ORAL ARGUMENT NOT YET SCHEDULED

No. 20-1198 (consolidated with Nos. 20-1161, 20-1171, 20-1172, 20-1180)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF OREGON, ACTING BY AND THROUGH ITS: OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY; OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT; OREGON DEPARTMENT OF FISH AND WILDLIFE; OREGON DEPARTMENT OF ENERGY,

Petitioners,

v.

FEDERAL ENERY REGULATORY COMMISSION,

Respondent,

JORDAN COVE ENERGY PROJECT, L.P., et al.,

Respondents-Intervenors.

OPENING BRIEF OF PETITIONERS STATE OF OREGON, et al.

On Petitions for Review of Orders of the
Federal Energy Regulatory Commission

Initial Brief: January 22, 2021
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Final Briefs: July 6, 2021

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

In accordance with Circuit Rule 28(a)(1), State Petitioners certify as follows:

A. Parties, Intervenors, and Amici

1. The following parties have appeared before this Court in the present consolidated cases:

Petitioners: Deborah Evans, Ronald C. Schaaf, Evans Schaaf Family LLC, Bill Gow, Sharon Gow, Wilfred E. Brown, Elizabeth A. Hyde, Barbara L. Brown, Pamela Brown Ordway, Chet N. Brown, Neal C. Brown Family LLC, Stacey McLaughlin, Craig McLaughlin, Richard Brown, Twyla Brown, Clarence Adams, Stephany Adams, Will McKinley, Wendy McKinley, Frank Adams, Lorraine Spurlock, Toni Woolsey, Alisa Acosta, Gerrit Boshuizen, Cornelis Boshuizen, John Clarke, Carol Munch, Ron Munch, Mitzi Sulffridge, James Dahlman, and Joan Dahlman (collectively Landowner Petitioners); Rogue Riverkeeper, Rogue Climate, Cascadia Wildlands, Center for Biological Diversity, Citizens for Renewables/Citizens Against LNG, Friends of Living Oregon Waters, Oregon Physicians for Social Responsibility, Oregon Wild, Oregon Women's Land Trust, Sierra Club, Waterkeeper Alliance, and Natural Resources Defense Council, Inc. (collectively Conservation Petitioners); Confederated Tribes of the Coos, Lower Umpqua and Siuslaw Indians, and

Cow Creek Band of Umpqua Tribe of Indians (collectively Tribal Petitioners); Oregon Department of Energy, Oregon Department of Environmental Quality, Oregon Department of Fish and Wildlife, Oregon Department of Land Conservation and Development, and State of Oregon (collectively State Petitioners).

Respondent: Federal Energy Regulatory Commission (FERC).

Respondent-Intervenors: Jordan Cove Energy Project, L.P. and Pacific Connector Gas Pipeline, LP (collectively the Project).

Amici curiae: As of this date, no amici are involved in this proceeding.

2. The following entities appeared in the administrative proceedings before FERC in Docket Nos. CP17-494-001 and CP17-495-001: Jordan Cove Energy Project, L.P.; Pacific Connector Gas Pipeline, LP; Cow Creek Band of Umpqua Tribe of Indians; Klamath Tribes; Confederated Tribes of the Coos, Lower Umpqua, and Siuslaw Indians; Citizens Against LNG; Jody McCaffree; Oregon Department of Energy; Oregon Department of Environmental Quality; Oregon Department of Fish and Wildlife; Oregon Department of Land Conservation and Development; Natural Resources Defense Council; Sierra Club; Niskanen Center (on behalf of Bill Gow, Sharon Gow, Neal C. Brown Family LLC, Wilfred E. Brown, Elizabeth A. Hyde, Barbara L. Brown, Pamela Brown Ordway, Chet N. Brown, Evans Schaff Family LLC, Deb Evans, Ron

Schaff, Stacey McLaughlin, Craig McLaughlin, Richard Brown, Twyla Brown, Clarence Adams, Stephany Adams, Will McKinley, Wendy McKinley, Frank Adams, Lorraine Spurlock, Toni Woolsey, Alisa Acosta, Gerrit Boshuizen, Cornelis Boshuizen, Robert Clarke, John Clarke, Carol Munch, Ron Munch, Mitzi Sulffridge, James Dahlman, and John Dahlman); Western Environmental Law Center; Center for Biological Diversity; Oregon Wild; Rogue Riverkeeper; Pacific Coast Federation of Fishermen's Associations; Institute for Fisheries Resources; Greater Good Oregon; Friends of Living Oregon Waters; Surfrider Foundation; Oregon Women's Land Trust; Oregon Shores Conservation Coalition; League of Women Voters of Coos County; League of Women Voters of Umpqua Valley; League of Women Voters of Rogue Valley; League of Women Voters of Klamath County; Rogue Climate; Umpqua Watersheds; Waterkeeper Alliance; Coast Range Forest Watch; Cascadia Wildlands; Oregon Physicians for Social Responsibility; Hair on Fire Oregon; Citizens for Renewables; Francis Eatherington; Janet Hodder; Michael Graybill; Kenneth E. Cates; Kristine Cates; James Davenport; Archina Davenport; David McGriff; Emily McGriff; Andrew Napell; Dixie Peterson; Paul Washburn; Carol Williams.

B. Rulings Under Review

The FERC orders at issue are *Jordan Cove Energy Project L.P.*, *Pacific*

Connector Gas Pipeline, LP, 170 FERC ¶ 61,202 (2020) (hereafter Certificate Order) [JA001], and *Jordan Cove Energy Project, L.P., Pacific Connector Gas Pipeline, LP*, 171 FERC ¶ 61,136 (2020) (hereafter Rehearing Order) [JA205].

C. Related Cases

These consolidated petitions for review have not previously been before this Court or any other court. State Petitioners are not aware of any other related cases within the meaning of Circuit Rule 28(a)(1)(C).

Respectfully submitted,

/s/ Philip Thoennes
Philip Thoennes
Assistant Attorney General

Counsel for Petitioners Oregon Department of Environmental Quality; Oregon Department of Land Conservation and Development; Oregon Department of Fish and Wildlife; Oregon Department of Energy; State of Oregon

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Constitutional and Statutory Provisions

Administrative Rules

Other Authorities

GLOSSARY

APA	Administrative Procedure Act
Certificate Order	*Jordan Cove Energy Project L.P., Pacific Connector Gas Pipeline, LP*, 170 FERC ¶ 61,202 (2020)
EIS	Environmental Impact Statement
FERC	Federal Energy Regulatory Commission
LNG	Liquefied natural gas
NEPA	National Environmental Policy Act
Project	Jordan Cove Energy Project, L.P. and Pacific Connector Gas Pipeline, LP
Rehearing Order	*Jordan Cove Energy Project, L.P., Pacific Connector Gas Pipeline, LP*, 171 FERC ¶ 61,136 (2020)
Wetland Program	*Compensatory Wetland Mitigation Program*

JURISDICTIONAL STATEMENT

State Petitioners seek review of two FERC orders issued under sections 3 and 7(c) of the Natural Gas Act, 15 U.S.C. §§ 717b, 717f(c), authorizing construction and operation of the Jordan Cove liquefied natural gas (LNG) terminal and Pacific Connector Pipeline (collectively the Project). The Natural Gas Act vests original jurisdiction over review of such orders in this Court. 15 U.S.C. § 717r(b).

On March 19, 2020, FERC issued an order under section 3 of the Natural Gas Act, authorizing the siting, construction, and maintenance of the Jordan Cove LNG terminal. In the same order, FERC granted a certificate of public convenience and necessity, under section 7(c) of the Act, to Pacific Connector Pipeline, authorizing the construction and operation of a pipeline carrying gas to the terminal. *Jordan Cove Energy Project L.P., Pacific Connector Gas Pipeline, LP*, 170 FERC ¶ 61,202 (2020) (Certificate Order) [JA001]. Within 30 days of the Certificate Order, State Petitioners timely filed a request for rehearing. [JA717A-717C]. On May 22, 2020, FERC denied State Petitioners' request for rehearing. *Jordan Cove Energy Project L.P., Pacific Connector Gas Pipeline, LP*, 171 FERC ¶ 61,136 (2020) (Rehearing Order) [JA205]. The Certificate Order and Rehearing Order are final agency actions reviewable under the Administrative Procedure Act (APA).

Within 60 days of the Rehearing Order, State Petitioners timely filed an amended petition for review of the Certificate Order and Rehearing Order pursuant to 15 U.S.C. § 717r(b). *State of Oregon et al. v. FERC*, No. 20-1198 (filed July 2, 2020).

STATUTORY PROVISIONS

Pertinent statutes are set forth in an addendum.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did FERC violate the Clean Water Act and Coastal Zone Management Act by granting conditional authorization to the Project even though the Project has not obtained necessary state approvals under those statutes?

2. Did FERC violate the National Environmental Policy Act (NEPA) by (1) refusing to determine if the Project's greenhouse gas emissions will have a "significant" environmental impact and to consider mitigation measures to reduce that impact and (2) failing to take a hard look at detrimental impacts to wetland ecosystems in Coos Bay?

STATEMENT OF THE CASE

In March 2013, Jordan Cove Energy Project L.P.—a wholly owned subsidiary of Jordan Cove LNG L.P.—filed an application under section 3 of the Natural Gas Act to "site, construct, and operate" a new LNG export terminal

in Coos County, Oregon. Certificate Order P3 [JA002]. In June 2013, Pacific Connector Gas Pipeline, LP—also a wholly owned subsidiary of Jordan Cove LNG L.P.—filed an application under section 7(c) of the Act "for a certificate of public convenience and necessity to construct and operate an interstate pipeline, which would deliver gas from interconnections near Malin, Oregon to Jordan Cove's proposed export terminal." Certificate Order P3 [JA002].

In 2016, FERC denied those applications, finding that Pacific Connector "failed to demonstrate sufficient need for its proposal" and that "without a source of gas" from the Pacific Connector pipeline, the Jordan Cove LNG terminal "could provide no benefit to counterbalance any impacts associated with construction, making the terminal inconsistent with the public interest." Certificate Order P6 [JA003]; *see also Jordan Cove Energy Project, L.P.*, 154 FERC ¶ 61,190 (2016) (order denying authorization under sections 3 and 7(c) of the Natural Gas Act).

In September 2017, Jordan Cove Energy Project L.P. filed a new application under section 3 of the Natural Gas Act to site, construct, and operate the terminal. Certificate Order P1 [JA001]. Pacific Connector Gas Pipeline, LP also filed a new application under section 7(c) for a certificate of public convenience and necessity to construct and operate a pipeline to transport natural gas from an interconnection to the terminal. Certificate Order P2

[JA001].

If constructed, the Jordan Cove export terminal "will produce up to 7.8 million metric tonnes per annum (MTPA) of LNG for export" and would consist of "gas inlet and gas conditioning facilities, liquefaction facilities, LNG storage facilities, LNG loading and marine facilities, and support systems." Certificate Order P7 [JA003]. Once construction is complete, operation of the Jordan Cove LNG terminal would require the use of about 200 acres of land. Certificate Order P12 [JA005]. The Pacific Connector project would consist of a 229-mile-long pipeline, beginning at an interconnection with existing pipeline infrastructure near Malin, Oregon, and extending through Klamath, Jackson, Douglas, and Coos Counties to the export terminal in Coos Bay. Certificate Order P15 [JA006]. Apart from the pipeline, the Pacific Connector project would include a new compressor station located in Klamath County, three new meter stations (one in Coos County and two in Klamath County), and related facilities. Certificate Order P15 [JA006-07].

In November 2019, FERC staff issued a final Environmental Impact Statement (final EIS) for the Project. Certificate Order P154 [JA064]. The final EIS "concludes that construction and operation of the [Project] would result in temporary, long-term, and permanent environmental impacts." Certificate Order P155 [JA064]. FERC determined that many of those impacts

would not be significant or would be reduced to less-than-significant levels with the implementation of "avoidance, minimization, and mitigation measures." Certificate Order P155 [JA064]. Pertinent to State Petitioners' arguments on judicial review, FERC declined to determine whether the Project's projected greenhouse gas emissions would be significant and declined to discuss mitigation measures to address those emissions. Certificate Order PP258-62 [JA112-14]. FERC also determined that construction and operation of the Project would not significantly impact freshwater and estuarine wetland ecosystems in Coos Bay. Certificate Order PP209-10 [JA090-91].

On March 19, 2020, FERC granted Jordan Cove Energy Project LP authorization "under section 3 of the NGA to site, construct, and operate the proposed project in Coos County, Oregon, as described and conditioned herein, and as fully described in Jordan Cove's application and subsequent filings by the applicant, including any commitments made therein." Certificate Order P297 [JA125]. That authorization is conditioned on "compliance with the environmental conditions listed in the appendix to this order." Certificate Order P297 [JA126].

FERC also granted Pacific Connector Gas Pipeline, LP "a certificate of public convenience and necessity under section 7(c) of the NGA . . . authorizing it to construct and operate the proposed project, as described and conditioned

herein, and as more fully described in Pacific Connector's application and subsequent filings by the applicant, including any commitments made therein." Certificate Order P297 [JA126]. That order was also conditioned on "compliance with the environmental conditions listed in the appendix to this order." Certificate Order P297 [JA126].

In the Certificate Order, FERC noted that other federal laws, including the Clean Water Act and Coastal Zone Management Act, impose certain requirements on the Project before it can begin construction and operation, and noted that the Project had yet to fulfill those prerequisites. FERC concluded, however, that it could grant certification under the Natural Gas Act, even though the Project had not obtained a section 401 permit under the Clean Water Act or a consistency determination under the Coastal Zone Management Act. Certificate Order PP191-92 [JA082-83].

Regarding the Clean Water Act, FERC determined that it was authorized to issue a certificate under sections 3 and 7(c) of the Natural Gas Act, even though the Project had not obtained a section 401 permit from the Oregon Department of Environmental Quality. FERC explained that its "practice of issuing conditional certificates has consistently been affirmed by courts as lawful." Certificate Order P192 [JA082]. FERC stated that "Pacific Connector and Jordan Cove will be unable to exercise the authorizations to construct and

operate the projects until they receive all necessary authorizations," including a section 401 permit. Certificate Order P192 [JA083]. FERC concluded that the Project must receive written authorization from the Director of FERC's Office of Energy Projects before beginning any construction—authorization that itself is dependent on the Project filing documentation with the Secretary of Energy demonstrating that it has received all applicable authorizations under federal law, or evidence of waiver of such authorizations. Environmental Condition 11 [JA133].[1]

Regarding the Coastal Zone Management Act, FERC acknowledged that

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[1] Environmental Condition 11 provides:

> 11. Jordan Cove and Pacific Connector must receive written authorization from the Director of OEP before commencing construction of any Project facilities, including any tree-felling or ground-disturbing activities. To obtain such authorization, Jordan Cove must file with the Secretary documentation that it has received all applicable authorizations required under federal law (or evidence of waiver thereof). Pacific Connector will not be granted authorization to commence construction of any of its Project facilities until 1) Jordan Cove has filed documentation that it has received all applicable authorizations required under federal law for construction of its terminal facilities (or evidence of waiver thereof) and 2) Pacific Connector has filed documentation that it has received all applicable authorizations required under federal law for construction of its pipeline facilities (or evidence of waiver thereof).

Certificate Order at 133 [JA133].

"[t]he Jordan Cove LNG Terminal and a portion of the Pacific Connector Pipeline will be constructed within a designated coastal zone. Accordingly, the projects are subject to a consistency review under the Coastal Zone Management Act. The Oregon DLCD [Department of Land Conservation and Development] is the designated state agency that implements the Oregon Coastal Management Program and undertakes the CZMA consistency review in Oregon." Certificate Order P230 [JA099]. FERC also noted that "[o]n February 19, 2020, Oregon DLCD objected to the applicants' consistency certification on the basis that the applicants have not established consistency with specific enforceable policies of the Oregon Coastal Management Program and that it is not supported by adequate information." Certificate Order P231 [JA100].[2] Nevertheless, FERC concluded that it could issue a certificate under sections 3 and 7(c) of the Natural Gas Act, conditional on the Project filing a

[2] On March 20, 2020, the Project appealed the Department of Land Conservation and Development's consistency determination to the Secretary of Commerce. *See* Federal Consistency Appeal by Jordan Cove Energy Project, L.P., and Pacific Connector Gas Pipeline, LP, 85 Fed. Reg. 21,834 (April 20, 2020). On February 8, 2021, after the opening briefs in this case were filed, the Secretary of Commerce issued a decision denying the Project's appeal and sustaining the Department of Land Conservation and Development's consistency determination. *See* Decision and Findings (Feb. 8, 2021), *available at* https://coast.noaa.gov/data/czm/consistency/appeals/fcappealdecisions/mediadecisions/jordancove.pdf (last accessed July 2, 2021).

determination of consistency with Oregon's Coastal Zone Management Plan before beginning any construction. Certificate Order P231 [JA100]; Environmental Condition 27 [JA136].[3]

Commissioner (now Chairman) Glick dissented, arguing that the Certificate Order violated both the Natural Gas Act and NEPA because the majority refused to consider whether the impact of the Jordan Cove Project's greenhouse gas emissions on global climate change is significant. Glick Dissent P2 [JA155-56]. Commissioner Glick also argued that the majority's public interest analysis failed to adequately account for the Project's adverse impacts—specifically, adverse impacts to threatened and endangered species, historic properties, and supply of short-term housing in the vicinity of the project, elevated noise levels during construction, and impairment to the visual character of the local community. Glick Dissent P3 [JA156].

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[3] Pertinent to the Project's need to obtain a consistency determination under the Coastal Zone Management Act, FERC provided:

> 27. Jordan Cove and Pacific Connector **shall not begin construction** of the Project **until** they file with the Secretary a copy of the determination of consistency with the Coastal Zone Management Plan issued by the State of Oregon.

Certificate Order at 136 [JA136] (boldface in original).

SUMMARY OF ARGUMENT

FERC exceeded its authority by granting Natural Gas Act authorization to the Project even though the Project has not obtained necessary state approvals under the Clean Water Act and Coastal Zone Management Act. Section 401 of the Clean Water Act prohibits a federal agency from issuing a license or permit unless the state certifies that the permitted activities will comply with the applicable provisions of the Act. Similarly, the Coastal Zone Management Act prohibits a federal agency from issuing a license or permit unless the state concurs that the activities affecting the coastal zone will comply with the state's Coastal Zone Management program. Here, the Project has not received section 401 certification from the State of Oregon, nor has the state waived its authority to issue such certification. And Oregon has objected to the Project's certification under the Coastal Zone Management Act. FERC's decision to grant Natural Gas Act authorization to the Project conditioned on future compliance with section 401 and the Coastal Zone Management Act was unlawful.

FERC's orders also violate the National Environmental Policy Act. Although FERC quantified the Project's greenhouse gas emissions and acknowledged that those emissions would impact the State of Oregon's ability to meet its greenhouse gas reduction goals, FERC refused to decide whether

those emissions were "significant." Likewise, FERC refused to consider mitigation designed to reduce those emissions. FERC's failure to assess the significance of the Project's greenhouse gas emissions was unlawful. FERC also failed to take a hard look at the Project's impacts to wetland ecosystems. FERC concluded that the Project would not have a significant impact on wetland ecosystems, based on the Project's own mitigation plan and the possibility that the U.S. Army Corps of Engineers may require additional mitigation in association with Corps permits. FERC's deference to the Project's inadequate plan and possible future action by another federal agency was unlawful.

STANDING

State Petitioners have standing to seek review of FERC's Certificate Order and Rehearing Order because they are an "aggrieved" party to the FERC proceedings within the meaning of 15 U.S.C. § 717r(b) and have "suffered an injury in fact that is fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable judicial decision." *City of Clarksville v. FERC*, 888 F.3d 477, 481 (D.C. Cir. 2018) (quotation marks omitted).

First, State Petitioners have standing to seek review of the Certificate Order and Rehearing Order because of the "special solicitude" Congress showed the states in the Natural Gas Act to protect their residents' welfare in

FERC proceedings. *See Maryland People's Counsel v. FERC*, 760 F.2d 318, 321-22 (D.C. Cir. 1985) (discussing 15 U.S.C. § 717r(b)).

Second, State Petitioners have standing because the Project will affect state-owned natural resources, including state-owned land and wildlife. The State of Oregon owns the submerged and submersible land in Coos Bay. *See Morse v. Or. Div. of State Lands*, 590 P.2d 709 (Or. 1979) (explaining that the state adopted the common law rule that it owns title to all tidal land); *see also Kramer v. City of Lake Oswego*, 446 P.3d 1, 8-9 (Or. 2019) (discussing the public ownership of lands underlying navigable bodies of water). FERC here conditionally authorized dredging, construction, transportation, and other activities on those lands. *See* Certificate Order P297 [JA125] (authorizing the siting, construction, and operation of an LNG export terminal in Coos County, Oregon), P297 [JA126] (authorizing construction and operation of the Pacific Connector Gas Pipeline). The State of Oregon also owns the wildlife, including the fish, within its borders and navigable waters. *State v. Dickerson*, 345 P.3d 447, 453-55 (Or. 2015) (explaining that title to wildlife is held in trust by the state for the benefit of its citizens); *Portland Fish Co. v. Benson*, 108 P. 122, 124 (Or. 1910) (explaining that title to fish held in trust by the state). FERC acknowledged that the Jordan Cove Project may have adverse effects on wildlife, including endangered species, although it concluded that some of those

effects would not be "significant." *See, e.g.*, Rehearing Order P173 [JA291] (determining that mitigation measures would reduce impacts to migratory bird species to less-than-significant levels), P175 [JA291-92] (explaining that FERC staff concluded that construction and operation of the Jordan Cove Project would not adversely affect the Southern Resident orca or the gray whale), 228 [JA316] (determining that FERC "satisfied its obligations under the [Endangered Species Act] by ensuring that the [FERC's] action will not jeopardize the continued existence of the western snowy plover or result in the destruction or adverse modification of its habitat"). Those injuries to the State of Oregon's natural resources, and the injury to its sovereign interest in protecting those resources for its residents, are sufficient to confer standing on State Petitioners to seek review of FERC's approval of the Project. *See Massachusetts v. EPA*, 549 U.S. 497, 518-19 (2007) (the state's interest "in all the air and earth within its domain" gave it standing to sue federal government for failing to protect those resources).

This case is unlike *Delaware Department of Natural Resources & Environmental Control v. FERC*, 558 F.3d 575 (D.C. Cir. 2009), where the State of Delaware lacked standing to challenge FERC's authorization of a project. In that case, the state retained complete authority to block the project on its own by objecting under the Coastal Zone Management Act—and it had,

in fact, already successfully blocked the project through an objection. *Id.* at 577-79. Here, however, FERC has authorized the Project to bypass the State of Oregon's Coastal Zone Management Act objection if the Secretary of Commerce overrides that objection. Rehearing Order P84 [JA248] ("[I]f the Secretary of Commerce overrides the state's determination, filing the Secretary's decision would satisfy Environmental Condition 27."). Unlike in *Delaware Department of Natural Resources*, where FERC confirmed that the Secretary's override would *not* allow the project to proceed, 558 F.3d at 578, the State of Oregon does not have the same veto power under the Coastal Zone Management Act in this case. And although the authorizations do not allow construction to begin without Oregon's Clean Water Act section 401 certification, FERC has authorized non-construction activities to begin that could affect the state's natural resources. For example, as explained further below, the Project plans to conduct pre-construction activities along the pipeline corridor such as road surfacing, brushing, and limbing in the right of way. As currently authorized, the Project can engage in those activities without obtaining water quality certification from the State of Oregon.

State Petitioners' injuries are fairly traceable to FERC's decision. Absent FERC's authorization, the Project could not proceed in the presently approved form. Finally, those injuries will be redressed by a decision from this Court

remanding the matter to FERC to comply with the Clean Water Act, Coastal Zone Management Act, and NEPA before it authorizes the project. *See City of Clarksville*, 888 F.3d at 482.

STANDARD OF REVIEW

FERC's orders are reviewed under the APA's arbitrary and capricious standard. *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1308 (D.C. Cir. 2015). Findings of fact must be "supported by substantial evidence," 15 U.S.C. § 717r(b), that "a reasonable mind might accept as adequate to support a conclusion." *Colo. Interstate Gas Co. v. FERC*, 599 F.3d 698, 704 (D.C. Cir. 2010). Moreover, "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

FERC's compliance with NEPA is also subject to review under the APA's arbitrary and capricious standard. *Sierra Club v. FERC*, 867 F.3d 1357, 1367-68 (D.C. Cir. 2017). An agency's decision is arbitrary and capricious where the agency "entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency." *Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014).

ARGUMENT

A. FERC exceeded its authority in authorizing the Project before the Project obtained necessary state approvals.

The Natural Gas Act preserves the states' authority to determine whether a proposed project is environmentally sound. Although FERC has authority to approve or deny applications to site and construct LNG terminals and pipelines, the Act provides that "nothing in this chapter affects the rights of States" under the Clean Water Act or the Coastal Zone Management Act, among other statutes. 15 U.S.C. § 717b(d). And as explained below, each of those statutes required the Project to obtain state certifications *before* FERC issued its authorizations under the Natural Gas Act. Because the Project has not obtained either of those certifications, FERC's authorizations were unlawful.

1. FERC violated the Clean Water Act by granting authorization to the Project without a water quality certification or waiver from the State of Oregon.

a. Section 401 prohibits an agency from issuing a license or permit without a state certification or waiver.

"In enacting the Clean Water Act, Congress sought to expand federal oversight of projects affecting water quality while also reinforcing the role of States as the prime bulwark in the effort to abate water pollution." *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 971 (D.C. Cir. 2011) (quotation marks omitted). Under section 401 of the Act, an applicant seeking approval from a

federal agency to conduct any activity that "may result in any discharge into the navigable waters" must obtain a certification from the state "that any such discharge will comply with the applicable provisions" of the Act:

> Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title.

33 U.S.C. § 1341(a)(1). A state must act on an application for certification within a reasonable period of time or the certification requirement will be deemed waived. *Id.* ("If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application."). But unless the state either issues the certification or waives the certification requirement, the federal agency cannot proceed:

> No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

Id.

b. The Project did not obtain a water quality certification or waiver from the State of Oregon for the FERC authorizations.

An authorization to site an LNG terminal under section 3 of the Natural Gas Act or to construct a pipeline under section 7 is "a Federal license or permit" within the meaning of section 401. *See Delaware Riverkeeper Network v. FERC*, 857 F.3d 388, 398 (D.C. Cir. 2017) (noting that Congress intended the provision "to apply broadly to federal approval of potential pollution activity"); *see also* 15 U.S.C. § 717b(d) ("nothing in this chapter affects the rights of the States under . . . (3) the Federal Water Pollution Control Act (33 U.S.C. § 1251 et seq.)"). And there is no dispute that the Project applied to FERC for permission to conduct activities—including facility construction and operation—that could result in discharges to navigable waters. *See* Certificate Order P206 [JA089] (discussing potential impacts to surface waters associated with terminal and pipeline construction and operation). FERC therefore could not lawfully issue the authorizations that the Project sought until the State of Oregon either (a) issued a water quality certification under section 401 or (b) waived the certification requirement by not acting on the application for more than a year.

And yet FERC granted the authorizations for the export terminal and pipeline without either condition having been met. The relevant state agency, the Oregon Department of Environmental Quality, has not issued a water quality certification for the FERC authorizations. Nor has Oregon waived the certification requirement. Indeed, FERC recently confirmed that the Project has not even applied to the department for a section 401 water quality certification related to its FERC authorizations. *See Jordan Cove Energy Project L.P., Pacific Connector Gas Pipeline, LP*, 174 FERC ¶ 61,057 (2021) (order denying petition for declaratory order that Oregon had waived the certification requirement). Thus, the one-year period for the department to act never began.[4] Without that certification or a waiver, none of the conditions required under section 401 had been met and FERC could not lawfully issue the authorizations.

c. The conditional nature of FERC's authorization does not satisfy the Clean Water Act's requirements.

FERC nonetheless concluded that it could issue the section 3 and 7 authorizations because it conditioned the commencement of any construction upon receiving "all applicable authorizations required under federal law (or

[4] The Project did apply to the Department of Environmental Quality for section 401 certification as part of its application for a Clean Water Act permit from the U.S. Army Corps of Engineers. The department denied that application within one year of the request.

evidence of waiver thereof)." Environmental Condition 11 [JA133]. Specifically, the Certificate Order stated that the section 3 and 7 authorizations are "conditioned on . . . compliance with the environmental conditions listed in the appendix" Certificate Order P297 [JA126], and Environmental Condition 11 provides that the Project "must receive written authorization . . . before commencing construction of any Project facilities." To receive that written authorization, the Project "must file with the Secretary documentation that it has received all applicable authorizations required under federal law (or evidence of waiver thereof)." Environmental Condition 11 [JA133]. FERC asserted that because the Project would have to obtain a section 401 water quality certification or demonstrate waiver before it could start construction, there would be no impacts on navigable waters until the State of Oregon issued or waived certification. Certificate Order P192 [JA082-83].

But that approach cannot be squared with the plain language of section 401. The statute flatly bars a federal agency from granting *any* license or permit "*until* the certification required by this section has been obtained or has been waived." 33 U.S.C. § 1341(a)(1) (emphasis added). The statute does not allow the agency to grant a license or permit *before* the section 401 certification has been obtained or waived, as FERC did here, even if the agency conditions some of the permitted activities on future compliance with the certification

requirement. At the very least, the statute does not allow FERC to grant a license or permit when the Project has not even applied to the state for the required section 401 certification.

This Court's decision in *Delaware Riverkeeper* does not authorize FERC's actions here. In that case, FERC conditionally approved a project in Pennsylvania while an application for a section 401 certification was pending, but before the state had issued the certification. 857 F.3d at 395. Pennsylvania ultimately issued the certification after FERC's conditional approval but before FERC's decision on rehearing and the petition for review in this Court. *Id.* This Court held that the sequencing of events did not require vacating FERC's order. It concluded that, because FERC's approval did not allow any construction to begin until the certification condition was met, it did not "approve[] 'activity . . . which may result in any discharge'" for purposes of section 401. *Delaware Riverkeeper*, 857 F.3d at 398 (ellipsis in original).

Two crucial differences distinguish this case from *Delaware Riverkeeper*. First, this case involves *no* section 401 certification at all, not merely a late certification. In *Delaware Riverkeeper*, the application for a section 401 certification was pending at the time of FERC's initial decision and the state issued the certification before FERC's ruling on rehearing, which was what triggered judicial review. 857 F.3d at 395. Here, however, the Project still had

not obtained the certification when proceedings before FERC concluded. It did not even have an application for the required certification pending with the state agency. Even if section 401 allows FERC to issue a conditional approval when the state certification will be forthcoming shortly, it should not allow FERC to do so when there is no realistic prospect of a state certification in the foreseeable future. *Delaware Riverkeeper* should not be extended to situations where the section 401 certification was not obtained before proceedings in front of FERC concluded.

Second, FERC's order is not conditioned in a way that prohibits all "activity . . . which may result in any discharge" within the meaning of section 401. Environmental Condition 11 requires that the Project obtain certification or a waiver before starting "construction," including "any tree-felling or ground-disturbing activities." Environmental Condition 11 [JA133]. But construction is not the only kind of activity that could result in a discharge to navigable waters. For example, existing storm water systems, road culverts, and herbicide application all could result in discharges without any new construction. Similarly, pre-construction activities like the removal of riparian vegetation along the pipeline corridor could result in discharges covered by the Clean Water Act due to the consequent solar gain at stream crossings or sedimentation from steep terrain. Here, the Project stated, in its Plan of

Development, Right of Way Clearing Plan, that it intends to place "additional road surfacing, which can include brushing and limbing . . . as needed for the planned use." Plan of Development at 7 [JA390]. As currently authorized, the Project can engage in those activities without first obtaining the section 401 certification—certification that would require the implementation of methods to prevent turbid discharges to navigable waters by minimizing the erosion of waste materials from cut banks, fills, and road surfaces as required under applicable state water quality standards. FERC insisted that no *construction* activities would result in discharges without compliance with the Clean Water Act, Rehearing Order P92 [JA251-52], but it did not discuss any of the non-construction activities that it authorized without a water quality certification. Unlike in *Delaware Riverkeeper*, therefore, FERC's order here is one that potentially "approved 'activity . . . which may result in any discharge'" for purposes of section 401. 857 F.3d at 398 (ellipsis in original).

Finally, although State Petitioners acknowledge that a panel of this Court is bound by *Delaware Riverkeeper*, it notes for purposes of further review that the decision is also incorrect. The conditional authorizations that FERC issued here are the only licenses or permits that FERC itself grants to allow the Project to proceed. Although Environmental Condition 11 requires that the Project obtain "written authorization" from the director of the Office of Energy Projects

before starting construction, that document is not the "license or permit" for the project within the meaning of section 401. FERC asserts that it will entertain a request for reconsideration of the director's written authorization and accede to judicial review of that decision, Rehearing Order P94 [JA253-54], but it is not clear whether the State of Oregon will even receive a copy of that document, much less that the statute or rules will allow it to be treated as an "order issued by the Commission" for purposes of further review. 15 U.S.C. § 717r. FERC's authorizations are the "license[s] or permit[s]" that "may result in discharge" under section 401, and FERC cannot issue them conditioned on after-the-fact compliance with the certification requirement.

2. FERC may not issue a Natural Gas Act certificate before the State of Oregon concurs with the Project's Coastal Zone Management Act certification.

Like the Clean Water Act, the Coastal Zone Management Act gives the State of Oregon the authority to veto federal licenses or permits for activity that will affect the state's coastal zones. Once a state's management program has been approved, an applicant for a license or permit must certify that the activity complies with the state's program:

> [A]ny applicant for a required Federal license or permit to conduct an activity, in or outside of the coastal zone, affecting any land or water use or natural resource of the coastal zone of that state shall provide in the application to the licensing or permitting agency a certification that the proposed activity complies with the

> enforceable policies of the state's approved program and that such activity will be conducted in a manner consistent with the program.

16 U.S.C. § 1456(c)(3)(A).

The state then has six months to notify the federal agency that it concurs in or objects to the applicant's certification. *Id.* If the state does not respond within six months, the state is presumed to concur. *Id.* And if the state objects, the Secretary of Commerce can overrule the objection. *Id.* But the federal agency cannot proceed until one of three things occurs: the state actually concurs, the state is presumed to concur because it did not act on the matter within six months, or the Secretary of Commerce overrules the state's objection:

> No license or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant's certification or until, by the state's failure to act, the concurrence is conclusively presumed, unless the Secretary, on his own initiative or upon appeal by the applicant, finds after providing a reasonable opportunity for detailed comments from the Federal agency involved and from the state, that the activity is consistent with the objectives of this chapter or is otherwise necessary in the interest of national security.

Id.

That statute barred FERC from issuing the authorizations here. The Oregon Department of Land Conservation and Development—the state's designated agency—objected to the Project's certification under the Coastal Zone Management Act, concluding that the project will not be consistent with

the state's approved program. *See* Oregon Department of Land Conservation and Development Federal Consistency Determination (Feb. 19, 2020), *available at* https://www.oregon.gov/lcd/OCMP/FCDocuments/FINAL-CZMA-OBJECTION_JCEP-DECISION_2.19.2020.pdf (last accessed July 2, 2021). The Project appealed that objection to the Secretary of Commerce and on February 8, 2021, after the opening briefs in this case were filed, the Secretary of Commerce issued a decision denying the Project's appeal and sustaining the Department of Land Conservation and Development's consistency determination. *See* Decision and Findings (Feb. 8, 2021), *available at* https://coast.noaa.gov/data/czm/consistency/appeals/fcappealdecisions/mediadecisions/jordancove.pdf (last accessed July 2, 2021). Thus, 16 U.S.C. § 1456(c)(3)(A) prohibited FERC from issuing any "license or permit" to the Project.

As with the Clean Water Act certification, FERC justified its decision to dispense with the Coastal Zone Management Act concurrence requirement on the ground that its authorization was conditional. Certificate Order P192 [JA082-83]. One of the environmental conditions listed in the appendix to the approval was that the Project "not begin construction of the Project until they file with the Secretary a copy of the determination of consistency with the Coastal Zone Management Plan issued by the State of Oregon." Environmental

Condition 27 [JA136]. Relying on *Delaware Riverkeeper*, FERC asserted that it could authorize the project conditioned on after-the-fact concurrence from the State of Oregon or, on appeal, the Secretary of Commerce. Certificate Order P192 & n. 371 [JA082-83].

But for the reasons discussed above, *Delaware Riverkeeper* does not apply here. First, this case involves a state's affirmative objection to the pertinent certification, not merely a pending request for concurrence. Second, even if the Project cannot start construction without concurrence, FERC's authorization allows it to conduct other "activity . . . affecting any land or water use or natural resource of the coastal zone," 16 U.S.C. § 1456(c)(3)(A), such as riparian vegetation clearing and road maintenance work. Finally, *Delaware Riverkeeper* incorrectly construed the Clean Water Act, and at a minimum it should not be extended to cover the similar provisions of the Coastal Zone Management Act.

B. FERC violated the National Environmental Policy Act by failing to take a hard look at the environmental impacts of the Jordan Cove Project.

1. The National Environmental Policy Act requires FERC to take a hard look at all the Project's impacts, including ways to mitigate significant impacts.

The National Environmental Policy Act (NEPA) "places upon [a federal] agency the obligation to consider every significant aspect of the environmental

impact of a proposed action." *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983) (citation and internal quotation marks omitted). Put differently, NEPA "requires agencies to take a 'hard look' at environmental consequences before undertaking any such action" that significantly affects the quality of the human environment. *Oglala Sioux Tribe v. U.S. Nuclear Regulatory Comm'n*, 896 F.3d 520, 530 (D.C. Cir. 2018) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989)).

Federal agencies fulfill the "hard look" mandate by preparing an environmental impact statement (EIS) before taking "major Federal actions significantly affecting the quality" of the environment. 42 U.S.C. § 4332(2)(C). An EIS "shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." 40 C.F.R. § 1502.1 (2019). Among other things, an EIS must analyze all direct, indirect, and cumulative impacts of the proposed action. *See* 40 C.F.R. §§ 1508.7, 1508.25(a)(2) (2019). An EIS must also analyze mitigation that is intended to reduce adverse impacts on the environment caused by the proposed action. *See* 40 C.F.R. §§ 1502.14(f), 1502.16(h), 1508.25(b) (2019).

2. The National Environmental Policy Act requires FERC to determine whether the Project's greenhouse gas emissions will have a significant environmental impact.

In this case, FERC issued a final EIS that made no effort to determine the significance of the Project's projected greenhouse gas emissions. The final EIS estimated that operation of the Project may result in the emission of up to 2,145,387 metric tons per year of carbon dioxide equivalent (CO_2e). Certificate Order P259 [JA112]; *see also* Final EIS at Table 4.12.1.3-1 [JA659] (terminal construction emissions), Table 4.12.1.3-2 [JA660] (terminal operation emissions), Table 4.12.1.4-1 [JA661] (pipeline facilities construction emissions), Table 4.12.1.4-2 [JA662] (pipeline facilities operation emissions). FERC refused, however, to determine whether the Project's greenhouse gas emissions—and their resulting incremental impact on global climate change—represent a "significant" environmental impact. FERC justified its decision by explaining that "we have neither the tools nor the expertise to determine whether project-related [greenhouse gas] emissions will have a significant impact on climate change and any potential resulting effects, such as global warming or sea rise." Certificate Order P262 [JA113]. In reaching that conclusion, FERC observed that there is no "universally accepted methodology for evaluating the projects' impacts on climate change." Certificate Order P183 [JA077-78].

FERC's refusal to determine whether the Project's greenhouse gas emissions are significant is unlawful. This Court recently held that a final EIS must "include a discussion of the 'significance' of [greenhouse gas emissions], *see* 40 C.F.R. § 1502.16(b) (2019), as well as 'the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions.'" *Sierra Club v. FERC*, 867 F.3d 1357, 1374 (D.C. Cir. 2017) (quoting 40 C.F.R. § 1508.7). Other courts have reached the same conclusion. *See, e.g.*, *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1216 (9th Cir. 2008) (holding that FERC is required to consider the consequences associated with greenhouse gas emissions and "evaluate the 'incremental impact' that those emissions will have on climate change or the environment more generally"); *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 51 (D.D.C. 2019) (explaining that the agency was required to "provide the information necessary for the public and agency decisionmakers to understand the degree to which [its] decisions would contribute" to the "impacts of climate change in the state, the region, and across the country"). Contrary to that settled requirement, however, FERC has failed to evaluate whether the "incremental impact" that the Project's greenhouse gas emissions will have on global climate change is "significant." FERC's refusal to do so violates NEPA.

In its final EIS, FERC acknowledged that the Project's greenhouse gas emissions will have an incremental impact on global climate change. Final EIS at 4-850 [JA667]. Indeed, it is undisputed that the projected greenhouse gas emissions associated with the Project are substantial. If constructed as proposed, the Project would be the largest emitter of greenhouse gases in Oregon and would emit twice as much greenhouse gas as the next highest non-energy producing industrial source in the state. *See* Greenhouse Gas Emissions from Facilities Holding Air Quality Permits (2018), *available at* https://www.oregon.gov/deq/aq/programs/Pages/GHG-Emissions.aspx (last accessed July 2, 2021). The final EIS projects that the export terminal alone will emit approximately 1.97 million metric tons per year, Final EIS at 4-701 [JA660], representing 14 to 16 percent of the total current industrial greenhouse gas emissions in the state.

Despite its acknowledgment that the Project's projected greenhouse gas emissions would have an incremental impact on climate change, FERC concluded that it could not determine whether those impacts are "significant," under NEPA, because it lacks the tools and expertise to do so. But neither does FERC have any subject matter expertise in noise pollution, habitat loss, water quality, and myriad other environmental impacts addressed in the final EIS and Certificate Order, yet it did not hesitate to assess whether the Project's impact

to those environmental concerns was significant. Furthermore, FERC cannot simply declare that it lacks a tool to assess the significance of greenhouse gas emissions. Even if there is no generally accepted methodology for assessing the cumulative impact of greenhouse gas emissions, NEPA nonetheless requires federal agencies to adopt or develop a methodology for conducting that assessment. That other agencies may adopt different methodologies is not a basis for inaction. *See* Consideration of Cumulative Impacts in EPA Review of NEPA Documents, U.S. Environmental Protection Agency, Office of Federal Activities (2252A), at 2 (EPA 315-R-99-002, May 1999), *available at* https://www.epa.gov/sites/production/files/2014-08/documents/cumulative.pdf ("Federal agencies prepare cumulative impact analysis using different terms and approaches.") (last accessed July 2, 2021).

Among other options, FERC could have assessed the significance of the impact by reference to the State of Oregon's established greenhouse gas reduction goals. FERC acknowledged that the State of Oregon has enacted legislation that establishes benchmark goals for the reduction of greenhouse gas emissions in the state. Certificate Order P260 [JA113]. For example, the State of Oregon set a goal of reducing greenhouse gas emissions in the year 2020 by 10 percent from 1990 emission levels; the goal calls for a 75 percent reduction in greenhouse gas emissions from 1990 levels by the year 2050. *See* Or. Rev.

Stat. § 468A.205. FERC also acknowledged that the greenhouse emissions associated with the Jordan Cove Project would make it more difficult for the State of Oregon to meet those goals, but went on to conclude that "Oregon's emission goals are not the same as an objective determination that the [greenhouse gas] emissions from the projects will have a significant impact on climate change." Certificate Order P262 [JA113]. But regardless whether the goals amount to that determination, they could have provided appropriate benchmarks for FERC's analysis.

FERC cited no authority supporting its refusal to assess the significance of the Project's greenhouse gas emissions. To the contrary, this Court has already held that FERC must provide "a quantitative estimate of the downstream greenhouse emissions that will result from burning the natural gas that [a] pipeline[] will transport or explain[] . . . why it could not have done so." *Sierra Club*, 867 F.3d at 1374. Further, this Court has explained that FERC has the "legal authority to mitigate" greenhouse gas emissions associated with a project. *Id.* (citing 15 U.S.C. § 717f(e)). Finally, as noted above, this Court explained that FERC's final EIS must "include a discussion of the 'significance' of [greenhouse gas emissions], *see* 40 C.F.R. § 1502.16(b), as well as 'the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions.'" *Id.* (quoting 40 C.F.R. § 1508.7).

FERC's failure to determine whether the Project's greenhouse gas emissions are significant violates NEPA and runs counter to this Court's case law.

3. FERC must consider measures to mitigate the incremental impacts to global climate change caused by greenhouse gas emissions.

Apart from unlawfully refusing to determine whether the Project's greenhouse gas emissions are significant, FERC unlawfully refused to consider possible mitigation measures intended to reduce adverse impacts on the environment caused by those emissions. For purposes of NEPA, "mitigation" is defined as

> measures that avoid, minimize, or compensate for effects caused by a proposed action or alternatives as described in an environmental document or record of decision and that have a nexus to those effects.

40 C.F.R. § 1508.1(s) (2019). Under NEPA's implementing regulations, the "environmental consequences" section of every EIS must include, among other things, a discussion of the "[m]eans to mitigate adverse environmental impacts[.]" 40 C.F.R. § 1502.16(a)(9) (2019). Consistent with that regulatory requirement, the Supreme Court has held that every EIS must contain "a detailed discussion of possible mitigation measures" to address adverse environmental impacts. *Robertson*, 490 U.S. at 351.

In this case, FERC's final EIS analyzed mitigation measures for other environmental impacts but failed to do so for greenhouse gas emissions. *See*,

e.g., Final EIS at 4-656 (discussing mitigation to address motor vehicle traffic impacts) [JA631]. Because FERC did not determine that the impacts of greenhouse gas emissions would be insignificant, its failure to consider any mitigation violated NEPA.

FERC also improperly excused the Project from mitigating the impact of its greenhouse gas emissions on the State of Oregon's own greenhouse gas emission goals. As noted above, FERC recognized that the Project's projected annual greenhouse gas emissions would "impact the State's ability to meet its greenhouse gas reduction goals as the annual emissions would represent 4.2 percent and 15.3 percent of Oregon's 2020 and 2050 GHG goals, respectively." Certificate Order P261 [JA113]. But because FERC was "unaware of any measures that Oregon has established to reduce [greenhouse gases] directly emitted by natural gas or LNG facilities," it explained that it would "not require the applicants to mitigate the impact on Oregon's ability to meet its GHG emission goals." Certificate Order P261 [JA113].

That explanation is based on an erroneous assessment of Oregon law as well as a legally untenable understanding of NEPA. First, contrary to FERC's apparent assertion, the State of Oregon has implemented programs to reduce greenhouse gas emissions associated with transportation, electricity generation, and stationary sources. *See, e.g.*, Or. Rev. Stat. § 469A.052 (establishing a

"renewable portfolio standard" for electric utilities and requiring that certain percentages of electricity sold at retail be derived from qualifying sources); Or. Admin. R. § 340-257-0040 (requiring that new vehicles sold in Oregon be certified to meet California emissions standards). The fact that the greenhouse gas reduction goals do not themselves implement any new regulatory program is irrelevant. In addition, the Governor recently directed all State agencies to take action to reduce greenhouse gas emissions by "(1) at least 45 percent below 1990 emissions levels by 2035 and (2) at least 80 percent below 1990 levels by 2050." Executive Order No. 20-04, Directing State Agencies to Take Actions to Reduce and Regulate Greenhouse Gas Emissions, at 5 (March 10, 2020), *available at* https://www.oregon.gov/gov/Documents/executive_orders/eo_20-04.pdf (last accessed July 2, 2021). The Executive Order also specifically requires the Department of Environmental Quality to "cap and reduce emissions from large stationary sources of emissions," consistent with the greenhouse gas emission goals. *Id.* at 6.

Second, FERC's failure to include a detailed discussion of possible greenhouse gas mitigation measures violates NEPA and the Supreme Court's holding in *Robertson*. Absent that detailed discussion, "neither the agency nor

other interested groups and individuals can properly evaluate the severity of the adverse effects." *Robertson*, 490 U.S. at 351-52.

4. FERC failed to take a hard look at environmental impacts to wetland ecosystems in Coos Bay.

FERC's decision to grant Natural Gas Act authorization to the Project suffers from another NEPA problem: FERC concluded that the Project would not significantly impact wetland ecosystems in Coos Bay after improperly deferring to the Project's inadequate mitigation plan and to the possibility that another federal agency may require mitigation to offset adverse impacts to wetlands. This Court should require FERC to develop a new or supplemental EIS to adequately consider impacts to wetland ecosystems and mitigation measures to offset those impacts.

As noted above, FERC was required to develop an EIS that adequately analyzed all direct, indirect, and cumulative environmental impacts associated with the Project, adequately discussed and analyzed mitigation measures intended to reduce adverse impacts to the environment, and utilized "high quality information and scientific analysis" in doing so. *See* 40 C.F.R. § 1502.16 (2019) (requiring analysis of direct and indirect effects); 40 C.F.R. § 1508.7 (2019) (requiring analysis of cumulative effects); 40 C.F.R. § 1502.14(f) (2019) (requiring the inclusion of "appropriate imitation measures"); 40 C.F.R. § 1500.1(b) (2019) (requiring the use of high quality scientific information).

FERC's treatment of the predicted impacts to wetlands fails to satisfy those standards.

In its comments on FERC's draft EIS, the Oregon Department of Fish and Wildlife raised numerous concerns about the Project's anticipated impact on freshwater and estuarine wetland ecosystems in Coos Bay. *See generally* Oregon Department of Fish and Wildlife Supplemental FEIS Comments (Feb. 5, 2020) [JA676-712]. In sum, construction and operation of the Project will result in a complex combination of temporary, long-term, and permanent impacts to the estuarine and freshwater ecosystems of Coos Bay. Three areas of concern bear emphasis. First, the Department of Fish and Wildlife explained that the Project's proposed eelgrass mitigation plan was insufficient and recommended that the Project's *Compensatory Wetland Mitigation Program* (hereafter "Wetland Plan") be reevaluated in favor of avoidance of eelgrass disturbance. Supplemental FEIS Comments at 10-13 [JA685-88]. The department also noted that FERC's EIS underestimated impacts associated with dredging in the Federal Navigational Channel and that the Wetland Plan does not mitigate for those impacts. Supplemental FEIS Comments at 13-14 [JA688-89]. Finally, the proposed LNG export terminal will create several localized but significant effects in freshwater and estuarine systems, including conversion of terrestrial habitat to aquatic habitat, changes to estuarine tidal

flow patterns, alteration of the salinity regime, and elevated turbidity. Supplemental FEIS Comments at 6-10, 14-16 [JA681-85, JA689-91].

In its final EIS, FERC acknowledged that construction and operation of the Jordan Cove export terminal will lead to the permanent loss of 22 acres of wetlands, while construction and operation of the pipeline will temporarily affect 114 acres of wetlands and permanently impact five acres of wetlands. (Final EIS at 5-4 [JA670]). According to the Wetland Plan, the Project will mitigate impacts to freshwater wetland resources via the "Kentuck Slough Wetland Mitigation Project"[5] and mitigate impacts to estuarine wetland resources via the "Eelgrass Mitigation site"[6] and the Kentuck project.

Based on the Project's Wetland Plan, FERC concluded that the Project would not significantly affect wetlands. Certificate Order P210 n. 427 [JA091] (citing FEIS at 4-139 [JA623], 5-4 [JA670]). FERC also asserted that "any

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[5] The Kentuck Project refers to a 140-acre parcel on the eastern shore of Coos Bay at the mouth of the Kentuck Slough. The property was previously a golf course and is now owned by the Project, which proposes a restoration of approximately 100 acres at the site. Final EIS at 2-18 [JA526].

[6] The Eelgrass Mitigation site is located near the Southwest Oregon Regional Airport in North Bend, where the Project proposes establishing new eelgrass beds. Final EIS at 2-18 [JA526]. In its Coastal Zone Management Act consistency determination, the Oregon Department of Land Conservation and Development expressed concern regarding impacts to eelgrass and recommended that FERC consider alternative eelgrass mitigation sites. *See* Federal Consistency Determination at 21-22, 50 (Feb. 19, 2020).

permits issued by the Corps for the projects may require project-related adverse impacts on wetlands be offset by mitigation similar to that identified in the *Compensatory Wetland Mitigation Plan*" and that its "reliance on wetland mitigation required by the Corps is reasonable." Certificate Order P210 & n. 427 [JA091] (citing *City of Oberlin v. FERC*, 937 F.3d 599, 610 (D.C. Cir. 2019)). In other words, FERC determined that the Project would not significantly impact wetlands by deferring to mitigation procedures outlined in the Project's own mitigation plan and to mitigation measures that might be developed by another federal agency.

FERC's reliance on the Project's Wetland Plan and the possibility that the Corps may mandate wetland mitigation measures was insufficient to satisfy NEPA. Nowhere in FERC's decision was there a "hard look" at the potential environmental impacts to wetland ecosystems within Coos Bay. Instead of taking its own hard look at those impacts, FERC deferred to the scrutiny of others by authorizing the Project subject to compliance with conditions contained in the Project's own mitigation program—conditions that, as explained above, are insufficient and ineffective—and subject to compliance with future mitigation measures developed by another federal agency. That is insufficient to satisfy NEPA's requirement that the agency take a hard look at potential environmental impacts and discuss mitigation measures to ameliorate

those impacts. *See State of Idaho By & Through Idaho Pub. Utilities Comm'n v. I.C.C.*, 35 F.3d 585, 595 (D.C. Cir. 1994).

Finally, this Court's decision in *City of Oberlin* does not compel a different result. There, this Court held that FERC acted reasonably by referencing pipeline safety standards—standards that are promulgated by a division within the Department of Transportation—as part of FERC's obligation to review a pipeline's potential for adverse impacts on public safety. 937 F.3d at 610. This Court explained that the Department of Transportation has the exclusive authority to establish safety standards for natural gas pipelines and has, in fact, established those standards. *Id.* It was therefore reasonable for FERC "to reference such standards as a component of its review of a pipeline's safety risks[.]" *Id.* In this case, however, FERC did not reference an existing set of mitigation measures promulgated by an agency with exclusive authority to do so. Rather, FERC declared that "any permits issued by the Corps for the projects *may* require project-related adverse impacts on wetlands by offset by mitigation similar to that identified" in the mitigation plan. Certificate Order P210 [JA091] (emphasis added). FERC's reliance on the possibility that the Corps will impose its own wetland mitigation measures is not reasonable.

CONCLUSION

The Court should grant the petitions and vacate FERC's orders.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation in this Court's order of December 18, 2020 (as counted by Microsoft Word), because this brief contains 9,018 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(e)(1).

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 it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

/s/ *Philip Thoennes*
Philip Thoennes

Dated: July 6, 2021

CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2021, I directed the Opening Brief of Petitioners State of Oregon, et al., to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Respectfully submitted,

/s/ Philip Thoennes
Philip Thoennes

Counsel for Petitioners Oregon Department of Environmental Quality; Oregon Department of Land Conservation and Development; Oregon Department of Fish and Wildlife; Oregon Department of Energy; State of Oregon

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STATUTORY ADDENDUM

tion 1254(n)(4)'', was repealed by Pub. L. 107–303. See Effective Date of 2002 Amendment note below.

1988—Subsec. (a)(2)(B). Pub. L. 100–653, § 1004, and Pub. L. 100–688, § 2001(1), made identical amendments, inserting ''Massachusetts Bay, Massachusetts (including Cape Cod Bay and Boston Harbor);'' after ''Buzzards Bay, Massachusetts;''.

Pub. L. 100–688, § 2001(2), substituted ''California; Galveston'' for ''California; and Galveston''.

Pub. L. 100–688, § 2001(3), which directed insertion of ''; Barataria-Terrebonne Bay estuary complex, Louisiana; Indian River Lagoon, Florida; and Peconic Bay, New York'' after ''Galveston Bay, Texas;'' was executed by making insertion after ''Galveston Bay, Texas'' as probable intent of Congress.

1987—Subsec. (a)(2)(B). Pub. L. 100–202 inserted ''Santa Monica Bay, California;''.

EFFECTIVE DATE OF 2002 AMENDMENT

Amendment by Pub. L. 107–303 effective Nov. 10, 1998, and Federal Water Pollution Act (33 U.S.C. 1251 et seq.) to be applied and administered on and after Nov. 27, 2002, as if amendments made by section 501(a)–(d) of Pub. L. 105–362 had not been enacted, see section 302(b) of Pub. L. 107–303, set out as a note under section 1254 of this title.

MASSACHUSETTS BAY PROTECTION; DEFINITION; FINDINGS AND PURPOSE; FUNDING SOURCES

Pub. L. 100–653, title X, §§ 1002, 1003, 1005, Nov. 14, 1988, 102 Stat. 3835, 3836, provided that:

''SEC. 1002. DEFINITION.

''For purposes of this title [amending section 1330 of this title and enacting provisions set out as notes under sections 1251 and 1330 of this title], the term 'Massachusetts Bay' includes Massachusetts Bay, Cape Cod Bay, and Boston Harbor, consisting of an area extending from Cape Ann, Massachusetts south to the northern reach of Cape Cod, Massachusetts.

''SEC. 1003. FINDINGS AND PURPOSE.

''(a) FINDINGS.—The Congress finds and declares that—

''(1) Massachusetts Bay comprises a single major estuarine and oceanographic system extending from Cape Ann, Massachusetts south to the northern reaches of Cape Cod, encompassing Boston Harbor, Massachusetts Bay, and Cape Cod Bay;

''(2) several major riverine systems, including the Charles, Neponset, and Mystic Rivers, drain the watersheds of eastern Massachusetts into the Bay;

''(3) the shorelines of Massachusetts Bay, first occupied in the middle 1600's, are home to over 4 million people and support a thriving industrial and recreational economy;

''(4) Massachusetts Bay supports important commercial fisheries, including lobsters, finfish, and shellfisheries, and is home to or frequented by several endangered species and marine mammals;

''(5) Massachusetts Bay also constitutes an important recreational resource, providing fishing, swimming, and boating opportunities to the region;

''(6) rapidly expanding coastal populations and pollution pose increasing threats to the long-term health and integrity of Massachusetts Bay;

''(7) while the cleanup of Boston Harbor will contribute significantly to improving the overall environmental quality of Massachusetts Bay, expanded efforts encompassing the entire ecosystem will be necessary to ensure its long-term health;

''(8) the concerted efforts of all levels of Government, the private sector, and the public at large will be necessary to protect and enhance the environmental integrity of Massachusetts Bay; and

''(9) the designation of Massachusetts Bay as an Estuary of National Significance and the development of a comprehensive plan for protecting and restoring the Bay may contribute significantly to its long-term health and environmental integrity.

''(b) PURPOSE.—The purpose of this title is to protect and enhance the environmental quality of Massachusetts Bay by providing for its designation as an Estuary of National Significance and by providing for the preparation of a comprehensive restoration plan for the Bay.

''SEC. 1005. FUNDING SOURCES.

''Within one year of enactment [Nov. 14, 1988], the Administrator of the United States Environmental Protection Agency and the Governor of Massachusetts shall undertake to identify and make available sources of funding to support activities pertaining to Massachusetts Bay undertaken pursuant to or authorized by section 320 of the Clean Water Act [33 U.S.C. 1330], and shall make every effort to coordinate existing research, monitoring or control efforts with such activities.''

PURPOSES AND POLICIES OF NATIONAL ESTUARY PROGRAM

Pub. L. 100–4, title III, § 317(a), Feb. 4, 1987, 101 Stat. 61, provided that:

''(1) FINDINGS.—Congress finds and declares that—

''(A) the Nation's estuaries are of great importance for fish and wildlife resources and recreation and economic opportunity;

''(B) maintaining the health and ecological integrity of these estuaries is in the national interest;

''(C) increasing coastal population, development, and other direct and indirect uses of these estuaries threaten their health and ecological integrity;

''(D) long-term planning and management will contribute to the continued productivity of these areas, and will maximize their utility to the Nation; and

''(E) better coordination among Federal and State programs affecting estuaries will increase the effectiveness and efficiency of the national effort to protect, preserve, and restore these areas.

''(2) PURPOSES.—The purposes of this section [enacting this section] are to—

''(A) identify nationally significant estuaries that are threatened by pollution, development, or overuse;

''(B) promote comprehensive planning for, and conservation and management of, nationally significant estuaries;

''(C) encourage the preparation of management plans for estuaries of national significance; and

''(D) enhance the coordination of estuarine research.''

SUBCHAPTER IV—PERMITS AND LICENSES

§ 1341. Certification

(a) Compliance with applicable requirements; application; procedures; license suspension

(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371(c) of this title.

Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

(2) Upon receipt of such application and certification the licensing or permitting agency shall immediately notify the Administrator of such application and certification. Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after receipt of such notification, such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirements in such State, and within such sixty-day period notifies the Administrator and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing. The Administrator shall at such hearing submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency. Such agency, based upon the recommendations of such State, the Administrator, and upon any additional evidence, if any, presented to the agency at the hearing, shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.

(3) The certification obtained pursuant to paragraph (1) of this subsection with respect to the construction of any facility shall fulfill the requirements of this subsection with respect to certification in connection with any other Federal license or permit required for the operation of such facility unless, after notice to the certifying State, agency, or Administrator, as the case may be, which shall be given by the Federal agency to whom application is made for such operating license or permit, the State, or if appropriate, the interstate agency or the Administrator, notifies such agency within sixty days after receipt of such notice that there is no longer reasonable assurance that there will be compliance with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title because of changes since the construction license or permit certification was issued in (A) the construction or operation of the facility, (B) the characteristics of the waters into which such discharge is made, (C) the water quality criteria applicable to such waters or (D) applicable effluent limitations or other requirements. This paragraph shall be inapplicable in any case where the applicant for such operating license or permit has failed to provide the certifying State, or, if appropriate, the interstate agency or the Administrator, with notice of any proposed changes in the construction or operation of the facility with respect to which a construction license or permit has been granted, which changes may result in violation of section 1311, 1312, 1313, 1316, or 1317 of this title.

(4) Prior to the initial operation of any federally licensed or permitted facility or activity which may result in any discharge into the navigable waters and with respect to which a certification has been obtained pursuant to paragraph (1) of this subsection, which facility or activity is not subject to a Federal operating license or permit, the licensee or permittee shall provide an opportunity for such certifying State, or, if appropriate, the interstate agency or the Administrator to review the manner in which the facility or activity shall be operated or conducted for the purposes of assuring that applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated. Upon notification by the certifying State, or if appropriate, the interstate agency or the Administrator that the operation of any such federally licensed or permitted facility or activity will violate applicable effluent limitations or other limitations or other water quality requirements such Federal agency may, after public hearing, suspend such license or permit. If such license or permit is suspended, it shall remain suspended until notification is received from the certifying State, agency, or Administrator, as the case may be, that there is reasonable assurance that such facility or activity will not violate the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(5) Any Federal license or permit with respect to which a certification has been obtained under paragraph (1) of this subsection may be suspended or revoked by the Federal agency issuing such license or permit upon the entering of a judgment under this chapter that such facility or activity has been operated in violation of the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(6) Except with respect to a permit issued under section 1342 of this title, in any case where actual construction of a facility has been lawfully commenced prior to April 3, 1970, no certification shall be required under this subsection for a license or permit issued after April 3, 1970, to operate such facility, except that any such license or permit issued without certification shall terminate April 3, 1973, unless prior to such termination date the person having such license or permit submits to the Federal agency which issued such license or permit a certification and otherwise meets the requirements of this section.

(b) Compliance with other provisions of law setting applicable water quality requirements

Nothing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements. The Administrator shall, upon the request of any Federal department or agency, or State or interstate agency, or applicant, provide, for the purpose of this section, any relevant information on applicable effluent limitations, or other limitations, standards, regulations, or requirements, or water quality criteria, and shall, when requested by any such department or agency or State or interstate agency, or applicant, comment on any methods to comply with such limitations, standards, regulations, requirements, or criteria.

(c) Authority of Secretary of the Army to permit use of spoil disposal areas by Federal licensees or permittees

In order to implement the provisions of this section, the Secretary of the Army, acting through the Chief of Engineers, is authorized, if he deems it to be in the public interest, to permit the use of spoil disposal areas under his jurisdiction by Federal licensees or permittees, and to make an appropriate charge for such use. Moneys received from such licensees or permittees shall be deposited in the Treasury as miscellaneous receipts.

(d) Limitations and monitoring requirements of certification

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

(June 30, 1948, ch. 758, title IV, § 401, as added Pub. L. 92–500, § 2, Oct. 18, 1972, 86 Stat. 877; amended Pub. L. 95–217, §§ 61(b), 64, Dec. 27, 1977, 91 Stat. 1598, 1599.)

AMENDMENTS

1977—Subsec. (a). Pub. L. 95–217 inserted reference to section 1313 of this title in pars. (1), (3), (4), and (5), struck out par. (6) which provided that no Federal agency be deemed an applicant for purposes of this subsection, and redesignated par. (7) as (6).

§ 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under section 407 of this title, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objectives of this chapter to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(i)(2) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance.

(b) State permit programs

At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from

(i) $6,000,000 for fiscal year 1992;
(ii) $12,000,000 for fiscal year 1993;
(iii) $12,000,000 for fiscal year 1994; and
(iv) $12,000,000 for fiscal year 1995.

(i) Definitions

In this section—

(1) the term ''Administrator'' means the Administrator of the Environmental Protection Agency;

(2) the term ''coastal State'' has the meaning given the term ''coastal state'' under section 304 of the Coastal Zone Management Act of 1972 (16 U.S.C. 1453);

(3) each of the terms ''coastal waters'' and ''coastal zone'' has the meaning that term has in the Coastal Zone Management Act of 1972 [16 U.S.C. 1451 et seq.];

(4) the term ''coastal management agency'' means a State agency designated pursuant to section 306(d)(6) of the Coastal Zone Management Act of 1972 [16 U.S.C. 1455(d)(6)];

(5) the term ''land use'' includes a use of waters adjacent to coastal waters; and

(6) the term ''Secretary'' means the Secretary of Commerce.

(Pub. L. 101–508, title VI, § 6217, Nov. 5, 1990, 104 Stat. 1388–314; Pub. L. 102–587, title II, § 2205(b)(24), Nov. 4, 1992, 106 Stat. 5052.)

REFERENCES IN TEXT

The Coastal Zone Management Act of 1972, referred to in subsecs. (a)(2) and (i)(3), 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 this chapter (§ 1451 et seq.). For complete classification of this Act to the Code, see Short Title note set out under section 1451 of this title and Tables.

This Act, referred to in subsecs. (a)(2) and (c)(2)(B), is Pub. L. 101–508, Nov. 5, 1990, 104 Stat. 1388, known as the Omnibus Budget Reconciliation Act of 1990. For complete classification of this Act to the Code, see Tables.

Section 318(a) of the Coastal Zone Management Act of 1972, referred to in subsec. (h)(2)(A), which is classified to section 1464(a) of this title, was amended by Pub. L. 104–150, § 4(1), June 3, 1996, 110 Stat. 1381, and, as so amended, does not contain a par. (4).

CODIFICATION

Section was enacted as part of the Coastal Zone Act Reauthorization Amendments of 1990 and also as part of the Omnibus Budget Reconciliation Act of 1990, and not as part of the Coastal Zone Management Act of 1972 which comprises this chapter.

AMENDMENTS

1992—Subsec. (i)(3). Pub. L. 102–587 struck out comma after ''coastal waters'' and inserted ''Zone'' before ''Management''.

§ 1456. Coordination and cooperation

(a) Federal agencies

In carrying out his functions and responsibilities under this chapter, the Secretary shall consult with, cooperate with, and, to the maximum extent practicable, coordinate his activities with other interested Federal agencies.

(b) Adequate consideration of views of Federal agencies

The Secretary shall not approve the management program submitted by a state pursuant to section 1455 of this title unless the views of Federal agencies principally affected by such program have been adequately considered.

(c) Consistency of Federal activities with State management programs; Presidential exemption; certification

(1)(A) Each Federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs. A Federal agency activity shall be subject to this paragraph unless it is subject to paragraph (2) or (3).

(B) After any final judgment, decree, or order of any Federal court that is appealable under section 1291 or 1292 of title 28, or under any other applicable provision of Federal law, that a specific Federal agency activity is not in compliance with subparagraph (A), and certification by the Secretary that mediation under subsection (h) of this section is not likely to result in such compliance, the President may, upon written request from the Secretary, exempt from compliance those elements of the Federal agency activity that are found by the Federal court to be inconsistent with an approved State program, if the President determines that the activity is in the paramount interest of the United States. No such exemption shall be granted on the basis of a lack of appropriations unless the President has specifically requested such appropriations as part of the budgetary process, and the Congress has failed to make available the requested appropriations.

(C) Each Federal agency carrying out an activity subject to paragraph (1) shall provide a consistency determination to the relevant State agency designated under section 1455(d)(6) of this title at the earliest practicable time, but in no case later than 90 days before final approval of the Federal activity unless both the Federal agency and the State agency agree to a different schedule.

(2) Any Federal agency which shall undertake any development project in the coastal zone of a state shall insure that the project is, to the maximum extent practicable, consistent with the enforceable policies of approved state management programs.

(3)(A) After final approval by the Secretary of a state's management program, any applicant for a required Federal license or permit to conduct an activity, in or outside of the coastal zone, affecting any land or water use or natural resource of the coastal zone of that state shall provide in the application to the licensing or permitting agency a certification that the proposed activity complies with the enforceable policies of the state's approved program and that such activity will be conducted in a manner consistent with the program. At the same time, the applicant shall furnish to the state or its designated agency a copy of the certification, with all necessary information and data. Each coastal state shall establish procedures for public notice in the case of all such certifications and, to the extent it deems appropriate, procedures for public hearings in connection therewith. At the earliest practicable time, the state

or its designated agency shall notify the Federal agency concerned that the state concurs with or objects to the applicant's certification. If the state or its designated agency fails to furnish the required notification within six months after receipt of its copy of the applicant's certification, the state's concurrence with the certification shall be conclusively presumed. No license or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant's certification or until, by the state's failure to act, the concurrence is conclusively presumed, unless the Secretary, on his own initiative or upon appeal by the applicant, finds after providing a reasonable opportunity for detailed comments from the Federal agency involved and from the state, that the activity is consistent with the objectives of this chapter or is otherwise necessary in the interest of national security.

(B) After the management program of any coastal state has been approved by the Secretary under section 1455 of this title, any person who submits to the Secretary of the Interior any plan for the exploration or development of, or production from, any area which has been leased under the Outer Continental Shelf Lands Act (43 U.S.C. 1331 et seq.) and regulations under such Act shall, with respect to any exploration, development, or production described in such plan and affecting any land or water use or natural resource of the coastal zone of such state, attach to such plan a certification that each activity which is described in detail in such plan complies with the enforceable policies of such state's approved management program and will be carried out in a manner consistent with such program. No Federal official or agency shall grant such person any license or permit for any activity described in detail in such plan until such state or its designated agency receives a copy of such certification and plan, together with any other necessary data and information, and until—

(i) such state or its designated agency, in accordance with the procedures required to be established by such state pursuant to subparagraph (A), concurs with such person's certification and notifies the Secretary and the Secretary of the Interior of such concurrence;

(ii) concurrence by such state with such certification is conclusively presumed as provided for in subparagraph (A), except if such state fails to concur with or object to such certification within three months after receipt of its copy of such certification and supporting information, such state shall provide the Secretary, the appropriate federal agency, and such person with a written statement describing the status of review and the basis for further delay in issuing a final decision, and if such statement is not so provided, concurrence by such state with such certification shall be conclusively presumed; or

(iii) the Secretary finds, pursuant to subparagraph (A), that each activity which is described in detail in such plan is consistent with the objectives of this chapter or is otherwise necessary in the interest of national security.

If a state concurs or is conclusively presumed to concur, or if the Secretary makes such a finding, the provisions of subparagraph (A) are not applicable with respect to such person, such state, and any Federal license or permit which is required to conduct any activity affecting land uses or water uses in the coastal zone of such state which is described in detail in the plan to which such concurrence or finding applies. If such state objects to such certification and if the Secretary fails to make a finding under clause (iii) with respect to such certification, or if such person fails substantially to comply with such plan as submitted, such person shall submit an amendment to such plan, or a new plan, to the Secretary of the Interior. With respect to any amendment or new plan submitted to the Secretary of the Interior pursuant to the preceding sentence, the applicable time period for purposes of concurrence by conclusive presumption under subparagraph (A) is 3 months.

(d) Application of local governments for Federal assistance; relationship of activities with approved management programs

State and local governments submitting applications for Federal assistance under other Federal programs, in or outside of the coastal zone, affecting any land or water use of natural resource of the coastal zone shall indicate the views of the appropriate state or local agency as to the relationship of such activities to the approved management program for the coastal zone. Such applications shall be submitted and coordinated in accordance with the provisions of section 6506 of title 31. Federal agencies shall not approve proposed projects that are inconsistent with the enforceable policies of a coastal state's management program, except upon a finding by the Secretary that such project is consistent with the purposes of this chapter or necessary in the interest of national security.

(e) Construction with other laws

Nothing in this chapter shall be construed—

(1) to diminish either Federal or state jurisdiction, responsibility, or rights in the field of planning, development, or control of water resources, submerged lands, or navigable waters; nor to displace, supersede, limit, or modify any interstate compact or the jurisdiction or responsibility of any legally established joint or common agency of two or more states or of two or more states and the Federal Government; nor to limit the authority of Congress to authorize and fund projects;

(2) as superseding, modifying, or repealing existing laws applicable to the various Federal agencies; nor to affect the jurisdiction, powers, or prerogatives of the International Joint Commission, United States and Canada, the Permanent Engineering Board, and the United States operating entity or entities established pursuant to the Columbia River Basin Treaty, signed at Washington, January 17, 1961, or the International Boundary and Water Commission, United States and Mexico.

(f) Construction with existing requirements of water and air pollution programs

Notwithstanding any other provision of this chapter, nothing in this chapter shall in any way affect any requirement (1) established by

the Federal Water Pollution Control Act, as amended [33 U.S.C. 1251 et seq.], or the Clean Air Act, as amended [42 U.S.C. 7401 et seq.], or (2) established by the Federal Government or by any state or local government pursuant to such Acts. Such requirements shall be incorporated in any program developed pursuant to this chapter and shall be the water pollution control and air pollution control requirements applicable to such program.

(g) Concurrence with programs which affect inland areas

When any state's coastal zone management program, submitted for approval or proposed for modification pursuant to section 1455 of this title, includes requirements as to shorelands which also would be subject to any Federally supported national land use program which may be hereafter enacted, the Secretary, prior to approving such program, shall obtain the concurrence of the Secretary of the Interior, or such other Federal official as may be designated to administer the national land use program, with respect to that portion of the coastal zone management program affecting such inland areas.

(h) Mediation of disagreements

In case of serious disagreement between any Federal agency and a coastal state—

(1) in the development or the initial implementation of a management program under section 1454 of this title; or

(2) in the administration of a management program approved under section 1455 of this title;

the Secretary, with the cooperation of the Executive Office of the President, shall seek to mediate the differences involved in such disagreement. The process of such mediation shall, with respect to any disagreement described in paragraph (2), include public hearings which shall be conducted in the local area concerned.

(i) Application fee for appeals

(1) With respect to appeals under subsections (c)(3) and (d) of this section which are submitted after November 5, 1990, the Secretary shall collect an application fee of not less than $200 for minor appeals and not less than $500 for major appeals, unless the Secretary, upon consideration of an applicant's request for a fee waiver, determines that the applicant is unable to pay the fee.

(2)(A) The Secretary shall collect such other fees as are necessary to recover the full costs of administering and processing such appeals under subsection (c) of this section.

(B) If the Secretary waives the application fee under paragraph (1) for an applicant, the Secretary shall waive all other fees under this subsection for the applicant.

(3) Fees collected under this subsection shall be deposited into the Coastal Zone Management Fund established under section 1456a of this title.

(Pub. L. 89–454, title III, § 307, as added Pub. L. 92–583, Oct. 27, 1972, 86 Stat. 1285; amended Pub. L. 94–370, § 6, July 26, 1976, 90 Stat. 1018; Pub. L. 95–372, title V, § 504, Sept. 18, 1978, 92 Stat. 693; Pub. L. 101–508, title VI, § 6208, Nov. 5, 1990, 104 Stat. 1388–307; Pub. L. 102–587, title II, § 2205(b)(13), (14), Nov. 4, 1992, 106 Stat. 5051.)

REFERENCES IN TEXT

The Outer Continental Shelf Lands Act, referred to in subsec. (c)(3)(B), is act Aug. 7, 1953, ch. 345, 67 Stat. 462, as amended, which is classified generally to subchapter III (§ 1331 et seq.) of chapter 29 of Title 43, Public Lands. For complete classification of this Act to the Code, see Short Title note set out under section 1331 of Title 43 and Tables.

The Federal Water Pollution Control Act, referred to in subsec. (f), is act June 30, 1948, ch. 758, as amended generally by Pub. L. 92–500, § 2, Oct. 18, 1972, 86 Stat. 816, which is classified generally to chapter 26 (§ 1251 et seq.) of Title 33, Navigation and Navigable Waters. For complete classification of this Act to the Code, see Short Title note set out under section 1251 of Title 33 and Tables.

The Clean Air Act, referred to in subsec. (f), is act July 14, 1955, ch. 360, 69 Stat. 322, as amended, which is classified generally to chapter 85 (§ 7401 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 7401 of Title 42 and Tables.

CODIFICATION

In subsec. (d), ''section 6506 of title 31'' substituted for ''title IV of the Intergovernmental Coordination [Cooperation] Act of 1968 [42 U.S.C. 4231 et seq.]'' on authority of Pub. L. 97–258, § 4(b), Sept. 13, 1982, 96 Stat. 1067, the first section of which enacted Title 31, Money and Finance.

AMENDMENTS

1992—Subsec. (c)(3)(B). Pub. L. 102–587, § 2205(b)(13), made technical amendment to directory language of Pub. L. 101–508, § 6208(b)(3)(B). See 1990 Amendment note below.

Subsec. (i). Pub. L. 102–587, § 2205(b)(14), designated existing provisions as par. (1), added pars. (2) and (3), and struck out at end of par. (1) ''The Secretary shall collect such other fees as are necessary to recover the full costs of administering and processing such appeals under subsection (c) of this section.''

1990—Subsec. (c)(1). Pub. L. 101–508, § 6208(a), amended par. (1) generally. Prior to amendment, par. (1) read as follows: ''Each Federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs.''

Subsec. (c)(2). Pub. L. 101–508, § 6208(b)(1), which directed the insertion of ''the enforceable policies of'' before ''approved State management programs'', was executed by making the insertion before ''approved state management programs'' to reflect the probable intent of Congress.

Subsec. (c)(3)(A). Pub. L. 101–508, § 6208(b)(2), in first sentence inserted '', in or outside of the coastal zone,'' after ''to conduct an activity'', substituted ''any land or water use or natural resource of'' for ''land or water uses in'', and inserted ''the enforceable policies of'' after ''the proposed activity complies with''.

Subsec. (c)(3)(B). Pub. L. 101–508, § 6208(b)(3)(A), substituted ''land or water use or natural resource of'' for ''land use or water use in'' in first sentence.

Pub. L. 101–508, § 6208(b)(3)(B), as amended by Pub. L. 102–587, § 2205(b)(13), inserted ''the enforceable policies of'' after ''such plan complies with'' in first sentence.

Subsec. (d). Pub. L. 101–508, § 6208(b)(4), substituted '', in or outside of the coastal zone, affecting any land or water use of natural resource of'' for ''affecting'' and inserted ''the enforceable policies of'' after ''that are inconsistent with''.

Subsec. (i). Pub. L. 101–508, § 6208(c), added subsec. (i).

1978—Subsec. (c)(3)(B)(ii). Pub. L. 95–372 inserted '', except if such state fails to concur with or object to such certification within three months after receipt of

its copy of such certification and supporting information, such state shall provide the Secretary, the appropriate federal agency, and such person with a written statement describing the status of review and the basis for further delay in issuing a final decision, and if such statement is not so provided, concurrence by such state with such certification shall be conclusively presumed'' after ''as provided for in subparagraph (A)''.

1976—Subsec. (b). Pub. L. 94–370, §6(2), struck out provisions requiring that in case of serious disagreement between Federal agency and state in development of program, Secretary shall seek to mediate the differences in cooperation with the Executive Office of the President and incorporated such provision into subsec. (h).

Subsec. (c)(3). Pub. L. 94–370, §6(3), designated existing provisions as subpar. (A) and added subpar. (B).

Subsec. (h). Pub. L. 94–370, §6(4), added subsec. (h) which incorporates former provision of subsec. (b) relating to mediation by Secretary of disagreements between Federal agencies and state.

§ 1456–1. Authorization of the Coastal and Estuarine Land Conservation Program

(a) In general

The Secretary may conduct a Coastal and Estuarine Land Conservation Program, in cooperation with appropriate State, regional, and other units of government, for the purposes of protecting important coastal and estuarine areas that have significant conservation, recreation, ecological, historical, or aesthetic values, or that are threatened by conversion from their natural, undeveloped, or recreational state to other uses or could be managed or restored to effectively conserve, enhance, or restore ecological function. The program shall be administered by the National Ocean Service of the National Oceanic and Atmospheric Administration through the Office of Ocean and Coastal Resource Management.

(b) Property acquisition grants

The Secretary shall make grants under the program to coastal states with approved coastal zone management plans or National Estuarine Research Reserve units for the purpose of acquiring property or interests in property described in subsection (a) that will further the goals of—

(1) a Coastal Zone Management Plan or Program approved under this chapter;

(2) a National Estuarine Research Reserve management plan;

(3) a regional or State watershed protection or management plan involving coastal states with approved coastal zone management programs; or

(4) a State coastal land acquisition plan that is consistent with an approved coastal zone management program.

(c) Grant process

The Secretary shall allocate funds to coastal states or National Estuarine Research Reserves under this section through a competitive grant process in accordance with guidelines that meet the following requirements:

(1) The Secretary shall consult with the coastal state's coastal zone management program, any National Estuarine Research Reserve in that State, and the lead agency designated by the Governor for coordinating the implementation of this section (if different from the coastal zone management program).

(2) Each participating coastal state, after consultation with local governmental entities and other interested stakeholders, shall identify priority conservation needs within the State, the values to be protected by inclusion of lands in the program, and the threats to those values that should be avoided.

(3) Each participating coastal state shall to the extent practicable ensure that the acquisition of property or easements shall complement working waterfront needs.

(4) The applicant shall identify the values to be protected by inclusion of the lands in the program, management activities that are planned and the manner in which they may affect the values identified, and any other information from the landowner relevant to administration and management of the land.

(5) Awards shall be based on demonstrated need for protection and ability to successfully leverage funds among participating entities, including Federal programs, regional organizations, State and other governmental units, landowners, corporations, or private organizations.

(6) The governor, or the lead agency designated by the governor for coordinating the implementation of this section, where appropriate in consultation with the appropriate local government, shall determine that the application is consistent with the State's or territory's approved coastal zone plan, program, and policies prior to submittal to the Secretary.

(7)(A) Priority shall be given to lands described in subsection (a) that can be effectively managed and protected and that have significant ecological value.

(B) Of the projects that meet the standard in subparagraph (A), priority shall be given to lands that—

(i) are under an imminent threat of conversion to a use that will degrade or otherwise diminish their natural, undeveloped, or recreational state; and

(ii) serve to mitigate the adverse impacts caused by coastal population growth in the coastal environment.

(8) In developing guidelines under this section, the Secretary shall consult with coastal states, other Federal agencies, and other interested stakeholders with expertise in land acquisition and conservation procedures.

(9) Eligible coastal states or National Estuarine Research Reserves may allocate grants to local governments or agencies eligible for assistance under section 1455a(e) of this title.

(10) The Secretary shall develop performance measures that the Secretary shall use to evaluate and report on the program's effectiveness in accomplishing its purposes, and shall submit such evaluations to Congress triennially.

(d) Limitations and private property protections

(1) A grant awarded under this section may be used to purchase land or an interest in land, including an easement, only from a willing seller. Any such purchase shall not be the result of a

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 responsibil-

ities 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;

(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

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

(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), the importation of the natural gas referred to in subsection (b), 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''—

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

(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.)

REFERENCES IN TEXT

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.

The Clean Air Act, referred to in subsec. (d)(2), is act July 14, 1955, ch. 360, 69 Stat. 322, as amended, which is classified generally to chapter 85 (§7401 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 7401 of Title 42 and Tables.

The Federal Water Pollution Control Act, referred to in subsec. (d)(3), is act June 30, 1948, ch. 758, as amended generally by Pub. L. 92–500, §2, Oct. 18, 1972, 86 Stat. 816, which is classified generally to chapter 26 (§1251 et seq.) of Title 33, Navigation and Navigable Waters. For complete classification of this Act to the Code, see Short Title note set out under section 1251 of Title 33 and Tables.

AMENDMENTS

2005—Pub. L. 109–58, §311(c)(1), inserted "; LNG terminals" after "natural gas" in section catchline.

Subsecs. (d) to (f). Pub. L. 109–58, §311(c)(2), added subsecs. (d) to (f).

1992—Pub. L. 102–486 designated existing provisions as subsec. (a) and added subsecs. (b) and (c).

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 authorizations for importation of natural gas from Alberta as pre-deliveries of Alaskan gas issued under this section with respect to pre-construction, construction, and initial operation of transportation system for Canadian and Alaskan natural gas transferred to the 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.

DELEGATION OF FUNCTIONS

Functions of President respecting certain facilities constructed and maintained on United States borders delegated to Secretary of State, see Ex. Ord. No. 11423, Aug. 16, 1968, 33 F.R. 11741, set out as a note under section 301 of Title 3, The President.

EX. ORD. NO. 10485. PERFORMANCE OF FUNCTIONS RESPECTING ELECTRIC POWER AND NATURAL GAS FACILITIES LOCATED ON UNITED STATES BORDERS

Ex. Ord. No. 10485. Sept. 3, 1953, 18 F.R. 5397, as amended by Ex. Ord. No. 12038, Feb. 3, 1978, 43 F.R. 4957, provided:

SECTION 1. (a) The Secretary of Energy is hereby designated and empowered to perform the following-described functions:

(1) To receive all applications for permits for the construction, operation, maintenance, or connection, at the borders of the United States, of facilities for the transmission of electric energy between the United States and a foreign country.

(2) To receive all applications for permits for the construction, operation, maintenance, or connection, at the borders of the United States, of facilities for the exportation or importation of natural gas to or from a foreign country.

(3) Upon finding the issuance of the permit to be consistent with the public interest, and, after obtaining the favorable recommendations of the Secretary of State and the Secretary of Defense thereon, to issue to the applicant, as appropriate, a permit for such construction, operation, maintenance, or connection. The Secretary of Energy shall have the power to attach to the issuance of the permit and to the exercise of the rights granted thereunder such conditions as the public interest may in its judgment require.

(b) In any case wherein the Secretary of Energy, the Secretary of State, and the Secretary of Defense cannot agree as to whether or not a permit should be issued, the Secretary of Energy shall submit to the President for approval or disapproval the application for a permit with the respective views of the Secretary of Energy, the Secretary of State and the Secretary of Defense.

SEC. 2. [Deleted.]

SEC. 3. The Secretary of Energy is authorized to issue such rules and regulations, and to prescribe such procedures, as it may from time to time deem necessary or desirable for the exercise of the authority delegated to it by this order.

SEC. 4. All Presidential Permits heretofore issued pursuant to Executive Order No. 8202 of July 13, 1939, and in force at the time of the issuance of this order, and all permits issued hereunder, shall remain in full force and effect until modified or revoked by the President or by the Secretary of Energy.

SEC. 5. Executive Order No. 8202 of July 13, 1939, is hereby revoked.

§ 717b–1. State and local safety considerations

(a) Promulgation of regulations

The Commission shall promulgate regulations on the National Environmental Policy Act of

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

tions as the Commission may prescribe as necessary in the public interest or for the protection of natural gas ratepayers. Nothing in this section shall be construed to create a private right of action.

(June 21, 1938, ch. 556, § 4A, as added Pub. L. 109–58, title III, § 315, Aug. 8, 2005, 119 Stat. 691.)

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

(a) Decreases in rates

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

(b) Costs of production and transportation

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

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

§ 717e. Ascertainment of cost of property

(a) Cost of property

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

(b) Inventory of property; statements of costs

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

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

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

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

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

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

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

(c) Certificate of public convenience and necessity

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

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

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

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

(B) natural gas produced by such person.

(d) Application for certificate of public convenience and necessity

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

(e) Granting of certificate of public convenience and necessity

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

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

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

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

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

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

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

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

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

AMENDMENTS

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

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

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

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

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

EFFECTIVE DATE OF 1988 AMENDMENT

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 accounts, records, and memoranda of natural-gas companies; and it shall be the duty of such natural-gas companies to furnish to the Commission, within such reasonable time as the Commission may order, any information with respect thereto which the Commission may by order require, including copies of maps, contracts, reports of engineers, and other data, records, and papers, and to grant to all agents of the Commission free access to its property and its accounts, records, and memoranda when requested so to do. No member, officer, or employee of the Commission shall divulge any fact or information which may come to his knowledge during the course of examination of books, records, data, or accounts, except insofar as he may be directed by the Commission or by a court.

(c) Books, accounts, etc., of the person controlling gas company subject to examination

The books, accounts, memoranda, and records of any person who controls directly or indirectly a natural-gas company subject to the jurisdiction of the Commission and of any other company controlled by such person, insofar as they relate to transactions with or the business of such natural-gas company, shall be subject to examination on the order of the Commission.

(June 21, 1938, ch. 556, §8, 52 Stat. 825.)

§ 717h. Rates of depreciation

(a) Depreciation and amortization

The Commission may, after hearing, require natural-gas companies to carry proper and adequate depreciation and amortization accounts in accordance with such rules, regulations, and forms of account as the Commission may prescribe. The Commission may from time to time ascertain and determine, and by order fix, the proper and adequate rates of depreciation and amortization of the several classes of property of each natural-gas company used or useful in the production, transportation, or sale of natural gas. Each natural-gas company shall conform its depreciation and amortization accounts to the rates so ascertained, determined, and fixed. No natural-gas company subject to the jurisdiction of the Commission shall charge to operating expenses any depreciation or amortization charges on classes of property other than those prescribed by the Commission, or charge with respect to any class of property a percentage of depreciation or amortization other than that prescribed therefor by the Commission. No such natural-gas company shall in any case include in any form under its operating or other expenses any depreciation, amortization, or other charge or expenditure included elsewhere as a depreciation or amortization charge or otherwise under its operating or other expenses. Nothing in this section shall limit the power of a State commission to determine in the exercise of its jurisdiction, with respect to any natural-gas company, the percentage rates of depreciation or amortization to be allowed, as to any class of property of such natural-gas company, or the composite depreciation or amortization rate, for the purpose of determining rates or charges.

(b) Rules

The Commission, before prescribing any rules or requirements as to accounts, records, or memoranda, or as to depreciation or amortization rates, shall notify each State commission having jurisdiction with respect to any natural-gas company involved and shall give reasonable opportunity to each such commission to present its views and shall receive and consider such views and recommendations.

(June 21, 1938, ch. 556, §9, 52 Stat. 826.)

REPEALS

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

§ 717r. Rehearing and review

(a) Application for rehearing; time

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

(b) Review of Commission order

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which is supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission order

The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(d) Judicial review

(1) In general

The United States Court of Appeals for the circuit in which a facility subject to section 717b of this title or section 717f of this title is proposed to be constructed, expanded, or operated shall have original and exclusive jurisdiction over any civil action for the review of an order or action of a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval (hereinafter collectively referred to as ''permit'') required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.).

(2) Agency delay

The United States Court of Appeals for the District of Columbia shall have original and exclusive jurisdiction over any civil action for the review of an alleged failure to act by a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.), for a facility subject to section 717b of this title or section 717f of this title. The failure of an agency to take action on a permit required under Federal law, other than the Coastal Zone Management Act of 1972, in accordance with the Commission schedule established pursuant to section 717n(c) of this title shall be considered inconsistent with Federal law for the purposes of paragraph (3).

(3) Court action

If the Court finds that such order or action is inconsistent with the Federal law governing such permit and would prevent the construction, expansion, or operation of the facility subject to section 717b of this title or section

717f of this title, the Court shall remand the proceeding to the agency to take appropriate action consistent with the order of the Court. If the Court remands the order or action to the Federal or State agency, the Court shall set a reasonable schedule and deadline for the agency to act on remand.

(4) Commission action

For any action described in this subsection, the Commission shall file with the Court the consolidated record of such order or action to which the appeal hereunder relates.

(5) Expedited review

The Court shall set any action brought under this subsection for expedited consideration.

(June 21, 1938, ch. 556, § 19, 52 Stat. 831; June 25, 1948, ch. 646, § 32(a), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Pub. L. 85–791, § 19, Aug. 28, 1958, 72 Stat. 947; Pub. L. 109–58, title III, § 313(b), Aug. 8, 2005, 119 Stat. 689.)

REFERENCES IN TEXT

The Coastal Zone Management Act of 1972, referred to in subsec. (d)(1), (2), is title III of Pub. L. 89–454, as added by Pub. L. 92–583, Oct. 27, 1972, 86 Stat. 1280, as amended, which is classified generally to chapter 33 (§ 1451 et seq.) of Title 16, Conservation. For complete classification of this Act to the Code, see Short Title note set out under section 1451 of Title 16 and Tables.

CODIFICATION

In subsec. (b), ''section 1254 of title 28'' substituted for ''sections 239 and 240 of the Judicial Code, as amended [28 U.S.C. 346, 347]'' on authority of act June 25, 1948, ch. 646, 62 Stat. 869, the first section of which enacted Title 28, Judiciary and Judicial Procedure.

AMENDMENTS

2005—Subsec. (d). Pub. L. 109–58 added subsec. (d).

1958—Subsec. (a). Pub. L. 85–791, § 19(a), inserted sentence providing that until record in a proceeding has been filed in a court of appeals, Commission may modify or set aside any finding or order issued by it.

Subsec. (b). Pub. L. 85–791, § 19(b), in second sentence, substituted ''transmitted by the clerk of the court to'' for ''served upon'', substituted ''file with the court'' for ''certify and file with the court a transcript of'', and inserted ''as provided in section 2112 of title 28'', and, in third sentence, substituted ''petition'' for ''transcript'', and ''jurisdiction, which upon the filing of the record with it shall be exclusive'' for ''exclusive jurisdiction''.

CHANGE OF NAME

Act June 25, 1948, eff. Sept. 1, 1948, as amended by act May 24, 1949, substituted ''court of appeals'' for ''circuit court of appeals'' wherever appearing.

§ 717s. Enforcement of chapter

(a) Action in district court for injunction

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper district court of the United States, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this chapter or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices or concerning apparent violations of the Federal antitrust laws to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings.

(b) Mandamus

Upon application of the Commission the district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this chapter or any rule, regulation, or order of the Commission thereunder.

(c) Employment of attorneys by Commission

The Commission may employ such attorneys as it finds necessary for proper legal aid and service of the Commission or its members in the conduct of their work, or for proper representation of the public interest in investigations made by it, or cases or proceedings pending before it, whether at the Commission's own instance or upon complaint, or to appear for or represent the Commission in any case in court; and the expenses of such employment shall be paid out of the appropriation for the Commission.

(d) Violation of market manipulation provisions

In any proceedings under subsection (a), the court may prohibit, conditionally or unconditionally, and permanently or for such period of time as the court determines, any individual who is engaged or has engaged in practices constituting a violation of section 717c–1 of this title (including related rules and regulations) from—

(1) acting as an officer or director of a natural gas company; or

(2) engaging in the business of—

(A) the purchasing or selling of natural gas; or

(B) the purchasing or selling of transmission services subject to the jurisdiction of the Commission.

(June 21, 1938, ch. 556, § 20, 52 Stat. 832; June 25, 1948, ch. 646, § 1, 62 Stat. 875, 895; Pub. L. 109–58, title III, § 318, Aug. 8, 2005, 119 Stat. 693.)

CODIFICATION

The words ''the District Court of the United States for the District of Columbia'' in subsec. (a) following ''district court of the United States'' and in subsec. (b) following ''district courts of the United States'' omitted as superfluous in view of section 132(a) of Title 28, Judiciary and Judicial Procedure, which states that ''There shall be in each judicial district a district court which shall be a court of record known as the United States District Court for the district'', and section 88 of title 28 which states that ''The District of Columbia constitutes one judicial district''.

AMENDMENTS

2005—Subsec. (d). Pub. L. 109–58 added subsec. (d).

§ 717t. General penalties

(a) Any person who willfully and knowingly does or causes or suffers to be done any act,