

12-566

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

**COALITION FOR RESPONSIBLE GROWTH AND RESOURCE CONSERVATION,
DAMASCUS CITIZENS FOR SUSTAINABILITY, AND SIERRA CLUB,
*Petitioners,***

v.

**FEDERAL ENERGY REGULATORY COMMISSION,
*Respondent.***

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

**BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

**MICHAEL A. BARDEE
GENERAL COUNSEL**

**ROBERT H. SOLOMON
SOLICITOR**

**KARIN L. LARSON
HOLLY E. CAFER
ATTORNEYS**

**FOR RESPONDENT
FEDERAL ENERGY REGULATORY
COMMISSION
WASHINGTON, D.C. 20426**

**APRIL 27, 2012
FINAL BRIEF: MAY 9, 2012**

TABLE OF CONTENTS

PAGE

STATEMENT OF THE ISSUE.....	1
STATUTORY AND REGULATORY PROVISIONS	2
COUNTER-STATEMENT OF JURISDICTION	2
STATEMENT OF THE CASE.....	2
STATEMENT OF THE FACTS	5
I. STATUTORY AND REGULATORY BACKGROUND	5
II. THE COMMISSION’S REVIEW OF THE MARC I PROJECT.....	7
A. The Project and Environmental Review	7
B. The Certificate Order.....	9
C. The Rehearing Order.....	10
D. Motion for Stay	12
SUMMARY OF ARGUMENT	12
ARGUMENT	14
I. STANDARD OF REVIEW.....	14
II. THE COMMISSION’S BALANCE OF PROJECT BENEFITS AND ENVIRONMENTAL IMPACTS SATISFIED ITS STATUTORY RESPONSIBILITIES	16
III. FERC’S FINDING OF NO SIGNIFICANT IMPACT COMPLIES WITH NEPA AND IS FULLY SUPPORTED BY THE RECORD	18

TABLE OF CONTENTS

	PAGE
A. FERC Reasonably Analyzed Project Impacts.....	19
B. FERC Reasonably Assessed the Context and Intensity of the Project	20
1. Context.....	20
2. Intensity.....	22
IV. FERC’S CUMULATIVE IMPACTS ANALYSIS FULLY SATISFIES NEPA REQUIREMENTS	26
A. The Commission Took a Hard Look at Cumulative Impacts Including Marcellus Shale Impacts	26
1. The Commission Analyzed Cumulative Impacts of Relevant Activities	27
2. The Commission Considered the Cumulative Impacts of Marcellus Shale Activities.....	28
B. Notwithstanding the Commission’s Consideration of Marcellus Shale Activities, NEPA Does Not Mandate Their Inclusion in the Cumulative Impacts Analysis.....	31
1. Marcellus Shale Activities Are Not Causally- Related to the Project.....	32
2. Future Marcellus Shale Activities Are Not Reasonably Foreseeable.....	35
C. The Commission Took a Hard Look at Incremental Impacts on Forests and Migratory Birds.....	36

TABLE OF CONTENTS

PAGE

1. The Coalition’s Challenge Is Statutorily Barred 36

2. The Commission’s EA Comprehensively Analyzed
Project Impacts on Forests and Migratory Birds 38

V. THE MITIGATION MEASURES REFLECT FERC’S
HARD LOOK AT PROJECT IMPACTS 40

A. The Mitigation Measures Required by the Certificate
Order Are Supported by Substantial Evidence 40

B. The Commission Adequately Analyzed Mitigation
Measures Related to Invasive Species and Forest
Fragmentation..... 43

CONCLUSION..... 46

TABLE OF AUTHORITIES

PAGE

COURT CASES:

<i>Abenaki Nation of Mississquoi v. Hughes</i> , 805 F. Supp. 234 (D. Vt. 1992), <i>aff'd</i> , 990 F.2d 729 (2d Cir. 1993)	41
<i>Allegheny Elec. Coop. Inc. v. FERC</i> , 922 F.2d 73 (2d Cir. 1990)	15
<i>Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.</i> , 462 U.S. 87 (1983).....	6, 16, 18, 35
<i>Blue Mountains Biodiversity Project v. Blackwood</i> , 161 F.3d 1208 (9th Cir. 1998)	25
<i>Canadian Ass'n of Petroleum Producers v. FERC</i> , 308 F.3d 11 (D.C. Cir. 2002).....	38
<i>Cellular Phone Taskforce v. FCC</i> , 205 F.3d 82 (2d Cir. 2000)	6, 7, 35
<i>Citizens to Preserve Overton Park, Inc. v. Volpe</i> , 401 U.S. 402 (1971).....	15
<i>City of New York v. Slater</i> , 145 F.3d 568 (2d Cir. 1998)	7
<i>Coalition for Responsible Growth v. FERC</i> , No. 12-566 (2d Cir. Feb. 28, 2012)	12
<i>Friends of the Ompompanoosuc v. FERC</i> , 968 F.2d 1549 (2d Cir. 1992)	15, 18, 19, 20, 22, 23, 41, 43
<i>Fund for Animals v. Kempthorne</i> , 538 F.3d 124 (2d Cir. 2008)	14, 15, 36
<i>In re World Trade Ctr. Disaster Site Litig. v. City of New York</i> , 503 F.3d 167 (2d Cir. 2007)	12

TABLE OF AUTHORITIES

PAGE

COURT CASES:

<i>Ind. Util. Regulatory Comm'n v. FERC</i> , 668 F.3d 735 (D.C. Cir. 2012).....	37
<i>Islander East Pipeline Co., LLC v. McCarthy</i> , 525 F.3d 141 (2d Cir. 2008)	5
<i>Kleppe v. Sierra Club</i> , 427 U.S. 390 (1976).....	14, 26, 27, 29
<i>LaFlamme v. FERC</i> , 945 F.2d 1124 (9th Cir. 1991)	42
<i>Marsh v. Oregon Natural Res. Council</i> , 490 U.S. 360 (1989).....	14, 18, 24, 29, 40
<i>Moreau v. FERC</i> , 982 F.2d 556 (D.C. Cir. 1993).....	37
<i>N. Plains Res. Council v. Surface Transp. Bd.</i> , 668 F.3d 1067 (9th Cir. 2011)	35
<i>Nat'l Audubon Soc'y v. Hoffman</i> , 132 F.3d 7 (2d Cir. 1997)	15, 18, 20, 23, 41
<i>Nat'l Parks & Conservation Ass'n v. Babbitt</i> , 241 F.3d 722 (9th Cir. 2001)	25, 42
<i>Natural Res. Defense Council, Inc. v. Callaway</i> , 524 F.2d 79 (2d Cir. 1975)	36
<i>Natural Res. Defense Council, Inc. v. U.S. Dep't of Agric.</i> , 613 F.3d 76 (2d Cir. 2010)	6
<i>Nevada v. Dep't of Energy</i> , 457 F.3d 78 (D.C. Cir. 2006).....	25

TABLE OF AUTHORITIES

PAGE

COURT CASES:

<i>New Jersey Zinc Co. v. FERC</i> , 843 F.2d 1497 (D.C. Cir. 1988).....	38
<i>O’Reilly v. U.S. Army Corps of Eng’rs</i> , 477 F.3d 225 (5th Cir. 2007).....	40
<i>Orangetown v. Gorsuch</i> 718 F.2d 29 (2d Cir. 1983)	23
<i>Robertson v. Methow Valley Citizens Council</i> , 490 U.S. 332 (1989).....	6, 15, 19, 29, 40, 41
<i>Sierra Club v. U.S. Army Corps of Eng’rs</i> , 701 F.2d 1011 (2d Cir. 1983)	24
<i>Sierra Club v. Wagner</i> , 555 F.3d 21 (1st Cir. 2009).....	17
<i>Soc’y Hill Towers Owners’ Ass’n v. Rendell</i> , 210 F.3d 168 (3d Cir. 2000)	24
<i>Sylvester v. U.S. Army Corps of Eng’rs</i> , 884 F.2d 394 (9th Cir. 1989).....	32, 33, 34
<i>U.S. Dep’t of Transp. v. Public Citizen</i> , 541 U.S. 752 (2004).....	6, 16, 30, 32, 33
<i>Utah Shared Access Alliance v. U.S. Forest Serv.</i> , 288 F.3d 1205 (10th Cir. 2002)	16
<i>Wetlands Action Network v. U.S. Army Corps of Eng’rs</i> , 222 F.3d 1105 (9th Cir. 2000).....	32, 41, 42

TABLE OF AUTHORITIES

PAGE

ADMINISTRATIVE CASES:

<i>Central New York Oil and Gas Co., LLC</i> , 137 FERC ¶ 61,121 (2011) (“Certificate Order”).....	3, <i>passim</i>
<i>Central New York Oil and Gas Co., LLC</i> , 138 FERC ¶ 61,104 (2012) (“Rehearing Order”).....	3, <i>passim</i>
<i>Central New York Oil and Gas Co., LLC</i> , FERC Docket No. CP10-480, Letter Order (Apr. 3, 2012).....	12

STATUTES:

Administrative Procedure Act

5 U.S.C. § 706(2)(A)	15
----------------------------	----

Natural Gas Act

Section 1(b), 15 U.S.C. § 717(b)	5
--	---

Section 1(c), 15 U.S.C. § 717(c)	5
--	---

Section 7(c), 15 U.S.C. § 717f(c)	2, 4, 17
---	----------

Section 7(c)(1)(A), 15 U.S.C. § 717f(c)(1)(A).....	5
--	---

Section 7(e), 15 U.S.C. § 717f(e)	3, 4, 6
---	---------

Section 19(a), 15 U.S.C. § 717r(a)	37
--	----

Section 19(b), 15 U.S.C. § 717r(b).....	2, 37, 44
---	-----------

National Environmental Policy Act

42 U.S.C. § 4321, <i>et seq.</i>	6
--	---

TABLE OF AUTHORITIES

PAGE

REGULATIONS:

40 C.F.R. § 1501.4..... 7

40 C.F.R. § 1502.7..... 17

40 C.F.R. § 1508.7..... 26

40 C.F.R. § 1508.9(a) 17

40 C.F.R. § 1508.9(a)(1)..... 16

40 C.F.R. § 1508.13..... 20

40 C.F.R. § 1508.27..... 20

40 C.F.R. § 1508.27(a) 20

40 C.F.R. § 1508.27(b)..... 22

40 C.F.R. § 1508.27(b)(7) 33

OTHER AUTHORITIES:

CEQ Guidance on Consideration of Past Actions in
Cumulative Effects Analysis (June 24, 2005) 26, 29, 30

Daniel R. Mandelker, NEPA Law & Litig. § 8:57 (2006) 41

Glossary

Br.	Petitioners' Brief
CEQ	Council on Environmental Quality, entity that promulgates regulations implementing NEPA
Certificate Order	<i>Central New York Oil and Gas Co., LLC</i> , 137 FERC ¶ 61,121 (2011), JA 870
Coalition	Petitioners, Coalition for Responsible Growth and Resource Conservation, Damascus Citizens for Sustainability, and the Sierra Club
Commission or FERC	Federal Energy Regulatory Commission
EA	Environmental Assessment
EIS	Environmental Impact Statement
EPA	U.S. Environmental Protection Agency
JA	page numbers in the Joint Appendix
Marcellus Shale	A black shale formation extending deep underground from Ohio and West Virginia, northeast into Pennsylvania and southern New York, containing natural gas which is developed using drilling and hydraulic fracturing techniques.
NEPA	National Environmental Policy Act
NGA	Natural Gas Act
Pipeline	Central New York Oil and Gas Company, LLC
Project	MARC I Hub Line Project
Rehearing Order	<i>Central New York Oil and Gas Co., LLC</i> , 138 FERC ¶ 61,104 (2012), JA 999

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

No. 12-566

**COALITION FOR RESPONSIBLE GROWTH AND RESOURCE
CONSERVATION, DAMASCUS CITIZENS FOR SUSTAINABILITY,
AND SIERRA CLUB,
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

The Federal Energy Regulatory Commission (“Commission” or “FERC”) approved the construction and operation of a 39-mile natural gas pipeline, after carefully considering and balancing the public need for the pipeline against its public costs. The question presented on appeal is:

Whether the Commission satisfied its procedural responsibilities under the National Environmental Policy Act (“NEPA”), when it issued a comprehensive

environmental assessment that considered all potential environmental harms in their appropriate context, and when it attached numerous conditions and mitigation measures designed to protect against adverse impacts.

STATUTORY AND REGULATORY PROVISIONS

Pertinent statutes and regulations are contained in the Addendum.

COUNTER-STATEMENT OF JURISDICTION

This Court has jurisdiction over the challenged orders under section 19(b) of the Natural Gas Act (“NGA”), 15 U.S.C. § 717r(b). However, NGA section 19(b) limits judicial review to objections that were “urged before the Commission in [an] application for rehearing unless there is reasonable ground for [the petitioner’s] failure to do so.” 15 U.S.C. § 717r(b). As explained in the Argument, the Coalition did not seek rehearing of the issues concerning environmental impacts on forests and migratory birds and the adequacy of mitigation measures for invasive species and forest fragmentation. *See infra* pp. 36-38, 43-44. Nor does the Coalition now explain this omission. Accordingly, the Court lacks jurisdiction over these issues.

STATEMENT OF THE CASE

In the orders on review, the Commission issued a certificate of public convenience and necessity under section 7(c) of the NGA, 15 U.S.C. § 717f(c), to Central New York Oil and Gas Company, LLC (“Pipeline”), authorizing it to build

and operate the MARC I Hub Line Project (“Project”). *Central New York Oil & Gas Co., LLC*, 137 FERC ¶ 61,121 (Nov. 14, 2011) (“Certificate Order”), *on reh’g*, 138 FERC ¶ 61,104 (Feb. 13, 2012) (“Rehearing Order”). The Project is a 39-mile long, 30-inch diameter natural gas pipeline in Bradford, Sullivan, and Lycoming Counties, Pennsylvania, along with new compression facilities and related appurtenant facilities. The Project will interconnect the Pipeline’s existing Stagecoach Storage Facility in Bradford County, Pennsylvania with other existing interstate pipeline systems. Certificate Order at P 7, JA 872.

In considering Pipeline’s application for a certificate, the Commission prepared a nearly 300-page environmental assessment (“EA”) under NEPA. The EA addresses Project impacts and mitigation measures related to geology, soils, water resources, wetlands, vegetation, fisheries, wildlife, threatened and endangered species, land use, recreation, visual resources, cultural resources, air quality, noise, safety, socioeconomics, and cumulative impacts. Rehearing Order at P 6, JA 1001. The EA concludes that, with the imposition of the recommended mitigation measures, the Project would not constitute a major federal action significantly affecting the quality of the human environment and, therefore, that an environmental impact statement (“EIS”) is unnecessary. EA at 119, JA 519.

The final orders reflect the Commission’s consideration of all factors bearing upon the public interest, as required by NGA section 7(e), 15 U.S.C.

§ 717f(e), including environmental issues. *See, e.g.*, Rehearing Order at P 9, JA 1002. Ultimately, the Commission determined that the Project, upon the Pipeline’s satisfaction of numerous environmental conditions and mitigation measures recommended in the EA, is consistent with the public convenience and necessity under section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c). Certificate Order at P 18, JA 876.

Petitioners, Coalition for Responsible Growth and Resource Conservation, Damascus Citizens for Sustainability, and Sierra Club (collectively, “Coalition”), participated throughout the Commission’s proceeding, filing comments regarding the agency’s environmental review of the Project. Certificate Order at P 80 n.70, JA 895. Before the Commission, the Coalition raised numerous challenges regarding the Commission’s environmental analysis. *See, e.g.*, Brief of Petitioners (“Br.”) at 4. The Commission addressed the Coalition’s contentions, including its objections to the EA, in the Certificate Order and Rehearing Order. *See, e.g.*, Certificate Order at PP 48-50, 81-107 (cumulative impacts analysis), JA 886, 895-903; *id.* PP 108-117 (need for EIS), JA 903-905; *id.* PP 125-128 (alternative pipeline routes), JA 907-908; *id.* PP 132-136 (mitigation measures), JA 910-911; *id.* P 148 (waterbodies), JA 914; *id.* PP 150-156 (flooding), JA 914-915; *id.* PP 160-165 (forest fragmentation), JA 916-917; *id.* PP 169-170 (mussels), JA 918-919; *id.* P 171 (invasive species plan), JA 919; *id.* PP 172-175 (Indiana bat), JA

919-920; *id.* PP 177-178 (rare plant surveys), JA 920-921; *id.* PP 179-188 (air quality), JA 921-922; and *id.* PP 189-193 (noise), JA 923; *see also* Rehearing Order at PP 26-71, JA 1007-1023. Other parties raised, and the Commission considered, various other issues.

This appeal followed, with the scope of challenged environmental issues narrowed to two alleged deficiencies (cumulative impacts and mitigation measures) in the EA.

STATEMENT OF THE FACTS

I. STATUTORY AND REGULATORY BACKGROUND

NGA sections 1(b) and (c) grant the Commission jurisdiction over the transportation and wholesale sale of natural gas in interstate commerce, with jurisdiction over the production, gathering, and local distribution of natural gas reserved to the states. 15 U.S.C. § 717(b) and (c). Under NGA section 7(c), any person seeking to construct, extend, acquire, or operate a facility for the transportation or sale of natural gas in interstate commerce must secure a certificate of public convenience and necessity from the Commission. 15 U.S.C. § 717f(c)(1)(A); *see also Islander East Pipeline Co., LLC v. McCarthy*, 525 F.3d 141, 143 (2d Cir. 2008) (describing the regulatory scheme for federal approval to build a natural gas pipeline). Under NGA section 7(e), the Commission shall issue a certificate to any qualified applicant upon finding that the proposed construction

and operation of a pipeline facility is required by the public convenience and necessity. 15 U.S.C. § 717f(e).

NEPA, 42 U.S.C. §§ 4321, *et seq.*, sets out procedures to be followed by federal agencies to ensure that the environmental effects of proposed actions are “adequately identified and evaluated.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *U.S. Dep’t of Transp. v. Public Citizen*, 541 U.S. 752, 768 (2004). “NEPA itself does not mandate particular results in order to accomplish these ends.” *Public Citizen*, 541 U.S. at 756 (quoting *Robertson*, 490 U.S. at 350); *see also Natural Res. Defense Council, Inc. v. U.S. Dep’t of Agric.*, 613 F.3d 76, 84 (2d Cir. 2010) (same). “Rather, NEPA imposes only procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions.” *Public Citizen*, 541 U.S. at 756-57 (citations omitted). Under NEPA, an agency must “take a ‘hard look’ at the environmental consequences before taking a major action.” *Balt. Gas & Elec. Co. v. Natural Res. Defense Council, Inc.*, 462 U.S. 87, 97 (1983) (citation omitted).

Regulations implementing NEPA, issued by the Council on Environmental Quality (“CEQ”), require agencies to consider the environmental effects of a proposed action by preparing either an EA, if supported by a finding of no significant impact, or a more comprehensive EIS. *See Cellular Phone Taskforce v.*

FCC, 205 F.3d 82, 94 (2d Cir. 2000) (quoting *City of New York v. Slater*, 145 F.3d 568, 571 (2d Cir. 1998)) (upholding FCC’s decision not to prepare an EIS in conjunction with a rulemaking); *see also* 40 C.F.R. § 1501.4 (detailing when to prepare an EIS or EA).

II. THE COMMISSION’S REVIEW OF THE MARC I PROJECT

A. The Project and Environmental Review

On August 6, 2010, the Pipeline filed with the Commission an NGA section 7(c) application for a certificate of public convenience and necessity, authorizing the construction and operation of a 39-mile long, 30-inch diameter pipeline along a general north-south route through Bradford, Sullivan, and Lycoming Counties, Pennsylvania. EA at 1, JA 401; *see also Central New York Oil and Gas Co.*, Application for Certificate of Public Convenience and Necessity at Exhibit F (Project map), JA 37 (attached hereto as Appendix A).

The Project interconnects existing interstate pipeline systems that generally follow east-west corridors. EA at 111, JA 511. Specifically, the Project will interconnect with the Pipeline’s existing Stagecoach natural gas storage facility (via its South Lateral) in Bradford County and with Transcontinental Gas Pipeline Corporation’s interstate pipeline system in Lycoming County (via Transcontinental’s Leidy Line). *See* Certificate Order at P 7, JA 872. The Project also indirectly interconnects with Millennium Pipeline Company’s and Tennessee

Gas Pipeline Company's respective existing interstate pipeline systems, both of which are directly interconnected with the Stagecoach Storage Facility. Certificate Order at P 4, JA 871.

The Project includes the construction and operation of a new compression facility in Sullivan County and an additional electric compressor unit at the Pipeline's existing compressor site in Bradford County. *Id.* The Project will provide expanded transportation and storage options to shippers using existing pipeline and storage systems, as well as access to interstate markets for natural gas produced from the Marcellus Shale in northeast Pennsylvania. Certificate Order at P 8, JA 873. Marcellus Shale is a black shale geological formation containing natural gas reserves which are developed using drilling and hydraulic fracturing techniques. The Marcellus Shale formation extends deep underground from Ohio and West Virginia, northeast through Pennsylvania and southern New York.

On September 22, 2010, the Commission issued a Notice of Intent to Prepare an Environmental Assessment for the Project. Certificate Order at P 46, JA 885. The Commission received 518 written comments in response during the scoping period. *Id.* After considering all substantive comments, including the Coalition's comments, the Commission issued a 300-page EA. Certificate Order at P 53, JA 887. The EA includes information provided by the state and federal agencies with which the Commission consulted. *Id.* (listing responding agencies).

The EA analyzes the Project's impacts on the following resources: geology, soils, water resources, wetlands, vegetation, fisheries, threatened and endangered species, land use, recreation, visual resources, cultural resources, air quality, noise, safety, and socioeconomics. EA at 20-95, JA 420-495. Where adverse impacts are identified, the EA details recommended mitigation measures that, if imposed, would reduce or resolve the respective impact. EA at 119-124, JA 519-524. The EA also considers the cumulative impacts of the Project and other projects in the general Project area. EA at 96-109, JA 496-509. Finally, the EA analyzes alternatives to the Project to determine if any are reasonable and preferable to the Project. EA at 109-118, JA 509-518. Ultimately, the EA made a finding of no significant impact based on implementation of the proposed mitigation measures listed in the EA. EA at 119, JA 519.

B. The Certificate Order

On November 14, 2011, the Commission issued a certificate of public convenience and necessity to the Pipeline, authorizing the construction of the MARC I Project. Certificate Order at P 1, JA 870. The Certificate Order concludes that the Project would serve the public interest by enhancing the market-access options available to pipelines and their customers in the region by creating a market hub. Specifically, the Project will facilitate the transportation of natural gas between multiple existing interstate gas pipeline systems as well as provide

shippers with access to additional storage capacity. *Id.* P 16, JA 875. There is significant demand for the Project's capacity, as evidenced by the Pipeline's execution of transportation contracts with three shippers for 100 percent of the design capacity of the Project for 10-year terms. *Id.* PP 8, 16, JA 873, 875.

In the Certificate Order, the Commission conducted an environmental review of the Project, taking into account the EA and all substantive comments on the EA. *See id.* P 80, JA 895. Specifically, the Commission addressed the Coalition's comments regarding the adequacy of the cumulative impacts analysis in the EA, *id.* PP 81-107, JA 895-903, whether the Project required an EIS, *id.* PP 108-117, JA 903-905, and the adequacy of the mitigation measures recommended in the EA, *id.* PP 130-136, JA 909-911. The Commission, upon balancing the evidence of public benefits against the identified potential adverse effects of the Project, coupled with the environmental analysis and the imposition of the mitigation measures recommended in the EA and other conditions, *id.* PP 13-18, JA 874-876, determined that the Project is required by the public convenience and necessity. *Id.* P 18, JA 876.

C. The Rehearing Order

Out of the many interested parties that commented on the EA, the Coalition was the only party to seek timely rehearing of the Certificate Order. (One individual filed a motion for late intervention and rehearing as to the Pipeline's use

of a private road. *See* Rehearing Order at P 10, JA 1002.) The Coalition claimed that the Commission had, under the NGA and NEPA, erroneously determined that the Project was required by the public convenience and necessity, failed to prepare an EIS, and impermissibly relied on a deficient EA. Rehearing Request, JA 933; *see also* Rehearing Order at PP 2, 26, JA 999-1000, 1007. The Coalition asserted that the EA was deficient for failing to analyze the cumulative impacts of Marcellus Shale development activities, inadequately considering alternative Project routes, and relying on identified mitigation measures without supporting analytical data. *See* Rehearing Request at 4-5, JA 936-937.

The Commission affirmed its finding that the Project is in the public interest, and identified all the factors the Commission considered to determine whether, on balance, the public benefits of the Project outweigh the potential adverse impacts. Rehearing Order at P 31, JA 1009. The Commission further addressed in detail the alleged deficiencies in the EA, concluding that the EA and Certificate Order thoroughly addressed the potential impacts from Project construction and operation, and finding that, with the 21 attached environmental conditions and mitigation measures, the Project will not have a significant impact on the environment. *Id.* P 22, JA 1005.

D. Motion for Stay

On February 14, 2012, the Coalition filed with this Court, with its petition for review, an emergency motion for a stay seeking to halt Project construction, including tree clearing, pending judicial review. Upon consideration of the pleadings and oral argument, this Court denied the Coalition's stay request. *Coalition for Responsible Growth v. FERC*, No. 12-566 (2d Cir. Feb. 28, 2012) (order denying motion for stay) (citing *In re World Trade Ctr. Disaster Site Litig. v. City of New York*, 503 F.3d 167 (2d Cir. 2007) (articulating the four-factor test for a stay, the first prong of which is whether the stay applicant has made a showing that it is likely to succeed on the merits)).

Following issuance of the Court's order denying stay, the Pipeline resumed tree clearing and has proceeded with Project construction consistent with Commission authorization. See *Central New York Oil and Gas Co.*, FERC Docket No. CP10-480, Letter Order (Apr. 3, 2012). The anticipated in-service date for the Project is July 2, 2012. Certificate Order at P 27, JA 880.

SUMMARY OF ARGUMENT

The Commission satisfied all of its statutory responsibilities in approving the MARC I Project. Its comprehensive environmental assessment informed the Commission's decisionmaking and allowed it to balance potential environmental impacts against the public benefits of the Project, which will provide a vital

interconnection of multiple interstate natural gas transmission systems in the Marcellus Shale producing area in northeastern Pennsylvania. Any potential adverse impacts, identified by the Commission in the EA and the many commenters on the EA, will be mitigated by the multiple conditions on pipeline construction and operation recommended by the EA and adopted by the Commission in its orders on review. That the Commission did not flat-out reject the pipeline proposal or develop a different set of mitigation measures does not mean that the Commission failed to take a hard look at possible consequences or otherwise failed to carry out its public interest responsibilities.

The Commission's decision, after developing the 300-page Project EA, that an even more detailed EIS is unnecessary, was an informed and reasoned decision. The lengthy EA fully identifies, describes and analyzes the Project's potential environmental impacts on all relevant resources, the cumulative impacts of other related projects, and appropriate mitigation measures to address identified adverse impacts. The EA disproves any argument that the Commission's finding of no significant impact was uninformed or arbitrary.

Contrary to the Coalition's argument, the Commission's environmental review was conducted fully within the context of the Pipeline's contribution to the public benefits and impacts in the affected region. Based on the record before it, the Commission reasonably concluded that activities related to the production of

Marcellus Shale gas are not causally-related to the Project and that future Marcellus Shale activities are not reasonably foreseeable. Based on these conclusions, the Commission reasonably decided to discuss known Marcellus Shale impacts, and chose not to engage in a more detailed quantitative analysis of Marcellus Shale impacts that, in the agency's informed judgment, would not improve its environmental review.

As permitted, the Commission relies on mitigation measures identified in the EA, which are supported by substantial evidence, to make a finding of no significant impact. Despite the Coalition's claims to the contrary, each mitigation measure is specific to and links back to the impact the measure is designed to mitigate. Moreover, the mitigation measures are mandatory, subject to review and approval by the Commission, and are enforceable. With potential adverse impacts effectively mitigated, the Commission was justified in concluding, after balancing the Project benefits and impacts, that the Project advances the public interest.

ARGUMENT

I. STANDARD OF REVIEW

Commission action taken pursuant to NEPA is entitled to a high degree of deference. *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 377-78 (1989). The Court's role is to ensure that NEPA's procedural requirements have been satisfied. *Fund for Animals v. Kempthorne*, 538 F.3d 124, 137 (2d Cir. 2008)

(citing *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976) (Court’s role is to ensure agency took a hard look at environmental consequences)); *see also Robertson*, 490 U.S. at 350-51 (NEPA merely prohibits uninformed – rather than unwise – agency action); *Nat’l Audubon Soc’y v. Hoffman*, 132 F.3d 7, 19 (2d Cir. 1997) (role of reviewing court is to ensure NEPA compliance without infringing upon the agency’s decisions in areas where it has expertise).

The Court reviews the substance of Commission actions under the Administrative Procedure Act, overturning the disputed orders only if they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). A court evaluates “whether the decision was based on a ‘consideration of the relevant factors and whether there has been a clear error of judgment.’” *Friends of the Ompompanoosuc v. FERC*, 968 F.2d 1549, 1553 (2d Cir. 1992) (quoting *Allegheny Elec. Coop. Inc. v. FERC*, 922 F.2d 73, 80 (2d Cir. 1990)).

The Commission’s findings of fact, if supported by substantial evidence, are conclusive. *Ompompanoosuc*, 968 F.2d at 1554 (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)). Because substantial evidence is more than a scintilla, but something less than a preponderance of the evidence, the possibility that different conclusions may be drawn from the same evidence does not prevent an agency’s finding from being supported by substantial

evidence. *See Fund for Animals*, 538 F.3d at 132 (when an agency makes a decision in the face of disputed technical facts, a court must be reluctant to alter the results). When reviewing factual determinations by an agency under NEPA, a court “must generally be at its most deferential.” *Balt. Gas & Elec. Co.*, 462 U.S. at 103.

II. THE COMMISSION’S BALANCE OF PROJECT BENEFITS AND ENVIRONMENTAL IMPACTS SATISFIED ITS STATUTORY RESPONSIBILITIES

The Commission’s comprehensive EA served its purpose – to provide sufficient evidence and analysis for determining whether to prepare an EIS or issue a finding of no significant impact. *See* 40 C.F.R. § 1508.9(a)(1); *see also Utah Shared Access Alliance v. U.S. Forest Serv.*, 288 F.3d 1205, 1213 (10th Cir. 2002) (agency develops an EA to consider environmental concerns but reserves its resources for instances where a full EIS is appropriate). In compliance with NEPA’s procedural requirements, the Commission prepared an EA offering a comprehensive evaluation of the Project, Project alternatives and Project impacts, along with measures intended to mitigate identified environmental impacts. Indeed, the EA contained a level of detail on par with an EIS such that the preparation of an EIS would serve no purpose in light of NEPA’s regulatory scheme as a whole. *See Public Citizen*, 541 U.S. at 767 (a “rule of reason” governs agency determination whether to prepare an EIS based on usefulness of additional

information).

Contrary to the Coalition's overarching claims of omissions and inadequacies in the EA (Br. at 11-14), the Commission's EA, comprising 142 pages of text and approximately 158 pages of supporting exhibits, is substantial by any measure. *Compare* 40 C.F.R. § 1508.9(a) (EA is a "concise" document) *with* 40 C.F.R. § 1502.7 (EIS text shall normally be less than 150 pages except for projects of unusual scope or complexity); *see, e.g., Sierra Club v. Wagner*, 555 F.3d 21, 30-31 (1st Cir. 2009) (describing 146-page EA (excluding appendices) as "lengthy by any standard").

Consistent with its responsibilities under the NGA and NEPA, the Commission considered all views in its orders and in the comprehensive EA that informed those orders. The Coalition's comments throughout the agency proceeding – like all views from all commenters – were considered as part of the Commission's public interest balance under NGA section 7(c), 15 U.S.C. § 717f(c). The Commission is, as it must be under the statutes it administers, sensitive to all perspectives and responsive to all arguments, whether economic or environmental in nature. The Commission satisfied its statutory responsibilities here by balancing the public benefits offered by the Project against its potential impacts. *See* Certificate Order at PP 15-18, JA 875-876; Rehearing Order at P 9, JA 1002 ("Based on the analysis in the EA, and after consideration of all

comments, the Commission found that with the adoption of the proposed mitigation measures recommended in the EA, construction of the project would result in no significant impacts” and, “based on the entire record, that the MARC I Project is required by the public convenience and necessity.”).

The Coalition looks only at Project impacts, not benefits, and – as explained in the following sections of this brief – fails to demonstrate that the Commission falls short of the “hard look” requirement of NEPA. *See Balt. Gas & Elec. Co.*, 462 U.S. at 97 (agency took a “hard look” where it adequately considered and disclosed the environmental impact of its actions).

III. FERC’S FINDING OF NO SIGNIFICANT IMPACT COMPLIES WITH NEPA AND IS FULLY SUPPORTED BY THE RECORD

The Coalition argues that the Commission violated NEPA by failing to prepare an EIS. Br. at 3, 40-45. Judicial review of agency decisions regarding whether an EIS is needed is “essentially procedural.” *Ompompanoosuc*, 968 F.2d at 1556. In reviewing an agency decision not to issue an EIS, a court first considers whether the agency took a “hard look” at the possible effects of the proposed action and, second, whether the agency’s decision was arbitrary or capricious. *Nat’l Audubon Soc’y*, 132 F.3d at 14 (citations omitted). While the court’s inquiry should be “searching and careful,” the ultimate scope of judicial review is narrow. *Id.* (court must not inject itself into an area where the choice of action to be taken is one assigned by Congress to an expert agency) (citing *Marsh*,

490 U.S. at 378).

A. FERC Reasonably Analyzed Project Impacts

The record, including the comprehensive EA and orders, reflects the Commission's careful evaluation of Project impacts on all relevant environmental resources coupled with specific mitigation measures to make a fully informed finding of no significant impact. *See* Certificate Order at PP 46-193 (environmental review), JA 885-923. The EA addresses Project impacts on the full range of resources including geology, soils, water resources, wetlands, vegetation, fisheries, wildlife, threatened and endangered species, land use, recreation, visual resources, cultural resources, air quality, noise, safety, socioeconomics, and cumulative impacts. *See* Certificate Order at P 54, JA 888; EA at 20-96, JA 420-496.

For the Coalition to succeed, the Court would need to find that the Commission, after developing a 300-page EA, made an uninformed decision. *See Robertson*, 490 U.S. at 351 (NEPA merely prohibits uninformed rather than unwise agency action). In the face of the level of detail in the EA, the Coalition fails to show that the Commission acted arbitrarily. *See Ompompanoosuc*, 968 F.2d at 1554-56 (finding of no significant impact not arbitrary where the Commission considered all aspects of the proposed action, required appropriate mitigation measures, and reasonably explained its decision).

B. FERC Reasonably Assessed the Context and Intensity of the Project

Only major federal actions “significantly affecting the quality of the human environment” require an EIS. 40 C.F.R. § 1508.13. An assessment of “significance” requires consideration of both “context” and “intensity.” 40 C.F.R. § 1508.27; *see Ompompanoosuc*, 968 F.2d at 1556. Whether a particular agency action will have a “significant” effect on the environment is a substantive question left to the informed discretion of the agency considering the action. *Nat’l Audubon Soc’y*, 132 F.3d at 14 (citing cases).

1. Context

Context, as used in the NEPA regulations, requires the significance of an action to be analyzed with respect to the affected region and the affected interests. 40 C.F.R. § 1508.27(a). The Coalition, focusing on just one of the three counties in the Project area, argues that the Project will radically alter existing “unspoiled natural resources” in Sullivan County and, thus, must be considered further. Br. at 41-42.

Based on the information presented in the EA, the Commission found otherwise. *See* Certificate Order at PP 108-112, JA 903-904. There is no misunderstanding of context. The Commission considered Project impacts on the Endless Mountains and the Pennsylvania Wilds, and “concluded that any impacts would be limited.” Rehearing Order at P 52, JA 1017; *see also* EA at 63-67, JA

463-467. No portion of the Project would cross or come within the vicinity of designated wilderness and wildlife areas, National Forests, Federal or State Parks, or other notable landmarks, rivers identified in the National Wild and Scenic Rivers System, National or State Scenic Byways, or Coastal Zone Management Areas – and the Coalition does not contend otherwise. EA at 63, JA 463. The Commission found that the Project route “will have an insignificant footprint in the Sullivan County region, as well as the Endless Mountains region.” Certificate Order at P 110, JA 904. Moreover, the Coalition’s premise is incorrect, as Sullivan County is not untouched by gas development. Marcellus Shale development is occurring throughout the Project area, including in Sullivan County. EA at 21 (citing Pennsylvania Department of Environmental Protection’s October 2010 Completion Report, which shows 59 well permits issued and 9 completed wells in Sullivan County between January and October 2010), JA 421.

While the Coalition argues further that the Commission failed to consider that the Project route in Sullivan County touches special protection waters and migratory bird habitats (Br. at 41), the record indicates otherwise. The EA considered in detail Project impacts on and mitigation measures to protect migratory birds from the loss and fragmentation of forested habitat. *See* EA at 47-49 and App. 4 (Draft Migratory Bird Impact Assessment), JA 447-449 and 600. Further, the EA identified and analyzed two sensitive waterbodies within the

Project route – the Susquehanna River and Elklick Run. *See* EA at 33-36 (detailing Project impacts and mitigation on waterbodies), JA 433-436.

2. Intensity

Intensity, as used in the NEPA regulations, refers to the severity of an impact. 40 C.F.R. § 1508.27(b). There are ten criteria for an agency to consider in evaluating the intensity of a proposed action. *Id.* However, no particular weight is given to the ten criteria. *Ompompanoosuc*, 968 F.2d at 1556. The Coalition argues three of the ten factors used to evaluate “intensity” suggest that Project impacts here are significant. Br. at 42-44 (focusing on controversy, uncertainty, and cumulative significance). The Commission appropriately considered the intensity of the Project to reach an informed conclusion that Project impacts were not significant enough to warrant an EIS.

While the Coalition alleges that “uncertainty” regarding the cumulative impacts of future Marcellus Shale drilling and associated development “weighs in favor of a finding of significance” (Br. at 42, 44-45), the Commission explained that preparing an EIS would not “assist in resolving these uncertainties” because the exact location, scale, and timing of future Marcellus Shale facilities is unknown. Rehearing Order at P 54, JA 1017; EA at 102 (development of Marcellus Shale is expected to take 20 to 40 years), JA 502. Consideration of the significance of a project’s impacts must take into account whether the time and expense of

preparing an EIS are commensurate with the likely benefits from a more searching evaluation than the EA provided. *See Ompompanoosuc*, 968 F.2d at 1556.

Similarly, while the Coalition contends that the Project is “highly controversial” (Br. at 42-44), there is “a difference between ‘controversy’ and ‘opposition.’” *Ompompanoosuc*, 968 F.2d at 1557 (citing *Orangetown v. Gorsuch*, 718 F.2d 29, 39 (2d Cir. 1983) (speculative effects insufficient to render project highly controversial)). As the Coalition notes, an action is only controversial if a “substantial dispute” exists. *See* Br. at 43. The Coalition points out that two of the seventeen commenting agencies (the U.S. Fish and Wildlife Service and the U.S. Environmental Protection Agency), along with two individual experts¹ aligned with the Coalition, identified areas of concern regarding the Project during the environmental review period. Br. at 43-44. But an action is not “highly controversial” merely because parties have raised questions about the possible effects, or even when there are disputes among experts. Rather, when parties and experts express conflicting views, the reviewing agency has discretion to choose to rely on the reasonable opinion of one or some of the disputing parties or experts.

¹ The Coalition’s attempt to buttress its argument that “controversy” exists with extra-record comments from a water resources engineer, submitted to this Court in conjunction with the Coalition’s February 14, 2012 emergency motion for a stay, must fail. *See Nat’l Audubon Soc’y*, 132 F.3d at 14 (court reviewing an agency decision is confined to the administrative record compiled by that agency when it made its decision).

See Marsh, 490 U.S. at 378.

Further, the Commission did not, as the Coalition alleges (Br. at 44), “ignore” the views of other agencies. Here, the Commission took under consideration and responded to all substantive comments regarding Project impacts. *See* Rehearing Order at P 31, JA 1009; *see also Sierra Club v. U.S. Army Corps of Eng’rs*, 701 F.2d 1011, 1030 (2d Cir. 1983) (agency’s responsibility under NEPA is to provide a good faith, reasoned response to critical comments). The Commission even modified certain mitigation requirements in response to concerns raised by federal agencies. *See, e.g.*, Certificate Order at PP 81-107 (addressing EPA comments regarding cumulative impacts), JA 895-903; *id.* PP 108-117 (addressing EPA comments regarding Project intensity), JA 903-905; *id.* PP 157-158 (answering EPA concerns regarding forested wetlands), JA 916; *id.* PP 160-165 (addressing EPA concerns regarding forest fragmentation), JA 916-917; and *id.* PP 166-168 (addressing FWS comments regarding migratory birds), JA 918; *see also Soc’y Hill Towers Owners’ Ass’n v. Rendell*, 210 F.3d 168, 184 (3d Cir. 2000) (holding that where the protesting party fails to raise substantial dispute regarding the environmental effects of the project, the nature and degree of “controversy” involved was not sufficient to conclude that the finding of no significant impact was arbitrary).

Finally, the Project EA here is quite different from the EAs at issue in the

Ninth Circuit cases on which the Coalition relies. Br. at 44 (citing *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208 (9th Cir. 1998), and *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722 (9th Cir. 2001)). In *Blue Mountains Biodiversity*, the court found multiple deficiencies in the EA for a salvage logging project, including the agency's failure to mention, much less analyze and address, the combined effects of three other salvage logging projects that were part of the agency's coordinated recovery strategy for the same area. See 161 F.3d at 1213-16. In *Nat'l Parks Ass'n*, the court found a substantial controversy regarding the size and nature of a project where 85 percent of the 450 comments opposed the agency's preferred action and favored a more limited alternative action presented in the EA. See 241 F.3d at 736.

No such deficiency is found here. See generally EA at 119 (finding of no significant impact based on the EA's analysis, parties' submissions, and proposed mitigation measures), JA 519; see also Certificate Order at PP 113-117 (refuting Coalition's assertion that Project is highly controversial), JA 905. "It is well settled that the court will not 'flyspeck' an agency's environmental analysis, looking for any deficiency no matter how minor." *Nevada v. Dep't of Energy*, 457 F.3d 78, 93 (D.C. Cir. 2006).

IV. FERC'S CUMULATIVE IMPACTS ANALYSIS FULLY SATISFIES NEPA REQUIREMENTS

The Coalition contends that the Commission failed to take a hard look at the Project's cumulative impact. Br. at 22-36. To support this allegation, the Coalition asserts that the Commission failed to (1) "catalogue" and assess the cumulative impacts of past, present and reasonably foreseeable Marcellus Shale development activities (Br. at 23, 29-36) and (2) identify the incremental impacts of the Project on forest and migratory bird populations. Br. at 23-28. Both of the alleged deficiencies are rebutted by the record as explained below. In short, contrary to the Coalition's contentions, the Commission's cumulative impacts analysis fully complies with NEPA regulations as implemented by the Council on Environmental Quality and interpreted by the courts.

A. The Commission Took a Hard Look at Cumulative Impacts Including Marcellus Shale Impacts

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." 40 C.F.R. § 1508.7. This definition was developed to conform with the Supreme Court's reading of NEPA in *Kleppe*, 427 U.S. 390. See *CEQ Guidance on Consideration of Past Actions in Cumulative Effects Analysis* at 2 (June 24, 2005) (attached as Appendix B). In *Kleppe*, the

Supreme Court held that proposals for related actions that will have cumulative or synergistic environmental impacts upon a region concurrently pending before an agency must be considered together. *Kleppe*, 427 U.S. at 410.

1. The Commission Analyzed Cumulative Impacts of Relevant Activities

Here, as required, the EA includes an analysis of the cumulative impacts of related past, present and reasonably foreseeable activities in the Project area. *See* Rehearing Order at P 45, JA 1014; EA at 96-109, JA 496-509. The EA reflects the process by which the Commission identified relevant activities for inclusion in the cumulative impacts analysis. *See* EA at 96-103, JA 496-503. First, the Commission identified and described potentially relevant jurisdictional and non-jurisdictional projects, including Marcellus Shale activities, throughout Pennsylvania. *See* EA at 97-98 (Table B.11), 99-102, JA 497-498, 499-502. Then, from this project pool, the Commission culled projects it determined to be related to the Project for purposes of a NEPA cumulative impacts analysis – in particular, other FERC-jurisdictional natural gas pipelines located in the same vicinity as the MARC I Project. *See* EA at 97-99 (excluding projects not located in Bradford, Sullivan, and Lycoming Counties or which would be in a different drainage basis as the Project), JA 497-499.

The EA details the impacts of the four relevant FERC-jurisdictional natural gas projects within the vicinity of the Project area. *See* EA at 103-109 (anticipated

cumulative impacts were based on NEPA documentation, agency and public input, and best professional judgment), JA at 503-509. The cumulative impacts analysis covered the following resources: ground water, surface water and wetlands, vegetation and wildlife, land use, air quality, noise, and climate change. *See* EA at 103, JA 503.

2. The Commission Considered the Cumulative Impacts of Marcellus Shale Activities

Although the Commission concluded that the Marcellus Shale development activities either were not causally-related or not reasonably foreseeable, it nonetheless provided available information regarding anticipated impacts from such activities throughout its cumulative impacts analysis. *See* EA at 103-109, JA 503-509.

The EA includes “readily available information about natural gas production and development in the [P]roject area as part of the cumulative impact analysis, including consideration of the impacts of Marcellus Shale drilling activities” Certificate Order at P 84, JA 896. The Commission used this information to assess potential cumulative impacts from Marcellus Shale development on wetlands, air quality and noise, vegetation and wildlife, long-term emissions of criteria pollutants, land use, recreation, special interest areas, and visual resources. *See* Certificate Order at P 59, JA 889-890; EA at 103-109, JA 503-509. For example, regarding land use, the EA states:

If the recovery of the Marcellus Shale gas reserves took place in areas that are useful for recreational activities at the same time and location as the Project, cumulative recreational impacts could be anticipated. The proposed project construction would only temporarily affect recreational activities in the immediate construction area; as would most gas recovery activities. Therefore, significant long-term cumulative impacts on recreational activities and special interest areas are not anticipated.

EA at 106, JA 506. However, the EA does not “include a quantitative analysis of the cumulative impacts of Marcellus Shale development in northeastern Pennsylvania and beyond.” Certificate Order at P 60, JA 890.

The EA’s level of discussion is enough. *See Marsh*, 490 U.S. at 376-77 (holding that agencies retain substantial discretion as to the extent of the inquiry and level of explanation necessary for a cumulative impacts analysis); *Robertson*, 490 U.S. at 346 (courts apply a rule of reason in evaluating the adequacy of an EA); *Kleppe*, 427 U.S. at 412-14 (determination of cumulative impacts “is a task assigned to the special competency of the appropriate agenc[y]” and is not to be disturbed “[a]bsent a showing of arbitrary action”). The Commission exercised its judgment to determine the scope of Marcellus Shale information that it deemed necessary or useful. *See* Certificate Order at P 107 n.97 (decisions regarding the extent and form of the information needed to analyze the cumulative effects of the Project are left to the Commission’s expertise) (citing *CEQ Guidance on*

Consideration of Past Actions in Cumulative Effects Analysis at 2 (attached as Appendix B), JA 903.

The Commission's discussion of potential impacts from Marcellus Shale activities served NEPA's informational purpose. The "informational role" of a NEPA document is to give the public the assurance that the agency has indeed considered environmental concerns in its decisionmaking process, and, "perhaps more significantly, provide a springboard for public comment in the agency decisionmaking process itself." *Public Citizen*, 541 U.S. at 768. Here, the Marcellus Shale cumulative impacts discussion served both roles. First, the information and discussion in the EA encouraged public comment on the issue, and the Commission's consideration of those comments enhanced its environmental review of the Project. *See* Certificate Order at PP 81-107, JA 895-903; Rehearing Order at P 8, JA 1001. Second, the EA's discussion of potential Marcellus Shale impacts and the resulting public comments better informed the Commission's Natural Gas Act section 7(c) balancing of public interests and benefits versus adverse effects that it undertook to decide whether to approve the Project. *See* Certificate Order at PP 8, 16 (noting that MARC I Project will enhance the market-access options in the Marcellus Shale production region), JA 873, 875; *see also* Rehearing Order at P 9 (noting that the Commission concluded, based on entire

record, that the Project is required by the public convenience and necessity), JA 1002.

B. Notwithstanding the Commission’s Consideration of Marcellus Shale Activities, NEPA Does Not Mandate Their Inclusion in the Cumulative Impacts Analysis

The Coalition responds (Br. at 29-36) that the Commission should have been even more probing. Discussion of Marcellus Shale impacts, according to the Coalition, is not enough. It insists that the Commission violated NEPA by failing to analyze and quantify Marcellus Shale impacts before making a finding of no significant impact. *See* Rehearing Order at PP 37, 49 (EA and orders discussed Marcellus Shale impacts, but did not include them in cumulative impact analysis), JA 1011, 1015-1016.

But there is no such error. The Commission correctly determined that NEPA did not mandate a fuller analysis of Marcellus Shale activities, based on the Commission’s findings that Marcellus Shale development activities are not causally-related, and, further, that anticipated future activities are not reasonably foreseeable. *See* Certificate Order at P 84 (finding “Marcellus Shale development and its associated potential environmental impacts are not sufficiently causally-related to the MARC I Project to warrant the more comprehensive analysis that [the Coalition] seek[s]”), JA 896; *id.* P 98 (“even if future [Marcellus Shale] development was sufficiently causally-related to the MARC I Project . . . the

Commission faces too many uncertainties about specific future development and its environmental consequences to provide meaningful consideration in a cumulative impacts analysis”), JA 901.

The Coalition’s challenges to these determinations, as explained below, are unsupported and inconsistent with legal precedent.

1. Marcellus Shale Activities Are Not Causally-Related to the Project

The Coalition inaccurately asserts that there is no causality requirement for cumulative impacts. Br. at 33-34. The Supreme Court has found otherwise. As the Commission explained in the Certificate Order, “NEPA requires a ‘reasonably close causal relationship’ between the environmental effect and the alleged cause.” Certificate Order at P 83 (quoting *Public Citizen*, 541 U.S. at 767), JA 896. The Coalition fails to rebut the case law upon which the Commission relies to conclude that an agency may properly limit its cumulative impacts analysis to actions which are sufficiently causally-related to the proposed action. *See* Certificate Order at PP 85-92, JA 897-899 (citing Supreme Court decision in *Public Citizen*, and lower court decisions in *Wetlands Action Network v. U.S. Army Corps of Eng’rs*, 222 F.3d 1105 (9th Cir. 2000) and *Sylvester v. U.S. Army Corps of Eng’rs*, 884 F.2d 394 (9th Cir. 1989)); Rehearing Order at PP 34-39 (same), JA 1010-1012.

In *Public Citizen*, the Supreme Court upheld the agency’s decision not to consider, in its EA for new safety regulations governing Mexican motor carriers,

the potential environmental impacts of an increased number of Mexican trucks on U.S. roads, based on the agency's finding that there was not a reasonably close causal relationship between the increased number of trucks and the safety regulations. *See* 541 U.S. at 767-69. The Supreme Court further noted that "consideration of the CEQ's 'cumulative impact' regulation does not change this analysis." *Id.* at 769-70. In the Court's judgment, the agency appropriately examined the cumulative impacts of its safety rules. Specifically, the agency considered potential impacts from the increase in the number of roadside inspections of Mexican trucks and buses. The impacts included increases in emissions and noise from the trucks as well as possible danger to passing motorists. *Id.* at 761, 770.

In *Sylvester*, the Ninth Circuit helpfully identified the purpose of the cumulative impacts analysis – to prevent an agency from avoiding finding significant indirect effects by breaking an action down into small component parts. *Sylvester*, 884 F.2d at 400 (citing 40 C.F.R. § 1508.27(b)(7)). Consistent with this purpose, the court then explained the definition of cumulative impact as follows:

Environmental impacts are in some respects like ripples following the casting of a stone in a pool. The simile is beguiling but useless as a standard. So employed it suggests that the entire pool must be considered each time a substance heavier than a hair lands upon its surface. This is not a practical guide. A better image is that of scattered bits of a broken chain, some segments of which contain numerous links, while others have only

one or two. Each segment stands alone, but each link within each segment does not.

Id. The Coalition incorrectly views the Project as part of the pool of Marcellus Shale activities. Instead, the Commission, after considering past, present and future Marcellus Shale activities, logically concluded that the Project and Marcellus Shale production activities are not links in the same chain such that a more detailed cumulative impacts analysis is warranted.

Specifically, the Commission examined the purpose of the Project, finding that past, present and future Marcellus Shale development activities are not “an essential predicate” for the Project because “it is not merely a gathering system for delivery” of Marcellus Shale gas. Certificate Order at P 91, JA 898. Rather, the Project contemplates a “bi-directional hub line, . . . enabl[ing] gas to flow between three major interstate pipeline systems in response to market demands, and to provide access for all three pipelines to storage assets at Stagecoach.” *Id.* The Commission further determined that, if the Project is not constructed, Marcellus Shale development will continue in the region, and unregulated developers will build gathering lines to serve the shale gas, “with no Commission regulation or NEPA oversight.” *Id.* Thus, the Commission reasonably concluded that Marcellus Shale development activities (including past, present, and future activities) are not sufficiently causally-related to the Project to warrant further consideration of cumulative impacts.

2. Future Marcellus Shale Activities Are Not Reasonably Foreseeable

With respect to potential future Marcellus Shale activities, including permitted wells, proposed gathering lines, and other related facilities, the Commission understandably determined that such activities are not “reasonably foreseeable.” Certificate Order at P 95, JA 899; EA at 96, 101, JA 496, 501. As of October 2010, the Pennsylvania Department of Environmental Protection had issued 4,510 production well permits, and is continuing to issue permits. Only some of those permits will result in actual drilling, and “it is unknown . . . what the associated infrastructure and related facilities may be for those wells ultimately drilled.” Certificate Order at P 96, JA 900; EA at 102, JA 502. The Commission requires specific information to prepare a “meaningful analysis of when, where and how Marcellus Shale development will ultimately occur” – and that information is “unknowable” at this time. Rehearing Order at P 48, JA 1015. The Commission’s judgment is based upon its expertise and entitled to deference from this Court. *See Balt. Gas & Elec. Co.*, 462 U.S. at 103; *Cellular Phone Taskforce*, 205 F.3d at 90.

The Coalition is correct that NEPA requires “reasonable forecasting.” Br. at 32 (quoting *N. Plains Res. Council v. Surface Transp. Bd.*, 668 F.3d 1067 (9th Cir. 2011)). NEPA does not, however, require an agency to “engage in speculative analysis” or “to do the impractical, if not enough information is available to permit meaningful consideration.” *N. Plains Res. Council*, 668 F.3d at 1078 (citation

omitted); *see also Natural Res. Defense Council, Inc. v. Callaway*, 524 F.2d 79, 90 (2d Cir. 1975) (holding that an agency need not “consider other projects so far removed in time or distance from its own that the interrelationship, if any, between them is unknown or speculative”).

Here, there are over 4,500 permits issued for Marcellus Shale wells in Pennsylvania and it is unknowable which of these wells ultimately may be drilled, much less what associated infrastructure and related facilities may ultimately be developed. *See* Rehearing Order at P 48, JA 1015; EA at 102, JA 502. Given the sheer number of potential wells and the expected 20 to 40 year time frame over which Marcellus Shale development is expected to occur (EA at 102, JA 502), a quantitative analysis of potential impacts from the wells and related facilities would require considerable speculation and hypothesizing. *See Fund for Animals*, 538 F.3d at 137 (speculation in an EIS is not precluded, but the agency is not obliged to engage in endless hypothesizing as to remote possibilities).

C. The Commission Took a Hard Look at Incremental Impacts on Forests and Migratory Birds

1. The Coalition’s Challenge Is Statutorily Barred

The Coalition’s brief presents issues that the Coalition did not raise below on rehearing. In Part II.A of its brief, the Coalition challenges the EA’s discussion of incremental Project effects on forests and migratory bird populations (Br. at 24-25), the direct effects of deforestation on migratory birds (Br. at 25-27), and the

effects or impacts of forest fragmentation. Br. at 27-28. These issues were not raised to the agency on rehearing and, therefore, cannot be advanced on appeal. *See* 15 U.S.C. § 717r(b) (limiting court’s jurisdiction to objections that were “urged before the Commission in [an] application for rehearing” unless there are “reasonable grounds for failure to do so”); *see also* 15 U.S.C. § 717r(a) (application for agency rehearing must “set forth specifically the ground or grounds upon which such application is based”); *Ind. Util. Regulatory Comm’n v. FERC*, 668 F.3d 735, 738-739 (D.C. Cir. 2012) (statute limits a court’s review to the grounds for objection “set forth specifically” in the petitioner’s request for Commission rehearing). This rehearing requirement is a jurisdictional prerequisite to judicial review.

While the Coalition’s rehearing request generally states that the cumulative impacts analysis in the EA was inadequate (Rehearing Request at 8, JA 940), the cumulative impacts discussion otherwise focuses exclusively on the impacts from “shale gas development.” *Id.* at 4, 8-13, JA 936, 940-945. Now, before this Court, the Coalition injects into its cumulative impacts argument a previously unasserted challenge that the Commission failed to assess adequately the Project’s direct and indirect effects on forest land use and migratory bird habitats. Because these issues were not raised on rehearing, the Commission did not consider them in its Rehearing Order. *See Moreau v. FERC*, 982 F.2d 556, 564 (D.C. Cir. 1993) (the

“obvious purpose” of the rehearing requirement “is to afford the Commission the first opportunity to consider, and perhaps dissipate, issues which are headed for the courts”); *Canadian Ass’n of Petroleum Producers v. FERC*, 308 F.3d 11, 15 (D.C. Cir. 2002) (the court cannot review what the Commission has not viewed in the first instance); *see also New Jersey Zinc Co. v. FERC*, 843 F.2d 1497, 1502-03 (D.C. Cir. 1988) (finding no jurisdiction where specific objection was not made in rehearing application, despite claim it was encompassed by “overarching objection”).

In short, the Coalition’s argument regarding impacts on forests and migratory birds is an impermissibly belated attempt to bootstrap these challenges into its cumulative impacts argument. Accordingly, the arguments raised in Part II.A of the Coalition’s brief should be dismissed for lack of jurisdiction.

2. The Commission’s EA Comprehensively Analyzed Project Impacts on Forests and Migratory Birds

If given the opportunity on rehearing, review of the EA would have contradicted the Coalition’s assertion that the EA’s discussion of incremental Project effects on forests and migratory bird populations was deficient. Br. at 24-28. Sixty-four pages of the EA detailed baseline Project impacts on each of the resources that are required to be examined by NEPA. *See* EA at 20-84 (identifying impacts on geology, soils, water resources and wetlands, vegetation and wildlife, endangered and threatened species, land use, socioeconomics, cultural resources,

air quality, and noise), JA 420-484.

As for forests and migratory birds, the EA recognized Project impacts, including some permanent impacts. *See* EA at 9 (identifying the five EA sections in which Project impacts on forests are discussed), JA 409, and *id.* at 47-49, App. 4 (migratory birds impacts analysis), JA 447-449, 600. Based on this analysis, the Commission reasonably could conclude that, with the required mitigation, these impacts do not rise to the level of significance as to require a full-blown EIS. *See* Certificate Order at PP 159-168, JA 916-918; *see also* EA at 119, JA 519 (finding no significant impacts based on the EA analysis and implementation of proposed mitigations).

The Coalition asserts that the EA “barely addresses” impacts on migratory birds resulting from forest “edge effect” and forest fragmentation. Br. at 25. The record shows the opposite. *See* Certificate Order at PP 161-165, JA 916-917 (highlighting the portions of the EA that discuss forest edge effect and forest fragmentation). Moreover, the Commission imposed a requirement that the Pipeline provide conservation measures and best management practices for migratory birds that address impacts associated with tree removal, edge effects, and forest/habitat fragmentation, as requested by the Environmental Protection Agency. *See id.* P 167, JA 918. The Coalition’s statement that the EA “provided no evidence on which to base any judgment” about migratory bird “species of

special conservation concern,” Br. at 26, is also directly contradicted by the EA. *See* EA at 47-49, App. 4 (identifying the fifteen bird species that use a microhabitat within the forest interior, Project impacts on the habitats, and proposed mitigation measures), JA 447-449, 600.

This issue is a “classic example of a factual dispute the resolution of which implicates substantial agency expertise.” *Marsh*, 490 U.S. at 376. Simply put, the Coalition’s real dispute is not with the quantity or quality of the EA’s analysis, but with the Commission’s ultimate conclusion that these impacts do not rise to the level of significance required to justify an EIS.

V. THE MITIGATION MEASURES REFLECT FERC’S HARD LOOK AT PROJECT IMPACTS

A. The Mitigation Measures Required by the Certificate Order Are Supported by Substantial Evidence

The Coalition argues that the Commission’s analysis and discussion of the mitigation measures in the EA are too superficial to survive NEPA scrutiny. Br. at 3, 36-40. The Coalition errs. The Commission’s discussion of required mitigation measures fully complies with NEPA’s requirements. The Coalition seeks a level of detail that would surpass regulatory requirements for an EIS, much less an EA. *See Robertson*, 490 U.S. at 352 (mitigation measures need not be laid out to the finest detail, even in an EIS); *O’Reilly v. U.S. Army Corps of Eng’rs*, 477 F.3d 225, 231-32 (5th Cir. 2007) (EA need not include the “reasonably complete” discussion

of mitigation measures required in an EIS) (quoting Daniel R. Mandelker, NEPA Law & Litig. § 8:57 (2006)).

Examining the adequacy of an EA, this Court has held that an agency may use mitigation measures that are supported by substantial evidence to make a finding of no significant impact. *Nat'l Audubon Soc'y*, 132 F.3d at 17 (citations omitted). Mitigation measures are supported by substantial evidence “when based on studies conducted by the agency or when they are likely to be adequately policed.” *Id.* (citing *Ompompanoosuc*, 968 F.2d at 1556-57, and *Abenaki Nation of Mississquoi v. Hughes*, 805 F. Supp. 234, 245 (D. Vt. 1992), *aff'd*, 990 F.2d 729 (2d Cir. 1993) (success of mitigation measures assured because they were mandatory conditions imposed upon licenses)).

The Coalition asserts that the mitigation measures here are inadequate because the Commission does not provide supporting analytical data or studies to ensure the success of each mitigation measure. Br. at 36-38. This argument ignores the granularity with which the EA presents the mitigation measures. The mitigation measures are specific and link back to the impact each measure is designed to mitigate. *See, e.g.*, EA at 34-38 (discussion of impacts and mitigation for surface water), JA 434-438. The Commission need not finalize mitigation plans prior to making a finding of no significant impact. *Robertson*, 490 U.S. at 352; *see also Wetlands Action Network*, 222 F.3d at 1121 (upholding issuance of

permit “before all the details of the mitigation plan had been finalized”);

LaFlamme v. FERC, 945 F.2d 1124, 1130 (9th Cir. 1991) (Commission did not err in permitting post-order monitoring and studies of environmental impacts).

The Coalition fails to recognize that the mitigation measures satisfy NEPA because each is mandatory and enforceable. Rehearing Order at P 64, JA 1020. Further, the Commission established procedures for monitoring the effectiveness of the mitigation measures. *See* Certificate Order at App. (Environmental Conditions 2, 6-7), JA 926, 927-928; *see also* Rehearing Order at P 64 n.84 (detailing framework to ensure Pipeline’s compliance with the mitigation measures), JA 1020. Thus, the EA and Certificate Order reasonably relied on the 21 environmental conditions, which impose numerous measures to mitigate Project impacts, to determine that the Project will not have a significant impact on the environment. *See* EA at 119, JA 519; Rehearing Order at P 22, JA 1005-1006.

As the court in a case cited by the Coalition (Br. at 36) explained, even “underdeveloped” mitigation measures are adequate where they are mandatory, enforceable, and subject to review by other agencies to ensure their efficacy. *See Nat’l Parks Ass’n*, 241 F.3d at 735 (citing *Wetlands Action Network*, 222 F.3d at 1121 (mitigation measures deemed sufficient to justify an agency’s decision to forego issuing an EIS)). Here, the Project mitigation measures are mandatory and enforceable. They either are measures developed by the Commission’s technical

experts to mitigate the impacts of natural gas facility construction (e.g., Pipeline's Erosion and Sedimentation Control Plan includes standards and mitigation measures from FERC-developed plans) or are measures to be developed in conjunction with the relevant state and local agencies with expertise in the specific environmental concern. *See* Certificate Order at PP 68, 136, JA 892, 911 (noting that state and local agencies require mitigation based on site-specific detail and local knowledge).

Where, as here, the Commission identified and detailed a Project impact, imposed enforceable mitigation measures (whether drafted or to be developed), and required future monitoring to ensure their success, the mitigation measures are supported by substantial evidence. Thus, the Commission's consideration of mitigation measures in finding no significant impact is entirely consistent with reasoned decisionmaking. *See Ompompanoosuc*, 968 F.2d at 1555 (FERC requirement that licensee consult with local agencies to develop measures to mitigate adverse project impact is a rational basis for finding of no significant impact).

B. The Commission Adequately Analyzed Mitigation Measures Related to Invasive Species and Forest Fragmentation

To the extent the Coalition now challenges the adequacy of the Commission's mitigation assessments for invasive species and forest fragmentation, these challenges are statutorily barred. *See* Br. at 37-38 (invasive

species); Br. at 38-40 (forest fragmentation). In its rehearing request to the agency, the Coalition did not even mention “invasive species” or “forest fragmentation,” much less argue that the associated mitigation measures are inadequate. The Coalition only generally challenged whether the Commission adequately evaluated the effectiveness of mitigation measures. *See* Rehearing Request at 20-21, JA 952-953. The Coalition’s failure below to raise its objections with specificity leaves this Court without jurisdiction to hear them now. 15 U.S.C. § 717r(b); *see also supra* pp. 37-38 (citing cases on rehearing prerequisite).

In any event, the Coalition’s assertions regarding invasive species and forest fragmentation are countered by record evidence. The Coalition argues that the Commission “merely listed” measures to mitigate impacts to invasive species and forest fragmentation. Br. at 36-37, 40. Contrary to the Coalition’s assertion, however, the EA considered forest fragmentation throughout the EA. *See* EA at 9 (table identifying EA sections which discuss forest fragmentation, including vegetation, wildlife, migratory birds, endangered and threatened species, and cumulative impacts), JA 409. The EA includes an extensive analysis of how habitat fragmentation would impact migratory birds and the Indiana bat, coupled with proposed mitigation measures to address the identified impacts. *See* EA at App. 4 at 2-7 (Draft Migratory Bird Impact Assessment), JA 602-607, and App. 5 at 17-20 (Biological Assessment), JA 651-654. Similarly, the EA and Certificate

Order address invasive species. *See* EA at 44-45, JA 444-445; Certificate Order at P 171 & App. (Environmental Condition 16), JA 919, 931.

Consistent with the purpose of an EA, the Project EA identifies both the environmental consequences of invasive species and forest fragmentation and related mitigation measures fully supporting a finding of no significant impact. The Commission gave these and all other environmental impacts the hard look that NEPA requires.

CONCLUSION

For the reasons stated, the petition for review, to the extent specific issues are not dismissed for lack of jurisdiction, should be denied and the challenged orders should be affirmed in all respects.

Respectfully submitted,

Michael A. Bardee
General Counsel

Robert H. Solomon
Solicitor

/s/ Karin L. Larson
Karin L. Larson
Holly E. Cafer
Attorneys for Respondent

Federal Energy Regulatory
Commission
Washington, DC 20426
TEL: (202) 502-8236
FAX: (202) 273-0901
Karin.Larson@ferc.gov

April 27, 2012
Final Brief: May 9, 2012

CERTIFICATE OF COMPLIANCE

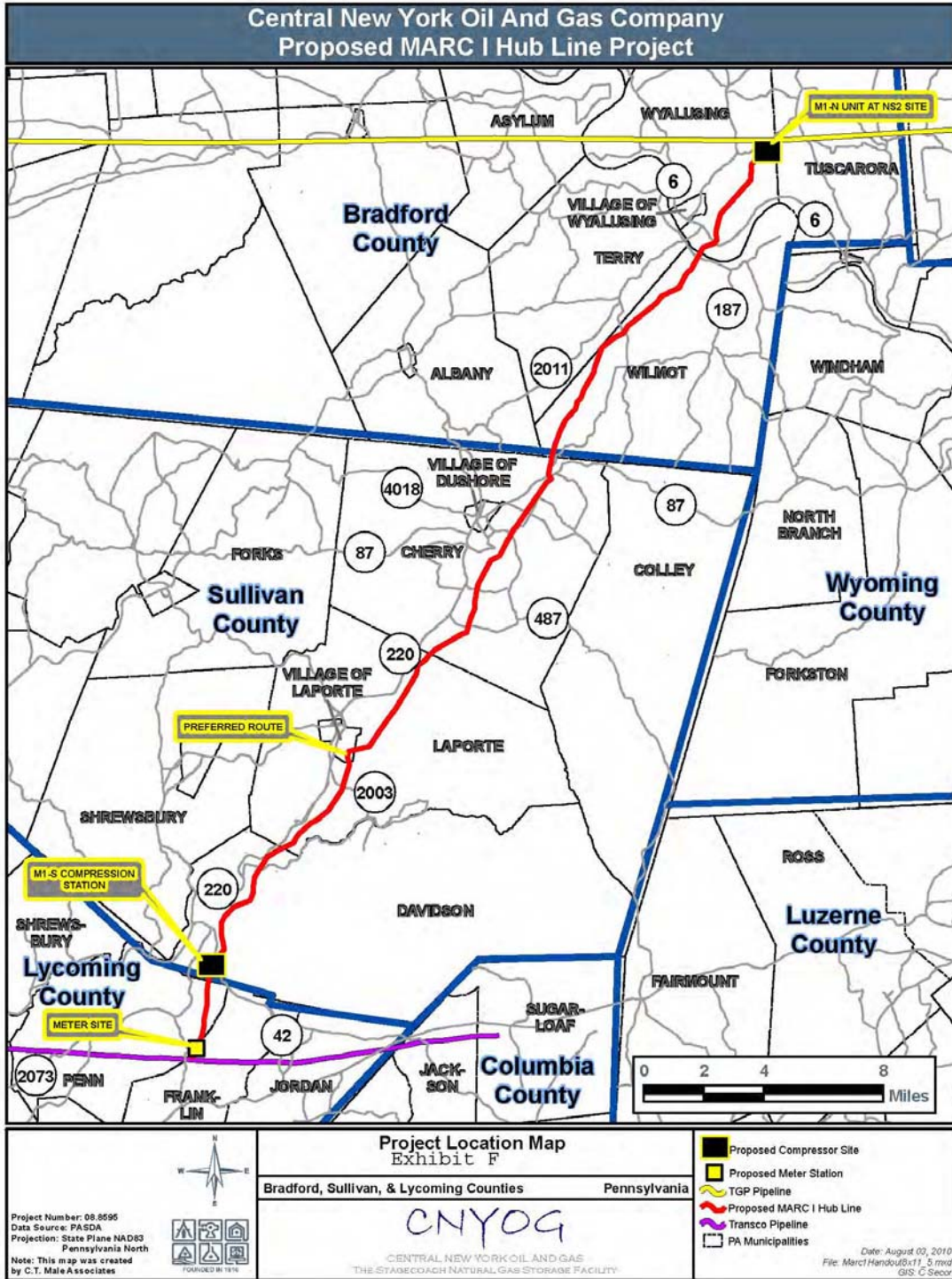
In accordance with Fed. R. App. P. 32(a), I certify that the Brief of Respondent Federal Energy Regulatory Commission uses a proportionally spaced typeface, Times New Roman, in 14 point font, and contains 9,919 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ Karin L. Larson
Karin L. Larson
Attorney for Federal Energy
Regulatory Commission

May 9, 2012

Appendix A

Project Map



Appendix B


CEQ Guidance on Consideration of Past Actions in Cumulative Effects Analysis (June 25, 2005)



EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL ON ENVIRONMENTAL QUALITY
WASHINGTON, D.C. 20503

June 24, 2005

MEMORANDUM

FROM: JAMES L. CONNAUGHTON 
CHAIRMAN

TO: HEADS OF FEDERAL AGENCIES

RE: GUIDANCE ON THE CONSIDERATION OF PAST
ACTIONS IN CUMULATIVE EFFECTS ANALYSIS

I. Introduction

In this Memorandum, the Council on Environmental Quality (CEQ) provides guidance on the extent to which agencies of the Federal government are required to analyze the environmental effects of past actions when they describe the cumulative environmental effect of a proposed action in accordance with Section 102 of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332, and the CEQ Regulations for Implementing the Procedural Provisions of NEPA, 40 C.F.R. parts 1500-1508. CEQ's interpretation of NEPA is entitled to deference. *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979).

II. Guidance

The environmental analysis required under NEPA is forward-looking, in that it focuses on the potential impacts of the proposed action that an agency is considering. Thus, review of past actions is required to the extent that this review informs agency decisionmaking regarding the proposed action. This can occur in two ways:

First, the effects of past actions may warrant consideration in the analysis of the cumulative effects of a proposal for agency action. CEQ interprets NEPA and CEQ's NEPA regulations on cumulative effects as requiring analysis and a concise description of the identifiable present effects of past actions to the extent that they are relevant and useful in analyzing whether the reasonably foreseeable effects of the agency proposal for action and its alternatives may have a continuing, additive and significant relationship to those effects. In determining what information is necessary for a cumulative effects analysis, agencies should use scoping to focus on the extent to which information is "relevant to reasonably foreseeable significant adverse impacts," is "essential to a reasoned choice among alternatives," and can be obtained without exorbitant cost. 40 CFR 1502.22. Based on scoping, agencies have discretion to determine whether, and to what extent, information about the specific nature, design, or present effects of a past action is useful for the agency's analysis of the effects of a proposal for agency action and its reasonable alternatives.

Agencies are not required to list or analyze the effects of individual past actions unless such information is necessary to describe the cumulative effect of all past actions combined. Agencies retain substantial discretion as to the extent of such inquiry and the appropriate level of explanation. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 376-77 (1989). Generally, agencies can conduct an adequate cumulative effects analysis by focusing on the current aggregate effects of past actions without delving into the historical details of individual past actions.

Second, experience with and information about past direct and indirect effects of individual past actions may also be useful in illuminating or predicting the direct and indirect effects of a proposed action. However, these effects of past actions may have no cumulative relationship to the effects of the proposed action. Therefore, agencies should clearly distinguish analysis of direct and indirect effects based on information about past actions from a cumulative effects analysis of past actions.

III. Discussion

The CEQ regulations for the implementation of NEPA define cumulative effects consistent with the Supreme Court's reading of NEPA in *Kleppe v. Sierra Club*, 427 U.S. 390, 413-414 (1976). "Cumulative impact" is defined in CEQ's NEPA regulations as the "impact on the environment that results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions . . ." 40 CFR 1508.7. CEQ interprets this regulation as referring only to the cumulative impact of the direct and indirect effects of the proposed action and its alternatives when added to the aggregate effects of past, present, and reasonably foreseeable future actions.

Agencies should be guided in their cumulative effects analysis by the scoping process, in which agencies identify the scope and "significant" issues to be addressed in an environmental impact statement. 40 CFR 1500.1(b), 1500.4(g), 1501.7, 1508.25. In the context of scoping, agencies typically decide the extent to which "it is reasonable to anticipate a cumulatively significant impact on the environment." 40 CFR 1508.27(b)(7). Agencies should ensure that their NEPA process produces environmental information that is useful to decisionmakers and the public by reducing the "accumulation of extraneous background data" and by "emphasiz[ing] real environmental issues and alternatives." 40 CFR 1500.2(b). Accordingly, the NEPA process requires agencies to identify "the significant environmental issues deserving study and deemphasizing insignificant issues, narrowing the scope of the environmental impact statement" at an early stage of agency planning. 40 CFR 15001.1(d). The Supreme Court has also emphasized that agencies may properly limit the scope of their cumulative effects analysis based on practical considerations. *Kleppe*, 427 U.S. at 414. The CEQ regulations provide for explicit documentation of such practical considerations when there is incomplete or unavailable information that is relevant to reasonably foreseeable significant adverse impacts. 40 CFR 1502.22. The extent and form of the information needed to analyze appropriately the cumulative effects of a proposed action and alternatives under NEPA varies widely and must be determined by the federal agency proposing the action on a case-by-case basis.

The analysis of cumulative effects begins with consideration of the direct and indirect effects on the environment that are expected or likely to result from the alternative proposals for

agency action. Agencies then look for present effects of past actions that are, in the judgment of the agency, relevant and useful because they have a significant cause-and-effect relationship with the direct and indirect effects of the proposal for agency action and its alternatives. CEQ regulations do not require the consideration of the individual effects of all past actions to determine the present effects of past actions. Once the agency has identified those present effects of past actions that warrant consideration, the agency assesses the extent that the effects of the proposal for agency action or its alternatives will add to, modify, or mitigate those effects. The final analysis documents an agency assessment of the cumulative effects of the actions considered (including past, present, and reasonably foreseeable future actions) on the affected environment.

With respect to past actions, during the scoping process and subsequent preparation of the analysis, the agency must determine what information regarding past actions is useful and relevant to the required analysis of cumulative effects. Cataloging past actions and specific information about the direct and indirect effects of their design and implementation could in some contexts be useful to predict the cumulative effects of the proposal. The CEQ regulations, however, do not require agencies to catalogue or exhaustively list and analyze all individual past actions. Simply because information about past actions may be available or obtained with reasonable effort does not mean that it is relevant and necessary to inform decisionmaking.

IV. Tools for NEPA Practitioners

a. Scoping:

It is not practical to analyze how the cumulative effects of an action interact with the universe; the analysis of environmental effects must focus on the aggregate effects of past, present and reasonably foreseeable future actions that are truly meaningful. Thus, analysts must narrow the focus of the cumulative effects analysis to effects of significance to the proposal for agency action and its alternatives, based on thorough scoping. A specific objective of scoping is to save time in the overall process by helping to ensure that draft statements adequately address the effects of the proposed action and alternatives that should be addressed. See Scoping Guidance (CEQ 1981) (<http://ceq.eh.doe.gov/nepa/regs/guidance.html>). Scoping provides the agency the opportunity to focus in on those cumulative effects that may be significant. The scope of the cumulative impact analysis is related to the magnitude of the environmental impacts of the proposed action. Proposed actions of limited scope typically do not require as comprehensive an assessment of cumulative impacts as proposed actions that have significant environmental impacts over a large area. Proposed actions that are typically finalized with a finding of no significant impact usually involve only a limited cumulative impact assessment to confirm that the effects of the proposed action do not reach a point of significant environmental impacts. Except in extraordinary circumstances, proposed actions that are categorically excluded from NEPA analysis do not involve cumulative impact analyses.

b. Incomplete and Unavailable Information:

The purpose of 40 CFR 1502.22 is to disclose the fact of incomplete or unavailable information, to acquire information if it is "relevant to reasonably foreseeable significant adverse impacts" and "essential to a reasoned choice among alternatives," and to advance decision-making

even in the absence of all information regarding reasonably foreseeable effects. The focus of this provision is, first and foremost, on "significant adverse impacts." The agency must find that the incomplete information is relevant to a "reasonably foreseeable" and "significant" impact before the agency is required to comply with 40 CFR 1502.22. If the incomplete cumulative effects information meets that threshold, the agency must consider the "overall costs" of obtaining the information. 40 CFR 1502.22(a). The term "overall costs" encompasses financial costs and other costs such as costs in terms of time (delay), program and personnel commitments. The requirement to determine if the "overall costs" of obtaining information is exorbitant should not be interpreted as a requirement to weigh the cost of obtaining the information against the severity of the effects, or to perform a cost-benefit analysis. Rather, the agency must assess overall costs in light of agency environmental program needs.

c. Programmatic Evaluations

In geographic settings where several Federal actions are likely to have effects on the same environmental resources it may be advisable for the lead Federal agencies to cooperate to provide historical or other baseline information relating to the resources. This can be done either through a programmatic NEPA analysis or can be done separately, such as through a joint inventory or planning study. The results can then be incorporated by reference into NEPA documents prepared for specific Federal actions so long as the programmatic analysis or study is reasonably available to the interested public.

d. Environmental Management Systems:

Agencies are encouraged at their discretion to consider whether programmatic coordination of cumulative effects analysis can be assisted through implementation of environmental management systems (EMS). See Executive Order 13148, 65 Fed. Reg. 24,595 (April 21, 2000); Memorandum from the Chairman of CEQ and the Director of the Office of Management and Budget to heads of all Federal agencies (<http://www.whitehouse.gov/ceq/memoranda01.html>). Pursuant to Executive Order 13148, agencies that choose to use an EMS to improve their cumulative analysis may find that the EMS can be designed and implemented to more efficiently meet NEPA requirements, improve public participation in the NEPA process, and provide a framework for cumulative effects analysis and adaptive management. By managing information collection on an ongoing basis, an EMS can provide a more systematic approach to agencies' identification and management of environmental conditions and obligations. Agencies can use an EMS to confirm assumptions, track performance, and increase confidence in their assessment of cumulative environmental effects.

d. Direct and Indirect Effects:

In some cases, based on scoping, information about the effects of past actions that were similar to the proposed action may be useful in describing the possible effects of the proposed action. In these circumstances, agencies should consider using available information about the effects of individual past actions that help illuminate or predict the direct or indirect effects of the proposed action and its alternatives. Agencies should clearly distinguish their use of past experience in direct and indirect effects analysis from their cumulative effects analysis.

ADDENDUM

STATUTES

AND

REGULATIONS

TABLE OF CONTENTS

PAGE

STATUTES:

Administrative Procedure Act

5 U.S.C. § 706.....A-1-A-2

Natural Gas Act

Section 7(c), 15 U.S.C. § 717f(c).....A-3-A-4

Section 7(e), 15 U.S.C. § 717f(e).....A-4

Section 19(a), 15 U.S.C. § 717r(a).....A-5-A-6

Section 19(b), 15 U.S.C. § 717r(b).....A-6

REGULATIONS:

40 C.F.R. § 1502.7.....A-7

40 C.F.R. § 1508.7.....A-8

40 C.F.R. § 1508.9.....A-8

40 C.F.R. § 1508.13.....A-8-A-9

40 C.F.R. § 1508.27.....A-10

injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

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

HISTORICAL AND REVISION NOTES

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

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

AMENDMENTS

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

§ 703. Form and venue of proceeding

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

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

HISTORICAL AND REVISION NOTES

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

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

AMENDMENTS

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

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judi-

cial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

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

HISTORICAL AND REVISION NOTES

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

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

§ 705. Relief pending review

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

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

HISTORICAL AND REVISION NOTES

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

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

§ 706. Scope of review

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

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
 - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
 - (B) contrary to constitutional right, power, privilege, or immunity;
 - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
 - (D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
 (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

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

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

HISTORICAL AND REVISION NOTES

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

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

ABBREVIATION OF RECORD

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

CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

Sec.	
801.	Congressional review.
802.	Congressional disapproval procedure.
803.	Special rule on statutory, regulatory, and judicial deadlines.
804.	Definitions.
805.	Judicial review.
806.	Applicability; severability.
807.	Exemption for monetary policy.
808.	Effective date of certain rules.

§ 801. Congressional review

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

- (i) a copy of the rule;
- (ii) a concise general statement relating to the rule, including whether it is a major rule; and
- (iii) the proposed effective date of the rule.

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

- (i) a complete copy of the cost-benefit analysis of the rule, if any;
- (ii) the agency's actions relevant to sections 603, 604, 605, 607, and 609;
- (iii) the agency's actions relevant to sections 202, 203, 204, and 205 of the Unfunded Mandates Reform Act of 1995; and
- (iv) any other relevant information or requirements under any other Act and any relevant Executive orders.

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

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

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

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

- (A) the later of the date occurring 60 days after the date on which—
 - (i) the Congress receives the report submitted under paragraph (1); or
 - (ii) the rule is published in the Federal Register, if so published;

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

- (i) on which either House of Congress votes and fails to override the veto of the President; or
- (ii) occurring 30 session days after the date on which the Congress received the veto and objections of the President; or

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

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

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

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

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

(c)(1) Notwithstanding any other provision of this section (except subject to paragraph (3)), a rule that would not take effect by reason of subsection (a)(3) may take effect, if the President makes a determination under paragraph (2) and submits written notice of such determination to the Congress.

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

(a) Decreases in rates

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

(b) Costs of production and transportation

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

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

§ 717e. Ascertainment of cost of property

(a) Cost of property

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

(b) Inventory of property; statements of costs

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

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

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

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

Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may

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

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

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

(c) Certificate of public convenience and necessity

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

(B) In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section

and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

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

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

(B) natural gas produced by such person.

(d) Application for certificate of public convenience and necessity

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

(e) Granting of certificate of public convenience and necessity

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

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.)

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

Council on Environmental Quality

§ 1502.9

as common timing, impacts, alternatives, methods of implementation, media, or subject matter.

(3) By stage of technological development including federal or federally assisted research, development or demonstration programs for new technologies which, if applied, could significantly affect the quality of the human environment. Statements shall be prepared on such programs and shall be available before the program has reached a stage of investment or commitment to implementation likely to determine subsequent development or restrict later alternatives.

(d) Agencies shall as appropriate employ scoping (§ 1501.7), tiering (§ 1502.20), and other methods listed in §§ 1500.4 and 1500.5 to relate broad and narrow actions and to avoid duplication and delay.

§ 1502.5 Timing.

An agency shall commence preparation of an environmental impact statement as close as possible to the time the agency is developing or is presented with a proposal (§ 1508.23) so that preparation can be completed in time for the final statement to be included in any recommendation or report on the proposal. The statement shall be prepared early enough so that it can serve practically as an important contribution to the decision-making process and will not be used to rationalize or justify decisions already made (§§ 1500.2(c), 1501.2, and 1502.2). For instance:

(a) For projects directly undertaken by Federal agencies the environmental impact statement shall be prepared at the feasibility analysis (go-no go) stage and may be supplemented at a later stage if necessary.

(b) For applications to the agency appropriate environmental assessments or statements shall be commenced no later than immediately after the application is received. Federal agencies are encouraged to begin preparation of such assessments or statements earlier, preferably jointly with applicable State or local agencies.

(c) For adjudication, the final environmental impact statement shall normally precede the final staff recommendation and that portion of the

public hearing related to the impact study. In appropriate circumstances the statement may follow preliminary hearings designed to gather information for use in the statements.

(d) For informal rulemaking the draft environmental impact statement shall normally accompany the proposed rule.

§ 1502.6 Interdisciplinary preparation.

Environmental impact statements shall be prepared using an interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts (section 102(2)(A) of the Act). The disciplines of the preparers shall be appropriate to the scope and issues identified in the scoping process (§ 1501.7).

§ 1502.7 Page limits.

The text of final environmental impact statements (e.g., paragraphs (d) through (g) of § 1502.10) shall normally be less than 150 pages and for proposals of unusual scope or complexity shall normally be less than 300 pages.

§ 1502.8 Writing.

Environmental impact statements shall be written in plain language and may use appropriate graphics so that decisionmakers and the public can readily understand them. Agencies should employ writers of clear prose or editors to write, review, or edit statements, which will be based upon the analysis and supporting data from the natural and social sciences and the environmental design arts.

§ 1502.9 Draft, final, and supplemental statements.

Except for proposals for legislation as provided in § 1506.8 environmental impact statements shall be prepared in two stages and may be supplemented.

(a) Draft environmental impact statements shall be prepared in accordance with the scope decided upon in the scoping process. The lead agency shall work with the cooperating agencies and shall obtain comments as required in part 1503 of this chapter. The draft statement must fulfill and satisfy to the fullest extent possible the requirements established for final statements

§ 1508.6

§ 1508.6 Council.

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

§ 1508.7 Cumulative impact.

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

§ 1508.8 Effects.

Effects include:

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

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

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

§ 1508.9 Environmental assessment.

Environmental assessment:

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

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact

40 CFR Ch. V (7–1–10 Edition)

statement or a finding of no significant impact.

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

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

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

§ 1508.10 Environmental document.

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

§ 1508.11 Environmental impact statement.

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

§ 1508.12 Federal agency.

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

§ 1508.13 Finding of no significant impact.

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

Council on Environmental Quality

§ 1508.19

repeat any of the discussion in the assessment but may incorporate it by reference.

§ 1508.14 Human environment.

Human environment shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. (See the definition of "effects" (§1508.8).) This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.

§ 1508.15 Jurisdiction by law.

Jurisdiction by law means agency authority to approve, veto, or finance all or part of the proposal.

§ 1508.16 Lead agency.

Lead agency means the agency or agencies preparing or having taken primary responsibility for preparing the environmental impact statement.

§ 1508.17 Legislation.

Legislation includes a bill or legislative proposal to Congress developed by or with the significant cooperation and support of a Federal agency, but does not include requests for appropriations. The test for significant cooperation is whether the proposal is in fact predominantly that of the agency rather than another source. Drafting does not by itself constitute significant cooperation. Proposals for legislation include requests for ratification of treaties. Only the agency which has primary responsibility for the subject matter involved will prepare a legislative environmental impact statement.

§ 1508.18 Major Federal action.

Major Federal action includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (§1508.27). Actions include the circumstance

where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action.

(a) Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (§§1506.8, 1508.17). Actions do not include funding assistance solely in the form of general revenue sharing funds, distributed under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1221 *et seq.*, with no Federal agency control over the subsequent use of such funds. Actions do not include bringing judicial or administrative civil or criminal enforcement actions.

(b) Federal actions tend to fall within one of the following categories:

(1) Adoption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*; treaties and international conventions or agreements; formal documents establishing an agency's policies which will result in or substantially alter agency programs.

(2) Adoption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of Federal resources, upon which future agency actions will be based.

(3) Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.

(4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.

§ 1508.19 Matter.

Matter includes for purposes of part 1504:

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

(b) Alternatives, which include:

- (1) No action alternative.
- (2) Other reasonable courses of actions.
- (3) Mitigation measures (not in the proposed action).

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

§ 1508.26 Special expertise.

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

§ 1508.27 Significantly.

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

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

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

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

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

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

scenic rivers, or ecologically critical areas.

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

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

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

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

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

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

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

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

§ 1508.28 Tiering.

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

