ORAL ARGUMENT SCHEDULED FOR JANUARY 28, 2019

No. 17-1271
(consolidated with Nos. 18-1002, 18-1175, 18-1177, 18-1186, 18-1216, and 18-1223)

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

Appalachian Voices, et al.,

Petitioners,

v.

Federal Energy Regulatory Commission,

Respondent.

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

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and *Amici*:

Except for the following, all parties, intervenors, and *amici* appearing in this case are listed in the Petitioners' Joint Opening Brief: *amici* listed above and *amicus curiae* Niskanen Center.

Rulings Under Review:

References to the rulings at issue appear in the Petitioners' Joint Opening Brief and the Respondent's Brief.

Related Cases:

References to related cases appear in the Petitioners' Joint Opening Brief and the Respondent's Brief.

CERTIFICATE OF COUNSEL PURSUANT TO CIRCUIT RULE 29(d)

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

Counsel for the Coalition reached out to other trade associations that were interested in participating as *amici* in this case. This effort resulted in the present Coalition, which reduced the possibility of multiple *amicus curiae* filings in this case. Through this effort and the requests for consent to file this brief with the parties of this case, counsel learned of no other potential *amici* until November 26, 2018, the day before the Coalition's *amicus curiae* brief is due. Counsel for the Coalition understands that another trade association may also be filing an *amicus curiae* brief in this case. On less than one day's notice, it would be impracticable to coordinate a joint filing in the event that the trade association decides to file a brief in this case. Counsel for the Coalition further states that *amici* have joined together to the extent practicable insofar as this brief features the consolidated views of four trade associations.

Counsel for the Coalition also anticipates that the trade association's brief, if filed, would address different issues (and/or different aspects of the same issues) than addressed by the Coalition's brief.

For these reasons, it is necessary for the Coalition to file a separate *amicus curiae* brief.

/s/ Megan H. Berge
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CORPORATE DISCLOSURE STATEMENTS

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

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

a "trade association" as defined by Circuit Rule 26.1. The NAM has no parent corporation, and no publicly held company has 10% or greater ownership in the NAM.

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

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IDENTITY AND INTEREST OF *AMICI CURIAE*

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

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

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

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

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

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

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

SUMMARY OF ARGUMENT

FERC properly determined that additional downstream greenhouse gas emissions were not reasonably foreseeable and thus not indirect effects of its certificate of the Mountain Valley Pipeline Project (MVP Project). Contrary to Petitioners' contention, there is no bright-line rule that these emissions are indirect effects of FERC's authorization of the construction and operation of a pipeline project. Instead, FERC must determine, on a case-by-case basis using information available at

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

the time of its decision, what to include as indirect effects in NEPA analyses. For the MVP Project, FERC reasonably determined that available information would not allow it to develop a meaningful forecast of downstream greenhouse gas emissions, such that these emissions were not reasonably foreseeable and thus not indirect effects. Accordingly, Petitioners' NEPA claim should be rejected.

ARGUMENT

This lawsuit is one of a series intended to block or hinder development of natural gas infrastructure that is much needed to reliably supply this country's increasing demand for natural gas. Petitioners impermissibly seek to expand the scope of analysis required under NEPA. NEPA affords agencies broad discretion to determine, case-by-case based on the record, what qualifies as an indirect effect. It does not require an agency to conclude that downstream greenhouse gas emissions constitute indirect effects. FERC provided a rational explanation for why, based on the record before it, downstream greenhouse gas emissions are not reasonably foreseeable and thus not indirect effects of FERC's authorization of the MVP Project.[3] There is no basis to overturn FERC's reasoned determination, which is fully

[3] *See generally Mountain Valley Pipeline, LLC and Equitrans, L.P.*, 161 FERC ¶ 61,043 (2017) ("MVP Project Certificate Order"), JA __, *aff'd on reh'g*, 163 FERC ¶ 61,197 (2018) ("MVP Rehearing Order"), JA __.

supported by the record.[4]

I. Possible Downstream Greenhouse Gas Emissions from the Authorization of Pipeline Projects Are Not Always Indirect Effects.

It is "well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350–51 (1989). NEPA's process requires agencies to address the direct, indirect, and cumulative effects of their actions.[5] 40 C.F.R §§1508.7-1508.8. Indirect effects must be both "caused by the action" and "reasonably foreseeable." *Id*. § 1508.8(b); *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 770 (2004). Causation under NEPA "requires a reasonably close relationship between the environmental effect and the alleged cause" (*i.e.*, the agency action), *id.* at 767, and an effect is reasonably foreseeable if it is "sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision." *Sierra Club v. FERC*, 827 F.3d 36, 47 (D.C. Cir. 2016) (internal quotation marks and citations omitted).

Although NEPA requires agencies to comply with the statute "to the fullest extent possible," that general charge does not broaden the scope of what qualifies as

[4] FERC's consideration of these emissions would be sufficient under NEPA even assuming they were indirect effects, so the Court also could resolve Petitioners' claim without determining whether downstream greenhouse gas emissions constitute indirect effects. *See infra* § III.

[5] The phrase "indirect effects" is synonymous with the phrase "indirect impacts." *See* 40 C.F.R. § 1508.8.

an indirect effect. *See* 42 U.S.C. § 4332. NEPA, for example, does not require "an agency [to] foresee the unforeseeable." *Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304, 1310 (D.C. Cir. 2014) (internal quotation marks and citation omitted). Thus, "an agency's NEPA obligations are not uncabined." *Sierra Club*, 827 F.3d at 50.

Determining what constitutes an indirect effect, like other agency determinations under NEPA, is "a task assigned to the special competency of the appropriate agencies." *Kleppe v. Sierra Club*, 427 U.S. 390, 414 (1976); *see also Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 376-77 (1989) (requiring courts to "defer to the informed discretion of the responsible federal agencies" about whether certain information was a "significant effect" (internal quotation marks and citation omitted)). And courts apply a "deferential rule of reason" to an agency's decision about the extent to which it will discuss indirect effects. *See WildEarth Guardians v. Jewell*, 738 F.3d 298, 310 (D.C. Cir. 2013); *Nat'l Wildlife Fed'n v. Appalachian Reg'l Comm'n*, 677 F.2d 883, 889 (D.C. Cir. 1981).

A. *Sabal Trail* does not establish a bright-line rule for NEPA analyses of all midstream infrastructure projects.

FERC determined that the indirect effect standard was not met by the prospect that, after natural gas was shipped through the MVP Project, combustion of some unknown quantity of gas for an unknown use in an unknown location might produce an unknown quantity of greenhouse gas emissions. Petitioners would have FERC

premise indirect effect status simply on the fact that the MVP Project was designed to transport natural gas at a certain maximum capacity. Pet. Br. at 48-50. According to this novel theory, downstream greenhouse gas emissions from the combustion of natural gas are reasonably foreseeable effects of *any* gas pipeline project. *Id.* at 48-49. Petitioners urge this Court to convert their theory to a requirement that FERC must always find that "downstream greenhouse-gas emissions are indirect effect [*sic*] of authorizing gas pipelines." Petitioners' argument is contrary to law and unsupported by the record.

First, there is no legal basis to replace FERC's case-by-case consideration of indirect effects with a judicially crafted absolute rule. Whether an effect qualifies as an indirect effect is a fact-specific inquiry based on the unique administrative record involved. *See* 42 U.S.C. § 4332(C)(i) (requiring agencies to discuss "the environmental impact of the *proposed action*" (emphasis added)); 40 C.F.R. § 1502.16(b) (stating agencies are to discuss indirect effects of the proposed action and alternatives); *American Rivers v. FERC*, 895 F.3d 32, 49–50 (D.C. Cir. 2018) (demonstrating that NEPA inquiries and analyses are case-specific, context-driven, and based on the "unique characteristics" of the underlying action); *State of Idaho By & Through Idaho Pub. Utilities Comm'n v. I.C.C.*, 35 F.3d 585, 595 (D.C. Cir. 1994) (explaining that NEPA mandates a case-by-case approach); Rehearing Order ¶ 303, JA ___ (acknowledging the case-by-case nature of NEPA analyses). Thus,

Petitioners' proposed bright-line rule would conflict with FERC's obligations under NEPA.

Second, Petitioners misconstrue the Court's fact-specific holding in *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017) (referred to herein as *Sabal Trail*), as an absolute rule. The Court's holding rests on a fact-driven analysis tailored to the relevant infrastructure project. In the certificate under review in *Sabal Trail*, FERC had authorized the construction and operation of the Southeast Market Pipelines Project to serve Florida's increasing demand for natural gas. *Id.* at 1363-64. The pipeline would connect directly to two existing and two proposed power plants in Florida through short lateral pipelines. *Id.* at 1363, 1371. In considering whether downstream greenhouse gas emissions were indirect effects of FERC's authorization of the pipeline, the Court concluded that, *based on the configuration of the project and specific information in the record regarding the four power plants*, it was reasonably foreseeable that gas being shipped to power plants in Florida would be burned by those power plants and produce greenhouse gases at their respective locations. *Id.* at 1371-72. The fact-specific nature of *Sabal Trail*'s holding is inherent in the Court's analysis.[6] The Court wrote that "greenhouse-gas emissions are an indirect effect of authorizing *this* project, which FERC could reasonably foresee,"

[6] *Amici*'s position is that *Sabal Trail* does not compel FERC to find that downstream greenhouse gas emissions are indirect effects. *Amici* are not, however, addressing whether *Sabal Trail* was correctly decided.

and further that it was plain "that gas will be burned in *those* [four] power plants." 867 F.3d at 1372, 1374 (emphases added).

In a subsequent decision, the Court also emphasized that *Sabal Trail* was confined to its facts. *Friends of Capital Crescent Trail v. Fed. Transit Admin.*, 877 F.3d 1051 (D.C. Cir. 2017) ("*Friends*"). That case clarified that the *Sabal Trail* Court "invalidated an indirect effects analysis because the agency had technical and contractual information on how much gas the pipelines [would] transport to specific power plants, and so could have estimated with some precision the level of greenhouse gas emissions produced by those power plants." *Id.* at 1065 (internal quotation marks and citation omitted). *Friends* thus confirms that NEPA analyses are project-specific and there is no absolute rule that all downstream emissions are indirect effects.

B. No other authority establishes a bright-line rule or otherwise supports Petitioners' requested outcome.

Aside from the cases discussed above, Petitioners cite only *City of Davis v. Coleman*, 521 F.2d 661 (9th Cir. 1975). That case is neither binding nor relevant here because the agency in that case failed to consider abundant evidence before it. Here, FERC considered all record evidence and rationally explained its indirect-effects determination.

The plaintiff in *City of Davis* challenged a Federal Highway Administration (FHWA) decision not to complete an environmental impact statement (EIS) for a

proposed highway project. *Id.* at 665-66. The Ninth Circuit concluded that FHWA acted arbitrarily because it failed to consider the project's growth-inducing effects in determining whether it would be "significant," requiring an EIS. *Id.* at 675. FHWA had "conclude[d], without further study, that the environmental impact of the proposed interchange [would] be insignificant," despite an abundance of "available information" indicating otherwise. *See id.* at 675. The court did not impose a bright-line rule, but instead remanded for the agency to consider potential growth-inducing effects to determine whether an EIS was required.

In contrast, here, FERC thoroughly considered the evidence before it and reasonably concluded there was insufficient information to find downstream greenhouse gas emissions were indirect effects. *See* MVP Project Final Environmental Impact Statement at 4-617 to 4-620, JA __ - __; *see also* MVP Certificate Order at ¶¶ 287-296, JA __ - __; MVP Rehearing Order at ¶¶ 268-271, JA __ - __. On rehearing, Petitioners identified no record evidence negating FERC's finding, nor have they done so here. MVP Rehearing Order ¶ 271 n.741, JA __ ("No party in this proceeding has pointed [to] any record evidence that would support a finding that the downstream activities are sufficiently casually connected to the MVP and Equitant Expansion Projects to be indirect impacts of the project.").

Petitioners also reference dissents to the MVP Rehearing Order, in which two commissioners asserted that downstream greenhouse gas emissions for the MVP

Project are foreseeable and thus indirect effects. Pet. Br. at 49. The dissents rely heavily on *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520 (8th Cir. 2003), where the Eighth Circuit concluded that it was reasonably foreseeable that the Surface Transportation Board's (STB's) approval of a rail line creating a direct route from coal mines to power plants would increase the demand for coal. *Id*. at 549. That case has been limited to its facts; the STB had specifically stated that it would "evaluate the potential air quality impacts associated with the increased availability and utilization" of coal from the rail line project it approved, but then "failed to deliver on this promise." *Id*. at 550; *see also Sierra Club*, 827 F.3d at 48 (recognizing the same). The Eighth Circuit limited *Mid States* to a situation where an agency "stated that a particular outcome was reasonably foreseeable and that it would consider its impact, but then failed to do so." *Arkansas Wildlife Fed'n v. U.S. Army Corps of Engineers*, 431 F.3d 1096, 1102 (8th Cir. 2005) (affirming Corps decision where it considered and determined certain impacts were not reasonably foreseeable); *cf. Coal. for Responsible Growth & Res. Conservation v. U.S. F.E.R.C.*, 485 F. App'x 472, 474 (2d Cir. 2012) (unpublished) (upholding FERC decision not to analyze in NEPA review future gas development in Pennsylvania because it was not "sufficiently causally-related" to a new 39-mile pipeline project created to carry Pennsylvania gas to market).

Mid States is inapposite to this case. Unlike the STB, FERC made no unkept

commitment of NEPA analysis. Instead, FERC explicitly considered the indirect effects issue and explained the absence of foreseeability. Rehearing Order ¶ 303, JA __ (explaining why downstream greenhouse gas emissions from the MVP Project are not reasonably foreseeable).

C. Maintaining FERC's discretion in this context is consistent with governing case law and practical realities.

The Court should be particularly wary of supplanting agency discretion with mandatory requirements in this context. NEPA "involves an almost endless series of judgment calls . . . [and] [t]he line-drawing decisions . . . are vested in the agencies, not the courts." *WildEarth*, 738 F.3d at 312. As applicable regulations recognize, imposing more required documentation can undermine the usefulness of the NEPA process. *See* 40 C.F.R. §§ 1500.4(b) (requiring agencies to not include unhelpful and excessive information in NEPA documents); 1502.7 (providing environmental impact statements "shall normally be less than 150 pages," except "for proposals of unusual scope or complexity [which] shall normally be less than 300 pages").

Agencies already routinely expend substantial resources to undertake otherwise unneeded analyses, simply to protect their authorizations from legal challenge. This often generates expensive, untimely, and encyclopedic documents, large

portions of which provide little, if any, benefit to the agency or public.[7] To prevent unnecessarily dense, delayed, and costly NEPA documents, courts defer to agency decisions that limit the scope of indirect effects when that limitation is supported by a rational explanation.

For example, the Supreme Court has explained that an agency's "[t]ime and resources are simply too limited to hold that an impact statement fails because the agency failed to ferret out every possib[ility]." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 551 (1978). This Circuit, too, has recognized that "an agency's NEPA obligations are not uncabined: '[P]ractical considerations of feasibility might well necessitate restricting the scope' of an agency's analysis." *Sierra Club*, 827 F.3d at 50 (quoting *Kleppe*, 427 U.S. at 414); *N. Slope Borough v. Andrus*, 642 F.2d 589, 600 n.47 (D.C. Cir. 1980) ("EIS need not be exhaustive to the point of discussing all possible details bearing on the proposed action but will be upheld as adequate . . . if it has been compiled in good faith" (quotation marks and citation omitted).[8]

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

[8] *See also Fund for Animals v. Kempthorne*, 538 F.3d 124, 137 (2d Cir. 2008)

Here, the record demonstrates that FERC's determination regarding indirect effects was reasonable and should be affirmed.

II. FERC Properly Exercised Its Discretion in Determining That Possible Downstream Greenhouse Gas Emissions Are Not Indirect Effects of FERC's Certificate of the MVP Project.

The Court's "limited" role in reviewing agency compliance with NEPA is not to "flyspeck" but merely ensure that the agency "has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious." *Sabal Trail*, 867 F.3d at 1367-68 (internal quotation marks and citation omitted). "The overarching question is whether an EIS's deficiencies are significant enough to undermine informed public comment and informed decisionmaking." *Id.* at 1368; *see also Robertson*, 490 U.S. at 350–51 ("NEPA merely prohibits uninformed—rather than unwise—agency action.").

Sabal Trail does not require a different result here. As explained above, *Sabal Trail* was driven by substantial, detailed, and concrete information in the record related to supply, location, end use, and contracted-for quantities of natural gas specific to the approved projects in that case. Here, for reasons particular to the MVP

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

Project, that information was nonexistent at the time of FERC's approval. FERC explained that while upstream gas producers had contracted to use available pipeline capacity for a 20-year period, where the gas would be delivered, in what quantities, and for what uses remained undefined at the time of the Project approval. *See* MVP Certificate Order ¶¶ 10, 41, JA __, __. Obviously, providing upstream producers with the flexibility to respond to changing demand conditions over a two-decade period in the future is imperative to satisfying that demand. But in contrast to *Sabal Trail*, for this open-ended project, FERC cannot generate reasonable forecasts of effects from hypothetical downstream emissions.

FERC's determination that unforeseeable downstream greenhouse gas emissions are not indirect effects of the MVP Project deserves deference. NEPA does not require agencies to "engage in speculative analysis . . . if not enough information is available to permit meaningful consideration." *N. Plains Res. Council v. STB*, 668 F.3d 1067, 1078 (9th Cir. 2011); *cf. Delaware Riverkeeper*, 753 F.3d at 1310 (NEPA "does not demand forecasting that is not meaningfully possible" or require "an agency [to] foresee the unforeseeable." (internal quotations marks omitted)). In other words, agencies "need not consider potential effects that are . . . indefinite." *Presidio Golf Club v. Nat'l Park Serv.*, 155 F.3d 1153, 1163 (9th Cir. 1998).

FERC indicated that it could not meaningfully forecast downstream greenhouse gas emissions and thus they were not reasonably foreseeable. Unlike in *Sabal*

Trail where detailed information regarding specific downstream uses was readily available, in this case, FERC explained that it "lack[ed] meaningful information about downstream use of the gas; *i.e.*, information about future power plants, storage facilities, or distribution networks, within the geographic scope of a project-affected resource." Rehearing Order ¶ 303, JA __. FERC acknowledged that "the MVP Project will interconnect with Transco's mainline system enabling the project's five shippers to supply gas to markets in the Northeast, Mid-Atlantic, and Southeast" generally. *Id.* But without additional and more specific information, FERC concluded that "there is no evidence in the record that ultimate end-use combustion of the gas transported by the Projects is reasonably foreseeable or will occur within the geographic scope of the emissions impacts from the MVP [Project]." *Id.*; *id.* ¶ 304 ("Here, it is unknown where and how the transported gas will be used and there is no identifiable end-use"); *id.* ¶¶ 301-302 (stating that "reasonably foreseeable" requirement applies to indirect and cumulative effects and that the downstream emissions "do not fall within the definition of indirect effects").

As FERC thoroughly explained in its decision, the Commission could not produce a meaningful forecast related to downstream greenhouse gas emissions based on existing information. Any effects forecast would be meaningless because of the high degree of uncertainty inherent in the assumptions on which it would be based. Thus, FERC's determination that downstream emissions are not indirect effects for

the MVP Project cannot be reasonably characterized as "undermin[ing] informed public comment and informed decisionmaking." *Sabal Trail*, 867 F.3d at 1368.

Based on the underlying record and the nature of the underlying project, FERC reasonably and lawfully determined that downstream greenhouse gas emissions were not indirect effects. There is no basis for the Court to second-guess the agency's exercise of this discretion. *See WildEarth*, 738 F.3d at 312; *Marsh*, 490 U.S. at 376-77; *Kleppe*, 427 U.S. at 414.

III. Assuming Downstream Greenhouse Gas Emissions Were Indirect Effects in This Case, FERC Adequately Considered Them.

In any event, even if the Court assumed that FERC should have treated hypothetical downstream emissions as indirect effects, it should reject Petitioners' claim because FERC satisfied NEPA. Despite finding that potential emissions were not in fact indirect effects of this Project, FERC nonetheless completed the analysis that would have been required had it found to the contrary, by quantifying the *maximum potential* downstream greenhouse gas emissions before approving the Project. *Compare Sabal Trail*, 867 F.3d at 1374 (concluding that when downstream emissions are indirect effects, the agency must quantify those emissions or explain why quantification is not possible), *with* MVP Project Final Environmental Impact Statement at 4-620, JA __ ("To account for end-use combustion, total annual emissions of GHG were estimated . . . based on the total capacity" of the MVP Project), *and* FERC Br. at 46-47. Accordingly, the Court need not decide whether FERC must *always* treat

potential downstream greenhouse gas emissions as indirect effects of midstream pipeline projects. *See Cohen v. Bd. of Trustees of the Univ. of the D.C.*, 819 F.3d 476, 485 (D.C. Cir. 2016) (The "cardinal principle of judicial restraint" is "if it is not necessary to decide more, it is necessary not to decide more.").

CONCLUSION

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

Dated: November 27, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 4,172 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and D.C. Cir. Rule 32(e)(1).

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

Dated: November 27, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25(d) and D.C. Circuit Rule 25(c), I hereby certify that on this 27th day of November, 2018, I have served the foregoing Amici Curiae Brief upon all counsel registered to receive service through the Court's CM/ECF system via electronic filing.

Dated: November 27, 2018

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ADDENDUM

STATUTES AND REGULATIONS

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

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

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

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

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

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

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

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

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

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

COMMISSION ON POPULATION GROWTH AND THE AMERICAN FUTURE

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

EXECUTIVE ORDER NO. 11507

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

EXECUTIVE ORDER NO. 11752

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

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

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

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

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

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

(i) the environmental impact of the proposed action,

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

(iii) alternatives to the proposed action,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

AMENDMENTS

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

CERTAIN COMMERCIAL SPACE LAUNCH ACTIVITIES

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

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

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

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

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

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

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

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

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

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

(i) facilitates cooperative conservation;

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

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

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

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

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

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

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

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

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

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

GEORGE W. BUSH.

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

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

EFFECTIVE DATE OF REPEAL

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

§ 4333. Conformity of administrative procedures to national environmental policy

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

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

§ 4334. Other statutory obligations of agencies

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

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

§ 4335. Efforts supplemental to existing authorizations

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

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

SUBCHAPTER II—COUNCIL ON ENVIRONMENTAL QUALITY

§ 4341. Omitted

CODIFICATION

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

§ 4342. Establishment; membership; Chairman; appointments

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

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

COUNCIL ON ENVIRONMENTAL QUALITY; REDUCTION OF MEMBERS

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

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

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

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

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

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

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

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

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

§ 1500.4 Reducing paperwork.

Agencies shall reduce excessive paperwork by:

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

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

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

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

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

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

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

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

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

(j) Incorporating by reference (§ 1502.21).

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

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

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

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

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

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

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

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

§ 1500.5 Reducing delay.

Agencies shall reduce delay by:

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

§ 1502.13 Purpose and need.

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

§ 1502.14 Alternatives including the proposed action.

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

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

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

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

(d) Include the alternative of no action.

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

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

§ 1502.15 Affected environment.

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

§ 1502.16 Environmental consequences.

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

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

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

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

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

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

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

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

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

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

§ 1502.17 List of preparers.

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

§ 1502.18 Appendix.

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

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

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

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

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

§ 1502.19 Circulation of the environmental impact statement.

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

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

(b) The applicant, if any.

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

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

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

§ 1502.20 Tiering.

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

§ 1502.21 Incorporation by reference.

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

§ 1508.6 Council.

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

§ 1508.7 Cumulative impact.

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

§ 1508.8 Effects.

Effects include:

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

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

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

§ 1508.9 Environmental assessment.

Environmental assessment:

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

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

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

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

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

§ 1508.10 Environmental document.

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

§ 1508.11 Environmental impact statement.

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

§ 1508.12 Federal agency.

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

§ 1508.13 Finding of no significant impact.

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