ORAL ARGUMENT HAS NOT BEEN SCHEDULED

No. 18-1188

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Otsego 2000, Inc., et al.,

Petitioners,

v.

Federal Energy Regulatory Commission,

Respondent,

Dominion Energy Transmission, Inc.,

Intervenor.

BRIEF OF *AMICI CURIAE* AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS, AMERICAN PETROLEUM INSTITUTE, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND NATIONAL ASSOCIATION OF MANUFACTURERS, IN SUPPORT OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION AND DENIAL OF PETITION FOR REVIEW

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and *Amici*:

All parties, intervenors, and *amici* appearing in this case are listed in Respondent's Brief, including *amici* listed above.

Rulings Under Review:

References to the rulings at issue appear in Respondent's Brief.

Related Cases:

References to related cases appear in Respondent's Brief.

CERTIFICATE OF COUNSEL PURSUANT TO CIRCUIT RULE 29(d)

Counsel for *amici curiae* American Fuel & Petrochemical Manufacturers, the Chamber of Commerce of the United States of America, the National Association of Manufacturers, and the American Petroleum Institute hereby certifies, pursuant to D.C. Circuit Rule 29(d), that it is not practicable to file a joint *amicus curiae* brief with other potential *amici* in support of Respondent and that it is therefore necessary to file a separate brief.

Counsel for these *amici* reached out to other trade associations representing industries that rely upon the efficient supply of natural gas and that may have been interested in participating as *amici* in this case. This effort resulted in the present coalition, which reduced the possibility of multiple *amicus curiae* filings in this case. Counsel understands that another trade association may file a separate *amicus curiae* brief that addresses different issues and different aspects of common issues from that association's distinct perspective. As such, Counsel believes *amici* have consolidated views and reduced the number of *amicus curiae* briefs to the extent practicable. For these reasons, it is necessary for this coalition to file a separate *amicus curiae* brief.

/s/ Megan H. Berge
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CORPORATE DISCLOSURE STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, undersigned counsel provides the following disclosures:

1. American Fuel & Petrochemical Manufacturers (AFPM) is a national trade association whose members comprise virtually all U.S. refining and petrochemical manufacturing capacity. AFPM has no parent companies, and no publicly held company has a 10% or greater ownership interest in AFPM. AFPM is a "trade association" within the meaning of Circuit Rule 26.1.
2. The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. The Chamber represents the interests of 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber is a "trade association" as defined by Circuit Rule 26.1. It does not have a parent company and has not issued shares or debt securities to the public. No publicly held company has a 10% or greater ownership interest in the Chamber.
3. The National Association of Manufacturers (NAM) is a nonprofit trade association representing small and large manufacturers in every industrial sector and in all 50 States. The NAM is the preeminent U.S. manufacturers' as-

sociation as well as the nation's largest industrial trade association. The NAM is a "trade association" as defined by Circuit Rule 26.1. The NAM has no parent corporation, and no publicly held company has 10% or greater ownership in the NAM.

4. American Petroleum Institute (API), founded in 1919, is a national trade association that represents all aspects of America's oil and natural gas industry. API's members include oil producers, refiners, suppliers, marketers, pipeline operators and marine transporters, as well as supporting service and supply companies. API is a "trade association" as defined by Circuit Rule 26.1. API's mission is to promote safety across the industry globally and to support a strong U.S. oil and natural gas industry. API has no parent corporation, and no publicly held company has 10% or greater ownership in API.

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IDENTITY AND INTEREST OF *AMICI CURIAE*

The American Fuel & Petrochemical Manufacturers (AFPM) is a national trade association whose members comprise virtually all United States refining and petrochemical manufacturing capacity. AFPM's members supply consumers with a wide variety of products that are used daily in homes and businesses. AFPM members help meet the fuel and petrochemical needs of the nation, strengthen economic and national security, and support nearly three million American jobs.

The Chamber of Commerce of the United States of America (Chamber) is the world's largest federation of businesses and associations. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million U.S. companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.[1]

[1] Because the underlying record of this case involves the evaluation of greenhouse gases, the Chamber wishes to note that it believes the global climate is changing, and that human activities contribute to those changes. Global climate change poses a serious long-term challenge that deserves serious solutions. Businesses, through technology, innovation, and ingenuity will offer the best options for reducing greenhouse gas emissions and mitigating the impacts of climate change and there-

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all fifty states. Manufacturing employs more than twelve million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The American Petroleum Institute (API), founded in 1919, is a national trade association that represents all aspects of America's oil and natural gas industry. API's members include oil producers, refiners, suppliers, marketers, pipeline operators and marine transporters, as well as supporting service and supply companies. API's mission is to promote safety across the industry globally and to support a strong U.S. oil and natural gas industry.

Amici have a substantial interest in this case. Their members include companies that regularly invest in capital-intensive projects that depend on federal authorizations requiring review under the National Environmental Policy Act (NEPA). *Amici*'s members also use natural gas in the course of business (e.g., for manufac-

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fore must be a part of any productive conversation on how to address global climate change.

turing, processing, and heating) and rely upon the interstate natural gas pipeline system regulated by the Federal Energy Regulatory Commission (FERC or Commission) to reliably serve their needs. The NEPA process for permitting new pipeline projects and other infrastructure and the associated litigation is costly and time-consuming. *Amici*'s members therefore rely on agencies to lawfully and efficiently complete NEPA reviews without unduly broadening the scope of analysis beyond that required by the statute. An unfavorable ruling in this case, where FERC has properly applied NEPA regulations to conclude that upstream and downstream greenhouse gas emissions are not indirect effects, would create negative precedent that could have broader effects on *amici*'s members. Accordingly, *amici* respectfully submit this *amicus curiae* brief.[2]

SUMMARY OF ARGUMENT

Under NEPA and this Court's precedent, FERC evaluates natural gas infrastructure projects on a case-by-case basis to consider the environmental impacts and alternatives. This evaluation includes reasonably foreseeable indirect effects of a project only where they are proximately caused by the project under review.

[2] In accordance with Federal Rule of Appellate Procedure 29(a)(4)(E), *amici curiae* affirm that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person, other than *amici curiae*, their members, and their counsel, contributed money that was intended to fund the preparation or submission of this brief. All parties consented to the filing of this *amicus curiae* brief.

FERC need not consider an environmental effect where it "has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions." *Dep't of Trans. v. Public Citizen*, 541 U.S. 752, 767-770 (2004). But Petitioners argue FERC always must conclude that emissions from "upstream and downstream" activities that are wholly independent from the project at issue are "indirect effects" that must be included in the NEPA analysis. That kind of absolute rule is contrary to law and would mire FERC and countless projects into needless, speculative analyses. Instead of accepting Petitioners' invitation to rewrite the law, this Court should continue to allow FERC to exercise its expertise in determining the effects of a project it is charged with approving.

In this case, FERC properly determined that greenhouse gas emissions from upstream and downstream activities were not indirect effects of FERC's approval of the midstream infrastructure project before it: the construction and modification of compressor stations for the New Market Project.[3] FERC reasonably determined that, due to the limited nature and scope of the project, the Commission lacked any logical basis to conclude that approving the project would cause reasonably fore-

[3] Generally, upstream activities refer to natural gas production and downstream activities refer to end-use of natural gas. Midstream infrastructure projects approved by FERC transport natural gas on the interstate pipeline network. Notably, FERC regulates only interstate transportation. There are state-regulated pipelines on the upstream end that connect production to the interstate network (e.g., gathering pipelines) and on the downstream end that connect the interstate network to pipelines that deliver the gas to end users (e.g., utility distribution systems connected to homes and businesses).

seeable upstream or downstream greenhouse gas emissions. Applying this Court's precedent, FERC correctly concluded that the emissions Petitioners hypothesized are not "indirect effects" under NEPA.

ARGUMENT

This lawsuit is one of a series meant to stop construction of infrastructure needed to serve the requirements of shippers of natural gas for additional space and routes on the interstate pipeline system. The thrust of Petitioners' argument would transform NEPA to impose obligations far beyond applicable statutory and regulatory texts and the judicial precedent interpreting them. NEPA charges agencies with determining indirect effects on a case-by-case basis. It does not presuppose or require an agency to assume all possible upstream and downstream greenhouse gas emissions are necessarily indirect effects of infrastructure enhancements. Here, FERC rationally explained why, based on the record before it, potential upstream and downstream greenhouse gas emissions are not indirect effects of the proposed project, particularly given its limited scope.[4] The record supports that reasoned determination, and there is no basis to overturn it.

[4] *See generally Dominion Transmission, Inc.*, 155 FERC ¶ 61,106 (2016) ("NMP Certificate Order"), JA __-__, *aff'd on reh'g*, 163 FERC ¶ 61,128 (2018) ("NMP Rehearing Order"), JA __-__.

I. FERC's authorization of the New Market Project complied with NEPA and was not arbitrary or capricious.

FERC's determination that upstream and downstream greenhouse gas emissions are not indirect effects of the New Market Project falls well within the Commission's broad discretion and comports with NEPA's requirements. In reviewing NEPA determinations, courts take a "limited" and "deferential" approach and do not "flyspeck" but ensure that the agency "has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious." *Sierra Club v. FERC*, 867 F.3d 1357, 1367-68 (D.C. Cir. 2017) (internal quotation marks and citation omitted) (referred to herein as *Sabal Trail*); *Sierra Club v. U.S. D.O.E.*, 867 F.3d 189, 201 (D.C. Cir. 2017). "The overarching question" is whether there is a deficiency in the NEPA analysis that is "significant enough to undermine informed public comment and informed decisionmaking." *Sabal Trail*, 867 F.3d at 1368; *see also Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989) ("NEPA merely prohibits uninformed—rather than unwise—agency action."). As explained below, FERC's indirect effects determinations were rational and fully comply with NEPA.

A. Maintaining FERC's discretion in the NEPA context is consistent with governing case law and practical realities.

Indirect effects must be both "caused by the action" and "reasonably foreseeable." 40 C.F.R. § 1508.8(b); *Pub. Citizen*, 541 U.S. at 770. "[A] 'but for'

causal relationship is insufficient to make an agency responsible for a particular effect." *Id*. at 767. Instead, causation under NEPA is analogous to "proximate cause from tort law" and "requires a reasonably close relationship between the environmental effect and the alleged cause" (i.e., the agency action). *Id.* (internal quotation marks omitted). An effect is reasonably foreseeable if it is "sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision." *Sierra Club v. FERC*, 827 F.3d 36, 47 (D.C. Cir. 2016) (internal quotation marks and citations omitted).

The Court should be wary of supplanting agency determinations of what the indirect effects of a specific project are with overly broad hardline rules. "[A]n agency's NEPA obligations are not uncabined," *id*. at 50, and deciding what constitutes an indirect effect, like other agency determinations under NEPA, is "a task assigned to the special competency of the appropriate agencies." *Kleppe v. Sierra Club*, 427 U.S. 390, 414 (1976); *see WildEarth Guardians v. Jewell*, 738 F.3d 298, 310 (D.C. Cir. 2013) (explaining the "deferential rule of reason"). NEPA "involves an almost endless series of judgment calls . . . [and] [t]he line-drawing decisions . . . are vested in the agencies, not the courts." *Id*. at 312. Inhibiting an agency's ability to make those case-specific judgment calls by adopting categorical rules would not only conflict with well-established NEPA precedent, it would require agencies to generate and include unhelpful analyses and documentation, un-

dermining the usefulness of the NEPA process. *See, e.g.*, 40 C.F.R. § 1500.4(b) (requiring agencies to not include unhelpful and excessive information in NEPA documents).

Agencies already expend substantial resources to undertake otherwise unneeded analyses, simply to protect their authorizations from legal challenge. This often generates mountains of documents, large portions of which provide little, if any, benefit to the agency or public.[5] To prevent unnecessarily delayed and costly decisionmaking, courts defer to agency determinations of the scope of indirect effects when that determination is supported by a rational explanation.

For example, the Supreme Court has explained that an agency's "[t]ime and resources are simply too limited to hold that an impact statement fails because the agency failed to ferret out every possib[ility]." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 551 (1978). This Circuit, too, has recognized that "'practical considerations of feasibility might well necessitate restricting the scope' of an agency's analysis." *Sierra Club*, 827 F.3d at 50 (quoting *Kleppe*, 427 U.S. at 414); *N. Slope Borough v. Andrus*, 642 F.2d

[5] *See* Government Accountability Office, *Little Information Exists on NEPA Analyses* at 12 (April 2014), *available at* https://www.gao.gov/assets/670/662543.pdf (providing average cost of an environmental impact statement of the Department of Energy between 2003 and 2012 was $6.6 million, with the range being a low of $60,000 and a high of $85 million); *id.* at 13-14 (indicating that from 2000 through 2012, "the total annual average governmentwide EIS preparation time increased at an average rate of 34.2 days per year").

589, 600 n.47 (D.C. Cir. 1980) ("EIS need not be exhaustive to the point of discussing all possible details bearing on the proposed action but will be upheld as adequate . . . if it has been compiled in good faith" (internal quotation marks and citation omitted)).[6]

When completing NEPA analyses, FERC, like other agencies, is charged with drawing lines, and "usefulness of any new potential information to the decisionmaking process" is the dividing line between what is reasonable forecasting and what is speculation. *Sierra Club*, 867 F.3d at 198. Contrary to Petitioners' proposed presumption that all new midstream natural gas transportation projects create a foreseeable, proportional increase in upstream production and downstream combustion is untethered to the realities of the complex interstate natural gas transportation context and the global demand for natural gas. Indeed, the operation of the midstream market, which is regulated by FERC, is a complicated network where buyers and sellers of gas are moving the gas to various places, which can change daily depending on market conditions. In addition, under FERC's rules, parties can release their capacity entitlements on the secondary market, adding an

[6] *See also Fund for Animals v. Kempthorne*, 538 F.3d 124, 137 (2d Cir. 2008) ("agency is not obliged to engage in endless hypothesizing as to remote possibilities"); *Sylvester v. U.S. Army Corps of Engineers*, 884 F.2d 394, 400 (9th Cir. 1989) ("Environmental impacts are in some respects like ripples following the casting of a stone in a pool. The simile is beguiling but useless as a standard. So employed it suggests that the entire pool must be considered each time a substance heavier than a hair lands upon its surface. This is not a practical guide.").

additional layer of complexity and generally rendering predictions about origins and destinations of natural gas to be complete guesswork.[7] Thus, FERC's determinations on where to draw the line regarding causation and what is reasonably foreseeable fall squarely within its expertise and discretion and are entitled to deference.

B. There is no basis for the Court to second-guess FERC's determination that the New Market Project is not the cause of upstream and downstream emissions.

FERC reasonably explained that upstream and downstream greenhouse gas emissions are not indirect effects because there is an insufficient causal connection between those emissions and the Commission's authorization of the New Market Project.

First, as a threshold matter, FERC observed that no party to the rehearing proceedings argued that there was a sufficient causal connection between upstream and downstream activities and the New Market Project. NMP Rehearing Order ¶ 41, JA ___; Respond. Br. at 26-27. This alone justifies denying Petitioners' NEPA claim.

[7] The structure and functions of natural gas pipelines and FERC's regulation of transportation on those pipelines previously have been described by both this Court and FERC. *See, e.g.*, *United Distribution Companies v. FERC*, 88 F.3d 1105, 1122-27 (D.C. Cir. 1996); FERC Office of Enforcement, Energy Primer: A Handbook on Energy Market Basics, at 25 (Nov. 2015).

Second, FERC reasoned that the record did not show that "potential increases in greenhouse gas emissions associated with production, non-project transport, and non-project combustion are causally related to [FERC's] action in approving [the New Market] Project." *Id.* ¶ 41, JA ___. FERC elaborated:

> A causal relationship sufficient to warrant Commission analysis of non-pipeline activity as an indirect impact would only exist if a proposed pipeline would transport new production from a specified production area and that production would not occur in the absence of the proposed pipeline (i.e., there will be no other way to move the gas).

NMP Certificate Order ¶ 71, JA ___; *id.* ¶ 67, JA ___ (noting that "a but-for causal relationship is insufficient" (quotation marks and citation omitted)). Without evidence in the record showing a sufficient causal relationship (or anything close to it), FERC rationally concluded that there was an insufficient causal connection between upstream and downstream greenhouse gas emissions and the New Market Project.

Third, FERC also properly determined that the demand for natural gas would exist and be satisfied with or without the New Market Project. As FERC explained:

> [A] number of factors, such as domestic natural gas prices and production costs drive new drilling. If the projects were not constructed, it is reasonable to assume that any new production spurred by such factors would reach intended markets through alternate pipelines or other modes of transportation.

NMP Certificate Order ¶ 77, JA ___. Stated differently, "[p]roduction and end-use consumption of natural gas will likely occur regardless of the Commission's approval of the New Market Project." *Id.* ¶ 41, JA ___; *id.* ¶ 83, JA ___; NMP Rehearing Order ¶¶ 60, 62, JA ___, ___. This is the result of the dynamic functioning of the interstate pipeline system, which offers a multitude of routes serving numerous points of service interconnected across the States. NMP Rehearing Order ¶ 38, JA ___. Thus, the factual premise of Petitioners' NEPA claim fails, and the Court should reject their arguments on this issue.

Fourth, recognizing that Congress expressly limits FERC's jurisdiction to interstate natural gas pipelines, FERC properly limited its NEPA review by not analyzing potential upstream and downstream effects from other segments of the natural gas market far removed from the New Market Project and wholly contingent upon non-FERC-agency authorizations. By doing so, FERC ensured it would not waste its limited resources on producing highly uncertain and unhelpful information that neither improves the decisionmaking process nor assists the public. *See* NMP Rehearing Order ¶¶ 42-43, JA ___-___ (explaining that "providing a broad analysis based on generalized assumptions rather than reasonably specific information does not meaningfully inform the Commission's project-specific review" or help the public); *see also Sierra Club*, 867 F.3d at 194-95 (observing that expert studies provide that energy market projections are "highly uncertain" and

that there are "great uncertainties about how the U.S. natural gas market will evolve").[8]

Based on the record and the nature of the underlying project, FERC reasonably and lawfully determined that causation was lacking with respect to possible upstream and downstream greenhouse gas emissions and that those emissions were not indirect effects. There is no basis for the Court to second-guess the agency's exercise of this discretion. *See WildEarth*, 738 F.3d at 312; *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 376-77 (1989); *Kleppe*, 427 U.S. at 414.

C. There is no basis for the Court to second-guess FERC's determination that upstream and downstream emissions are not reasonably foreseeable.

FERC also correctly concluded that upstream and downstream emissions were not reasonably foreseeable because FERC could not meaningfully forecast them. FERC's conclusion—which was both rational and based on the record—fell well within the Commission's broad discretion.

Related to potential upstream impacts, FERC observed that absent "meaningful information regarding potential future natural gas production in a region of influence, production related impacts are not sufficiently reasonably foreseeable."

[8] The uncertainty permeating these expert studies is unsurprising given that interstate pipeline transportation is highly variable due to multiple gas receipt and delivery points, multiple shippers, multiple route options, and shifting demand based on weather and other drivers of natural gas use (e.g., electric power use).

NMP Certificate Order ¶ 86, JA ____. FERC elaborated that because "the location, scale, and timing of any additional wells are matters of speculation, particularly with respect to their relationship to the projects," upstream emissions are not reasonably foreseeable. *See id.* ¶¶ 80-81, JA ___ - ____; NMP Rehearing Order ¶ 38, JA ___. FERC also noted that it was unknown where the gas the New Market Project would transport would come from given the multiple upstream connections to other interstate natural gas pipelines that themselves were connected to different production areas. NMP Rehearing Order ¶¶ 38, 61, JA ___, ___ (noting that the specific source of natural gas is unknown and will likely change over time). FERC's conclusion that upstream impacts were not reasonably foreseeable was therefore reasonable.

Similarly, FERC thoroughly explained that it could not generate a meaningful forecast of downstream greenhouse gas emissions based on existing information. Given the type, nature, and scope of the Project, FERC lacked "meaningful information" about downstream use, such as specific information about "future power plants, storage facilities, or distribution networks." NMP Rehearing Order ¶ 34, JA ___. FERC explained that the volume of gas to be consumed was unknown because the Project's capacity was designed for "intermittent peak use." *Id.* ¶ 62, JA ___. Likewise, although two distribution companies would receive gas of unknown quantity at unknown intervals, "where and how the transported gas will

be used" was not known. *Id.* ¶ 65, JA ___. Thus, the Project did not contemplate an "identifiable end-use," and FERC rationally concluded that downstream greenhouse gas emissions were not reasonably foreseeable. *Id.*, JA ___; *id.* ¶ 39, JA ___ ("the specific end use of the transported natural gas" is unknown).

Based on the circumstances described above, which Petitioners do not contest, any effects FERC could have forecasted would have been indefinite and meaningless because of the high degree of uncertainty inherent in the assumptions on which those forecasts would have been based. *Presidio Golf Club v. Nat'l Park Serv.*, 155 F.3d 1153, 1163 (9th Cir. 1998) (providing that agencies "need not consider potential effects that are . . . indefinite"). NEPA did not require FERC to "engage in [this] speculative analysis," and FERC's determination that upstream and downstream emissions are not indirect effects for the New Market Project cannot be reasonably characterized as "undermin[ing] informed public comment and informed decisionmaking." *Sabal Trail*, 867 F.3d at 1368; *N. Plains Res. Council v. STB*, 668 F.3d 1067, 1078 (9th Cir. 2011); *cf. Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304, 1310 (D.C. Cir. 2014) (NEPA "does not demand forecasting that is not meaningfully possible" or require "an agency [to] foresee the unforeseeable." (internal quotations marks omitted)).

II. *Sabal Trail*'s holding is limited in application to the unique facts of that case and in any event must be read together with other precedent of this Court.

Petitioners' interpretation of *Sabal Trail* exaggerates the holding in that case. Petitioners argue that because the New Market Project adds capacity to the pipeline system and, in their view, "has the *potential* to spur demand," Pet'rs' Br. at 37 (emphasis added), *Sabal Trail* compels FERC to conclude that an indirect effect of approval would be increased upstream and downstream greenhouse gas emissions. That is not and never has been the law.

To the contrary, determining the indirect effects of a Commission certificate is a fact-specific inquiry based on the particular administrative record involved. *See* 42 U.S.C. § 4332(C)(i) (requiring agencies to discuss "the environmental impact of the *proposed action*" (emphasis added)); 40 C.F.R. § 1502.16(b) (stating agencies are to discuss indirect effects of the proposed action and alternatives); *American Rivers v. FERC*, 895 F.3d 32, 49–50 (D.C. Cir. 2018) (demonstrating that NEPA inquiries and analyses are case-specific, context-driven, and based on the "unique characteristics" of the underlying action); *State of Idaho By & Through Idaho Pub. Utilities Comm'n v. I.C.C.*, 35 F.3d 585, 595 (D.C. Cir. 1994) (explaining that NEPA mandates a case-by-case approach); NMP Certificate Order ¶¶ 34, 39 JA ___, ___ (acknowledging the case-by-case nature of NEPA analyses). These authorities confirm that NEPA requires a case-by-case consideration of indi-

rect effects and does not allow for an absolute rule that upstream and downstream emissions are indirect effects of every pipeline project.

A. *Sabal Trail*'s fact-driven holding does not establish a categorical rule and does not apply to the New Market Project.

The Court's narrow holding in *Sabal Trail* contradicts Petitioners' proposition that upstream and downstream greenhouse gas emissions are necessarily indirect effects of midstream infrastructure projects. Pet'rs' Br. at 12-13. That decision rests on a fact-driven analysis tailored to the specific project in question—the construction and operation of the Southeast Market Pipelines Project. *Id.* at 1363-64. The proposed pipeline for that project connected directly to two existing and two proposed power plants in Florida through short lateral pipelines. *Id.* at 1363, 1371.

Based on the unique configuration of the project in Sabal Trail directly connecting to power plants and specific information in the record, the Court concluded that it was reasonably foreseeable that the pipeline would transport a predictable quantity of natural gas per day to these particular interconnected power plants; that the gas would be burned at those power plants to generate electricity; that those activities would produce greenhouse gases at their respective locations within the vicinity of the pipeline; and that based on the proximity and direct connection of these discrete facilities, there was a sufficiently close causal connection between FERC's authorization and the combustion of downstream greenhouse gases. *Id.* at

1371-74. The Court's analysis confirms the fact-specific nature of *Sabal Trail*'s holding. The Court wrote that "greenhouse-gas emissions are an indirect effect of authorizing *this* project, which FERC could reasonably foresee," and further that it was plain "that gas will be burned in *those* [four] power plants." 867 F.3d at 1372, 1374 (emphases added).

Subsequently, the Court also emphasized that *Sabal Trail* was confined to its facts in *Friends of the Capital Crescent Trail v. Fed. Transit Admin.*, 877 F.3d 1051 (D.C. Cir. 2017) ("*Friends*"). That case clarified that the *Sabal Trail* Court "invalidated an indirect effects analysis because the agency had technical and contractual information on how much gas the pipelines [would] transport to specific power plants, and so could have estimated with some precision the level of greenhouse gas emissions produced by those power plants." *Id.* at 1065 (internal quotation marks and citation omitted). *Friends* thus confirms that NEPA analyses must be project-specific and refutes Petitioners' argument for an absolute rule that upstream and downstream greenhouse gas emissions are necessarily indirect effects.

Amici urge the Court in this case to confirm that *Sabal Trail* was limited to its facts and applied only where FERC was asked to authorize a pipeline project that was designed to, and FERC estimated would, deliver reasonably predictable quantities of natural gas directly to specific power plants for combustion in the vi-

cinity of the project.[9] That stands in stark contrast with a traditional midstream project like the New Market Project, which is designed to function as part of the interstate pipeline network that serves natural gas shippers who can receive gas from multiple upstream sources and deliver it to marketers or end-users who use the gas for multiple purposes at numerous destinations. *See* Rehearing Order at 38-39, JA ___. These many variables and the uncertainty they create render predictions about upstream and downstream environmental impacts wholly speculative.

B. Under D.C. Circuit precedent, FERC is not the legal cause of upstream and downstream greenhouse gas emissions.

In *Sabal Trail*, the majority failed to adequately account for an important and potentially dispositive factor in many cases: the scope of FERC's jurisdiction. FERC's jurisdiction is limited to midstream natural gas transportation infrastructure and does not extend to upstream production and downstream end-use of natu-

[9] As FERC observed in the rehearing order, "Similarly with respect to downstream activities, e.g. the potential for induced development of power plants, storage facilities, and distribution networks, there is nothing in the record that identifies any specific end use or new incremental load downstream of the New Market Project, much less an end use or new incremental load within the geographic area of where the impacts from the New Market Project will be felt." NMP Rehearing Order ¶ 39, JA ___. Geographic proximity is relevant because of NEPA's instruction that "determination of the extent and effect of [cumulative impacts], and particularly identification of the geographic area within which they may occur, is a task assigned to the special competency of the appropriate agencies." *Kleppe*, 427 U.S. at 414. Here, FERC appropriately found that the geographic area was limited because the scope of the project was itself limited. NMP Rehearing Order ¶¶ 34-40, JA ___-___.

ral gas in settings that can generate greenhouse gas emissions. *See Sabal Trail*, 867 F.3d at 1380-83 (Brown, J., Dissenting). *Sabal Trail* should have acknowledged, as this Circuit has in previous cases involving liquified natural gas terminals (LNG Cases),[10] that there is typically an insufficient causal connection between FERC's authorization of midstream projects and greenhouse gas emissions that may result from upstream production activities or downstream end-use activities over which FERC has no authority. *Sabal Trail*'s failure to acknowledge this has generated significant and unnecessary litigation.[11]

Indirect effects must be both "caused by the action" and "reasonably foreseeable." 40 C.F.R. § 1508.8(b). It is well-established that "environmental consequences tied to [another agency's] authorization . . . fall outside the Commission's NEPA wheelhouse." *Sierra Club*, 827 F.3d at 47–48.

Here, "the Commission does not control the production or consumption of

[10] *See Sierra Club*, 827 F.3d at 47; *Sierra Club v. FERC*, 827 F.3d 59, 68 (D.C. Cir. 2016); *EarthReports, Inc. v. FERC*, 828 F.3d 949, 952 (D.C. Cir. 2016).

[11] The *Sabal Trail* Court relies on the requirement that FERC must make a public-interest-like determination that includes consideration of environmental impacts to conclude that FERC could deny a permit based on upstream or downstream emissions. However, in making the decision whether to issue the permit, FERC's public-interest determination is not unbounded, but instead focuses on the environmental effects of the construction and operation of the pipeline and on cumulative impacts within the region in which the pipeline will be located. Moreover, it is undisputed that FERC has no legal authority to approve or deny permits for upstream and downstream activities that could result in emissions. Thus, FERC's approval of a midstream project cannot be the legal cause of upstream or downstream emissions.

natural gas." NMP Rehearing Order ¶ 43, JA ___. For example, FERC has no authority over the permitting of natural gas wells and other aspects of production. Similarly, FERC has no jurisdiction over siting or permitting power plants and factories that use natural gas or over the sale of natural gas to residential and commercial end-users. Instead, other federal and state government agencies have the authority and expertise to license these upstream and downstream activities. Without approvals from these federal and state agencies, any potential increases in upstream and downstream emissions could not occur.[12] Thus, these emissions would be outside of FERC's wheelhouse and not be indirect effects of the New Market Project.

This case and others like it demonstrate the importance of the practical limits placed on NEPA review. Without these limits, FERC would be required to assume without factual basis that all upstream and downstream activities possibly attributable to a midstream project would occur and must be analyzed, despite FERC's lack of jurisdiction over those activities. Besides being unsupported and highly speculative, this assumption would impermissibly uncabin the scope of indirect ef-

[12] Just as only the Department of Energy can authorize the quantity of natural gas that may be exported from a liquified natural gas facility, only other non-FERC agencies can authorize increased upstream production (e.g., through drilling permits) and increased downstream combustion of natural gas (e.g., through air permits). *See Sierra Club*, 827 F.3d at 47; 15 U.S.C. § 717f(e) (providing that FERC "shall" issue a certificate if the proposed construction "is or will be required by the present or future public convenience and necessity"); *Sabal Trail*, 867 F.3d at 1381-82; NMP Certificate Order ¶ 70, JA ___.

fects under NEPA. *Cf. Sierra Club*, 827 F.3d at 50.

The Court should therefore use this case to fully reconcile *Sabal Trail* with the LNG Cases and hold that there is an insufficient causal connection between upstream and downstream greenhouse gas emissions and FERC's authorization of the New Market Project, particularly given the absence here of the specific facts that were present in *Sabal Trail*.

III. Petitioners' attempt to circumvent FERC's discretion by imposing a sweeping "best efforts" information-collection requirement fails.

Petitioners claim that FERC violated NEPA by alleging that the Commission did not make its "best efforts" to collect information about theoretical upstream and downstream effects. Pet'rs' Br. at 16. In doing so, Petitioners advocate imposing an extra-statutory duty to exercise "best efforts" to collect information. Petitioners' argument relies on cherry-picked language from a split decision in the Ninth Circuit, *Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1136 (9th Cir. 2011). Pet'rs' Br. at 16. Reviewed in context, that language is irrelevant in this case.

As a threshold matter, this argument is not properly before the Court because Petitioners did not preserve it. Respond. Br. at 29-30 (noting that Petitioners raised this argument for the first time two years after FERC issued the Certificate Order). Even assuming Petitioners did preserve it, the argument fails. The origin of the

"best efforts" phrase is *City of Davis v. Coleman*, 521 F.2d 661 (9th Cir. 1975). That case involved a challenge to a decision not to complete an environmental impact statement (EIS) for a proposed highway project. *Id.* at 665-66. The Ninth Circuit concluded that the Federal Highway Administration (FHWA) acted unreasonably by failing to consider the project's growth-inducing effects and "conclud[ing], without further study, that the environmental impact of the proposed interchange [would] be insignificant," *despite an abundance of "available information" indicating otherwise*. *See id.* at 675 (emphasis added). In reaching this conclusion, the court stated that "an agency must use its best efforts to find out all that it *reasonably* can." *Id.* at 676 (emphasis added).

The touchstone for judicial review under NEPA is reasonableness, not whether Petitioners believe the agency met a "best efforts" standard to procure information, no matter how high the cost or how minimal or speculative the benefit.[13] The origin and context of the phrase "best efforts" confirm that it is not a standard under NEPA, and that FERC applies its expertise and exercises its discretion to determine whether it should—based on legal obligations, cost-benefit anal-

[13] Tellingly, in addition to *Barnes* and *City of Davis*, only one other judicial decision has ever used the "best efforts" phrase from those cases. *See Karst Envtl. Educ. & Prot., Inc. v. Fed. Highway Admin.*, No. 1:10-CV-00154-R, 2011 WL 5301589, at *25 (W.D. Ky. Nov. 2, 2011) (unpublished) (holding FHWA complied with NEPA when not examining growth inducing effects of a project because those effects would occur even without the project), *aff'd*, 559 F. App'x 421 (6th Cir. 2014).

yses, and other factors—attempt to obtain specific information.

Petitioners proffer no evidence sufficient to show that FERC abused its discretion or acted unreasonably. Indeed, this case does not resemble *City of Davis* where FHMA cursorily concluded, without investigation and contrary to an abundance of available information, that the construction of a highway interchange could not have any significant environmental impacts. Regardless, neither *City of Davis* or the other decisions bind this Court, and Petitioners, like the general public, had the opportunity during the public comment period to provide FERC with any information they believed the Commission should have considered.

CONCLUSION

Amici respectfully request that the Court deny the petition for review.

Dated: February 1, 2019

Respectfully submitted,

By: /s/ Megan H. Berge

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 5,733 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and D.C. Cir. Rule 32(e)(1).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using the Microsoft Office Word 2016 word processing software in 14-point Times New Roman type style.

Dated: February 1, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25(d) and D.C. Circuit Rule 25(c), I hereby certify that on this 1st day of February, 2019, I have served the foregoing Amici Curiae Brief upon all counsel registered to receive service through the Court's CM/ECF system via electronic filing.

Dated: February 1, 2019

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ADDENDUM

STATUTES AND REGULATIONS

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STATUTES

OTHER AUTHORITIES

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 appli-

cation shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

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

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

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

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

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

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

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

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

AMENDMENTS

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

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

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

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

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

EFFECTIVE DATE OF 1988 AMENDMENT

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

TRANSFER OF FUNCTIONS

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

§ 717g. Accounts; records; memoranda

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

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

(b) Access to and inspection of accounts and records

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

and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

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

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

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

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

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

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

COMMISSION ON POPULATION GROWTH AND THE AMERICAN FUTURE

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

EXECUTIVE ORDER NO. 11507

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

EXECUTIVE ORDER NO. 11752

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

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

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

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

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

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

(i) the environmental impact of the proposed action,

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

(iii) alternatives to the proposed action,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

AMENDMENTS

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

CERTAIN COMMERCIAL SPACE LAUNCH ACTIVITIES

Pub. L. 104–88, title IV, § 401, Dec. 29, 1995, 109 Stat. 955, provided that: ''The licensing of a launch vehicle or launch site operator (including any amendment, extension, or renewal of the license) under [former] chapter 701 of title 49, United States Code [now chapter 509 (§ 50901 et seq.) of Title 51, National and Commercial Space Programs], shall not be considered a major Federal action for purposes of section 102(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(C)) if—

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

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

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

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

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

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

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

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

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

(i) facilitates cooperative conservation;

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

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

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

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

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

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

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

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

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

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

GEORGE W. BUSH.

§ 4332a. Repealed. Pub. L. 114–94, div. A, title I, § 1304(j)(2), Dec. 4, 2015, 129 Stat. 1386

Section, Pub. L. 112–141, div. A, title I, § 1319, July 6, 2012, 126 Stat. 551, related to accelerated decisionmaking in environmental reviews.

EFFECTIVE DATE OF REPEAL

Repeal effective Oct. 1, 2015, see section 1003 of Pub. L. 114–94, set out as an Effective Date of 2015 Amendment note under section 5313 of Title 5, Government Organization and Employees.

§ 4333. Conformity of administrative procedures to national environmental policy

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

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

§ 4334. Other statutory obligations of agencies

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

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

§ 4335. Efforts supplemental to existing authorizations

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

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

SUBCHAPTER II—COUNCIL ON ENVIRONMENTAL QUALITY

§ 4341. Omitted

CODIFICATION

Section, Pub. L. 91–190, title II, § 201, Jan. 1, 1970, 83 Stat. 854, which required the President to transmit to Congress annually an Environmental Quality Report, terminated, effective May 15, 2000, pursuant to section 3003 of Pub. L. 104–66, as amended, set out as a note under section 1113 of Title 31, Money and Finance. See, also, item 1 on page 41 of House Document No. 103–7.

§ 4342. Establishment; membership; Chairman; appointments

There is created in the Executive Office of the President a Council on Environmental Quality (hereinafter referred to as the ''Council''). The Council shall be composed of three members who shall be appointed by the President to serve at his pleasure, by and with the advice and consent of the Senate. The President shall designate one of the members of the Council to serve as Chairman. Each member shall be a person who, as a result of his training, experience, and attainments, is exceptionally well qualified to analyze and interpret environmental trends and information of all kinds; to appraise programs and activities of the Federal Government in the light of the policy set forth in subchapter I of this chapter; to be conscious of and responsive to the scientific, economic, social, esthetic, and cultural needs and interests of the Nation; and to formulate and recommend national policies to promote the improvement of the quality of the environment.

(Pub. L. 91–190, title II, § 202, Jan. 1, 1970, 83 Stat. 854.)

COUNCIL ON ENVIRONMENTAL QUALITY; REDUCTION OF MEMBERS

Provisions stating that notwithstanding this section, the Council was to consist of one member, appointed by the President, by and with the advice and consent of the Senate, serving as chairman and exercising all powers, functions, and duties of the Council, were contained in the Department of the Interior, Environment, and Related Agencies Appropriations Act, 2006, Pub. L. 109–54, title III, Aug. 2, 2005, 119 Stat. 543, and were repeated in provisions of subsequent appropriations acts which are not set out in the Code. Similar provisions were also contained in the following prior appropriations acts:

Pub. L. 108–447, div. I, title III, Dec. 8, 2004, 118 Stat. 3332.

Pub. L. 108–199, div. G, title III, Jan. 23, 2004, 118 Stat. 408.

Pub. L. 108–7, div. K, title III, Feb. 20, 2003, 117 Stat. 514.

Pub. L. 107–73, title III, Nov. 26, 2001, 115 Stat. 686.

Pub. L. 106–377, § 1(a)(1) [title III], Oct. 27, 2000, 114 Stat. 1441, 1441A–45.

Pub. L. 106–74, title III, Oct. 20, 1999, 113 Stat. 1084.

Pub. L. 105–276, title III, Oct. 21, 1998, 112 Stat. 2500.

except where compliance would be inconsistent with other statutory requirements. These regulations are issued pursuant to NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*) section 309 of the Clean Air Act, as amended (42 U.S.C. 7609) and Executive Order 11514, Protection and Enhancement of Environmental Quality (March 5, 1970, as amended by Executive Order 11991, May 24, 1977). These regulations, unlike the predecessor guidelines, are not confined to sec. 102(2)(C) (environmental impact statements). The regulations apply to the whole of section 102(2). The provisions of the Act and of these regulations must be read together as a whole in order to comply with the spirit and letter of the law. It is the Council's intention that judicial review of agency compliance with these regulations not occur before an agency has filed the final environmental impact statement, or has made a final finding of no significant impact (when such a finding will result in action affecting the environment), or takes action that will result in irreparable injury. Furthermore, it is the Council's intention that any trivial violation of these regulations not give rise to any independent cause of action.

§ 1500.4 Reducing paperwork.

Agencies shall reduce excessive paperwork by:

(a) Reducing the length of environmental impact statements (§ 1502.2(c)), by means such as setting appropriate page limits (§§ 1501.7(b)(1) and 1502.7).

(b) Preparing analytic rather than encyclopedic environmental impact statements (§ 1502.2(a)).

(c) Discussing only briefly issues other than significant ones (§ 1502.2(b)).

(d) Writing environmental impact statements in plain language (§ 1502.8).

(e) Following a clear format for environmental impact statements (§ 1502.10).

(f) Emphasizing the portions of the environmental impact statement that are useful to decisionmakers and the public (§§ 1502.14 and 1502.15) and reducing emphasis on background material (§ 1502.16).

(g) Using the scoping process, not only to identify significant environmental issues deserving of study, but also to deemphasize insignificant issues, narrowing the scope of the environmental impact statement process accordingly (§ 1501.7).

(h) Summarizing the environmental impact statement (§ 1502.12) and circulating the summary instead of the entire environmental impact statement if the latter is unusually long (§ 1502.19).

(i) Using program, policy, or plan environmental impact statements and tiering from statements of broad scope to those of narrower scope, to eliminate repetitive discussions of the same issues (§§ 1502.4 and 1502.20).

(j) Incorporating by reference (§ 1502.21).

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

(l) Requiring comments to be as specific as possible (§ 1503.3).

(m) Attaching and circulating only changes to the draft environmental impact statement, rather than rewriting and circulating the entire statement when changes are minor (§ 1503.4(c)).

(n) 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).

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

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

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

[43 FR 55990, Nov. 29, 1978; 44 FR 873, Jan. 3, 1979]

§ 1500.5 Reducing delay.

Agencies shall reduce delay by:

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.

(g) Urban quality, historic and cultural resources, and the design of the built environment, including the reuse and conservation potential of various alternatives and mitigation measures.

(h) Means to mitigate adverse environmental impacts (if not fully covered under § 1502.14(f)).

[43 FR 55994, Nov. 29, 1978; 44 FR 873, Jan. 3, 1979]

§ 1502.17 List of preparers.

The environmental impact statement shall list the names, together with their qualifications (expertise, experience, professional disciplines), of the persons who were primarily responsible for preparing the environmental impact statement or significant background papers, including basic components of the statement (§§ 1502.6 and 1502.8). Where possible the persons who are responsible for a particular analysis, including analyses in background papers, shall be identified. Normally the list will not exceed two pages.

§ 1502.18 Appendix.

If an agency prepares an appendix to an environmental impact statement the appendix shall:

(a) Consist of material prepared in connection with an environmental impact statement (as distinct from material which is not so prepared and which is incorporated by reference (§ 1502.21)).

(b) Normally consist of material which substantiates any analysis fundamental to the impact statement.

(c) Normally be analytic and relevant to the decision to be made.

(d) Be circulated with the environmental impact statement or be readily available on request.

§ 1502.19 Circulation of the environmental impact statement.

Agencies shall circulate the entire draft and final environmental impact statements except for certain appendices as provided in § 1502.18(d) and unchanged statements as provided in § 1503.4(c). However, if the statement is unusually long, the agency may circulate the summary instead, except that the entire statement shall be furnished to:

(a) Any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved and any appropriate Federal, State or local agency authorized to develop and enforce environmental standards.

(b) The applicant, if any.

(c) Any person, organization, or agency requesting the entire environmental impact statement.

(d) In the case of a final environmental impact statement any person, organization, or agency which submitted substantive comments on the draft.

If the agency circulates the summary and thereafter receives a timely request for the entire statement and for additional time to comment, the time for that requestor only shall be extended by at least 15 days beyond the minimum period.

§ 1502.20 Tiering.

Agencies are encouraged to tier their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review (§ 1508.28). Whenever a broad environmental impact statement has been prepared (such as a program or policy statement) and a subsequent statement or environmental assessment is then prepared on an action included within the entire program or policy (such as a site specific action) the subsequent statement or environmental assessment need only summarize the issues discussed in the broader statement and incorporate discussions from the broader statement by reference and shall concentrate on the issues specific to the subsequent action. The subsequent document shall state where the earlier document is available. Tiering may also be appropriate for different stages of actions. (Section 1508.28).

§ 1502.21 Incorporation by reference.

Agencies shall incorporate material into an environmental impact statement by reference when the effect will be to cut down on bulk without impeding agency and public review of the action. The incorporated material shall be cited in the statement and its content briefly described. No material

§ 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