

(e) Granting of certificate of public convenience and necessity

Except in the cases governed by the provisos contained in subsection (c)(1) of this section, a

certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

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

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

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

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

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

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

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

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

AMENDMENTS

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

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

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

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

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

EFFECTIVE DATE OF 1988 AMENDMENT

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

TRANSFER OF FUNCTIONS

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

§ 717g. Accounts; records; memoranda

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

Every natural-gas company shall make, keep, and preserve for such periods, such accounts, records of cost-accounting procedures, correspondence, memoranda, papers, books, and other records as the Commission may by rules and regulations prescribe as necessary or appropriate for purposes of the administration of this chapter: *Provided, however*, That nothing in this chapter shall relieve any such natural-gas company from keeping any accounts, memoranda, or records which such natural-gas company may be required to keep by or under authority of the laws of any State. The Commission may prescribe a system of accounts to be kept by such

such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, contracts, agreements, and other records. Such court may issue an order requiring such person to appear before the Commission or member or officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found or may be doing business. Any person who willfully shall fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, contracts, agreements, or other records, if in his or its power so to do, in obedience to the subpena of the Commission, shall be guilty of a misdemeanor and upon conviction shall be subject to a fine of not more than $1,000 or to imprisonment for a term of not more than one year, or both.

(e) Testimony of witnesses

The testimony of any witness may be taken at the instance of a party, in any proceeding or investigation pending before the Commission, by deposition at any time after the proceeding is at issue. The Commission may also order testimony to be taken by deposition in any proceeding or investigation pending before it at any stage of such proceeding or investigation. Such depositions may be taken before any person authorized to administer oaths not being of counsel or attorney to either of the parties, nor interested in the proceeding or investigation. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce documentary evidence, in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission, as hereinbefore provided. Such testimony shall be reduced to writing by the person taking deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent.

(f) Deposition of witnesses in a foreign country

If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken before an officer or person designated by the Commission, or agreed upon by the parties by stipulation in writing to be filed with the Commission. All depositions must be promptly filed with the Commission.

(g) Witness fees

Witnesses whose depositions are taken as authorized in this chapter, and the person or officer taking the same, shall be entitled to the same fees as are paid for like services in the courts of the United States.

(June 21, 1938, ch. 556, § 14, 52 Stat. 828; Pub. L. 91–452, title II, § 218, Oct. 15, 1970, 84 Stat. 929.)

AMENDMENTS

1970—Subsec. (h). Pub. L. 91–452 struck out subsec. (h) which related to the immunity from prosecution of any individual compelled to testify or produce evidence, documentary or otherwise, after claiming his privilege against self-incrimination.

EFFECTIVE DATE OF 1970 AMENDMENT

Amendment by Pub. L. 91–452 effective on sixtieth day following Oct. 15, 1970, and not to affect any immunity to which any individual is entitled under this section by reason of any testimony given before sixtieth day following Oct. 15, 1970, see section 260 of Pub. L. 91–452, set out as an Effective Date; Savings Provision note under section 6001 of Title 18, Crimes and Criminal Procedure.

STUDY AND REPORT ON NATURAL GAS PIPELINE AND STORAGE FACILITIES IN NEW ENGLAND

Pub. L. 107–355, § 26, Dec. 17, 2002, 116 Stat. 3012, provided that:

''(a) STUDY.—The Federal Energy Regulatory Commission, in consultation with the Department of Energy, shall conduct a study on the natural gas pipeline transmission network in New England and natural gas storage facilities associated with that network.

''(b) CONSIDERATION.—In carrying out the study, the Commission shall consider the ability of natural gas pipeline and storage facilities in New England to meet current and projected demand by gas-fired power generation plants and other consumers.

''(c) REPORT.—Not later than 1 year after the date of enactment of this Act [Dec. 17, 2002], the Federal Energy Regulatory Commission shall prepare and submit to the Committee on Energy and Natural Resources of the Senate and the Committee on Energy and Commerce of the House of Representatives a report containing the results of the study conducted under subsection (a), including recommendations for addressing potential natural gas transmission and storage capacity problems in New England.''

§ 717n. Process coordination; hearings; rules of procedure

(a) Definition

In this section, the term ''Federal authorization''—

(1) means any authorization required under Federal law with respect to an application for authorization under section 717b of this title or a certificate of public convenience and necessity under section 717f of this title; and

(2) includes any permits, special use authorizations, certifications, opinions, or other approvals as may be required under Federal law with respect to an application for authorization under section 717b of this title or a certificate of public convenience and necessity under section 717f of this title.

(b) Designation as lead agency

(1) In general

The Commission shall act as the lead agency for the purposes of coordinating all applicable Federal authorizations and for the purposes of complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(2) Other agencies

Each Federal and State agency considering an aspect of an application for Federal authorization shall cooperate with the Commission

and comply with the deadlines established by the Commission.

(c) Schedule

(1) Commission authority to set schedule

The Commission shall establish a schedule for all Federal authorizations. In establishing the schedule, the Commission shall—

(A) ensure expeditious completion of all such proceedings; and

(B) comply with applicable schedules established by Federal law.

(2) Failure to meet schedule

If a Federal or State administrative agency does not complete a proceeding for an approval that is required for a Federal authorization in accordance with the schedule established by the Commission, the applicant may pursue remedies under section 717r(d) of this title.

(d) Consolidated record

The Commission shall, with the cooperation of Federal and State administrative agencies and officials, maintain a complete consolidated record of all decisions made or actions taken by the Commission or by a Federal administrative agency or officer (or State administrative agency or officer acting under delegated Federal authority) with respect to any Federal authorization. Such record shall be the record for—

(1) appeals or reviews under the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.), provided that the record may be supplemented as expressly provided pursuant to section 319 of that Act [16 U.S.C. 1465]; or

(2) judicial review under section 717r(d) of this title of decisions made or actions taken of Federal and State administrative agencies and officials, provided that, if the Court determines that the record does not contain sufficient information, the Court may remand the proceeding to the Commission for further development of the consolidated record.

(e) Hearings; parties

Hearings under this chapter may be held before the Commission, any member or members thereof, or any representative of the Commission designated by it, and appropriate records thereof shall be kept. In any proceeding before it, the Commission in accordance with such rules and regulations as it may prescribe, may admit as a party any interested State, State commission, municipality or any representative of interested consumers or security holders, or any competitor of a party to such proceeding, or any other person whose participation in the proceeding may be in the public interest.

(f) Procedure

All hearings, investigations, and proceedings under this chapter shall be governed by rules of practice and procedure to be adopted by the Commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision, rule, or regulation issued under the authority of this chapter.

(June 21, 1938, ch. 556, § 15, 52 Stat. 829; Pub. L. 109–58, title III, § 313(a), Aug. 8, 2005, 119 Stat. 688.)

REFERENCES IN TEXT

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

The Coastal Zone Management Act of 1972, referred to in subsec. (d)(1), 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.

AMENDMENTS

2005—Pub. L. 109–58 substituted ''Process coordination; hearings; rules of procedure'' for ''Hearings; rules of procedure'' in section catchline, added subsecs. (a) to (d), and redesignated former subsecs. (a) and (b) as (e) and (f), respectively.

§ 717*o*. Administrative powers of Commission; rules, regulations, and orders

The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

(June 21, 1938, ch. 556, § 16, 52 Stat. 830.)

§ 717p. Joint boards

(a) Reference of matters to joint boards; composition and power

The Commission may refer any matter arising in the administration of this chapter to a board to be composed of a member or members, as determined by the Commission, from the State or each of the States affected or to be affected by such matter. Any such board shall be vested with the same power and be subject to the same duties and liabilities as in the case of a member of the Commission when designated by the Commission to hold any hearings. The action of such board shall have such force and effect and its

proceedings shall be conducted in such manner as the Commission shall by regulations prescribe. The Board shall be appointed by the Commission from persons nominated by the State commission of each State affected, or by the Governor of such State if there is no State commission. Each State affected shall be entitled to the same number of representatives on the board unless the nominating power of such State waives such right. The Commission shall have discretion to reject the nominee from any State, but shall thereupon invite a new nomination from that State. The members of a board shall receive such allowances for expenses as the Commission shall provide. The Commission may, when in its discretion sufficient reason exists therefor, revoke any reference to such a board.

(b) Conference with State commissions regarding rate structure, costs, etc.

The Commission may confer with any State commission regarding rate structures, costs, accounts, charges, practices, classifications, and regulations of natural-gas companies; and the Commission is authorized, under such rules and regulations as it shall prescribe, to hold joint hearings with any State commission in connection with any matter with respect to which the Commission is authorized to act. The Commission is authorized in the administration of this chapter to avail itself of such cooperation, services, records, and facilities as may be afforded by any State commission.

(c) Information and reports available to State commissions

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

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

§ 717q. Appointment of officers and employees

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

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

REFERENCES IN TEXT

The civil-service laws, referred to in text, are set forth in Title 5, Government Organization and Employees. See, particularly, section 3301 et seq. of Title 5.

CODIFICATION

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

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

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

''Chapter 51 and subchapter III of chapter 53 of title 5'' substituted in text for ''the Classification Act of 1949, as amended'' on authority of Pub. L. 89–554, § 7(b), Sept. 6, 1966, 80 Stat. 631, the first section of which enacted Title 5.

AMENDMENTS

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

REPEALS

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

§ 717r. Rehearing and review

(a) Application for rehearing; time

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

for the conduct of research and surveys, the preparation of reports, and other activities necessary to the discharge of its duties, and to request from any Federal department or agency any information and assistance it deems necessary to carry out its functions; required the General Services Administration to provide administrative services for the Commission on a reimbursable basis; required the Commission to submit an interim report to the President and the Congress one year after it was established and to submit its final report two years after Mar. 16, 1970; terminated the Commission sixty days after the date of the submission of its final report; and authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, such amounts as might be necessary to carry out the provisions of Pub. L. 91–213.

EXECUTIVE ORDER NO. 11507

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

EXECUTIVE ORDER NO. 11752

Ex. Ord. No. 11752, Dec. 17, 1973, 38 F.R. 34793, which related to the prevention, control, and abatement of environmental pollution at Federal facilities, was revoked by Ex. Ord. No. 12088, Oct. 13, 1978, 43 F.R. 47707, set out as a note under section 4321 of this title.

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

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

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

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

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

(i) the environmental impact of the proposed action,

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

(iii) alternatives to the proposed action,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

AMENDMENTS

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

CERTAIN COMMERCIAL SPACE LAUNCH ACTIVITIES

Pub. L. 104–88, title IV, §401, Dec. 29, 1995, 109 Stat. 955, provided that: ''The licensing of a launch vehicle or launch site operator (including any amendment, extension, or renewal of the license) under chapter 701 of title 49, United States Code, shall not be considered a major Federal action for purposes of section 102(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(C)) if—

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

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

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

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

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

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

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

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

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

(i) facilitates cooperative conservation;

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

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

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

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

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

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

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

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

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

GEORGE W. BUSH.

§ 4333. Conformity of administrative procedures to national environmental policy

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

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

§ 4334. Other statutory obligations of agencies

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

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

§ 4335. Efforts supplemental to existing authorizations

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

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

SUBCHAPTER II—COUNCIL ON ENVIRONMENTAL QUALITY

§ 4341. Omitted

CODIFICATION

Section, Pub. L. 91–190, title II, §201, Jan. 1, 1970, 83 Stat. 854, which required the President to transmit to Congress annually an Environmental Quality Report, terminated, effective May 15, 2000, pursuant to section 3003 of Pub. L. 104–66, as amended, set out as a note

CODIFICATION

Section was not enacted as part of act Feb. 25, 1920, ch. 85, 41 Stat. 437, known as the Mineral Leasing Act, which comprises this chapter.

§ 185. Rights-of-way for pipelines through Federal lands

(a) Grant of authority

Rights-of-way through any Federal lands may be granted by the Secretary of the Interior or appropriate agency head for pipeline purposes for the transportation of oil, natural gas, synthetic liquid or gaseous fuels, or any refined product produced therefrom to any applicant possessing the qualifications provided in section 181 of this title in accordance with the provisions of this section.

(b) Definitions

(1) For the purposes of this section ''Federal lands'' means all lands owned by the United States except lands in the National Park System, lands held in trust for an Indian or Indian tribe, and lands on the Outer Continental Shelf. A right-of-way through a Federal reservation shall not be granted if the Secretary or agency head determines that it would be inconsistent with the purposes of the reservation.

(2) ''Secretary'' means the Secretary of the Interior.

(3) ''Agency head'' means the head of any Federal department or independent Federal office or agency, other than the Secretary of the Interior, which has jurisdiction over Federal lands.

(c) Inter-agency coordination

(1) Where the surface of all of the Federal lands involved in a proposed right-of-way or permit is under the jurisdiction of one Federal agency, the agency head, rather than the Secretary, is authorized to grant or renew the right-of-way or permit for the purposes set forth in this section.

(2) Where the surface of the Federal lands involved is administered by the Secretary or by two or more Federal agencies, the Secretary is authorized, after consultation with the agencies involved, to grant or renew rights-of-way or permits through the Federal lands involved. The Secretary may enter into interagency agreements with all other Federal agencies having jurisdiction over Federal lands for the purpose of avoiding duplication, assigning responsibility, expediting review of rights-of-way or permit applications, issuing joint regulations, and assuring a decision based upon a comprehensive review of all factors involved in any right-of-way or permit application. Each agency head shall administer and enforce the provisions of this section, appropriate regulations, and the terms and conditions of rights-of-way or permits insofar as they involve Federal lands under the agency head's jurisdiction.

(d) Width limitations

The width of a right-of-way shall not exceed fifty feet plus the ground occupied by the pipeline (that is, the pipe and its related facilities) unless the Secretary or agency head finds, and records the reasons for his finding, that in his judgment a wider right-of-way is necessary for operation and maintenance after construction, or to protect the environment or public safety. Related facilities include but are not limited to valves, pump stations, supporting structures, bridges, monitoring and communication devices, surge and storage tanks, terminals, roads, airstrips and campsites and they need not necessarily be connected or contiguous to the pipe and may be the subjects of separate rights-of-way.

(e) Temporary permits

A right-of-way may be supplemented by such temporary permits for the use of Federal lands in the vicinity of the pipeline as the Secretary or agency head finds are necessary in connection with construction, operation, maintenance, or termination of the pipeline, or to protect the natural environment or public safety.

(f) Regulatory authority

Rights-of-way or permits granted or renewed pursuant to this section shall be subject to regulations promulgated in accord with the provisions of this section and shall be subject to such terms and conditions as the Secretary or agency head may prescribe regarding extent, duration, survey, location, construction, operation, maintenance, use, and termination.

(g) Pipeline safety

The Secretary or agency head shall impose requirements for the operation of the pipeline and related facilities in a manner that will protect the safety of workers and protect the public from sudden ruptures and slow degradation of the pipeline.

(h) Environmental protection

(1) Nothing in this section shall be construed to amend, repeal, modify, or change in any way the requirements of section 102(2)(C) [42 U.S.C. 4332(2)(C)] or any other provision of the National Environmental Policy Act of 1969 [42 U.S.C. 4321 et seq.].

(2) The Secretary or agency head, prior to granting a right-of-way or permit pursuant to this section for a new project which may have a significant impact on the environment, shall require the applicant to submit a plan of construction, operation, and rehabilitation for such right-of-way or permit which shall comply with this section. The Secretary or agency head shall issue regulations or impose stipulations which shall include, but shall not be limited to: (A) requirements for restoration, revegetation, and curtailment of erosion of the surface of the land; (B) requirements to insure that activities in connection with the right-of-way or permit will not violate applicable air and water quality standards nor related facility siting standards established by or pursuant to law; (C) requirements designed to control or prevent (i) damage to the environment (including damage to fish and wildlife habitat), (ii) damage to public or private property, and (iii) hazards to public health and safety; and (D) requirements to protect the interests of individuals living in the general area of the right-of-way or permit who rely on the fish, wildlife, and biotic resources of the area for subsistence purposes. Such regulations shall be applicable to every right-of-way or

permit granted pursuant to this section, and may be made applicable by the Secretary or agency head to existing rights-of-way or permits, or rights-of-way or permits to be renewed pursuant to this section.

(i) Disclosure

If the applicant is a partnership, corporation, association, or other business entity, the Secretary or agency head shall require the applicant to disclose the identity of the participants in the entity. Such disclosure shall include where applicable (1) the name and address of each partner, (2) the name and address of each shareholder owning 3 per centum or more of the shares, together with the number and percentage of any class of voting shares of the entity which such shareholder is authorized to vote, and (3) the name and address of each affiliate of the entity together with, in the case of an affiliate controlled by the entity, the number of shares and the percentage of any class of voting stock of that affiliate owned, directly or indirectly, by that entity, and, in the case of an affiliate which controls that entity, the number of shares and the percentage of any class of voting stock of that entity owned, directly or indirectly, by the affiliate.

(j) Technical and financial capability

The Secretary or agency head shall grant or renew a right-of-way or permit under this section only when he is satisfied that the applicant has the technical and financial capability to construct, operate, maintain, and terminate the project for which the right-of-way or permit is requested in accordance with the requirements of this section.

(k) Public hearings

The Secretary or agency head by regulation shall establish procedures, including public hearings where appropriate, to give Federal, State, and local government agencies and the public adequate notice and an opportunity to comment upon right-of-way applications filed after the date of enactment of this subsection.

(*l*) Reimbursement of costs

The applicant for a right-of-way or permit shall reimburse the United States for administrative and other costs incurred in processing the application, and the holder of a right-of-way or permit shall reimburse the United States for the costs incurred in monitoring the construction, operation, maintenance, and termination of any pipeline and related facilities on such right-of-way or permit area and shall pay annually in advance the fair market rental value of the right-of-way or permit, as determined by the Secretary or agency head.

(m) Bonding

Where he deems it appropriate the Secretary or agency head may require a holder of a right-of-way or permit to furnish a bond, or other security, satisfactory to the Secretary or agency head to secure all or any of the obligations imposed by the terms and conditions of the right-of-way or permit or by any rule or regulation of the Secretary or agency head.

(n) Duration of grant

Each right-of-way or permit granted or renewed pursuant to this section shall be limited to a reasonable term in light of all circumstances concerning the project, but in no event more than thirty years. In determining the duration of a right-of-way the Secretary or agency head shall, among other things, take into consideration the cost of the facility, its useful life, and any public purpose it serves. The Secretary or agency head shall renew any right-of-way, in accordance with the provisions of this section, so long as the project is in commercial operation and is operated and maintained in accordance with all of the provisions of this section.

(*o*) Suspension or termination of right-of-way

(1) Abandonment of a right-of-way or noncompliance with any provision of this section may be grounds for suspension or termination of the right-of-way if (A) after due notice to the holder of the right-of-way, (B) a reasonable opportunity to comply with this section, and (C) an appropriate administrative proceeding pursuant to section 554 of title 5, the Secretary or agency head determines that any such ground exists and that suspension or termination is justified. No administrative proceeding shall be required where the right-of-way by its terms provides that it terminates on the occurrence of a fixed or agreed upon condition, event, or time.

(2) If the Secretary or agency head determines that an immediate temporary suspension of activities within a right-of-way or permit area is necessary to protect public health or safety or the environment, he may abate such activities prior to an administrative proceeding.

(3) Deliberate failure of the holder to use the right-of-way for the purpose for which it was granted or renewed for any continuous two-year period shall constitute a rebuttable presumption of abandonment of the right-of-way: *Provided*, That where the failure to use the right-of-way is due to circumstances not within the holder's control the Secretary or agency head is not required to commence proceedings to suspend or terminate the right-of-way.

(p) Joint use of rights-of-way

In order to minimize adverse environmental impacts and the proliferation of separate rights-of-way across Federal lands, the utilization of rights-of-way in common shall be required to the extent practical, and each right-of-way or permit shall reserve to the Secretary or agency head the right to grant additional rights-of-way or permits for compatible uses on or adjacent to rights-of-way or permit area granted pursuant to this section.

(q) Statutes

No rights-of-way for the purposes provided for in this section shall be granted or renewed across Federal lands except under and subject to the provisions, limitations, and conditions of this section. Any application for a right-of-way filed under any other law prior to the effective date of this provision may, at the applicant's option, be considered as an application under this section. The Secretary or agency head may require the applicant to submit any additional information he deems necessary to comply with the requirements of this section.

(r) Common carriers

(1) Pipelines and related facilities authorized under this section shall be constructed, operated, and maintained as common carriers.

(2)(A) The owners or operators of pipelines subject to this section shall accept, convey, transport, or purchase without discrimination all oil or gas delivered to the pipeline without regard to whether such oil or gas was produced on Federal or non-Federal lands.

(B) In the case of oil or gas produced from Federal lands or from the resources on the Federal lands in the vicinity of the pipeline, the Secretary may, after a full hearing with due notice thereof to the interested parties and a proper finding of facts, determine the proportionate amounts to be accepted, conveyed, transported or purchased.

(3)(A) The common carrier provisions of this section shall not apply to any natural gas pipeline operated by any person subject to regulation under the Natural Gas Act [15 U.S.C. 717 et seq.] or by any public utility subject to regulation by a State or municipal regulatory agency having jurisdiction to regulate the rates and charges for the sale of natural gas to consumers within the State or municipality.

(B) Where natural gas not subject to State regulatory or conservation laws governing its purchase by pipelines is offered for sale, each such pipeline shall purchase, without discrimination, any such natural gas produced in the vicinity of the pipeline.

(4) The Government shall in express terms reserve and shall provide in every lease of oil lands under this chapter that the lessee, assignee, or beneficiary, if owner or operator of a controlling interest in any pipeline or of any company operating the pipeline which may be operated accessible to the oil derived from lands under such lease, shall at reasonable rates and without discrimination accept and convey the oil of the Government or of any citizen or company not the owner of any pipeline operating a lease or purchasing gas or oil under the provisions of this chapter.

(5) Whenever the Secretary has reason to believe that any owner or operator subject to this section is not operating any oil or gas pipeline in complete accord with its obligations as a common carrier hereunder, he may request the Attorney General to prosecute an appropriate proceeding before the Secretary of Energy or Federal Energy Regulatory Commission or any appropriate State agency or the United States district court for the district in which the pipeline or any part thereof is located, to enforce such obligation or to impose any penalty provided therefor, or the Secretary may, by proceeding as provided in this section, suspend or terminate the said grant of right-of-way for noncompliance with the provisions of this section.

(6) The Secretary or agency head shall require, prior to granting or renewing a right-of-way, that the applicant submit and disclose all plans, contracts, agreements, or other information or material which he deems necessary to determine whether a right-of-way shall be granted or renewed and the terms and conditions which should be included in the right-of-way. Such information may include, but is not limited to: (A) conditions for, and agreements among owners or operators, regarding the addition of pumping facilities, looping, or otherwise increasing the pipeline or terminal's throughput capacity in response to actual or anticipated increases in demand; (B) conditions for adding or abandoning intake, offtake, or storage points or facilities; and (C) minimum shipment or purchase tenders.

(s) Exports of Alaskan North Slope oil

(1) Subject to paragraphs (2) through (6) of this subsection and notwithstanding any other provision of this chapter or any other provision of law (including any regulation) applicable to the export of oil transported by pipeline over right-of-way granted pursuant to section 1652 of title 43, such oil may be exported unless the President finds that exportation of this oil is not in the national interest. The President shall make his national interest determination within five months of November 28, 1995. In evaluating whether exports of this oil are in the national interest, the President shall at a minimum consider—

(A) whether exports of this oil would diminish the total quantity or quality of petroleum available to the United States;

(B) the results of an appropriate environmental review, including consideration of appropriate measures to mitigate any potential adverse effects of exports of this oil on the environment, which shall be completed within four months of November 28, 1995; and

(C) whether exports of this oil are likely to cause sustained material oil supply shortages or sustained oil prices significantly above world market levels that would cause sustained material adverse employment effects in the United States or that would cause substantial harm to consumers, including noncontiguous States and Pacific territories.

If the President determines that exports of this oil are in the national interest, he may impose such terms and conditions (other than a volume limitation) as are necessary or appropriate to ensure that such exports are consistent with the national interest.

(2) Except in the case of oil exported to a country with which the United States entered into a bilateral international oil supply agreement before November 26, 1979, or to a country pursuant to the International Emergency Oil Sharing Plan of the International Energy Agency, any oil transported by pipeline over right-of-way granted pursuant to section 1652 of title 43 shall, when exported, be transported by a vessel documented under the laws of the United States and owned by a citizen of the United States (as determined in accordance with section 50501 of title 46).

(3) Nothing in this subsection shall restrict the authority of the President under the Constitution, the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.), the National Emergencies Act (50 U.S.C. 1601 et seq.), or Part B of title II of the Energy Policy and Conservation Act (42 U.S.C. 6271–76) to prohibit exports.

(4) The Secretary of Commerce shall issue any rules necessary for implementation of the President's national interest determination, includ-

ing any licensing requirements and conditions, within 30 days of the date of such determination by the President. The Secretary of Commerce shall consult with the Secretary of Energy in administering the provisions of this subsection.

(5) If the Secretary of Commerce finds that exporting oil under authority of this subsection has caused sustained material oil supply shortages or sustained oil prices significantly above world market levels and further finds that these supply shortages or price increases have caused or are likely to cause sustained material adverse employment effects in the United States, the Secretary of Commerce, in consultation with the Secretary of Energy, shall recommend, and the President may take, appropriate action concerning exports of this oil, which may include modifying or revoking authority to export such oil.

(6) Administrative action under this subsection is not subject to sections 551 and 553 through 559 of title 5.

(t) Existing rights-of-way

The Secretary or agency head may ratify and confirm any right-of-way or permit for an oil or gas pipeline or related facility that was granted under any provision of law before the effective date of this subsection, if it is modified by mutual agreement to comply to the extent practical with the provisions of this section. Any action taken by the Secretary or agency head pursuant to this subsection shall not be considered a major Federal action requiring a detailed statement pursuant to section 102(2)(C) of the National Environmental Policy Act of 1970 (Public Law 90–190; 42 U.S.C. 4321).[1]

(u) Limitations on export

Any domestically produced crude oil transported by pipeline over rights-of-way granted pursuant to this section, except such crude oil which is either exchanged in similar quantity for convenience or increased efficiency of transportation with persons or the government of an adjacent foreign state, or which is temporarily exported for convenience or increased efficiency of transportation across parts of an adjacent foreign state and reenters the United States, shall be subject to all of the limitations and licensing requirements of the Export Administration Act of 1979 (50 U.S.C. App. 2401 and following) and, in addition, before any crude oil subject to this section may be exported under the limitations and licensing requirements and penalty and enforcement provisions of the Export Administration Act of 1979 the President must make and publish an express finding that such exports will not diminish the total quantity or quality of petroleum available to the United States, and are in the national interest and are in accord with the provisions of the Export Administration Act of 1979: *Provided*, That the President shall submit reports to the Congress containing findings made under this section, and after the date of receipt of such report Congress shall have a period of sixty calendar days, thirty days of which Congress must have been in session, to consider whether exports under the terms of this section are in the national interest. If the Congress within this time period passes a concurrent resolution of disapproval stating disagreement with the President's finding concerning the national interest, further exports made pursuant to the aforementioned Presidential findings shall cease.

(v) State standards

The Secretary or agency head shall take into consideration and to the extent practical comply with State standards for right-of-way construction, operation, and maintenance.

(w) Reports

(1) The Secretary and other appropriate agency heads shall report to the Committee on Natural Resources of the United States House of Representatives and the Committee on Energy and Natural Resources of the United States Senate annually on the administration of this section and on the safety and environmental requirements imposed pursuant thereto.

(2) The Secretary or agency head shall promptly notify the Committee on Natural Resources of the United States House of Representatives and the Committee on Energy and Natural Resources of the United States Senate upon receipt of an application for a right-of-way for a pipeline twenty-four inches or more in diameter, and no right-of-way for such a pipeline shall be granted until a notice of intention to grant the right-of-way, together with the Secretary's or agency head's detailed findings as to the terms and conditions he proposes to impose, has been submitted to such committees.

(3) Periodically, but at least once a year, the Secretary of the Department of Transportation shall cause the examination of all pipelines and associated facilities on Federal lands and shall cause the prompt reporting of any potential leaks or safety problems.

(x) Liability

(1) The Secretary or agency head shall promulgate regulations and may impose stipulations specifying the extent to which holders of rights-of-way and permits under this chapter shall be liable to the United States for damage or injury incurred by the United States in connection with the right-of-way or permit. Where the right-of-way or permit involves lands which are under the exclusive jurisdiction of the Federal Government, the Secretary or agency head shall promulgate regulations specifying the extent to which holders shall be liable to third parties for injuries incurred in connection with the right-of-way or permit.

(2) The Secretary or agency head may, by regulation or stipulation, impose a standard of strict liability to govern activities taking place on a right-of-way or permit area which the Secretary or agency head determines, in his discretion, to present a foreseeable hazard or risk of danger to the United States.

(3) Regulations and stipulations pursuant to this subsection shall not impose strict liability for damage or injury resulting from (A) an act of war, or (B) negligence of the United States.

(4) Any regulation or stipulation imposing liability without fault shall include a maximum limitation on damages commensurate with the

[1] So in original. Probably should be ''National Environmental Policy Act of 1969 (Public Law 91–190; 42 U.S.C. 4332(2)(C))''.

foreseeable risks or hazards presented. Any liability for damage or injury in excess of this amount shall be determined by ordinary rules of negligence.

(5) The regulations and stipulations shall also specify the extent to which such holders shall indemnify or hold harmless the United States for liability, damage, or claims arising in connection with the right-of-way or permit.

(6) Any regulation or stipulation promulgated or imposed pursuant to this section shall provide that all owners of any interest in, and all affiliates or subsidiaries of any holder of, a right-of-way or permit shall be liable to the United States in the event that a claim for damage or injury cannot be collected from the holder.

(7) In any case where liability without fault is imposed pursuant to this subsection and the damages involved were caused by the negligence of a third party, the rules of subrogation shall apply in accordance with the law of the jurisdiction where the damage occurred.

(y) Antitrust laws

The grant of a right-of-way or permit pursuant to this section shall grant no immunity from the operation of the Federal antitrust laws.

(Feb. 25, 1920, ch. 85, §28, 41 Stat. 449; Aug. 21, 1935, ch. 599, §1, 49 Stat. 678; Aug. 12, 1953, ch. 408, 67 Stat. 557; Pub. L. 93–153, title I, §101, Nov. 16, 1973, 87 Stat. 576; Pub. L. 95–91, title III, §§301(b), 306, title IV, §402(a), (b), title VII, §§703, 707, Aug. 4, 1977, 91 Stat. 578, 581, 583, 584, 606, 607; Pub. L. 99–64, title I, §123(b), July 12, 1985, 99 Stat. 156; Pub. L. 101–475, §1, Oct. 30, 1990, 104 Stat. 1102; Pub. L. 103–437, §11(a)(1), Nov. 2, 1994, 108 Stat. 4589; Pub. L. 104–58, title II, §201, Nov. 28, 1995, 109 Stat. 560; Pub. L. 104–66, title I, §1121(k), Dec. 21, 1995, 109 Stat. 724.)

REFERENCES IN TEXT

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

The date of enactment of this subsection, referred to in subsec. (k), the effective date of this provision, referred to in subsec. (q), and the effective date of this subsection, referred to in subsec. (t), probably mean the date of approval of Pub. L. 93–153, which was Nov. 16, 1973.

The Natural Gas Act, referred to in subsec. (r)(3)(A), is act June 21, 1938, ch. 556, 52 Stat. 821, as amended, which is classified generally to chapter 15B (§717 et seq.) of Title 15, Commerce and Trade. For complete classification of this Act to the Code, see section 717w of Title 15 and Tables.

The International Emergency Economic Powers Act, referred to in subsec. (s)(3), is title II of Pub. L. 95–223, Dec. 28, 1977, 91 Stat. 1626, as amended, which is classified generally to chapter 35 (§1701 et seq.) of Title 50, War and National Defense. For complete classification of this Act to the Code, see Short Title note set out under section 1701 of Title 50 and Tables.

The National Emergencies Act, referred to in subsec. (s)(3), is Pub. L. 94–412, Sept. 14, 1976, 90 Stat. 1255, as amended, which is classified principally to chapter 34 (§1601 et seq.) of Title 50. For complete classification of this Act to the Code, see Short Title note set out under section 1601 of Title 50 and Tables.

The Energy Policy and Conservation Act, referred to in subsec. (s)(3), is Pub. L. 94–163, Dec. 22, 1975, 89 Stat. 871, as amended. Part B of title II of the Act is classified generally to part B (§6271 et seq.) of subchapter II of chapter 77 of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 6201 of Title 42 and Tables.

The Export Administration Act of 1979, referred to in subsec. (u), is Pub. L. 96–72, Sept. 29, 1979, 93 Stat. 503, as amended, which is classified principally to section 2401 et seq. of Title 50, Appendix, War and National Defense. For complete classification of this Act to the Code, see Short Title note set out under section 2401 of Title 50, Appendix, and Tables.

CODIFICATION

In subsec. (s)(2), ''section 50501 of title 46'' substituted for ''section 2 of the Shipping Act, 1916 (46 U.S.C. App. 802)'' on authority of Pub. L. 109–304, §18(c), Oct. 6, 2006, 120 Stat. 1709, which Act enacted section 50501 of Title 46, Shipping.

AMENDMENTS

1995—Subsec. (s). Pub. L. 104–58 amended heading and text of subsec. (s) generally. Prior to amendment, subsec. (s) provided that the Secretary of Interior, in consultation with Federal and State agencies, review need for national system of transportation and utility corridors across Federal lands and report to Congress and the President by July 1, 1975.

Subsec. (w)(4). Pub. L. 104–66 struck out par. (4) which read as follows: ''The Secretary of the Department of Transportation shall report annually to the President, the Congress, the Secretary of the Interior, and the Secretary of Energy any potential dangers of or actual explosions, or potential or actual spillage on Federal lands and shall include in such report a statement of corrective action taken to prevent such explosion or spillage.''

1994—Subsec. (w)(1), (2). Pub. L. 103–437 substituted ''Natural Resources'' for ''Interior and Insular Affairs'' before ''of the United States House''.

1990—Subsec. (w)(1). Pub. L. 101–475, §1(a), substituted ''Committee on Interior and Insular Affairs of the United States House of Representatives and the Committee on Energy and Natural Resources of the United States Senate'' for ''House and Senate Committees on Interior and Insular Affairs''.

Subsec. (w)(2). Pub. L. 101–475, §1(b), amended par. (2) generally. Prior to amendment, par. (2) read as follows: ''The Secretary or agency head shall notify the House and Senate Committees on Interior and Insular Affairs promptly upon receipt of an application for a right-of-way for a pipeline twenty-four inches or more in diameter, and no right-of-way for such a pipeline shall be granted until sixty days (not counting days on which the House of Representatives or the Senate has adjourned for more than three days) after a notice of intention to grant the right-of-way, together with the Secretary's or agency head's detailed findings as to terms and conditions he proposes to impose, has been submitted to such committees, unless each committee by resolution waives the waiting period.''

1985—Subsec. (u). Pub. L. 99–64 substituted ''Export Administration Act of 1979 (50 U.S.C. App. 2401 and following)'' for ''Export Administration Act of 1969 (Act of December 30, 1969; 83 Stat. 841)'' and ''Export Administration Act of 1979'' for ''Export Administration Act of 1969'' in two places.

1973—Pub. L. 93–153 completely rewrote the section substituting 25 subsecs. lettered (a) through (y) covering all aspects of the granting of rights-of-way for pipelines through Federal lands for the former single unlettered paragraph under which rights-of-way of 25 feet on each side of the pipeline could be granted and under which the pipeline was to be operated as a common carrier.

1953—Act Aug. 12, 1953, permitted companies subject to Federal regulation, or public utilities subject to

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

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

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

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

§ 157.6 Applications; general requirements.

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

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

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

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

(ii) Applications covering acquisitions and all attached exhibits;

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

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

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

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

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

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

(ix) The annual report required by § 157.207;

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

(xi) Amendments to any of the foregoing.

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

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

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

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

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

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

§ 385.2101 of this chapter who possesses authority to sign.

(5) *Other requirements.* Applications under section 7 of the Natural Gas Act must conform to the requirements of §§ 157.5 through 157.14. Amendments to or withdrawals of applications must conform to the requirements of §§ 385.213 and 385.214 of this chapter. If the application involves an acquisition of facilities, it must conform to the additional requirements prescribed in §§ 157.15 and 157.16. If the application involves an abandonment of facilities or service, it must conform to the additional requirements prescribed in § 157.18.

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

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

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

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

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

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

(6) A table of contents which shall list all exhibits and documents filed in compliance with §§ 157.5 through 157.18, as well as all other documents and exhibits otherwise filed, identifying them by their appropriate titles and alphabetical letter designations. The alphabetical letter designations specified in §§ 157.14, 157.16, and 157.18 must be strictly adhered to and extra exhibits submitted at the volition of applicant shall be designated in sequence under the letter Z (Z1, Z2, Z3, etc.).

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

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

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

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

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

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

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

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

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

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

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

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

(3) The notice shall include:

(i) The docket number of the filing;

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

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

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

(v) A brief summary of what rights the landowner has at the Commission and in proceedings under the eminent domain rules of the relevant state. Except: pipelines are not required to include this information in the published newspaper notice. Instead, the newspaper notice should provide the Commission's Internet address and the telephone number for the Commission's Office of External Affairs; and

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

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

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

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

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

[17 FR 7386, Aug. 14, 1952]

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

§157.7 Abbreviated applications.

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

§ 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.

(2) Participate in the scoping process (described below in §1501.7).

(3) Assume on request of the lead agency responsibility for developing information and preparing environmental analyses including portions of the environmental impact statement concerning which the cooperating agency has special expertise.

(4) Make available staff support at the lead agency's request to enhance the latter's interdisciplinary capability.

(5) Normally use its own funds. The lead agency shall, to the extent available funds permit, fund those major activities or analyses it requests from cooperating agencies. Potential lead agencies shall include such funding requirements in their budget requests.

(c) A cooperating agency may in response to a lead agency's request for assistance in preparing the environmental impact statement (described in paragraph (b)(3), (4), or (5) of this section) reply that other program commitments preclude any involvement or the degree of involvement requested in the action that is the subject of the environmental impact statement. A copy of this reply shall be submitted to the Council.

§1501.7 Scoping.

There shall be an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action. This process shall be termed scoping. As soon as practicable after its decision to prepare an environmental impact statement and before the scoping process the lead agency shall publish a notice of intent (§1508.22) in the FEDERAL REGISTER except as provided in §1507.3(e).

(a) As part of the scoping process the lead agency shall:

(1) Invite the participation of affected Federal, State, and local agencies, any affected Indian tribe, the proponent of the action, and other interested persons (including those who might not be in accord with the action on environmental grounds), unless there is a limited exception under §1507.3(c). An agency may give notice in accordance with §1506.6.

(2) Determine the scope (§1508.25) and the significant issues to be analyzed in depth in the environmental impact statement.

(3) Identify and eliminate from detailed study the issues which are not significant or which have been covered by prior environmental review (§1506.3), narrowing the discussion of these issues in the statement to a brief presentation of why they will not have a significant effect on the human environment or providing a reference to their coverage elsewhere.

(4) Allocate assignments for preparation of the environmental impact statement among the lead and cooperating agencies, with the lead agency retaining responsibility for the statement.

(5) Indicate any public environmental assessments and other environmental impact statements which are being or will be prepared that are related to but are not part of the scope of the impact statement under consideration.

(6) Identify other environmental review and consultation requirements so the lead and cooperating agencies may prepare other required analyses and studies concurrently with, and integrated with, the environmental impact statement as provided in §1502.25.

(7) Indicate the relationship between the timing of the preparation of environmental analyses and the agency's tentative planning and decisionmaking schedule.

(b) As part of the scoping process the lead agency may:

(1) Set page limits on environmental documents (§1502.7).

(2) Set time limits (§1501.8).

(3) Adopt procedures under §1507.3 to combine its environmental assessment process with its scoping process.

(4) Hold an early scoping meeting or meetings which may be integrated with any other early planning meeting the agency has. Such a scoping meeting will often be appropriate when the impacts of a particular action are confined to specific sites.

(c) An agency shall revise the determinations made under paragraphs (a) and (b) of this section if substantial changes are made later in the proposed

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

§ 1502.13 Purpose and need.

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

§ 1502.14 Alternatives including the proposed action.

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

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

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

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

(d) Include the alternative of no action.

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

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

§ 1502.15 Affected environment.

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

§ 1502.16 Environmental consequences.

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

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

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

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

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

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

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

a judicial action which is not final, the agency shall so specify.

§ 1506.4 Combining documents.

Any environmental document in compliance with NEPA may be combined with any other agency document to reduce duplication and paperwork.

§ 1506.5 Agency responsibility.

(a) *Information.* If an agency requires an applicant to submit environmental information for possible use by the agency in preparing an environmental impact statement, then the agency should assist the applicant by outlining the types of information required. The agency shall independently evaluate the information submitted and shall be responsible for its accuracy. If the agency chooses to use the information submitted by the applicant in the environmental impact statement, either directly or by reference, then the names of the persons responsible for the independent evaluation shall be included in the list of preparers (§ 1502.17). It is the intent of this paragraph that acceptable work not be redone, but that it be verified by the agency.

(b) *Environmental assessments.* If an agency permits an applicant to prepare an environmental assessment, the agency, besides fulfilling the requirements of paragraph (a) of this section, shall make its own evaluation of the environmental issues and take responsibility for the scope and content of the environmental assessment.

(c) *Environmental impact statements.* Except as provided in §§ 1506.2 and 1506.3 any environmental impact statement prepared pursuant to the requirements of NEPA shall be prepared directly by or by a contractor selected by the lead agency or where appropriate under § 1501.6(b), a cooperating agency. It is the intent of these regulations that the contractor be chosen solely by the lead agency, or by the lead agency in cooperation with cooperating agencies, or where appropriate by a cooperating agency to avoid any conflict of interest. Contractors shall execute a disclosure statement prepared by the lead agency, or where appropriate the cooperating agency, specifying that they have no financial or other interest in the outcome of the project. If the document is prepared by contract, the responsible Federal official shall furnish guidance and participate in the preparation and shall independently evaluate the statement prior to its approval and take responsibility for its scope and contents. Nothing in this section is intended to prohibit any agency from requesting any person to submit information to it or to prohibit any person from submitting information to any agency.

§ 1506.6 Public involvement.

Agencies shall:

(a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures.

(b) Provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected.

(1) In all cases the agency shall mail notice to those who have requested it on an individual action.

(2) In the case of an action with effects of national concern notice shall include publication in the FEDERAL REGISTER and notice by mail to national organizations reasonably expected to be interested in the matter and may include listing in the *102 Monitor.* An agency engaged in rulemaking may provide notice by mail to national organizations who have requested that notice regularly be provided. Agencies shall maintain a list of such organizations.

(3) In the case of an action with effects primarily of local concern the notice may include:

(i) Notice to State and areawide clearinghouses pursuant to OMB Circular A–95 (Revised).

(ii) Notice to Indian tribes when effects may occur on reservations.

(iii) Following the affected State's public notice procedures for comparable actions.

(iv) Publication in local newspapers (in papers of general circulation rather than legal papers).

(v) Notice through other local media.

(vi) Notice to potentially interested community organizations including small business associations.

which address classified proposals may be safeguarded and restricted from public dissemination in accordance with agencies' own regulations applicable to classified information. These documents may be organized so that classified portions can be included as annexes, in order that the unclassified portions can be made available to the public.

(d) Agency procedures may provide for periods of time other than those presented in §1506.10 when necessary to comply with other specific statutory requirements.

(e) Agency procedures may provide that where there is a lengthy period between the agency's decision to prepare an environmental impact statement and the time of actual preparation, the notice of intent required by §1501.7 may be published at a reasonable time in advance of preparation of the draft statement.

PART 1508—TERMINOLOGY AND INDEX

Sec.

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

SOURCE: 43 FR 56003, Nov. 29, 1978, unless otherwise noted.

§ 1508.1 Terminology.

The terminology of this part shall be uniform throughout the Federal Government.

§ 1508.2 Act.

Act means the National Environmental Policy Act, as amended (42 U.S.C. 4321, *et seq.*) which is also referred to as ''NEPA.''

§ 1508.3 Affecting.

Affecting means will or may have an effect on.

§ 1508.4 Categorical exclusion.

Categorical exclusion means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (§1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. An agency may decide in its procedures or otherwise, to prepare environmental assessments for the reasons stated in §1508.9 even though it is not required to do so. Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

§ 1508.5 Cooperating agency.

Cooperating agency means any Federal agency other than a lead agency which has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal (or a reasonable alternative) for legislation or other major Federal action significantly affecting the quality of the human environment. The selection and responsibilities of a cooperating agency are described in §1501.6. A State or local agency of similar qualifications or, when the effects are on a reservation, an Indian Tribe, may by agreement with the lead agency become a cooperating agency.

§ 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

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 5th day of July 2011, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or via U.S. Mail, as indicated below:

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