ORAL ARGUMENT NOT YET SCHEDULED

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

No. 13-1219

MYERSVILLE CITIZENS FOR A RURAL COMMUNITY, INC., *ET AL.*,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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FINAL BRIEF: March 6, 2014

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties:

To counsel's knowledge, the parties before this Court and before the Federal Energy Regulatory Commission in the underlying agency proceeding are as listed in Petitioners' brief.

B. Rulings Under Review:

1. Order Issuing Certificate, *Dominion Transmission, Inc.*, 141 FERC ¶ 61,240 (Dec. 20, 2012) ("Certificate Order"), R. 564, JA 341; and

2. Order Denying Rehearing, *Dominion Transmission, Inc.*, 143 FERC ¶ 61,148 (May 16, 2013) ("Rehearing Order"), R. 595, JA 535.

C. Related Cases:

In addition to the cases listed in Petitioners' brief, the following is a related case:

1. *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238 (D.C. Cir. 2013) (concluding that Maryland Department of the Environment must promptly act on application for air quality permit).

/s/ Karin L. Larson
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TABLE OF CONTENTS

PAGE

STATEMENT OF THE ISSUE 1

STATUTORY AND REGULATORY PROVISIONS 2

INTRODUCTION 2

STATEMENT OF FACTS 4

I. STATUTORY AND REGULATORY BACKGROUND 4

A. Natural Gas Act 4

B. National Environmental Policy Act 5

C. The Relationship Of The Natural Gas Act To The Clean Air Act 7

II. THE COMMISSION'S REVIEW OF THE PROJECT 7

A. The Project 7

B. The Commission's Environmental Review 10

C. The Certificate Order 11

D. The Rehearing Order 13

E. Related Court Proceeding 14

SUMMARY OF ARGUMENT 15

ARGUMENT 17

I. STANDARD OF REVIEW 17

TABLE OF CONTENTS

PAGE

II. THE COMMISSION'S DECISION TO ISSUE THE PROJECT CERTIFICATE WAS REASONABLE AND SUPPORTED BY SUBSTANTIAL EVIDENCE 19

A. Project Need Is Supported By Substantial Evidence 20

B. The Commission Issued A Conditional Certificate Consistent With The Natural Gas Act And Commission Practice 24

III. THE COMMISSION'S ENVIRONMENTAL ANALYSIS FULLY COMPLIED WITH THE NATIONAL ENVIRONMENTAL POLICY ACT 26

A. The Commission Reasonably Analyzed Impacts Upon Property Values 27

B. The Commission Reasonably Concluded That The Project Has Minimal Impacts On Air Quality 31

C. FERC Considered A Full Range Of Potential Alternatives 33

D. The Commission Did Not Impermissibly Segment The Project From The Cove Point Export Project 37

IV. THE COMMISSION FULLY AFFORDED CITIZENS THEIR DUE PROCESS RIGHTS 43

CONCLUSION 46

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

American Gas Ass'n v. FERC,
593 F.3d 14 (D.C. Cir. 2009)..... 34, 36

B&J Oil and Gas v. FERC,
353 F.3d 71 (D.C. Cir. 2004)..... 34-35

Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.,
462 U.S. 87 (1983)..... 6, 18, 27

Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.,
419 U.S. 281 (1974)..... 18

Burlington Truck Lines, Inc. v. United States,
371 U.S. 156 (1962)..... 18

Cabinet Mountains Wilderness v. Peterson,
685 F.2d 678 (D.C. Cir. 1982)..... 29

Citizens Against Burlington, Inc. v. Busey,
938 F.2d 190 (D.C. Cir. 1991)..... 28

**Coal. on Sensible Transp. v. Dole*,
826 F.2d 60 (D.C. Cir. 1987)..... 38, 40, 41, 42

Columbia Gas Transmission Co. v. FERC,
750 F.2d 105 (D.C. Cir. 1984)..... 21

Dep't of Transp. v. Public Citizen,
541 U.S. 752 (2004)..... 5, 6

**Dominion Transmission, Inc. v. Summers*,
723 F.3d 238 (D.C. Cir. 2013)..... 4, 7, 9, 15, 26, 31

---

* Cases chiefly relied upon are marked with an asterisk.

TABLE OF AUTHORITIES

COURT CASES (continued): **PAGE**

FPC v. Transcon. Gas Pipeline Corp.,
365 U.S. 1 (1961)..... 21

Friends of the Ompompanoosuc v. FERC,
968 F.2d 1549 (2d Cir. 1992) 28

Jepsen v. FERC,
420 F. App'x. 1 (Apr. 26, 2011)..... 45

Marsh v. Or. Natural Res. Council,
490 U.S. 360 (1989)..... 19, 29

Mich. Consol. Gas Co. v. FERC,
883 F.2d 117 (D.C. Cir. 1989)..... 18

Mich. Gambling Opposition v. Kempthorne,
525 F.3d 23 (D.C. Cir. 2008)..... 6

**Midcoast Interstate Transmission, Inc. v. FERC*,
198 F.3d 960 (D.C. Cir. 2000)..... 20, 22, 34

Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983)..... 18

NAACP v. FPC,
425 U.S. 662 (1976)..... 4

Nat'l Comm. for the New River, Inc. v. FERC,
373 F.3d 1323 (D.C. Cir. 2004)..... 18, 39

Nat'l Wildlife Fed'n v. Appalachian Reg'l Comm'n,
677 F.2d 883 (D.C. Cir. 1981)..... 43

Natural Res. Def. Council, Inc. v. Hodel,
865 F.2d 288 (D.C. Cir. 1988)..... 19

COURT CASES (continued): **PAGE**

Nevada v. Dep't of Energy,
457 F.3d 78 (D.C. Cir. 2006)..... 18, 19

N. Plains Res. Council, Inc. v. Surface Transp. Board,
668 F.3d 1067 (9th Cir. 2011)..... 30

N. Slope Borough v. Andrus,
642 F.2d 589 (D.C. Cir. 1980)..... 19

O'Reilly v. U.S. Army Corps of Eng'rs,
477 F.3d 225 (5th Cir. 2007)..... 41

Pub. Citizen v. Nat'l Hwy. Traffic Safety Admin.,
848 F.2d 256 (D.C. Cir. 1988)..... 29

Pub. Utils. Comm'n of Cal. v. FERC,
900 F.2d 269 (D.C. Cir. 1990)..... 4, 25, 30

Robertson v. Methow Valley Citizens Council,
490 U.S. 332 (1989)..... 5, 6, 19

Taxpayers of Mich. Against Casinos v. Norton,
433 F.3d 852 (D.C. Cir. 2006)..... 6

Taxpayers Watchdog, Inc. v. Stanley,
819 F.2d 294 (D.C. Cir. 1987)..... 38

Theodore Roosevelt Conservation P'ship v. Salazar,
616 F.3d 497 (D.C. Cir. 2010)..... 6, 41

Theodore Roosevelt Conservation P'ship v. Salazar,
661 F.3d 66 (D.C. Cir. 2011)..... 19

Weinberger v. Catholic Action of Hawaii,
454 U.S. 139 (1981)..... 41

ADMINISTRATIVE CASES:

Amendments to Conform Regulations with Order No. 630,
Order No. 643, FERC Stats. & Regs. ¶ 31,149 (2003) 43

Certification of New Interstate Natural Gas Pipeline Facilities,
88 FERC ¶ 61,277 (1999), *clarified*,
90 FERC ¶ 61,128, *further clarified*,
92 FERC ¶ 61,094 (2000)..... 12, 22

Dominion Transmission, Inc.,
141 FERC ¶ 61,240 (Dec. 20, 2012) 2, 3, 8-13, 20-30, 32, 34-36, 39, 40, 42, 45

Dominion Transmission, Inc.,
143 FERC ¶ 61,148 (May 16, 2013) 2, 13, 14, 24, 25, 27, 28, 30, 32, 33, 36, 39, 40, 41, 44, 45

Texas Eastern Transmission, LP,
141 FERC ¶ 61,043 (2012)..... 42

STATUTES:

Administrative Procedure Act

5 U.S.C. § 706(2)(A) 18

Clean Air Act

42 U.S.C. § 7410(a)(2)(c)..... 7

42 U.S.C. § 7506(c)(1) 7

Natural Gas Act

Section 1(b), 15 U.S.C. § 717(b)..... 4

Section 1(c), 15 U.S.C. § 717(c) 4

Section 7(c), 15 U.S.C. § 717f(c) 2, 4, 20

Section 7(e), 15 U.S.C. § 717f(e) 3, 4, 20, 24

Section 15(b), 15 U.S.C. § 717n 5, 7

Section 15(b), 15 U.S.C. § 717n(b)(1) 5, 26

Section 15(c), 15 U.S.C. § 717n(c)(1) 5, 26

REGULATIONS:

18 C.F.R. § 157.7 23

18 C.F.R. § 157.7(a) 23

18 C.F.R. § 157.10(b) 43

18 C.F.R. § 157.10(d) 43

18 C.F.R. § 157.10(d)(3) 44

18 C.F.R. § 388.112(d) 44

18 C.F.R. § 388.113 44

40 C.F.R. § 1501.4 6

40 C.F.R. § 1501.4(e) 6

40 C.F.R. § 1502.14 33

40 C.F.R. § 1508.9 6

40 C.F.R. § 1508.9(b) 33

40 C.F.R. § 1508.13 6

40 C.F.R. § 1508.23 41

GLOSSARY

CEII	Critical Energy Infrastructure Information
Certificate Order	*Dominion Transmission, Inc.*, 141 FERC ¶ 61,240 (Dec. 20, 2012), JA 341
Certificate Policy Statement	*Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000)
Citizens	Petitioners, Myersville Citizens for a Rural Community, Inc., Franz Gerner, Theodore Cady, and Tammy Mangan
Commission or FERC	Federal Energy Regulatory Commission
EA	Environmental Assessment for the Allegheny Storage Project, issued June 2012
FOIA	Freedom of Information Act
Myersville Compressor	A new 16,000 horsepower compressor station located in town of Myersville, Frederick County, Maryland, that is one component of Dominion Transmission, Inc.'s Allegheny Storage Project
Maryland Department	Maryland Department of the Environment
NEPA	National Environmental Policy Act
NGA	Natural Gas Act
Pipeline	Dominion Transmission, Inc., sponsor of the Allegheny Storage Project
Project	Allegheny Storage Project, which includes the construction and operation of two new compressor stations and pipeline and storage facilities in several mid-Atlantic states
Rehearing Order	*Dominion Transmission, Inc.*, 143 FERC ¶ 61,148 (May 16, 2013), JA 535

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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") conditionally approved an application to construct and operate natural gas storage and pipeline facilities. The question presented on appeal is:

Whether the Commission satisfied its responsibilities under the Natural Gas Act and National Environmental Policy Act when it issued a certificate of public convenience and necessity for a fully-subscribed project after conducting a comprehensive environmental assessment that considered all potential environmental harms and relevant project alternatives, balancing the public need

for the project against its public costs, and attaching numerous conditions to mitigate identified adverse impacts.

STATUTORY AND REGULATORY PROVISIONS

Pertinent statutes and regulations are contained in the Addendum.

INTRODUCTION

In the orders on review, the Commission issued a certificate of public convenience and necessity under section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c), to Dominion Transmission, Inc. ("Pipeline"), authorizing it to build and operate the Allegheny Storage Project ("Project"). *See Dominion Transmission, Inc.*, 141 FERC ¶ 61,240 (Dec. 20, 2012) ("Certificate Order"), R. 564, JA 341, *on reh'g*, 143 FERC ¶ 61,148 (May 16, 2013) ("Rehearing Order"), R. 595, JA 535.[1] Pipeline operates a large integrated underground natural gas storage system coupled with approximately 11,000 miles of transmission and gathering pipeline in Ohio, West Virginia, Pennsylvania, New York, Maryland, and Virginia. Certificate Order P 2, JA 342. The Project is designed to provide contracted-for natural gas storage and firm transportation capacity for three customers, two of which are local distribution companies that serve end-users in the Northeast and mid-Atlantic. The Project requires the construction of multiple facilities including

[1] "R." refers to a record item. "JA" refers to the Joint Appendix page number. "P" refers to the internal paragraph number within a FERC order.

a 16,000 horsepower compressor station in the Town of Myersville, Maryland ("Myersville Compressor").

Petitioners, Myersville Citizens for a Rural Community, Inc. and three members as individuals, Franz Gerner, Theodore Cady, and Tammy Mangan (collectively, "Citizens"), challenge a single component of the multifaceted Project: the Myersville Compressor.

In an agency proceeding extending over a year and resulting in a detailed, 105-page Environmental Assessment, the Commission thoroughly evaluated the Project's potential impacts and Project alternatives. *See* Environmental Assessment for the Allegheny Storage Project, Docket No. CP12-72-000 (June 2012) ("EA"), R. 507, JA 135. The challenged orders reflect the Commission's balancing of all factors bearing upon the public interest, as required by Natural Gas Act section 7(e), 15 U.S.C. § 717f(e), including environmental issues. Ultimately, the Commission determined that the Project is required by the public convenience and necessity, in part to "ensure[] the ability of two local distribution companies to meet the needs of their overall 1.5 million customers during . . . the winter heating season." Certificate Order P 66, JA 362.

This appeal followed.

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY BACKGROUND

A. Natural Gas Act

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

Under Natural Gas Act section 7(e), the Commission shall issue a certificate to any qualified applicant upon finding that the proposed construction and operation of the pipeline facility "is or will be required by the present or future public convenience and necessity." 15 U.S.C. § 717f(e). The Act empowers the

Commission to "attach to the issuance of the certificate . . . such reasonable terms and conditions as the public convenience and necessity may require." *Id.*

The NGA, as amended by the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005), endowed the Commission with unique and detailed procedural authority to coordinate the processing and review of certificate applications. *See* 15 U.S.C. § 717n. To this end, the Commission is "the lead agency for the purposes of coordinating all applicable Federal authorizations, including air quality permits." *Dominion Transmission*, 723 F.3d at 241 (citing 15 U.S.C. § 717n(b)(1)). Pursuant to this procedural authority, the Commission is authorized to set a schedule to "ensure expeditious completion of all such proceedings." 15 U.S.C. § 717n(c)(1).

B. National Environmental Policy Act

The Commission's consideration of an application for a certificate of public convenience and necessity triggers environmental review. *See* 42 U.S.C. §§ 4321, *et seq.* The National Environmental Policy Act ("NEPA") sets out procedures to be followed by federal agencies to ensure that the environmental effects of proposed actions are "adequately identified and evaluated." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). *See also Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 768 (2004) (same). "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 (quoting *Robertson*, 490 U.S. at 349-50); *see also Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 503 (D.C. Cir. 2010) (NEPA ensures a "fully informed and well-considered decision, not necessarily the best decision"). Accordingly, an agency must "take a 'hard look' at the environmental consequences before taking a major action." *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983) (citation omitted).

Regulations implementing NEPA require agencies to consider the environmental effects of a proposed action by preparing either an environmental assessment, if supported by a finding of no significant impact, or a more comprehensive environmental impact statement. *See* 40 C.F.R. § 1501.4 (detailing when to prepare an environmental impact statement versus an environmental assessment); *see, e.g.*, *Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23, 28 (D.C. Cir. 2008) (summarizing regulations governing agency's determination whether an environmental impact statement is needed). Once the agency issues a finding of no significant impact, it has fulfilled NEPA's documentation requirements. *See Taxpayers of Mich. Against Casinos v. Norton*, 433 F.3d 852, 857 (D.C. Cir. 2006) (citing 40 C.F.R. §§ 1501.4(e), 1508.9, 1508.13).

C. The Relationship Of The Natural Gas Act To The Clean Air Act

The Natural Gas Act does not preempt the Clean Air Act's state emissions regulations. *See generally* 15 U.S.C. § 717n. The Clean Air Act requires state approval for federal licenses and permits for industrial projects that are pollution sources. Specifically, section 176 of the Clean Air Act states that "[n]o department, agency or instrumentality of the Federal Government shall . . . license or permit, or approve, any activity which does not conform to an implementation plan after it has been approved or promulgated under section 7410 of this title." 42 U.S.C. § 7506(c)(1). Under Clean Air Act section 7410(a), states may enact an air quality permit program for the construction of any stationary source to ensure compliance with air quality standards. *Id.* § 7410(a)(2)(c); *see also Dominion Transmission*, 723 F.3d at 240-41 (detailing Clean Air Act requirements as they apply to the Project).

II. THE COMMISSION'S REVIEW OF THE PROJECT

A. The Project

The genesis of the Project was three binding precedent agreements for a total of 125,000 dekatherms per day of additional storage withdrawal service (increasing Pipeline's total storage capacity by less than one percent), and 115,000 dekatherms per day of additional firm transportation capacity. The three customers are

Washington Gas Light Co., Baltimore Gas and Electric Co., and Peoples TWC, LLC (storage service only).

To meet the contracted-for capacity, Pipeline designed the "Storage Factory Project," which involved leaching two salt caverns coupled with pipeline looping and the construction of new compressor stations, including a station in Middletown, Frederick County, Maryland. *Dominion Transmission, Inc.*, Notice of Intent to Prepare an Environmental Assessment for the Storage Factory Project, Docket No. PF07-12-000 (Aug. 29, 2007). The proposed in-service date for the Storage Factory Project was January 2014. *Id.* at 3. In November 2008, Pipeline terminated the Storage Factory Project citing technical complexities associated with the planned salt caverns. *See* EA at 95, JA 238. Pipeline stated that it would file, within a few years, a revised project to serve the Storage Factory Project customers "within their anticipated time frame." *Dominion Transmission, Inc.*, Notice of Project Suspension, Docket No. PF07-12-000 (Nov. 3, 2008) (revised project would still include a compressor station in Frederick County, Maryland). The replacement project is the Allegheny Storage Project that is the subject of this appeal. *See* Certificate Order P 10 n.8 (detailing Project history), JA 344.

In July 2011, Pipeline initiated the Commission's environmental review of the Project using FERC's "pre-filing procedures." *See Dominion Transmission Inc.*, Request to Initiate the Pre-filing Process, Docket No. PF11-9-000 (July 19,

2011), R. 1, JA 1. In February 2012, Pipeline filed with the Commission an NGA section 7(c) application for authorization to construct and operate the Project. To provide the incremental storage service, Pipeline proposes to lease storage capacity and increase the withdrawal rate at one of its existing storage fields. To create the additional transportation capacity, Pipeline will construct two new compressor stations[2] (the Myersville Compressor and a second compressor in Ohio) and 1.6 miles of suction and discharge pipeline to interconnect the compressors to Pipeline's existing system. Certificate Order PP 4-6, JA 342-343. In addition, Pipeline will upgrade two existing metering and regulating stations, install additional dehydration at an existing compressor station, and replace a total of 3.1 miles of pipeline in an existing storage field. *Id.* The Myersville Compressor, a new 16,000 horsepower, gas-fired engine compressor, is the focus of this appeal. Pipeline intends to use the Myersville Compressor as a peaking facility to be operated during periods of high demand. *Id.* P 4 n.5, JA 342-343.

The Myersville Compressor is sited on a 21-acre property owned by Pipeline that lies adjacent to a wastewater treatment plant and a major interstate divided highway, I-70, at the Route 17 interchange. *See* EA at 50 (detailing compressor site), JA 193; *see also id.* Figure A-1 (aerial map of the compressor site), JA 250.

[2] A compressor boosts the system pressure along pipelines in order to maintain required flow rates. *Dominion Transmission*, 723 F.3d at 241 & n.1 (describing the Project).

A copy of the aerial map is included in the Addendum. The property is zoned "General Commercial" with a "Highway Employment Overlay" and sits across from industrially zoned land. Certificate Order P 55, JA 359. Pipeline chose a location that already contains "numerous modern intrusions" including a highway, gas stations, a waste water treatment plant, a heavy equipment and tractor business, overhead electric transmission lines, and other commercial structures. EA at 54, JA 197. The closest public or conservation area to the compressor site is two miles away. *Id.* at 49, JA 192.

The compressor facilities would be sited within a 3.8-acre fenced area on Pipeline's 21-acre property. *Id.* at 17, JA 160. Pipeline will maintain existing trees and woodlands along the property boundaries. *Id.* at 50, JA 193. With this natural screening, only the compressor building roof would be visible from nearby commercial properties. *Id.*

B. The Commission's Environmental Review

The Commission initiated its environmental review of the Project in July 2011. Throughout the Commission's review there were multiple opportunities for public input. *See* Project Update, Docket No. CP12-72-00 (Apr. 5, 2012), R. 490, JA 132. In response to its outreach, the Commission received numerous comments, including comments from Citizens, which focused on the Myersville Compressor. Certificate Order P 49, JA 357. After considering all substantive

comments on the Project and alternatives, the Commission issued a detailed Environmental Assessment. *Id.* P 52, JA 358.

The Environmental Assessment evaluated multiple alternatives to the Myersville Compressor, including the no-action, looping, and electric compression alternatives. *Id.* P 53, JA 358. The Environmental Assessment analyzed the Project's impacts on the following resources: 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. *Id.* P 52, JA 358. Where adverse impacts were identified, the Environmental Assessment recommended mitigation measures that, if imposed, would reduce or resolve the respective impact. EA at 99-102, JA 242-245. Ultimately, the Environmental Assessment recommended a finding of no significant impact based on implementation of the identified mitigation measures. *Id.* at 99, JA 242.

C. The Certificate Order

On December 20, 2012, the Commission issued a certificate of public convenience and necessity to the Pipeline authorizing the construction of the Project upon satisfaction of various environmental conditions. Certificate Order P 1, JA 341. The Commission applied the criteria set forth in its Certificate Policy Statement to determine whether there is a need for the Project and whether the

Project will serve the public interest. *Id.* P 16 (citing *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) ("Certificate Policy Statement") (policy for evaluating proposals for certificating new construction)), JA 345. The Commission found significant demand for the Project's capacity, as evidenced by the Pipeline's contracts with three customers for 100 percent of the Project's capacity with 15 year terms for the transportation service. *Id.* P 21, JA 347. The only potential adverse economic impacts were on landowners and the community near the Myersville Compressor. However, the Commission concluded that Pipeline minimized these impacts by purchasing the necessary land and siting the station next to a wastewater treatment plant, a gas station, and an interstate highway. *Id.* P 20, JA 346-347.

The Commission's environmental review of the Project considered the Environmental Assessment and all substantive comments on it. *See id.* PP 47-162, JA 357-389. The Commission addressed all of Citizens' comments, including the issues which were ultimately raised in this appeal: alternatives (*id.* PP 53-64, 93-96, JA 358-361, 370-371); need for the Myersville Compressor (*id.* PP 65-66, JA 361-362); air quality and the Clean Air Act permit (*id.* PP 67-71, 110-116, 150-152, JA 362-363, 375-376, 385-386); segmentation (*id.* PP 23 n.16, 79-83, JA 348, 366-367); and Citizens' due process rights (*id.* PP 160-161, JA 388). After

considering the record regarding the Project's potential environmental effects, the Commission concluded that the Project, as mitigated by satisfaction of attached conditions, would have no significant environmental impact. *Id.* P 162, JA 389.

Ultimately, upon balancing the evidence of public benefits against the limited potential adverse effects of the Project, coupled with its finding of no significant environmental impact, the Commission determined that the Project, with appropriate environmental conditions, is required by the public convenience and necessity. *Id.* P 21, JA 347. The Commission's approval of the proposed Project was expressly conditioned upon the fulfillment of twelve environmental conditions, many of which must be satisfied before construction may commence. *See id.* at Appendix B, JA 392-396. Among the conditions, the certificate requires the receipt of all necessary authorizations from relevant state and federal agencies pursuant to the Clean Air Act. *Id.* at Appendix B, Environmental Condition No. 8, JA 395.

D. The Rehearing Order

In the Rehearing Order, issued on May 16, 2013, the Commission rejected Citizens' challenges to the Myersville Compressor. The Commission explained that its issuance of a certificate conditioned upon Pipeline obtaining a Clean Air Act permit is an appropriate exercise of its authority under the Natural Gas Act and a common Commission practice. *See* Rehearing Order PP 20-23, JA 541-542.

Further, the Commission found that "there is no danger of a Clean Air Act violation." *Id.* P 65, JA 558.

Regarding the demonstrated need for the Project, the Commission affirmed its policy of accepting executed long-term agreements with customers as strong evidence of market demand for a project. *Id.* PP 30-31, JA 544-545. Further, the Commission confirmed that the Project is "not associated in any way with the Cove Point LNG Terminal or potential export authority at the terminal." *Id.* P 33, JA 545. The Commission rejected Citizens' rehearing arguments regarding alternatives, noting that the alternatives identified by Citizens were considered but ultimately eliminated from detailed study for "various reasons, including unreasonable costs, reliability, increased land requirements, or additional environmental impacts . . . ." *Id.* P 36, JA 547. Finally, with respect to Citizens' due process claims, the Commission noted that Citizens had ample time to review Project documents and to file comments, as evidenced by the fact that the Certificate Order addressed all comments including those filed three days before the Certificate Order issued. *Id.* PP 93, 95, JA 566.

E. Related Court Proceeding

After the Certificate Order issued, Pipeline sought review in this Court of the refusal of the Maryland Department of the Environment ("Maryland Department") to process Pipeline's application for an air quality permit for the Myersville

Compressor. Citizens intervened on behalf of the respondent, the Maryland Department. The Court held that the Maryland Department acted inconsistently with federal law by failing to act to grant, condition, or deny Pipeline's air quality permit. *See Dominion Transmission*, 723 F.3d at 245. Accordingly, the Court remanded the case to the Maryland Department to take "prompt action" on Pipeline's air permit application. *Id.* at 240, 242.

SUMMARY OF ARGUMENT

The Commission satisfied all of its statutory responsibilities in approving the Project. Congress entrusted the Commission with broad power to determine whether a natural gas certificate application is in the present or future public interest. The Commission, in approving the Project, balanced the many competing interests under the guidelines set forth in its Certificate Policy Statement in the same manner as it has done in hundreds of certificate proceedings. Here, consistent with the Certificate Policy Statement criteria, the need for the Project is demonstrated by three long-term contracts for 100 percent of the Project capacity and the Project customers' supporting statements. While Citizens do not believe the Commission made precisely the right decision in approving the Project, they failed to show that the Commission's choice was unreasonable or departed in any way from Commission policy or precedent.

The Natural Gas Act vests the Commission with broad power to approve

natural gas certificate applications and attach such "terms and conditions" that the Commission finds necessary. While the Commission must appropriately recognize state authority under the Clean Air Act, this does not affect the agency's power to conditionally approve an application, subject to later compliance with that statute. Citizens' argument that the Commission cannot act until it has received all necessary state authorizations and permits for the Project would undermine the Commission's broad authority to review such applications in a timely manner.

The Commission's decision, after developing the 105-page Project Environmental Assessment, that the Myersville Compressor would not have a significant environmental impact was an informed and reasoned decision. The Environmental Assessment fully identifies, describes, and analyzes the Project's potential environmental impacts, including potential impacts on property values in the town of Myersville. Ultimately the Environmental Assessment recommends appropriate mitigation measures to address identified adverse impacts. With potential adverse impacts effectively mitigated, the Commission was justified in concluding, after balancing Project benefits and impacts, that the Project advances the public interest.

The Commission carefully considered all viable alternatives, including those supported by Citizens. The Commission identified the environmental impacts of each alternative and compared and contrasted that alternative to the Project. After

taking a hard look at each alternative and upon finding that no alternative was environmentally preferable to the Project, the Commission fully satisfied its obligation under the National Environmental Policy Act to consider alternatives.

The record lacks evidence linking the Project with a liquefied natural gas export project application filed with the Commission months after the Commission approved the Project. The Project's purpose, capacity, customers, delivery points and timeframes are distinct and different than the LNG export project. Here, the Project is an independent viable gas transportation and storage project that will provide a much needed service to its local distribution company customers who serve retail end-users in the Northeast and mid-Atlantic markets.

Finally, Citizens fail to justify their due process claims regarding their ability to access and analyze Pipeline's non-public protected information filed with the certificate application. Citizens had ample opportunity to submit comments, protests and evidence into the record on all issues – an opportunity they took full advantage of.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews the substance of Commission actions under the Administrative Procedure Act, overturning 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). Under the arbitrary and capricious standard, the Court's scope of review is narrow and it will not substitute its judgment for that of the agency; rather, the Court determines "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Mich. Consol. Gas Co. v. FERC*, 883 F.2d 117, 120-21 (D.C. Cir. 1989) (citing *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974)). As part of this task, the Court determines whether "the agency . . . articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicles Mfrs. Ass'n*, 463 U.S. at 43 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

The Administrative Procedure Act's arbitrary and capricious standard also applies to challenges under the National Environmental Policy Act. *Nevada v. Dep't of Energy*, 457 F.3d 78, 87 (D.C. Cir. 2006). When the Court reviews Commission action taken "under NEPA, the court's role is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious." *Nat'l Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323, 1327 (D.C. Cir. 2004) (denying appeal of FERC pipeline certificate decision) (quoting *Balt. Gas & Elec.*, 462 U.S. at 97-98).

The Commission's findings of fact, if supported by substantial evidence, are conclusive. *Id.*

Actions of administrative agencies taken pursuant to the National Environmental Policy Act are entitled to a high degree of deference. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 377-78 (1989). This Court evaluates agency compliance with NEPA under a "rule of reason" standard. *Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 75 (D.C. Cir. 2011) (citing *Nevada*, 457 F.3d at 93). This Court has consistently declined to "'flyspeck' an agency's environmental analysis, looking for any deficiency no matter how minor." *Id.* Thus, "[a]s long as the agency's decision is 'fully informed' and 'well-considered,' it is entitled to judicial deference and a reviewing court should not substitute its own policy judgment." *Natural Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288, 294 (D.C. Cir. 1988) (quoting *N. Slope Borough v. Andrus*, 642 F.2d 589, 599 (D.C. Cir. 1980)). *See also Robertson*, 490 U.S. at 350-51 (NEPA merely prohibits uninformed – rather than unwise – agency action).

II. THE COMMISSION'S DECISION TO ISSUE THE PROJECT CERTIFICATE WAS REASONABLE AND SUPPORTED BY SUBSTANTIAL EVIDENCE

Consistent with its responsibilities under the Natural Gas Act and National Environmental Policy Act, the Commission was sensitive to all perspectives and responsive to all arguments, whether economic or environmental in nature.

Citizens' comments throughout the agency proceeding – like every commenter's concerns – were considered as part of the Commission's public interest balance under NGA section 7(c), 15 U.S.C. § 717f(c). The Commission satisfied its statutory responsibilities here by balancing the public benefits offered by the Project against its potential impacts. *See* Certificate Order P 21 (balancing need for the Project against identified potential adverse consequences), JA 347.

In the challenged orders, the Commission concluded that the certificate, as conditioned by the Commission, would result in a project that will "ensure[] the ability of two local distribution companies to meet the needs of their overall 1.5 million customers during periods of peak demand (i.e., the winter heating season) . . . ." *Id.* P 66, JA 362. In reaching this conclusion, the Commission fully satisfied its responsibilities under the Natural Gas Act. *See Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 967 (D.C. Cir. 2000) (provided adverse environmental effects are identified and evaluated, FERC may decide that other values outweigh the environmental costs).

A. Project Need Is Supported By Substantial Evidence

Section 7(e) of the Natural Gas Act grants the Commission exclusive authority to determine whether an application to construct natural gas facilities "is or will be required by the present or future public convenience and necessity." 15 U.S.C. § 717f(e). This statutory provision confers broad authority upon the

Commission. *See FPC v. Transcon. Gas Pipeline Corp.*, 365 U.S. 1, 7 (1961) (Commission is "the guardian of the public interest," entrusted "with a wide range of discretionary authority"); *Columbia Gas Transmission Co. v. FERC*, 750 F.2d 105, 112 (D.C. Cir. 1984) (Commission vested with wide discretion to balance competing equities against the backdrop of the public interest).

Here, the Commission properly exercised its discretion in evaluating and balancing relevant factors under its established framework – the Certificate Policy Statement – for determining whether there is a need for the Project and whether it will serve the public interest. *See* Certificate Order P 16, JA 345. In this case, substantial record evidence supported the Commission's conclusion that the Project's benefits outweighed residual impacts. The record shows: (1) 100 percent of Project capacity subscribed under multiple long-term contracts; (2) no adverse economic impacts on Pipeline's existing customers or existing pipelines in the market and their captive customers; (3) no need to exercise eminent domain; and (4) mitigation of any potential for negative impacts on property values by the Compressor's location next to a wastewater treatment plant, gas station and interstate highway, coupled with the imposition of multiple environmental conditions. *See id.* PP 18-21 (applying the Certificate Policy Statement criteria), JA 346-347.

Citizens' argument, that to determine need the Commission should have

considered a broader range of factors (Br. 25-27), misapprehends the Commission's Certificate Policy Statement and precedent. No additional evidence is necessary where, as here, market need is demonstrated by contracts for 100 percent of the Project's capacity, particularly when Pipeline is not exercising eminent domain. *See Certificate Policy Statement*, 88 FERC ¶ 61,227 at 61,749 ("the strength of the benefit showing [is] proportional to the applicant's proposed exercise of eminent domain"). Precedent agreements "constitute significant evidence of demand." *Id.* at 61,748; *see also Midcoast Interstate*, 198 F.3d at 968 (Court has "consistently required the Commission to give weight to the contracts . . . of the parties before it"). Although the Certificate Policy Statement broadened the types of evidence certificate applicants may present to show the public benefits of a project, it did not compel an additional showing. *See Certificate Policy Statement*, 88 FERC ¶ 61,227 at 61,744, 61,748-49 (eliminating the requirement that applicants present contracts to demonstrate project need). Moreover, the Commission does "not look behind" the contracts to make judgments about the needs of individual shippers. Certificate Order P 66 (citing *Certificate Policy Statement*, 88 FERC ¶ 61,227 at 61,744), JA 362.

Citizens emphasize the fact that the precedent agreements were entered into in 2007 (Br. 25), but fail to provide any evidence that Pipeline is not still bound by the contracts. Rather, the record shows that both of the Project's transportation

customers need the contracted-for capacity. Washington Gas Light Co., *Motion to Intervene in Support of Application*, Docket No. CP12-72-000 (Mar. 16, 2012) (attesting that Project needed to meet the natural gas requirements of its retail customers), R. 377, JA 574; Baltimore Gas and Electric Co., *Motion to Intervene in Support of Application*, Docket No. CP12-72-000 (Mar. 5, 2012) (stating that Project needed to meet the retail natural gas requirements of its Central Maryland service territory), R. 358, JA 123. As the Commission explained, in 2007, Pipeline developed the Storage Factory Project to provide the capacity Washington Gas and Baltimore Gas need to serve their retail customers. But, when forced to terminate that project, Pipeline developed the revised Project to provide these customers with the contracted-for service within their anticipated time frame (in 2014). Certificate Order P 10 n.8, JA 344; *see also Dominion Transmission, Inc.*, Notice of Storage Factory Project Suspension, Docket No. PF07-12-000 (Nov. 3, 2008).

Citizens erroneously claim (Br. 26) that Pipeline must submit with its certificate application the executed contracts. Here, Pipeline filed an abbreviated application as permitted under the Commission's regulations. *See* 18 C.F.R. § 157.7. An abbreviated certificate application need only include the information and supporting data necessary to explain the project and its economic justification. *Id.* § 157.7(a). Pipeline fulfilled this obligation by summarizing the relevant terms of its customer agreements for the Project capacity, including the customer names,

capacity amounts, rates, delivery points and contract terms. *See* Certificate Application, Exhibit I "Market Data" (exhibit supported by sworn affidavit of Pipeline director), R. 339, JA 96-98.

Citizens further claim that the Myersville Compressor is larger than justified by market studies and the current low prices for natural gas. Br. 19, 27 (referencing the U.S. Energy Information Administration's *Annual Energy Outlook 2011*). Citizens argue that the fact that overall demand for gas has decreased, coupled with record low prices, undercuts the need for this Project. The Commission found the Energy Outlook reports unhelpful as they only provide a general overview of demand and do not indicate demand in the specific markets which the Project is intended to serve. Rehearing Order P 31, JA 545. Moreover, as the Commission explained, contrary to Citizens' assumptions, low natural gas prices typically spur demand. Certificate Order P 23 n.16, JA 348.

B. The Commission Issued A Conditional Certificate Consistent With The Natural Gas Act And Commission Practice

Natural Gas Act section 7 grants the Commission broad authority to issue certificates of public convenience and necessity with "reasonable terms and conditions." 15 U.S.C. § 717f(e). Pursuant to this broad authority, when the Commission approves a major infrastructure project within its jurisdiction, whether it is a hydroelectric facility, a liquefied natural gas terminal, or, as here, natural gas facilities, it typically does so subject to various conditions. *See* Rehearing Order

PP 20, 23 (issuing conditional certificate a common, court-approved practice), JA 541, 542; *see also Pub. Utils. Comm'n of Cal.*, 900 F.2d at 282 (upholding a Commission-issued NGA section 7 certificate conditioned upon FERC completing the NEPA-mandated environmental review).

Consistent with its statutory authority, the Commission approved the Project subject to numerous conditions, including the requirement that Pipeline obtain an air quality permit. *See* Certificate Order, Appendix B, Condition 8 (Pipeline must obtain all applicable authorizations required under federal law before FERC will authorize Project construction), JA 395. As further protection, the certificate may be modified to allow other agencies to apply additional conditions as they deem necessary. *Id.* P 152 & Appendix B, Environmental Condition 1, JA 386, 392.

The Commission takes this course of action – rather than simply awaiting other authorizations – to make timely decisions that help inform project sponsors, supporters, and opponents, as well as other licensing agencies. *See* Rehearing Order P 23, JA 542 (explaining practical reason underlying the agency's approach). Moreover, the Commission's decision to conditionally approve Pipeline's application, subject to state concurrence under the Clean Air Act, is in keeping with its status as the statutory "lead agency," which must coordinate all federal authorizations for a natural gas project, and with which a "State agency," such as the Maryland Department, must cooperate to "ensure expeditious

completion of all such proceedings." 15 U.S.C. §§ 717n(b)(1); 717n(c)(1)(A).

Citizens further argue that, by issuing the Project certificate, the Commission improperly encroached on the State's authority to issue an air permit under the Clean Air Act. Br. 32-34. This Court has considered and rejected this argument. *See Dominion Transmission*, 723 F.3d at 245 (holding that once FERC issued the certificate approving the Myersville Compressor, the state environmental agency must process Pipeline's air quality permit application). The Commission expressly acknowledged that "the Maryland state and local agencies retain full authority to grant or deny air quality permits." Certificate Order P 71 (noting that the Maryland Department may choose to reject Pipeline's air quality permit application), JA 363-364. Citizens' argument is also foreclosed by the Court's holding in *Dominion Transmission*, in which the Court held that it, "like FERC," believes "that the [Maryland] Department is better situated to determine whether [Pipeline] has complied" with Maryland's air quality control program. *Dominion Transmission*, 723 F.3d at 245.

III. THE COMMISSION'S ENVIRONMENTAL ANALYSIS FULLY COMPLIED WITH THE NATIONAL ENVIRONMENTAL POLICY ACT

Citizens focus solely on Project impacts, not benefits, and – as explained in the following sections of this brief – fail to demonstrate that the Commission falls short of the "hard look" requirement of NEPA. *See Balt. Gas & Elec.*, 462 U.S. at

97 (agency took a "hard look" where it adequately considered and disclosed the environmental impact of its actions).

A. The Commission Reasonably Analyzed Impacts Upon Property Values

The Environmental Assessment closely examined potential impacts of the Myersville Compressor that could affect property values, specifically air pollution, visual impacts, noise, and safety. *See* Certificate Order PP 102, 131 (EA considered entire town of Myersville in its review of environmental impacts), JA 373, 380. As detailed below, the Commission found the Myersville Compressor's impact on each resource to be limited or minimal and, where necessary, the Commission developed measures to mitigate potential impacts. *Id.* P 104, JA 373; *see also* Rehearing Order P 46 (detailing the environmental conditions mitigating impacts on property values), JA 551.

The Environmental Assessment determined that the Myersville Compressor, which is bordered by an interstate highway, would result in "no perceptible increase in noise." EA at 72, JA 215; *see also id.* at 75 (highway contributes a greater amount of noise and vibration than what the compressor will add), JA 218. The visual and aesthetic impacts of the Myersville Compressor are also minimal. Because of the existing trees and woodlands along the property boundary, only the Compressor station roof will be visible from the nearby gas station and highway. EA at 50, JA 193; *see also id.* at 51 (compressor not visible from nearby parks),

JA 194. The Commission found no significant safety concern related to the Compressor's operation. *See* Certificate Order PP 122-125, JA 377-378; *see also* Rehearing Order P 46 n.51 (detailing safety measures Pipeline must comply with regarding the Myersville Compressor), JA 551; EA at 81-83 (describing Department of Transportation's oversight of pipeline safety), JA 224-226. The Environmental Assessment also extensively evaluated the Compressor's impact on air pollution. *See id*. at 59-71, JA 202-214. The Commission found, based on air modeling studies, that the Myersville Compressor would be below the National Ambient Air Quality Standards for all pollutants regulated under the Clean Air Act. Certificate Order P 111, JA 375. Based on this analysis, the Commission reasonably concluded that, with the required mitigation, these impacts do not rise to the level of significance. *See Friends of the Ompompanoosuc v. FERC*, 968 F.2d 1549, 1554-56 (2d Cir. 1992) (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).

Citizens further claim that the Commission "failed to quantify" the impacts of the Project on property values. Br. 41-42. NEPA imposes no such obligation. *See Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 200 (D.C. Cir. 1991) (rule of reason guides depth of agency's discussion of particular environmental impacts). Here, the Commission acknowledged that, due to a lack of studies on the

effects of above-ground natural gas facilities on property values, the impacts are "difficult to quantify." EA at 57, JA 200; *see also* Certificate Order P 20 n.12 (finding Canadian article on impact of oil facilities on residential property values cited by Citizens not helpful), JA 347. 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, Citizens' real dispute is not with the quantity or quality of the Environmental Assessment's analysis, but with the Commission's ultimate conclusion that these impacts, subject to mitigation, would not "significantly reduce property or resale values in the Project area." EA at 57, JA 200; Certificate Order P 104 (same), JA 373; *see also Cabinet Mtns. Wilderness v. Peterson*, 685 F.2d 678, 682 (D.C. Cir. 1982) (a finding of no significant impact can be predicated upon agency's imposition of mitigation measures)*; Pub. Citizen v. Nat'l Hwy. Traffic Safety Admin.*, 848 F.2d 256, 266 (D.C. Cir. 1988) (agency's finding of no significant impact is entitled to deference).

The Commission also addressed Citizens' argument (Br. 41-42) that the Myersville Compressor would result in lost future development opportunities negatively impacting the Town of Myersville's tax base. To the contrary, the Commission found that the Project would generate increased tax revenue which would "generally benefit the locality." EA at 56-57, JA 199-200. Regarding potential development, no party disputed that the compressor site is not currently

being used for "any discernable commercial (or agricultural) function and there are no existing or foreseeable [commercial development] plans." Certificate Order P 106, JA 373. Further, the Commission found claims regarding potential future economic development that might have occurred at the compressor site to be "highly speculative." *Id.*; Rehearing Order PP 44-45 (same), JA 550-551; *see also N. Plains Res. Council, Inc. v. Surface Transp. Board*, 668 F.3d 1067, 1078 (9th Cir. 2011) (agency not required to "engage in speculative analysis"). The Compressor would not "preclude any existing or future use of nearby properties." EA at 57, JA 200. Further, there is no evidence supporting Citizens' claim that Pipeline acquired the compressor site at a low value, thus depressing commercial property values. Rehearing Order P 45 n.49, JA 551.

Last, Citizens argue that the Commission failed to consider the impact of the agency's alleged preemption of Myersville's local zoning decisions on local property values. Br. 43-44. But, federal preemption has no bearing on the Commission's environmental analysis of the Project. *See* Certificate Order P 78 (NGA preemption of a particular state or local law "is not tantamount to a 'violation' of that state or local law, as contemplated by the [NEPA] regulations"), JA 366; *see also Pub. Utils. Comm'n of Cal.*, 900 F.2d at 282 (NEPA does not require an assessment of non-environmental factors). Moreover, the challenged orders did not expressly preempt any state or local regulations. The Commission

left it to the State to determine if "Myersville's applicable zoning requirements are preempted in this particular case." *Dominion Transmission,* 723 F.3d at 245 (holding that FERC "properly chose" to let the Maryland Department determine which, if any, of Myersville's zoning and land use requirements are preempted).

B. The Commission Reasonably Concluded That The Project Has Minimal Impacts On Air Quality

The Environmental Assessment contradicts Citizens' contention that the Commission failed to adequately analyze the Myersville Compressor's potential to emit nitrogen oxides (NO_x). Br. 36-38. The Environmental Assessment describes the extensive modeling used to determine the Project's air quality impacts. *See, e.g.*, EA at 62-64, JA 205-207.

That modeling analyzed the maximum ambient impacts of air contaminants from operation of the Myersville Compressor. Under the Clean Air Act, as implemented by the Environmental Protection Agency, six air contaminants, including nitrogen dioxide (NO_2),[3] are pollutants subject to National Ambient Air Quality Standards. The modeling was conducted using the maximum number of

[3] The EA references both nitrogen oxides (NO_x) and nitrogen dioxide (NO_2). NO_x represents a group of nitrogen oxide compounds which includes nitrogen dioxide (NO_2). The Environmental Protection Agency regulates only nitrogen dioxide (NO_2) as it is the most prevalent form of nitrogen oxides (NO_x) in the atmosphere that is generated by human activities. *See* EPA Technical Bulletin, *Nitrogen Oxides (NO_x), Why and How They Are Controlled*, at 1 (November 1999), available at http://www.epa.gov/ttncatc1/dir1/fnoxdoc.pdf.

operating hours (6,000 hours) stated in Pipeline's air quality permit application for the Myersville Compressor. The modeling estimated that the Compressor's operational impacts upon air quality would be below the National Ambient Air Quality Standards for each pollutant. *Id.* at 63-64, JA 206-207. The Environmental Assessment further found that under Clean Air Act standards, the Myersville Compressor would be classified as a minor source of hazardous air pollutants. *Id.* at 70, JA 213. The Commission found that, notwithstanding the fact that the Clean Air Act permit is outstanding for future action by Maryland officials, the information it had available for use in preparing the Environmental Assessment was sufficient for its analysis of adverse air quality impacts. Certificate Order P 151, JA 386.

Citizens raised on rehearing before the agency, and repeat in their brief, the allegation that an "identical" compressor station will emit 31.25 tons per year of NO_x as compared to Myersville Compressor's estimate of 23.75 tons per year. Br. 36. The Commission rejected this claim as an invalid comparison because the Myersville Compressor's estimate was based upon maximum allowable operations of 6,000 hours per year. Rehearing Order P 27, JA 544. Citizens take issue with the Commission's use of the maximum operating permit limit of 6,000 hours per year of full power operation reflected in Pipeline's Clean Air Act permit application. Br. 37. But, as the Commission noted, it is not uncommon for an

applicant to mitigate emissions through reductions of operating hours, and that the Clean Air Act allows for such limitations. Rehearing Order P 25, JA 543. In any event, if Pipeline's air quality permit application is ultimately denied, Pipeline would be prohibited from constructing the Myersville Compressor. *Id.* P 25 n.26, JA 543.

On appeal, Citizens simply restate, without more, the allegations concerning the air quality analysis that it made before the Commission. The Court should sustain the Commission's decision, as none of the issues raised by Citizens undermines the reasonableness of the Commission's conclusion that air emissions associated with the Myersville Compressor will be within environmentally acceptable levels.

C. FERC Considered A Full Range Of Potential Alternatives

The National Environmental Policy Act requires an environmental assessment to include a "brief discussion[] . . . of alternatives." 40 C.F.R. § 1508.9(b) (defining what constitutes an environmental assessment). Citizens incorrectly rely on the NEPA regulation governing environmental impact statements, not environmental assessments; the latter is the NEPA document at issue in this case. Br. 39 (citing 40 C.F.R. § 1502.14 (detailing the alternatives analysis required in an impact statement)).

The Commission must – as it did in this case – consider reasonable

alternatives raised by parties. *See American Gas Ass'n v. FERC*, 593 F.3d 14, 19 (D.C. Cir. 2009); *see also Midcoast Interstate*, 198 F.3d at 967-68 (same). Here, the Commission took the requisite hard look at the no-action, pipeline looping, and electric compressor alternatives. The Environmental Assessment considered nine alternative sites for the Myersville Compressor, as well as no-action and system alternatives (such as using existing natural gas systems or pipeline looping in lieu of construction of the Myersville Compressor). *See* Certificate Order P 59, JA 360; EA at 90-91, JA 233-234. In considering alternatives, the Commission evaluated whether each alternative (i) will offer a significant environmental advantage over the Project, (ii) is technically and economically feasible, (iii) is permitable within the same timeframe as the Project, and (iv) will meet the Project's objectives. EA at 90, JA 233. None of the evaluated alternatives satisfied these criteria.

Regarding the no-action alternative, by which the Project's customers would be served through other companies' existing infrastructure, Citizens claim that there are four other pipeline projects that "could potentially accommodate service." Br. 28. The Commission's technical review, however, did not identify a single pipeline that could provide the Project's capacity. EA at 90-91, JA 233-234. Here, the Commission's determination regarding disputed technical facts such as these is based upon its expertise and is entitled to deference. *See B&J Oil and Gas v.*

FERC, 353 F.3d 71, 76 (D.C. Cir. 2004) (court reluctant to interfere with FERC's reasoned judgments involving technical questions).

Citizens also fail to demonstrate that the looping alternative is either environmentally or economically preferable. Looping is a means to increase transportation capacity by constructing a new pipeline (typically adjacent to an existing pipeline) which connects to an existing pipeline at both of its ends. Here, the looping alternative would require construction of a 30-mile pipeline loop which would affect 418 acres compared to the 13 acres for the construction of the Myersville Compressor. EA at 91, JA 234; *see also* Certificate Order P 62 (looping alternative would require a 25-foot-wide expansion of the existing right-of-way along the entire 30-mile loop, resulting in 109 acres of new permanent right-of-way easements), JA 361. Even if the Commission were to accept Citizens' claim (Br. 41) that the looping option would require only 47.5 acres for construction and 54.5 acres for operation (more than double the land required for the Myersville Compressor), looping still does not offer any clear environmental benefit over the Compressor.

The Commission found equally unavailing Citizens' cost comparison argument. *See* Br. 40 (arguing that lifetime cost of the Compressor is $153 million compared to $155 million for looping). First, in this case project costs are not determinative given that Pipeline and the Project customers will bear 100 percent

of the Project's costs. Certificate Order P 95, JA 371. Moreover, the Commission rejected Citizens' cost estimate as speculative. *Id.* (estimate based on assumptions and estimates that have no basis in the record of this proceeding); *see also* Rehearing Order P 38 n.36 (same), JA 548. Regardless, given that Citizens, specifically its member Franz Gerner, estimate that the Myersville Compressor will cost $2 million *less* than the looping alternative, *see id.*, the looping alternative is not economically preferable to the Project. Accordingly, the Commission reasonably rejected this alternative from further detailed study.

Similarly, the Commission considered, but ultimately rejected as not reasonable, the use of electric-powered compressor units in lieu of the natural gas-powered engine. *See* Certificate Order PP 61, 108, JA 360, 374. Use of electric compressors at the Myersville site would require an additional 10 acres of land to construct a new power line to serve the electric-driven engines. EA at 97, JA 240. In addition, electric compressors would introduce a significant risk to Pipeline's ability to provide reliable service during periods of peak demand. *Id.* at 98, JA 241. Thus, the Commission reasonably ended its consideration of this alternative. *See, e.g.*, *American Gas Ass'n*, 593 F.3d at 19 (reasoned decision-making requires FERC to consider alternatives raised by parties or give some reason, "within its broad discretion," for declining to do so).

D. The Commission Did Not Impermissibly Segment The Project From The Cove Point Export Project

Agencies may not evade their responsibilities under NEPA by artificially dividing a major federal action into smaller components. Here, there is no record evidence to support Citizens' argument that the Project is connected to Pipeline affiliate's liquefied natural gas ("LNG") export project. *See* Br. 15, 20, 45-47. Citizens' argument is based on their claim that the Myersville Compressor will be used primarily to transport gas to the Cove Point LNG facility and not to serve local utilities. Br. 19-20.

The Cove Point export project is being developed by Pipeline's affiliate Dominion Cove Point LNG, LP ("Cove Point"). Cove Point owns a liquefied natural gas import terminal on the Chesapeake Bay in Southeastern Maryland. The terminal connects, via its own 88-mile pipeline, to a nexus of interstate natural gas pipelines in northern Virginia. *See* Cove Point System Map, attached hereto in the Addendum.

The Cove Point export project includes construction of liquefaction facilities at the existing Cove Point LNG import terminal. *Dominion Cove Point LNG, LP*, Application for Authority to Export Natural Gas and Abbreviated Application for a Certificate of Public Convenience and Necessity, Docket No. CP13-113-000 (Apr. 1, 2013) (project will allow natural gas to be liquefied for oversees export). The Cove Point project also includes adding compression on the Cove Point pipeline to

enable export customers to transport natural gas to the LNG terminal for liquefaction. *Id.* at 24-27. The export project's capacity is fully subscribed by two customers, Pacific Summit Energy, LLC and GAIL (India) Limited, under 20-year contracts, with a targeted in-service date of March 2017. *Id.* at 2-3. Cove Point filed its certificate application in April 2013. Currently the Commission is conducting its environmental review of the project and drafting the environmental assessment. *See Dominion Cove Point LNG, LP*, Project Update for the Cove Point Liquefaction Project, Docket No. CP13-113-000 (Oct. 2013).

When evaluating a segmentation claim, courts consider whether the proposed segment (1) has substantial independent utility, (2) has logical termini, and (3) does not foreclose the opportunity to consider alternatives. *See Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 298 (D.C. Cir. 1987) (finding independent utility in four-mile section of mass transit project originally planned as 18.6 miles). This Court focuses on the "independent utility" factor. *Coal. on Sensible Transp. v. Dole*, 826 F.2d 60, 69 (D.C. Cir. 1987). "The proper question is whether one project will serve a significant purpose even if a second related project is not built." *Id.* The answer with respect to the Project is yes. The Project is a stand-alone project designed to serve specific customers, with designated capacity amounts, in a set time frame, all of which differ from the Cove Point export project.

Citizens argue that because the Myersville Compressor is sized larger than the compressor designed for the prior Storage Factory project, the Project must be connected to the Cove Point project. Br. 46-47. Their claim ignores the fact that the Project is designed to serve the contract demand for two customers, both of which are on record stating that they need the Project capacity to serve their retail customer load. *See* Certificate Order P 23 & n.16 (finding no evidence that the Project customers contemplate using the Project capacity to export natural gas), JA 348; *see also supra* p. 23 (citing customers' motions in support of Project). Regarding the size of the Myersville Compressor, the Commission further explained that pipelines are designed to meet peak demands during periods of 100 percent load conditions, though customers rarely use 100 percent of their contracted capacity. Rehearing Order P 32, JA 545. Moreover, it is Pipeline's "prerogative . . . to determine the project's goals and the means of achieving them." *Nat'l Comm. for the New River*, 373 F.3d at 1332.

Further, the Commission explained that the Project and the export project are not "connected actions" under NEPA regulations where, as here, neither project depends on the other. *See* Certificate Order P 83, JA 367. Here, the impetus for each project is to provide the incremental transportation capacity to serve its respective customers and, with respect to Cove Point, to provide the export services its customers demand. The Commission further found, based on Cove

Point's certificate application, that the Myersville Compressor is not needed to support the export of the liquefied natural gas. Rehearing Order P 33 n.31, JA 546. In response to Citizens' claims that flow diagrams "show that the majority of the gas from the Myersville station will be delivered to the Cove Point export facility," the Commission found their analysis of the flow diagrams to be flawed. Certificate Order P 161 n.109 (concluding that Citizens' "analysis . . . seeks to compare design day (contractual obligation) flow with non-coincidental peak deliveries; such comparisons are not valid"), JA 388.

Even if the capacity created by the Myersville Compressor is ultimately used to transport some gas to Cove Point, that is just the reality of the interstate natural gas transportation system network. Pipeline's 11,000-mile pipeline system is much like a highway network. As this Court has recognized, "it is inherent in the very concept of a highway network that each segment will facilitate movement in many others; [but] if such mutual benefits compelled [NEPA] aggregation, no project could be said to enjoy independent utility." *Coal. on Sensible Transp.*, 826 F.2d at 69 (finding independent utility of a highway widening project from other upgrade projects along the same highway).

Citizens argue that the Project and the Cove Point export project are interdependent because they "have been developed in the same time frame." Br. 45. Here the Project's timing defeats Citizens' claim. The issue is whether an

agency may prepare an environmental assessment for each individual project or a single, comprehensive environmental impact statement for all interdependent projects. *Coal. on Sensible Transp.*, 826 F.2d at 69. In evaluating a segmentation argument, courts are concerned with projects that have reached the proposal stage at the time the agency is conducting the environmental review of the "connected" project. *O'Reilly v. U.S. Army Corps of Eng'rs*, 477 F.3d 225, 236-37 (5th Cir. 2007) (citing 40 C.F.R. § 1508.23 to define NEPA "projects" as proposals in which action is imminent); *see also* 40 C.F.R. § 1508.23 (NEPA regulation defining "proposal"); *Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139, 146 (1981) (mere contemplation of an action is insufficient to support segmentation claim). A potential new natural gas facility first becomes a "proposal" for NEPA purposes when the developer files the project application with the Commission. *See Theodore Roosevelt Conservation*, 616 F.3d at 513 (agency's issuance of a notice of intent to prepare an EIS merely reflects the "incipient notion" of a project).

Here, the Cove Point export project was first proposed (certificate application filed with FERC on April 1, 2013) ten months after the Project's Environmental Assessment issued (June 14, 2012) and three months after the Commission approved the Project (December 20, 2012). Rehearing Order P 33 & n.31, JA 545 & 546. Thus, the Cove Point export project was merely a future, contemplated project at the time the Project's Environmental Assessment issued.

Moreover, the fact that Cove Point initiated the pre-filing process with the Commission two weeks before the Project's Environmental Assessment issued is irrelevant. As evidence by the termination of the Storage Factory Project over a year into the Commission's environmental review of that project under its "pre-filing" procedures, some projects engaged in FERC's pre-filing procedures never mature into formal applications for certificates. *See, e.g.*, Certificate Order PP 10 n.8, 54, JA 344, 358 (Storage Factory Project terminated 16 months into pre-filing process); *see also Texas Eastern Transmission, LP*, 141 FERC ¶ 61,043, at P 24 (2012) (pre-filing process often results in project sponsor making significant modifications to its originally planned project before it files its certificate application).

The other two segmentation factors, logical termini and opportunity to consider alternatives, also demonstrate that the Project is a legitimate stand-alone project. Here, Pipeline designed the Project and selected the termini (the delivery points) to meet a distinct, demonstrated market need that was separate from the Cove Point export projects, as evidenced by each project's unique contracts. The "opportunity to consider alternatives" factor indicates unlawful segmentation only "when a given project effectively commits decisionmakers to a future course of action." *Coal. on Sensible Transp.*, 826 F.2d at 69 (restricting alternatives for future projects is not enough to find unlawful segmentation). Citizens present no

evidence that construction of the Project will compel (or even facilitate) construction of the Cove Point export project. *See* Br. 45-47. None of Citizens' contentions amounts to "persuasive evidence" that the Commission acted arbitrarily by not conducting a single environmental review of these two distinct projects. *See Nat'l Wildlife Fed'n v. Appalachian Reg'l Comm'n*, 677 F.2d 883, 891 (D.C. Cir. 1981) (deferential arbitrary and capricious standard applies to segmentation of environmental review).

IV. THE COMMISSION FULLY AFFORDED CITIZENS THEIR DUE PROCESS RIGHTS

Citizens contend that their due process rights were violated by the timing and procedural steps required to obtain portions of Pipeline's certificate application that are designated as non-public Critical Energy Infrastructure Information ("CEII"). Br. 48-49. First, they assert that the Commission's regulations, *see* 18 C.F.R. § 157.10(b), required Pipeline to provide all parties to the administrative proceeding a copy of the privileged or confidential CEII components of the certificate application. *See* Br. 48. Citizens are mistaken.

Section 157.10(d) states that the certificate applicant "shall omit the CEII" from the information otherwise supplied to intervenors or made available to the public. 18 C.F.R. § 157.10(d); *see also Amendments to Conform Regulations with Order No. 630 (CEII Final Rule)*, Order No. 643, FERC Stats. & Regs. ¶ 31,149 at 30,681 (2003) (adding subsection (d) to section 157.10 to protect confidential

information from automatic disclosure to intervenors). Section 157.10(d)(3) of the Commission's regulations allows Citizens to request the CEII information under the Commission's standard procedures for obtaining CEII information. *See* 18 C.F.R. § 157.10(d)(3) (citing 18 C.F.R. § 388.113 (CEII regulations)).

Moreover, the Commission timely processed Citizens' requests for CEII and other privileged information. *See* Br. 49 (arguing that the two to three month CEII process is untimely). Citizens fail to cite to any violation of the Commission's regulations governing the process for requesting and obtaining CEII or privileged materials. Rehearing Order P 96 n.108, JA 567. The Commission explained the timing, stating: "considering the volume and sensitive nature of the information sought, [FERC] staff requires time to process the [CEII and Freedom of Information Act ("FOIA")] requests." *Id.* Moreover, Commission regulations grant Pipeline (as the owner of the protected material) an opportunity to comment on its disclosure. *See* 18 C.F.R. § 388.112(d).

Finally, while Citizens claim generally that the CEII regulations violate due process (Br. 49-50), they fail to demonstrate that they were deprived of a meaningful opportunity to comment on the Project. *See* Rehearing Order P 100 (rejecting "general claims regarding our FOIA and CEII regulations as unsupported"), JA 568. Nothing impeded Citizens' ability to challenge the Project. Citizens had "ample time to review and file comments with respect to CEII and

FOIA documents," as the Commission's Certificate Order addressed all comments on the Environmental Assessment filed up to three days prior to the order's issuance. *See id.* PP 80, 95, 98, & n.111, JA 563, 566, 568; Certificate Order PP 89-96 (addressing Dr. Gerner's November 2012 comments), JA 369-371; *id.* P 96 n.74 (addressing Dr. Gerner's December 17, 2012 comments), JA 371; *id.* P 161 n.109 (addressing Citizens' December 14, 2012 comments), JA 388. Here, Citizens were afforded due process as they were able to assert their various claims rooted in the CEII and privileged materials. No more was required. *See Jepsen v. FERC*, 420 F. App'x. 1 (Apr. 26, 2011) (no due process violation where petitioners argued issue on rehearing at FERC but were denied opportunity to review document that supported their argument).

CONCLUSION

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

Respectfully submitted,

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Final Brief: March 6, 2014

Myersville Citizens for a Rural Community, Inc., et al. v. FERC
D.C. Cir. No. 13-1219

Docket No. CP12-72-000

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Final Brief of Respondent Federal Energy Regulatory Commission contains 9,941 words, not including the tables of contents and authorities, the glossary, the certificates of counsel, and the addendum.

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March 6, 2014

ADDENDUM

TABLE OF CONTENTS

PAGE

Maps:

Aerial Map of Myersville Compressor Site..... A-1

Cove Point System Map A-2

Statutes:

Natural Gas Act

15 U.S.C. § 717b(d)..... A-3

15 U.S.C. §§ 717f(c)&(e) A-5

15 U.S.C. §§ 717n(a)-(c) A-7

Regulations:

FERC Regulations

18 C.F.R. § 157.7..... A-9

18 C.F.R. §§ 157.10(b)&(d) A-10

18 C.F.R. §§ 388.112(a), (c)&(d)..... A-12

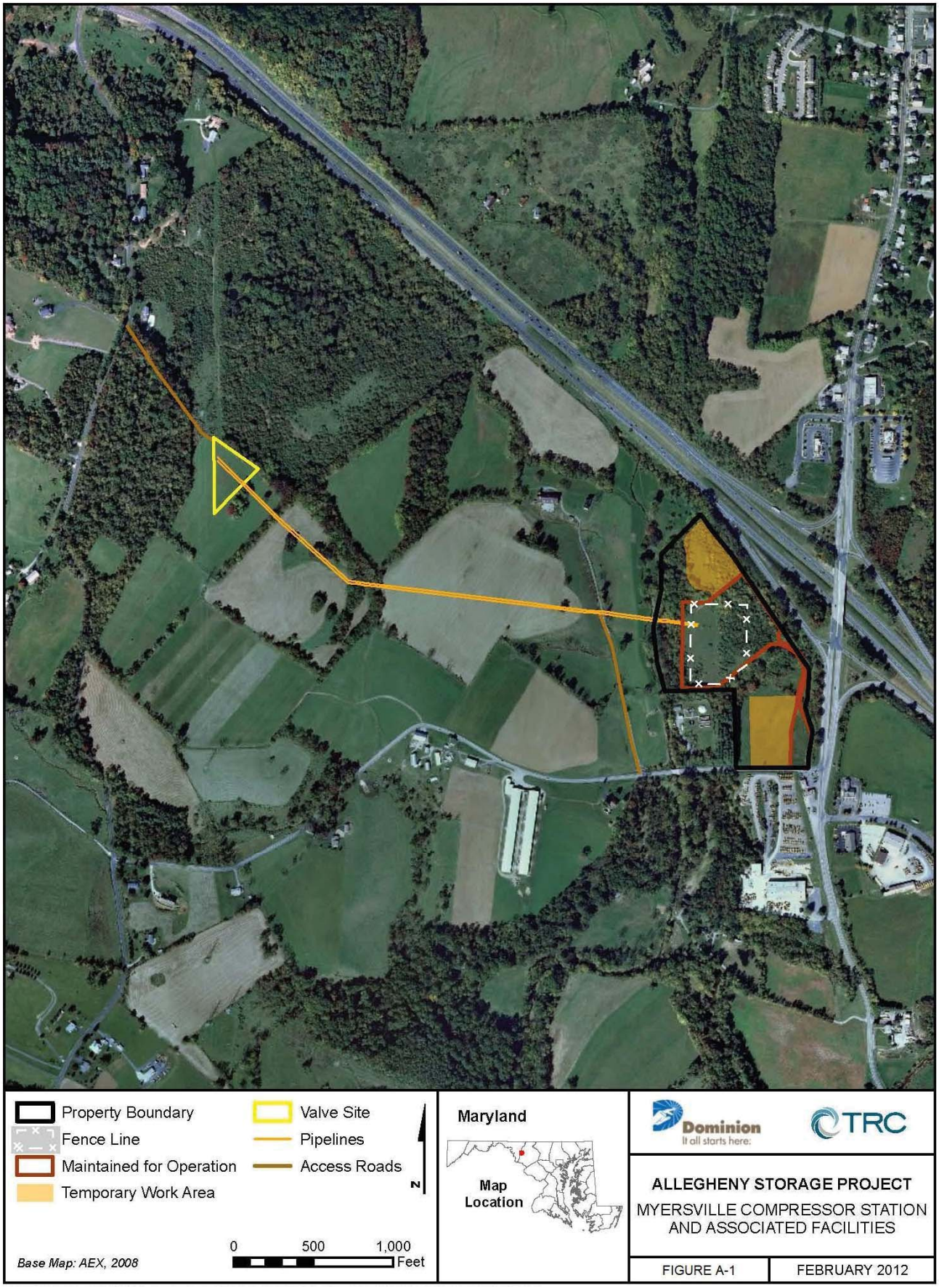
18 C.F.R. §§ 388.113(c)&(d) A-15

NEPA Regulations

40 C.F.R. § 1501.4..... A-19

40 C.F.R. § 1502.14..... A-22

40 C.F.R. § 1508.9..... A-23

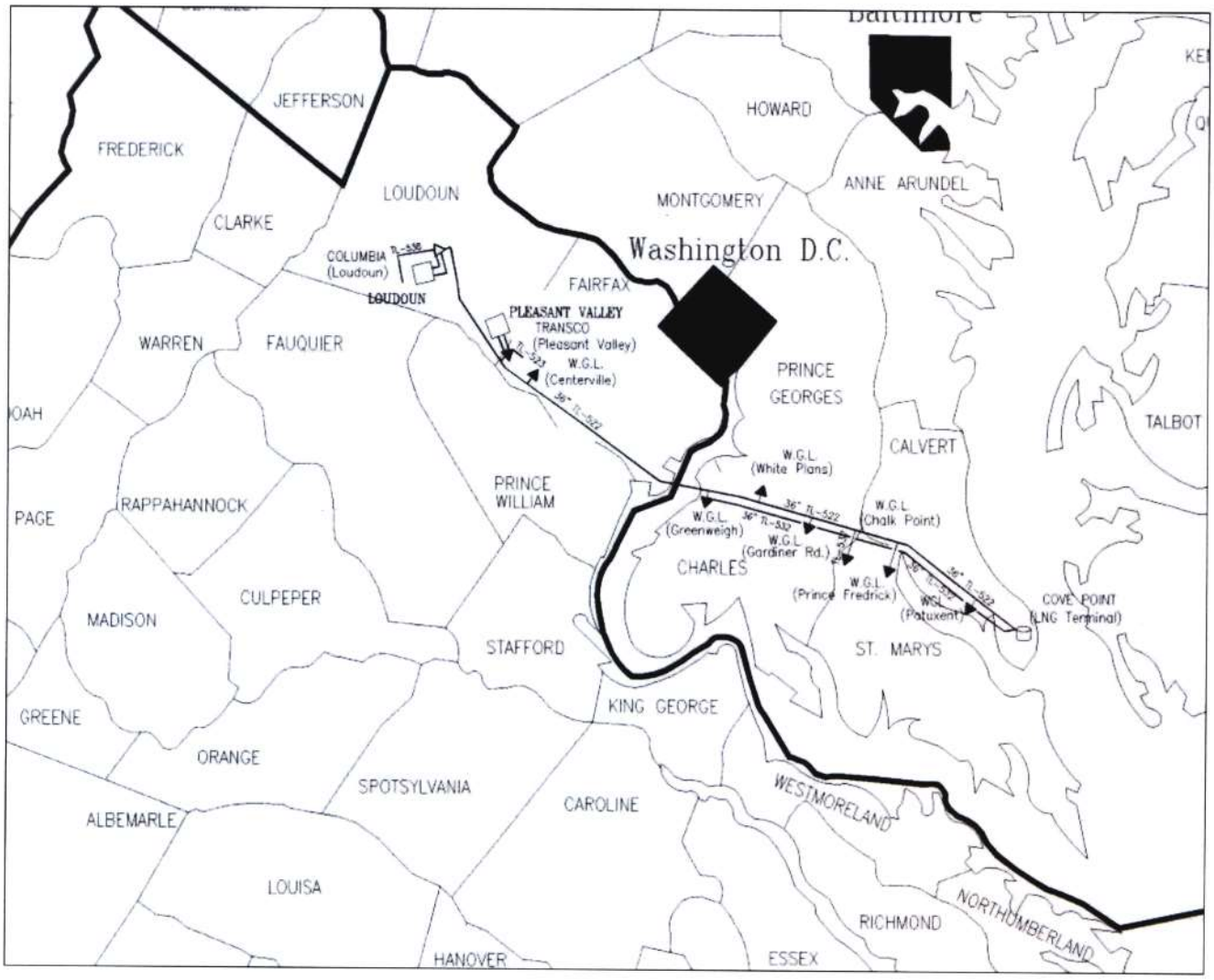


A-1

Bold black line outlines Pipeline's 21-acre property.

White "- x" line outlines 3.8-acre location of compressor facilities.

SYSTEM MAP


JEFFERSON
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LOUDOUN
CLARKE
HOWARD
ANNE ARUNDEL
MONTGOMERY
Washington D.C.
COLUMBIA
(Loudoun)
LOUDOUN
PLEASANT VALLEY
TRANSCO
(Pleasant Valley)
W.G.L.
(Centerville)
FAIRFAX
WARREN
FAUQUIER
PRINCE
GEORGES
CALVERT
TALBOT
W.G.L.
(White Plains)
PRINCE
WILLIAM
RAPPAHANNOCK
PAGE
W.G.L.
(Greenwaigh)
W.G.L.
(Gardiner Rd.)
W.G.L.
(Chalk Point)
CHARLES
W.G.L.
(Prince Fredrick)
WGL
(Patuxent)
COVE POINT
(LNG Terminal)
MADISON
CULPEPER
STAFFORD
ST. MARYS
KING GEORGE
GREENE
ORANGE
SPOTSYLVANIA
CAROLINE
WESTMORELAND
ALBEMARLE
LOUISA
RICHMOND
NORTHUMBERLAND
HANOVER
ESSEX

1954—Subsec. (c). Act Mar. 27, 1954, added subsec. (c).

TERMINATION OF FEDERAL POWER COMMISSION; TRANSFER OF FUNCTIONS

Federal Power Commission terminated and functions, personnel, property, funds, etc., transferred to Secretary of Energy (except for certain functions transferred to Federal Energy Regulatory Commission) by sections 7151(b), 7171(a), 7172(a), 7291, and 7293 of Title 42, The Public Health and Welfare.

STATE LAWS AND REGULATIONS

Pub. L. 102–486, title IV, § 404(b), Oct. 24, 1992, 106 Stat. 2879, provided that: ''The transportation or sale of natural gas by any person who is not otherwise a public utility, within the meaning of State law—

''(1) in closed containers; or

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

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

EMERGENCY NATURAL GAS ACT OF 1977

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

EXECUTIVE ORDER NO. 11969

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

PROCLAMATION NO. 4485

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

PROCLAMATION NO. 4495

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

§ 717a. Definitions

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

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

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

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

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

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

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

(7) ''Interstate commerce'' means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.

(8) ''State commission'' means the regulatory body of the State or municipality having jurisdiction to regulate rates and charges for the sale of natural gas to consumers within the State or municipality.

(9) ''Commission'' and ''Commissioner'' means the Federal Power Commission, and a member thereof, respectively.

(10) ''Vehicular natural gas'' means natural gas that is ultimately used as a fuel in a self-propelled vehicle.

(11) ''LNG terminal'' includes all natural gas facilities located onshore or in State waters that are used to receive, unload, load, store, transport, gasify, liquefy, or process natural gas that is imported to the United States from a foreign country, exported to a foreign country from the United States, or transported in interstate commerce by waterborne vessel, but does not include—

(A) waterborne vessels used to deliver natural gas to or from any such facility; or

(B) any pipeline or storage facility subject to the jurisdiction of the Commission under section 717f of this title.

(June 21, 1938, ch. 556, § 2, 52 Stat. 821; Pub. L. 102–486, title IV, § 404(a)(2), Oct. 24, 1992, 106 Stat. 2879; Pub. L. 109–58, title III, § 311(b), Aug. 8, 2005, 119 Stat. 685.)

AMENDMENTS

2005—Par. (11). Pub. L. 109–58 added par. (11).

1992—Par. (10). Pub. L. 102–486 added par. (10).

TERMINATION OF FEDERAL POWER COMMISSION; TRANSFER OF FUNCTIONS

Federal Power Commission terminated and functions, personnel, property, funds, etc., transferred to Secretary of Energy (except for certain functions transferred to Federal Energy Regulatory Commission) by sections 7151(b), 7171(a), 7172(a)(1), 7291, and 7293 of Title 42, The Public Health and Welfare.

§ 717b. Exportation or importation of natural gas; LNG terminals

(a) Mandatory authorization order

After six months from June 21, 1938, no person shall export any natural gas from the United States to a foreign country or import any natural gas from a foreign country without first having secured an order of the Commission authorizing it to do so. The Commission shall issue such order upon application, unless, after opportunity for hearing, it finds that the proposed exportation or importation will not be consistent

with the public interest. The Commission may by its order grant such application, in whole or in part, with such modification and upon such terms and conditions as the Commission may find necessary or appropriate, and may from time to time, after opportunity for hearing, and for good cause shown, make such supplemental order in the premises as it may find necessary or appropriate.

(b) Free trade agreements

With respect to natural gas which is imported into the United States from a nation with which there is in effect a free trade agreement requiring national treatment for trade in natural gas, and with respect to liquefied natural gas—

(1) the importation of such natural gas shall be treated as a ''first sale'' within the meaning of section 3301(21) of this title; and

(2) the Commission shall not, on the basis of national origin, treat any such imported natural gas on an unjust, unreasonable, unduly discriminatory, or preferential basis.

(c) Expedited application and approval process

For purposes of subsection (a) of this section, the importation of the natural gas referred to in subsection (b) of this section, or the exportation of natural gas to a nation with which there is in effect a free trade agreement requiring national treatment for trade in natural gas, shall be deemed to be consistent with the public interest, and applications for such importation or exportation shall be granted without modification or delay.

(d) Construction with other laws

Except as specifically provided in this chapter, nothing in this chapter affects the rights of States under—

(1) the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.);

(2) the Clean Air Act (42 U.S.C. 7401 et seq.); or

(3) the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.).

(e) LNG terminals

(1) The Commission shall have the exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal. Except as specifically provided in this chapter, nothing in this chapter is intended to affect otherwise applicable law related to any Federal agency's authorities or responsibilities related to LNG terminals.

(2) Upon the filing of any application to site, construct, expand, or operate an LNG terminal, the Commission shall—

(A) set the matter for hearing;

(B) give reasonable notice of the hearing to all interested persons, including the State commission of the State in which the LNG terminal is located and, if not the same, the Governor-appointed State agency described in section 717b–1 of this title;

(C) decide the matter in accordance with this subsection; and

(D) issue or deny the appropriate order accordingly.

(3)(A) Except as provided in subparagraph (B), the Commission may approve an application described in paragraph (2), in whole or part, with such modifications and upon such terms and conditions as the Commission find[1] necessary or appropriate.

(B) Before January 1, 2015, the Commission shall not—

(i) deny an application solely on the basis that the applicant proposes to use the LNG terminal exclusively or partially for gas that the applicant or an affiliate of the applicant will supply to the facility; or

(ii) condition an order on—

(I) a requirement that the LNG terminal offer service to customers other than the applicant, or any affiliate of the applicant, securing the order;

(II) any regulation of the rates, charges, terms, or conditions of service of the LNG terminal; or

(III) a requirement to file with the Commission schedules or contracts related to the rates, charges, terms, or conditions of service of the LNG terminal.

(C) Subparagraph (B) shall cease to have effect on January 1, 2030.

(4) An order issued for an LNG terminal that also offers service to customers on an open access basis shall not result in subsidization of expansion capacity by existing customers, degradation of service to existing customers, or undue discrimination against existing customers as to their terms or conditions of service at the facility, as all of those terms are defined by the Commission.

(f) Military installations

(1) In this subsection, the term ''military installation''—

(A) means a base, camp, post, range, station, yard, center, or homeport facility for any ship or other activity under the jurisdiction of the Department of Defense, including any leased facility, that is located within a State, the District of Columbia, or any territory of the United States; and

(B) does not include any facility used primarily for civil works, rivers and harbors projects, or flood control projects, as determined by the Secretary of Defense.

(2) The Commission shall enter into a memorandum of understanding with the Secretary of Defense for the purpose of ensuring that the Commission coordinate and consult[2] with the Secretary of Defense on the siting, construction, expansion, or operation of liquefied natural gas facilities that may affect an active military installation.

(3) The Commission shall obtain the concurrence of the Secretary of Defense before authorizing the siting, construction, expansion, or operation of liquefied natural gas facilities affecting the training or activities of an active military installation.

(June 21, 1938, ch. 556, § 3, 52 Stat. 822; Pub. L. 102–486, title II, § 201, Oct. 24, 1992, 106 Stat. 2866; Pub. L. 109–58, title III, § 311(c), Aug. 8, 2005, 119 Stat. 685.)

[1] So in original. Probably should be ''finds''.

[2] So in original. Probably should be ''coordinates and consults''.

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

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

TRANSFER OF FUNCTIONS

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

§ 717g. Accounts; records; memoranda

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

Every natural-gas company shall make, keep, and preserve for such periods, such accounts, records of cost-accounting procedures, correspondence, memoranda, papers, books, and

(d) Jurisdiction of courts of United States

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

(e) Testimony of witnesses

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

(f) Deposition of witnesses in a foreign country

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

(g) Witness fees

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

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

AMENDMENTS

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

EFFECTIVE DATE OF 1970 AMENDMENT

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

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

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

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

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

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

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

(a) Definition

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

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

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

(b) Designation as lead agency

(1) In general

The Commission shall act as the lead agency for the purposes of coordinating all applicable Federal authorizations and for the purposes of

complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(2) Other agencies

Each Federal and State agency considering an aspect of an application for Federal authorization shall cooperate with the Commission and comply with the deadlines established by the Commission.

(c) Schedule

(1) Commission authority to set schedule

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

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

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

(2) Failure to meet schedule

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

(d) Consolidated record

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

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

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

(e) Hearings; parties

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

(f) Procedure

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

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

REFERENCES IN TEXT

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

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

AMENDMENTS

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

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

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

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

§ 717p. Joint boards

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

The Commission may refer any matter arising in the administration of this chapter to a board to be composed of a member or members, as determined by the Commission, from the State or

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U.S. GOVERNMENT
INFORMATION
GPO

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

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

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

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

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

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

[17 FR 7386, Aug. 14, 1952]

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

§157.7 Abbreviated applications.

(a) *General.* When the operations sales, service, construction, extensions, acquisitions or abandonment proposed by an application do not require all the data and information specified by this part to disclose fully the nature and extent of the proposed undertaking, an abbreviated application may be filed in the manner prescribed in §385.2011 of this chapter, provided it contains all information and supporting data necessary to explain fully the proposed project, its economic justification, its effect upon applicant's present and future operations and upon the public proposed to be served, and is otherwise in conformity with the applicable requirements of this part regarding form, manner of presentation, and filing. Such an application shall (1) state that it is an abbreviated application; (2) specify which of the data and information required by this part are omitted; and (3) relate the facts relied upon to justify separately each such omission.

[Order 280, 29 FR 4876, Apr. 7, 1964]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting §157.7, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.fdsys.gov*.

§157.8 Acceptance for filing or rejection of applications.

Applications will be docketed when received and the applicant so advised.

(a) If an application patently fails to comply with applicable statutory requirements or with applicable Commission rules, regulations, and orders for which a waiver has not been granted, the Director of the Office of Energy Projects or the Director of the Office of Energy Market Regulation may reject the application within 10 business days of filing as provided by §385.2001(b) of this chapter. This rejection is without prejudice to an applicant's refiling a complete application. However, an application will not be rejected solely on the basis of:

(1) Environmental reports that are incomplete because the company has not been granted access by the affected landowner(s) to perform required surveys; or,

(2) Environmental reports that are incomplete, but where the minimum checklist requirements of part 380, appendix A of this chapter have been met.

(b) An application which relates to an operation, sale, service, construction, extension, acquisition, or abandonment concerning which a prior application has been filed and rejected, shall be docketed as a new application. Such new application shall state the docket number of the prior rejected application.

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U.S. GOVERNMENT
INFORMATION
GPO

(c) The Director of the Office of Energy Projects or the Director of the Office of Energy Market Regulation may also reject an application after it has been noticed, at any time, if it is determined that such application does not conform to the requirements of this part.

[Order 603–A, 64 FR 54536, Oct. 7, 1999, as amended by Order 699, 72 FR 45325, Aug. 14, 2007; Order 701, 72 FR 61054, Oct. 29, 2007]

§ 157.9 Notice of application and notice of schedule for environmental review.

(a) Notice of each application filed, except when rejected in accordance with § 157.8, will be issued within 10 business days of filing, and subsequently will be published in the FEDERAL REGISTER and copies of such notice sent to States affected thereby, by electronic means if practical, otherwise by mail. Persons desiring to receive a copy of the notice of every application shall so advise the Secretary.

(b) For each application that will require an environmental assessment or an environmental impact statement, notice of a schedule for the environmental review will be issued within 90 days of the notice of the application, and subsequently will be published in the FEDERAL REGISTER.

[Order 653, 70 FR 8724, Feb. 23, 2005, as amended by Order 687, 71 FR 62920, Oct. 27, 2006]

§ 157.10 Interventions and protests.

(a) Notices of applications, as provided by § 157.9, will fix the time within which any person desiring to participate in the proceeding may file a petition to intervene, and within which any interested regulatory agency, as provided by § 385.214 of this chapter, desiring to intervene may file its notice of intervention.

(1) Any person filing a petition to intervene or notice of intervention shall state specifically whether he seeks formal hearing on the application.

(2) Any person may file to intervene on environmental grounds based on the draft environmental impact statement as stated at § 380.10(a)(1)(i) of this chapter. In accordance with that section, such intervention will be deemed timely as long as it is filed within the comment period for the draft environmental impact statement.

(3) Failure to make timely filing will constitute grounds for denial of participation in the absence of extraordinary circumstances or good cause shown.

(4) Protests may be filed in accordance with § 385.211 of this chapter within the time permitted by any person who does not seek to participate in the proceeding.

(b) A copy of each application, supplement and amendment thereto, including exhibits required by §§ 157.14, 157.16, and 157.18, shall upon request be promptly supplied by the applicant to anyone who has filed a petition for leave to intervene or given notice of intervention.

(1) An applicant is not required to serve voluminous or difficult to reproduce material, such as copies of certain environmental information, to all parties, as long as such material is publicly available in an accessible central location in each county throughout the project area.

(2) An applicant shall make a good faith effort to place the materials in a public location that provides maximum accessibility to the public.

(c) Complete copies of the application must be available in accessible central locations in each county throughout the project area, either in paper or electronic format, within three business days of the date a filing is issued a docket number. Within five business days of receiving a request for a complete copy from any party, the applicant must serve a full copy of any filing on the requesting party. Such copy may exclude voluminous or difficult to reproduce material that is publicly available. Pipelines must keep all voluminous material on file with the Commission and make such information available for inspection at buildings with public access preferably with evening and weekend business hours, such as libraries located in central locations in each county throughout the project area.

(d) *Critical Energy Infrastructure Information.* (1) If this section requires an applicant to reveal Critical Energy Infrastructure Information (CEII), as defined in § 388.113(c) of this chapter, to

the public, the applicant shall omit the CEII from the information made available and insert the following in its place:

(i) A statement that CEII is being withheld;

(ii) A brief description of the omitted information that does not reveal any CEII; and

(iii) This statement: ''Procedures for obtaining access to Critical Energy Infrastructure Information (CEII) may be found at 18 CFR 388.113. Requests for access to CEII should be made to the Commission's CEII Coordinator.''

(2) The applicant, in determining whether information constitutes CEII, shall treat the information in a manner consistent with any filings that applicant has made with the Commission and shall to the extent practicable adhere to any previous determinations by the Commission or the CEII Coordinator involving the same or like information.

(3) The procedures contained in §§ 388.112 and 388.113 of this chapter regarding designation of, and access to, CEII, shall apply in the event of a challenge to a CEII designation or a request for access to CEII. If it is determined that information is not CEII or that a requester should be granted access to CEII, the applicant will be directed to make the information available to the requester.

(4) Nothing in this section shall be construed to prohibit any persons from voluntarily reaching arrangements or agreements calling for the disclosure of CEII.

[Order 603–A, 64 FR 54536, Oct. 7, 1999, as amended by Order 643, 68 FR 52095, Sept. 2, 2003]

§ 157.11 Hearings.

(a) *General.* The Commission will schedule each application for public hearing at the earliest date possible giving due consideration to statutory requirements and other matters pending, with notice thereof as provided by § 1.19(b) of this chapter: *Provided, however,* That when an application is filed less than fifteen days prior to the commencement of a hearing theretofore ordered on a pending application and seeks authority to serve some or all of the markets sought in such pending application or is otherwise competitive with such pending application, the Commission will not schedule the new application for hearing until it has rendered its final decision on such pending application, except when, on its own motion, or on appropriate application, it finds that the public interest requires otherwise.

(b) *Shortened procedure.* If no protest or petition to intervene raises an issue of substance, the Commission may upon request of the applicant dispose of an application in accordance with the provisions of § 385.802 of this chapter.

[17 FR 7386, Aug. 14, 1952, as amended by Order 225, 47 FR 19057, May 3, 1982]

§ 157.12 Dismissal of application.

Except for good cause shown, failure of an applicant to go forward on the date set for hearing and present its full case in support of its application will constitute ground for the summary dismissal of the application and the termination of the proceedings.

[17 FR 7386, Aug. 14, 1952]

§ 157.13 Form of exhibits to be attached to applications.

Each exhibit attached to an application must conform to the following requirements:

(a) *General requirements.* Each exhibit must be submitted in the manner prescribed in §§ 157.6(a) and 385.2011 of this chapter and contain a title page showing applicant's name, docket number (to be left blank), title of the exhibit, the proper letter designation of the exhibit, and, if of 10 or more pages, a table of contents, citing by page, section number or subdivision, the component elements or matters therein contained.

(b) *Reference to annual reports and previous applications.* An application may refer to annual reports and previous applications filed with the Commission and shall specify the exact pages or exhibit numbers of the filing to which reference is made, including the page numbers in any exhibit to which reference is made. When reference is made to a previous application the docket number shall be stated. No part of a rejected application may be incorporated by reference.

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substantial subject-matter interest therein.

[Order 488, 53 FR 1473, Jan. 20, 1988, as amended by Order 597, 63 FR 5455, Feb. 3, 1998]

§ 388.111 Procedures in event of subpoena.

(a)(1) The procedures specified in this section will apply to all subpoenas directed to Commission employees that relate in any way to the employees' official duties. These procedures will also apply to subpoenas directed to former Commission employees if the subpoenas seek nonpublic materials or information acquired during Commission employment. The provisions of paragraph (c) of this section will also apply to subpoenas directed to the Commission.

(2) For purposes of this section,

(i) *Employees*, except where otherwise specified, includes ''special government employees'' and other Commission employees; and

(ii) *Nonpublic* includes any material or information which is exempt from availability for public inspection and copying;

(iii) *Special government employees* includes consultants and other employees as defined by section 202 of Title 18 of the United States Code.

(iv) *Subpoena* means any compulsory process in a case or matter, including a case or matter to which the Commission is not a party;

(b) Any employee who is served with a subpoena must promptly advise the General Counsel of the Commission of the service of the subpoena, the nature of the documents or information sought, and all relevant facts and circumstances. Any former employee who is served with a subpoena that concerns nonpublic information shall promptly advise the General Counsel of the Commission of the service of the subpoena, the nature of the documents or information sought, and all relevant facts and circumstances.

(c) A party causing a subpoena to be issued to the Commission or any employee or former employee of the Commission must furnish a statement to the General Counsel of the Commission. This statement must set forth the party's interest in the case or matter, the relevance of the desired testimony or documents, and a discussion of whether the desired testimony or documents are reasonably available from other sources. If testimony is desired, the statement must also contain a general summary of the testimony and a discussion of whether Commission records could be produced and used in lieu of testimony. Any authorization for testimony will be limited to the scope of the demand as summarized in such statement.

(d) Commission records or information which are not part of the public record will be produced only upon authorization by the Commission.

(e) The Commission or its designee will consider and act upon subpoenas under this section with due regard for statutory restrictions, the Commission's Rules of Practice and Procedure, and the public interest, taking into account factors such as applicable privileges including the deliberative process privilege; the need to conserve the time of employees for conducting official business; the need to avoid spending the time and money of the United States for private purposes; the need to maintain impartiality between private litigants in cases where a substantial government interest is not involved; and the established legal standards for determining whether justification exists for the disclosure of confidential information and records.

(f) The Commission authorizes the General Counsel or the General Counsel's designee to make determinations under this section.

§ 388.112 Requests for privileged treatment and Critical Energy Infrastructure Information (CEII) treatment for documents submitted to the Commission.

(a) *Scope.* (1) By following the procedures specified in this section, any person submitting a document to the Commission may request privileged treatment for some or all of the information contained in a particular document that it claims is exempt from the mandatory public disclosure requirements of the Freedom of Information Act, 5 U.S.C. 552 (FOIA), and should be withheld from public disclosure. For the purposes of the Commission's filing requirements, information subject to

an outstanding claim of exemption from disclosure under FOIA, including critical energy infrastructure information (CEII), will be referred to as privileged material.

(2) Any person submitting documents containing CEII as defined in § 388.113, or seeking access to such information should follow the procedures in this chapter.

(b) *Procedures for filing and obtaining privileged or CEII material.* (1) General Procedures. A person requesting that material be treated as privileged information or CEII must include in its filing a justification for such treatment in accordance with the filing procedures posted on the Commission's Web site at *http://www.ferc.gov*. A person requesting that a document filed with the Commission be treated as privileged or CEII must designate the document as privileged or CEII in making an electronic filing or clearly indicate a request for such treatment on a paper filing. The cover page and pages or portions of the document containing material for which privileged treatment is claimed should be clearly labeled in bold, capital lettering, indicating that it contains privileged, confidential and/or Critical Energy Infrastructure Information, as appropriate, and marked ''DO NOT RELEASE.'' The filer also must submit to the Commission a public version with the information that is claimed to be privileged material redacted, to the extent practicable.

(2) Procedures for Proceedings with a Right to Intervene. The following procedures set forth the methods for filing and obtaining access to material that is filed as privileged in complaint proceedings and in any proceeding to which a right to intervention exists:

(i) If a person files material as privileged material or CEII in a complaint proceeding or other proceeding to which a right to intervention exists, that person must include a proposed form of protective agreement with the filing, or identify a protective agreement that has already been filed in the proceeding that applies to the filed material. This requirement does not apply to material submitted in hearing or settlement proceedings, or if the only material for which privileged treatment is claimed consists of landowner lists or privileged information filed under §§ 380.12(f), (m), (o) and 380.16(f) of this chapter.

(ii) The filer must provide the public version of the document and its proposed form of protective agreement to each entity that is required to be served with the filing.

(iii) Any person who is a participant in the proceeding or has filed a motion to intervene or notice of intervention in the proceeding may make a written request to the filer for a copy of the complete, non-public version of the document. The request must include an executed copy of the protective agreement and a statement of the person's right to party or participant status or a copy of their motion to intervene or notice of intervention. Any person may file an objection to the proposed form of protective agreement. A filer, or any other person, may file an objection to disclosure, generally or to a particular person or persons who have sought intervention.

(iv) If no objection to disclosure is filed, the filer must provide a copy of the complete, non-public document to the requesting person within 5 days after receipt of the written request that is accompanied by an executed copy of the protective agreement. If an objection to disclosure is filed, the filer shall not provide the non-public document to the person or class of persons identified in the objection until ordered by the Commission or a decisional authority.

(v) For material filed in proceedings set for trial-type hearing or settlement judge proceedings, a participant's access to material for which privileged treatment is claimed is governed by the presiding official's protective order.

(vi) For landowner lists, information filed as privileged under §§ 380.12(f), (m), (o) and 380.16(f), forms filed with the Commission, and other documents not covered above, access to this material can be sought pursuant to a FOIA request under § 388.108 or a CEII request under § 388.113 of this chapter. Applicants are not required under paragraph (b)(2)(iv) of this section to provide intervenors with landowner lists and the other materials identified in the previous sentence.

(c) *Effect of privilege or CEII claim.* (1) For documents filed with the Commission:

(i) The documents for which privileged or CEII treatment is claimed will be maintained in the Commission's document repositories as non-public until such time as the Commission may determine that the document is not entitled to the treatment sought and is subject to disclosure consistent with §§ 388.108 or 388.113 of this chapter. By treating the documents as non-public, the Commission is not making a determination on any claim of privilege or CEII status. The Commission retains the right to make determinations with regard to any claim of privilege or CEII status, and the discretion to release information as necessary to carry out its jurisdictional responsibilities.

(ii) The request for privileged or CEII treatment and the public version of the document will be made available while the request is pending.

(2) For documents submitted to Commission staff. The notification procedures of paragraphs (d), (e), and (f) of this section will be followed before making a document public.

(d) *Notification of request and opportunity to comment.* When a FOIA or CEII requester seeks a document for which privilege or CEII status has been claimed, or when the Commission itself is considering release of such information, the Commission official who will decide whether to release the information or any other appropriate Commission official will notify the person who submitted the document and give the person an opportunity (at least five calendar days) in which to comment in writing on the request. A copy of this notice will be sent to the requester.

(e) *Notification before release.* Notice of a decision by the Commission, the Chairman of the Commission, the Director, Office of External Affairs, the General Counsel or General Counsel's designee, a presiding officer in a proceeding under part 385 of this chapter, or any other appropriate official to deny a claim of privilege, in whole or in part, or to make a limited release of CEII, will be given to any person claiming that the information is privileged or CEII no less than 5 calendar days before disclosure. The notice will briefly explain why the person's objections to disclosure are not sustained by the Commission. A copy of this notice will be sent to the FOIA or CEII requester.

(f) Notification of suit in Federal courts. When a FOIA requester brings suit to compel disclosure of information for which a person has claimed privileged treatment, the Commission will notify the person who submitted the documents of the suit.

[Order 769, 77 FR 65476, Oct. 29, 2012]

§ 388.113 Accessing critical energy infrastructure information.

(a) *Scope.* This section governs access to critical energy infrastructure information (CEII). The rules governing submission of CEII are contained in 18 CFR 388.112(b). The Commission reserves the right to restrict access to previously filed documents as well as Commission-generated documents containing CEII.

(b) *Purpose.* The procedures in this section are available at the requester's option as an alternative to the FOIA procedures in § 388.108 where the information requested is exempted from disclosure under the FOIA and contains CEII.

(c) *Definitions.* For purposes of this section:

(1) *Critical energy infrastructure* information means specific engineering, vulnerability, or detailed design information about proposed or existing critical infrastructure that:

(i) Relates details about the production, generation, transportation, transmission, or distribution of energy;

(ii) Could be useful to a person in planning an attack on critical infrastructure;

(iii) Is exempt from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552; and

(iv) Does not simply give the general location of the critical infrastructure.

(2) *Critical infrastructure* means existing and proposed systems and assets, whether physical or virtual, the incapacity or destruction of which would negatively affect security, economic security, public health or safety, or any combination of those matters.

(d) *Accessing critical energy infrastructure information.* (1) An Owner/operator

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INFORMATION
GPO

(c) *Effect of privilege or CEII claim.* (1) For documents filed with the Commission:

(i) The documents for which privileged or CEII treatment is claimed will be maintained in the Commission's document repositories as non-public until such time as the Commission may determine that the document is not entitled to the treatment sought and is subject to disclosure consistent with §§ 388.108 or 388.113 of this chapter. By treating the documents as non-public, the Commission is not making a determination on any claim of privilege or CEII status. The Commission retains the right to make determinations with regard to any claim of privilege or CEII status, and the discretion to release information as necessary to carry out its jurisdictional responsibilities.

(ii) The request for privileged or CEII treatment and the public version of the document will be made available while the request is pending.

(2) For documents submitted to Commission staff. The notification procedures of paragraphs (d), (e), and (f) of this section will be followed before making a document public.

(d) *Notification of request and opportunity to comment.* When a FOIA or CEII requester seeks a document for which privilege or CEII status has been claimed, or when the Commission itself is considering release of such information, the Commission official who will decide whether to release the information or any other appropriate Commission official will notify the person who submitted the document and give the person an opportunity (at least five calendar days) in which to comment in writing on the request. A copy of this notice will be sent to the requester.

(e) *Notification before release.* Notice of a decision by the Commission, the Chairman of the Commission, the Director, Office of External Affairs, the General Counsel or General Counsel's designee, a presiding officer in a proceeding under part 385 of this chapter, or any other appropriate official to deny a claim of privilege, in whole or in part, or to make a limited release of CEII, will be given to any person claiming that the information is privileged or CEII no less than 5 calendar days before disclosure. The notice will briefly explain why the person's objections to disclosure are not sustained by the Commission. A copy of this notice will be sent to the FOIA or CEII requester.

(f) Notification of suit in Federal courts. When a FOIA requester brings suit to compel disclosure of information for which a person has claimed privileged treatment, the Commission will notify the person who submitted the documents of the suit.

[Order 769, 77 FR 65476, Oct. 29, 2012]

§ 388.113 Accessing critical energy infrastructure information.

(a) *Scope.* This section governs access to critical energy infrastructure information (CEII). The rules governing submission of CEII are contained in 18 CFR 388.112(b). The Commission reserves the right to restrict access to previously filed documents as well as Commission-generated documents containing CEII.

(b) *Purpose.* The procedures in this section are available at the requester's option as an alternative to the FOIA procedures in § 388.108 where the information requested is exempted from disclosure under the FOIA and contains CEII.

(c) *Definitions.* For purposes of this section:

(1) *Critical energy infrastructure* information means specific engineering, vulnerability, or detailed design information about proposed or existing critical infrastructure that:

(i) Relates details about the production, generation, transportation, transmission, or distribution of energy;

(ii) Could be useful to a person in planning an attack on critical infrastructure;

(iii) Is exempt from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552; and

(iv) Does not simply give the general location of the critical infrastructure.

(2) *Critical infrastructure* means existing and proposed systems and assets, whether physical or virtual, the incapacity or destruction of which would negatively affect security, economic security, public health or safety, or any combination of those matters.

(d) *Accessing critical energy infrastructure information.* (1) An Owner/operator

of a facility, including employees and officers of the owner/operator, may obtain CEII relating to its own facility directly from Commission staff without going through the procedures outlined in paragraph (d)(4) of this section. Non-employee agents of an owner/operator of such facility may obtain CEII relating to the owner/operator's facility in the same manner as owner/operators as long as they present written authorization from the owner/operator to obtain such information.

(2) An employee of a federal agency acting within the scope of his or her federal employment may obtain CEII directly from Commission staff without following the procedures outlined in paragraph (d)(4) of this section. Any Commission employee at or above the level of division director or its equivalent may rule on federal agency representatives' requests for access to CEII.

(3) A landowner whose property is crossed by or in the vicinity of a project may receive detailed alignment sheets containing CEII directly from Commission staff without submitting a non-disclosure agreement as outlined in paragraph (d)(4) of this section. A landowner must provide Commission staff with proof of his or her property interest in the vicinity of a project.

(4) If any other requester has a particular need for information designated as CEII, the requester may request the information using the following procedures:

(i) File a signed, written request with the Commission's CEII Coordinator. The request must contain the following: Requester's name (including any other name(s) which the requester has used and the dates the requester used such name(s)), title, address, and telephone number; the name, address, and telephone number of the person or entity on whose behalf the information is requested; a detailed statement explaining the particular need for and intended use of the information; and a statement as to the requester's willingness to adhere to limitations on the use and disclosure of the information requested. A requester shall provide his or her date and place of birth upon request, if it is determined by the CEII Coordinator that this information is necessary to process the request. Unless otherwise provided in Section 113(d)(3), a requester must also file an executed non-disclosure agreement.

(ii) A requester who seeks the information on behalf of all employees of an organization should clearly state that the information is sought for the organization, that the requester is authorized to seek the information on behalf of the organization, and that all the requesters agree to be bound by a non-disclosure agreement that must be executed by and will be applied to all individuals who have access to the CEII.

(iii) After the request is received, the CEII Coordinator will determine if the information is CEII, and, if it is, whether to release the CEII to the requester. The CEII Coordinator will balance the requester's need for the information against the sensitivity of the information. If the requester is determined to be eligible to receive the information requested, the CEII Coordinator will determine what conditions, if any, to place on release of the information.

(iv) If the CEII Coordinator determines that the CEII requester has not demonstrated a valid or legitimate need for the CEII or that access to the CEII should be denied for other reasons, this determination may be appealed to the General Counsel pursuant to § 388.110 of this Chapter. The General Counsel will decide whether the information is properly classified as CEII, which by definition is exempt from release under FOIA, and whether the Commission should in its discretion make such CEII available to the CEII requester in view of the requester's asserted legitimacy and need.

(v) Once a CEII requester has been verified by Commission staff as a legitimate requester who does not pose a security risk, his or her verification will be valid for the remainder of that calendar year. Such a requester is not required to provide detailed information about him or herself with subsequent requests during the calendar year. He or she is also not required to file a non-disclosure agreement with subsequent requests during the calendar year because the original non-disclosure agreement will apply to all subsequent releases of CEII.

(vi) If an organization is granted access to CEII as provided by paragraph (d)(4)(iii) of this section, and later seeks to add additional individuals to the non-disclosure agreement, the names of these individuals must be sent to the CEII Coordinator with certification that notice has been given to the submitter. Any newly added individuals must execute a supplement to the original non-disclosure agreement indicating their acceptance of its terms. If there is no written opposition within five (5) days of notifying the CEII Coordinator and the submitter concerning the addition of any newly-named individuals, the CEII Coordinator will issue a standard notice accepting the addition of names to the non-disclosure agreement. If the submitter files a timely opposition with the CEII Coordinator, the CEII Coordinator will issue a formal determination addressing the merits of such opposition.

(e) Fees for processing CEII requests will be determined in accordance with 18 CFR 388.109.

[Order 630, 68 FR 9870, Mar. 3, 2003, as amended by Order 630–A, 68 FR 46460, Aug. 6, 2003; Order 649, 69 FR 48391, Aug. 10, 2004; Order 662, 70 FR 37036, June 28, 2005; 71 FR 58276, Oct. 3, 2006; 72 FR 63985, Nov. 14, 2007; Order 769, 77 FR 65477, Oct. 29, 2012]

PART 389—OMB CONTROL NUMBERS FOR COMMISSION INFORMATION COLLECTION REQUIREMENTS

AUTHORITY: 44 U.S.C. 3501–3520.

§ 389.101 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

(a) *Purpose.* This part collects and displays control numbers assigned to information collection requirements of the Commission by the Office of Management and Budget (OMB) pursuant to the Paperwork Reduction Act of 1980. This part fulfills the requirements of section 3507(f) of the Paperwork Reduction Act, which requires that agencies display a current control number assigned by the Director of OMB for each agency information collection requirement.

(b) *Display.*

18 CFR part or section where the information collection requirement is located	Current OMB control number (all numbers begin with 1902–)
2.19	0058, 0015
2.55	0161
2.56a	0055
2.69	0060
2.75	0052
2.76	0051, 0052, 0055
2.77	0051, 0052, 0055
2.78	0066
2.79	0060
2.80	0128
Part 4 Subpart D	0073
Part 4 Subpart E	0058
Part 4 Subpart F	0058
Part 4 Subpart G	0115
Part 4 Subpart H	0115
Part 4 Subpart J	0115
Part 4 Subpart L	0058
Part 4 Subpart L	0115
Part 4 Subpart M	0136
4.30	0073
4.31	0073
4.32	0058, 0073, 0115, 0136
4.33	0073
4.34	0073
4.80	0073
4.81	0073
4.82	0073
Part 6	0068
Part 9	0069
11.3(c)	0136
11.3(d)	0136
11.4(b)	0136
11.16	0087
16.1	0058, 0115
16.14	0058, 0115
16.15	0058, 0115
16.16	0058, 0115
24.1	0079
Part 33	0082
Part 34	0043
Part 35 Subpart A	0096
35.12	0096
35.13	0096
35.26	0096
35.27	0096
35.30	0096
Part 45	0083
46.3	0114
46.6	0099
Part 101	0021, 0029
Part 116	0021
Part 125	0098
141.1	0021
141.2	0029
141.14	0106
141.51	0140
141.61	0024
Part 152	0116
Part 153	0062
Part 154	0052
154.38	0070
154.52	0070
154.61	0070
154.62	0070
154.63	0070
154.64	0070
154.65	0070
154.66	0070
154.67	0070
154.91	0055

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(a) Integrating the NEPA process into early planning (§ 1501.2).

(b) Emphasizing interagency cooperation before the environmental impact statement is prepared, rather than submission of adversary comments on a completed document (§ 1501.6).

(c) Insuring the swift and fair resolution of lead agency disputes (§ 1501.5).

(d) Using the scoping process for an early identification of what are and what are not the real issues (§ 1501.7).

(e) Establishing appropriate time limits for the environmental impact statement process (§§ 1501.7(b)(2) and 1501.8).

(f) Preparing environmental impact statements early in the process (§ 1502.5).

(g) Integrating NEPA requirements with other environmental review and consultation requirements (§ 1502.25).

(h) Eliminating duplication with State and local procedures by providing for joint preparation (§ 1506.2) and with other Federal procedures by providing that an agency may adopt appropriate environmental documents prepared by another agency (§ 1506.3).

(i) Combining environmental documents with other documents (§ 1506.4).

(j) Using accelerated procedures for proposals for legislation (§ 1506.8).

(k) Using categorical exclusions to define categories of actions which do not individually or cumulatively have a significant effect on the human environment (§ 1508.4) and which are therefore exempt from requirements to prepare an environmental impact statement.

(l) Using a finding of no significant impact when an action not otherwise excluded will not have a significant effect on the human environment (§ 1508.13) and is therefore exempt from requirements to prepare an environmental impact statement.

§ 1500.6 Agency authority.

Each agency shall interpret the provisions of the Act as a supplement to its existing authority and as a mandate to view traditional policies and missions in the light of the Act's national environmental objectives. Agencies shall review their policies, procedures, and regulations accordingly and revise them as necessary to insure full compliance with the purposes and provisions of the Act. The phrase ''to the fullest extent possible'' in section 102 means that each agency of the Federal Government shall comply with that section unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible.

PART 1501—NEPA AND AGENCY PLANNING

Sec.

1501.1 Purpose.
1501.2 Apply NEPA early in the process.
1501.3 When to prepare an environmental assessment.
1501.4 Whether to prepare an environmental impact statement.
1501.5 Lead agencies.
1501.6 Cooperating agencies.
1501.7 Scoping.
1501.8 Time limits.

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

SOURCE: 43 FR 55992, Nov. 29, 1978, unless otherwise noted.

§ 1501.1 Purpose.

The purposes of this part include:

(a) Integrating the NEPA process into early planning to insure appropriate consideration of NEPA's policies and to eliminate delay.

(b) Emphasizing cooperative consultation among agencies before the environmental impact statement is prepared rather than submission of adversary comments on a completed document.

(c) Providing for the swift and fair resolution of lead agency disputes.

(d) Identifying at an early stage the significant environmental issues deserving of study and deemphasizing insignificant issues, narrowing the scope of the environmental impact statement accordingly.

(e) Providing a mechanism for putting appropriate time limits on the environmental impact statement process.

§ 1501.2 Apply NEPA early in the process.

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

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

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

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

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

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

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

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

§ 1501.3 When to prepare an environmental assessment.

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

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

§ 1501.4 Whether to prepare an environmental impact statement.

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

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

(1) Normally requires an environmental impact statement, or

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

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

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

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

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

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

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

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

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

§ 1501.5 Lead agencies.

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

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

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

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

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

(1) Magnitude of agency's involvement.

(2) Project approval/disapproval authority.

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

(4) Duration of agency's involvement.

(5) Sequence of agency's involvement.

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

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

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

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

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

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

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

§ 1501.6 Cooperating agencies.

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

(a) The lead agency shall:

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

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

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

(b) Each cooperating agency shall:

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

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

§ 1501.8 Time limits.

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

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

(b) The agency may:

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

(i) Potential for environmental harm.

(ii) Size of the proposed action.

(iii) State of the art of analytic techniques.

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

(v) Number of persons and agencies affected.

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

(vii) Degree to which the action is controversial.

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

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

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

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

(iii) Preparation of the draft environmental impact statement.

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

(v) Preparation of the final environmental impact statement.

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

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

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

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

PART 1502—ENVIRONMENTAL IMPACT STATEMENT

Sec.

1502.1 Purpose.
1502.2 Implementation.
1502.3 Statutory requirements for statements.
1502.4 Major Federal actions requiring the preparation of environmental impact statements.
1502.5 Timing.
1502.6 Interdisciplinary preparation.
1502.7 Page limits.
1502.8 Writing.
1502.9 Draft, final, and supplemental statements.
1502.10 Recommended format.
1502.11 Cover sheet.
1502.12 Summary.
1502.13 Purpose and need.
1502.14 Alternatives including the proposed action.
1502.15 Affected environment.
1502.16 Environmental consequences.
1502.17 List of preparers.
1502.18 Appendix.
1502.19 Circulation of the environmental impact statement.
1502.20 Tiering.
1502.21 Incorporation by reference.
1502.22 Incomplete or unavailable information.
1502.23 Cost-benefit analysis.
1502.24 Methodology and scientific accuracy.
1502.25 Environmental review and consultation requirements.

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

SOURCE: 43 FR 55994, Nov. 29, 1978, unless otherwise noted.

§ 1502.1 Purpose.

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

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

§ 1502.13 Purpose and need.

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

§ 1502.14 Alternatives including the proposed action.

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

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

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

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

(d) Include the alternative of no action.

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

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

§ 1502.15 Affected environment.

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

§ 1502.16 Environmental consequences.

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

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

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

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

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

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

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

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§ 1508.6 Council.

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

§ 1508.7 Cumulative impact.

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

§ 1508.8 Effects.

Effects include:

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

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

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

§ 1508.9 Environmental assessment.

Environmental assessment:

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

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

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

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

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

§ 1508.10 Environmental document.

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

§ 1508.11 Environmental impact statement.

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

§ 1508.12 Federal agency.

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

§ 1508.13 Finding of no significant impact.

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

Myersville Citizens for a Rural Community, Inc., et al. v. FERC **Docket No. CP12-72-000**
D.C. Cir. No. 13-1219

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P.25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 6th day of March 2014, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system as indicated below:

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