REPORT OF THE GAS, OIL, AND LIQUIDS STEERING COMMITTEE

This report summarizes policy developments and legal decisions that occurred at the Federal Energy Regulatory Commission ("FERC" or the "Commission"), the Pipeline and Hazardous Materials Safety Administration ("PHMSA"), and the United States Courts of Appeals in natural gas regulation between July 1, 2020, and June 30, 2021.[1]

1. The Gas, Oil & Liquids Steering Committee thanks Matthew J. Agen, D. Duggan Baker V, Robert Ballentine, Chris Barr, Susan Beall Kittey, Janna Chesno, Mary Emerson, Kathy Goyette, Mariah Johnston, Namratha Minupuri, Phillip Mone, Michael Pincus, Randall Rich, Jessica Rogers, Lisa Tonery, and Monique Watson for their contributions to this report.

I. RULEMAKING ACTIONS

A. Order No. 875, Civil Monetary Penalty Inflation Adjustments

On January 8, 2021, FERC issued a final rule amending "its regulations governing the maximum civil monetary penalties assessable for violations of statutes, rules, and orders within" FERC's jurisdiction.[2] FERC stated that the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015[3] ("2015 Adjustment Act"), which further amended the Federal Civil Penalties Inflation Adjustment Act of 1990,[4] required the head of each federal agency to issue a rule by July 2016 adjusting for inflation each civil monetary penalty provided by law within the agency's jurisdiction and to make further inflation adjustments on an annual basis every January 15 thereafter.[5] The 2015 Adjustment Act defines a civil monetary penalty as

> any penalty, fine, or other sanction that: (A)(i) is for a specific monetary amount as provided by Federal law; or (ii) has a maximum amount provided for by Federal law; (B) is assessed or enforced by an agency pursuant to Federal law; and (C) is assessed or enforced pursuant to an administrative proceeding or a civil action in the federal courts.[6]

This definition applies to the maximum civil penalties that may be imposed under the Federal Power Act (FPA),[7] the Natural Gas Act (NGA),[8] the Natural Gas Policy Act of 1978 (NGPA),[9] and the Interstate Commerce Act (ICA).[10]

"Under the 2015 Adjustment Act, an agency is directed to use the maximum civil monetary penalty applicable at the time of assessment of a civil penalty, regardless of the date on which the violation occurred."[11] Pursuant to the 2015 Adjustment Act, FERC issued the final rule to adjust the civil monetary penalty for the violations: (1) under section 22 of the NGA from $1,269,500 per violation, per day to $1,307,164 per violation, per day;[12] and (2) under section 504(b)(6)(A)(i) of the NGPA from 1,291,894 per violation, per day to $1,307,164 per violation, per day. Additionally, the civil monetary penalty for violations under section 504(b)(6)(A)(i) of the NGPA is adjusted from $1,269,500 per violation, per day to $1,291,894 per violation, per day.[13] FERC's adjustment resulted in an increase in percentage for each covered maximum penalty, which will apply "at the time

2. Order No. 865, *Civil Monetary Penalty Inflation Adjustments*, 170 FERC ¶ 61,001 (2020) [hereinafter Order No. 865].

3. Civil Monetary Penalty Inflation Adjustments, Pub. L. No. 114-74, § 701, 129 Stat. 584, 599 (2015).

4. Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. 101-410, 104 Stat. 890 (1990) (codified as amended at 28 U.S.C. § 2461 note (2006)).

5. 28 U.S.C. § 2461 note, at (4).

6. *Id.* at (3).

7. 16 U.S.C. §§ 791a-828c (1978).

8. 15 U.S.C. §§ 717-717z (2005).

9. 15 U.S.C. §§ 3301-432 (1978).

10. 49 App. U.S.C. §§ 10101-6106 (1988).

11. Order No. 865, *supra* note 2, at P 7; *see e.g.*, Memorandum of Russell T. Vought, Office of Management and Budget, Implementation of the Penalty Inflation Adjustments for 2020, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, at 2 (Dec. 16, 2019).

12. Order No. 875, *Civil Monetary Penalty Inflation Adjustments*, 174 FERC ¶ 61,015 at P 8 (2021) [hereinafter Order No. 875].

13. *Id.*

of assessment of civil penalty regardless of the date on which the violation occurred."[14] FERC's final rule became effective on February 4, 2021.[15]

B. Limiting Authorizations to Proceed with Construction Activities Pending Rehearing, Order No. 871-B, 175 FERC ¶ 61,098 (2021)

On May 4, 2021, the Commission issued Order No. 871-B, addressing arguments raised on rehearing and clarification, and setting aside, in part, prior Order No 871.[16] In Order No. 871,

> the Commission issued a final rule to amend its regulations to preclude the issuance of authorizations to proceed with construction activities [concerning] natural gas facilities approved pursuant to section 3 or section 7 of the Natural Gas Act (NGA) until either the time for filing a request for rehearing of such order has passed with no rehearing request being filed or the Commission has acted on the merits of any rehearing request.[17]

Order No. 871-B revises the rule that it will "apply only when a request for rehearing raises issues reflecting opposition to project construction, operation, or need."[18]

Order No. 871-B revised Order No. 870

> to provide that the limit on construction authorization will only apply until the earlier of the date that (1) a qualifying rehearing request is no longer pending before the Commission or (2) 90 days following the date that a qualifying request for rehearing may be deemed denied by operation of law.[19]

"In addition, the Commission announced a general policy" for

> stays of NGA section 7(c) certificate orders, subject to a particularized application of the policy on a case-by-case basis, of its intent to stay its NGA section 7(c) certificate orders during the 30-day rehearing period and pending Commission resolution of any timely requests for rehearing filed by landowners, subject to the same 90-day time limitation referenced above and certain exceptions.[20]

FERC stated that "this policy is not intended to prevent a project developer from continuing to engage in development-related activities, as permitted consistent with the stay of the certificate, that" does "not require the use of landowner property or that is voluntarily agreed to by the landowner during the stay period.[21]"

II. RATES, TERMS, AND CONDITIONS OF SERVICE

A. Penalty Waivers

Following an extreme weather event in the Southwest United States in February 2021, several pipelines filed requests with the Commission to waive certain

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14. *Id.* at P 7.
15. Order No. 875, *supra* note 12.
16. Order No. 871-B, *Limiting Authorizations to Proceed with Construction Activities Pending Rehearing*, 175 FERC ¶ 61,098 at P 2 (2021) [hereinafter Order No. 871-B].
17. *Id.*
18. *Id.*
19. *Id.*
20. Order No. 871-B, *supra* note 16, at P 2.
21. *Id.*

penalties and associated interest obligations stemming from non-compliance with Operational Flow Orders issued during certain periods within that weather event. In a series of individual orders, the Commission accepted those waiver requests.

1. Panhandle Eastern Pipe Line Company, L.P.

On March 25, 2021, in *Panhandle Eastern Pipe Line Company, L.P.*, the Commission issued an order accepting Panhandle's proposal to waive penalties for non-compliance with operational flow order ("OFO") for the first gas day of the OFO (February 15), but not for subsequent days during which the OFO was effective.[22] Some intervenors supported the filing, and some shippers criticized the pipeline's failure to extend the waiver to later gas days in which the OFO was in effect, citing alleged difficulties in achieving compliance and the impact of the penalties, *inter alia*. The Commission found that the pipeline's decision to waive penalties for the first gas day was not unduly discriminatory and was consistent with the facts and the tariff.[23] Regarding requests that the pipeline should have waived penalties after the first gas day, the Commission rejected those claims as being beyond the scope of the proceeding, because the commenters did not allege that the proposed waiver was unduly discriminatory.[24]

2. Southern Star Central Gas Pipeline, Inc.

On April 9, 2021, the Commission issued an order accepting a contested waiver request, in *Southern Star Central Gas Pipeline, Inc.*,[25] in a proceeding in which the pipeline sought a waiver of penalties for non-compliance with an OFO for the period February 11 through February 19, 2021.[26] Southern Star's request was supported by a number of commenters,[27] but protested by a shipper that remained in compliance during the OFO and contended, *inter alia*, that it should be credited with OFO non-compliance penalty revenues, that the waiver failed to address or meet the Commission's four-part test for granting waivers, that it was inconsistent with the filed rate doctrine, and that it would degrade the deterrence value of the OFO penalties.[28] The Commission concluded that the waiver request met its four-part test,[29] that the pipeline found no gamesmanship and instead cited cooperation during the OFO, rejected the contention that granting waiver would have undesirable consequences, and found that the filed rate doctrine was not violated because the waiver request was filed before the deadline for issuance and collection of the penalties in question.[30]

22. *Panhandle Eastern Pipeline Co., LP*, 174 FERC ¶ 61,237 at P 19 (2021).
23. *Id*.
24. *Id.* at P 20.
25. *Southern Star Cent. Gas Pipeline, Inc.*, 175 FERC ¶ 61,015 (2021), *reh'g denied*, 175 FERC ¶ 62,141 (2021).
26. *Id.* at P 24.
27. *Id.* at PP 11-13.
28. *Id.* at PP 14-16.
29. 175 FERC ¶ 61,015, at PP 22-26.
30. *Id*. at PP 26-27.

3. Gulf South Pipeline Company, LLC.

On April 19, 2021, the Commission issued an order accepting the request of a pipeline for waiver of penalties for the full four-day length of an OFO in February, which had been unanimously supported by commenting parties, in *Gulf South Pipeline Company, LLC*.[31]

4. El Paso Natural Gas Company, LLC

On August 11, the Commission issued an order in *El Paso Natural Gas Company, L.L.C.*, accepting El Paso's contested waiver request for all penalties associated with the February extreme weather event.[32] The waiver request was supported by a number of parties, but was protested by two parties, who separately raised claims (1) seeking distribution of penalty revenues to compliant shippers,[33] and (2) alleging that granting the waiver would create unwanted consequences for compliant shippers in future weather events.[34] Several shippers supporting the waiver filed complaints seeking to require waiver, subsequent to the waiver filing,[35] but clarified in a subsequent filing that the complaints could be withdrawn if the Commission granted the pipeline's waiver request "without modification or condition."[36] The Commission concluded that the penalty waiver was "a not unduly discriminatory exercise of [El Paso's] discretion" under its tariff to waive penalties, given the specific facts,[37] and disagreed with the protesting shippers' claims.[38] The Commission also dismissed the complaints, without prejudice, in light of the determination to grant the waiver request without modification or condition.[39]

B. Bankruptcy

1. ETC Tiger Pipeline, LLC

On June 22, 2020, the Commission issued a declaratory order holding that it and the United States Bankruptcy Courts have concurrent jurisdiction to review and address the disposition of two natural gas firm transportation agreements between Chesapeake Energy Marketing, L.L.C. (Chesapeake) and ETC Tiger Pipeline, LLC (ETC Tiger).[40] On August 21, 2020, FERC denied Chesapeake's request for rehearing, finding that the Commission and the United States Bankruptcy Court provide "two distinct, yet vitally important, roles," and concluded that it was

31. *Gulf South Pipeline Co.*, 175 ¶ 61,055 at P 1 (2021).
32. *El Paso Nat. Gas Co.*, 176 FERC ¶ 61,084 at P 21 (2021).
33. *Id.* at P 18.
34. *Id.* at P 17.
35. *Id*. at P 7.
36. 176 FERC ¶ 61,084, at P 10.
37. *Id.* at PP 21-22.
38. *Id.* at PP 23-24.
39. *Id.* at P 25.
40. *ETC Tiger Pipeline, LLC*, 171 FERC ¶ 61,248 (2020).

"necessary to give effect to both."[41] The Commission also concluded that there was "no conflict between the Commission's obligations under the NGA and the Bankruptcy Code"[42] finding the Commission's role "– executing its exclusive authority to protect the public interest outside of the bankruptcy context-"[43] was consistent with section 1129(a)(6) of the Bankruptcy Code's[44] "recognition that debtors must seek regulatory approval of rate changes."[45] The Commission ruled that its order was consistent with existing precedent.[46] In addition, the Commission found that "wholesale power contracts were unlike other contracts that may be sought to be rejected in bankruptcy in that they were affected by the public interest and subject to regulatory review of changes to their rates, terms or conditions"[47] and its approach was "supported by the Supreme Court's decision in *Mission Product*.[48] Finally, the Commission ruled that its *Arkla* analysis was "inapplicable to the jurisdictional question" and clarified that "to the extent the Commission's application of *Arkla*[49] in previous cases involving issues related to bankruptcy" [was] inconsistent with [its] finding of concurrent jurisdiction," then it "depart[ed] from those decisions."[50]

2. Gulfport

On September 15, 2020,

> Rockies Express Pipeline LLC (Rockies Express) filed a petition for declaratory order, pursuant to Rule 207 of the Commission's Rules of Practice and Procedure,[51] seeking a Commission order holding that if Gulfport Energy Corporation (Gulfport) files for bankruptcy, the Commission will have concurrent jurisdiction, under sections 4 and 5 of the NGA, with the United States Bankruptcy Courts with respect to three Rockies Express firm transportation service agreements with Gulfport (Gulfport TSAs).[52] The petition also requested that the Commission exercise its jurisdiction to establish an adjudicative proceeding to affirm that "continued performance under the Gulfport TSAs does not seriously harm the public interest and that any party wishing to abrogate the Gulfport TSAs carries the burden of establishing that the public interest mandates such abrogation."[53]

41. *ETC Tiger Pipeline, LLC*, 172 FERC ¶ 61,155 at P 19 (2020) (citing Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1624 (2018) ("When confronted with two Acts of Congress allegedly touching on the same topic, this Court is not at 'liberty to pick and choose among congressional enactments' and must instead strive 'to give effect to both.'" (quoting Morton v. Mancari, 417 U.S. 535, 551 (1974)).

42. *Id.* at P 21.

43. *Id.*

44. 11 U.S.C. § 1129(a)(6) (2010).

45. 172 FERC ¶ 61,155, at P 21.

46. *Id.* at PP 23-24.

47. *Id.* at P 26.

48. *Id.* at P 27 (citing Mission Prod. Holdings v. Tempnology, LLC, 139 S. Ct. 1652, 1665 (2019)).

49. *Arkansas Louisiana Gas Co. v. Hall*, 7 FERC ¶ 61,175, at p. 61,322 (1979) (*Arkla*).

50. 172 FERC ¶ 61,155, at PP 31, 33.

51. 18 C.F.R. § 385.207 (2020).

52. *Rockies Express Pipeline LLC*, 172 FERC ¶ 61,279 at P 1 (2020).

53. *Id.*

On September 25, 2020, "the Commission grant[ed] Rockies Express' petition and establish[ed] a new [paper hearing] proceeding to determine whether the public interest requir[ed] abrogation or modification of the Gulfport TSAs."[54]

On October 28, 2020, the Commission issued an order on the paper hearing established in its September 25 Order.[55] The Commission affirmed that the "public interest standard of review under the *Mobile-Sierra* Doctrine"[56] governs its analysis to examine the question - whether the public interest presently requires the Gulfport TSAs to be modified or abrogated as filed rates. The Commission explained that it "may abrogate or modify those agreements only if it concludes the evidence indicates that the continuation of those filed rate agreements will "seriously harm the public interest."[57] The Commission concluded that it could not "find that a filed rate contract seriously harms the public interest without evidence in the record to make the required conclusion."[58] The Commission concluded that "the filed rates, terms, and conditions of the Gulfport TSAs do not seriously harm the public interest.[59] Accordingly, [it] h[e]ld that the Gulfport TSAs remain just and reasonable."[60]

Gulfport sought rehearing of the Commission's September 25, 2020 order. On November 12, 2020, the Commission denied Gulfport's rehearing request.[61] Initially, FERC disagreed that its earlier order "was unlawfully premature or administratively imprudent"[62] because "Rockies Express had a reasonable expectation that a bankruptcy filing could be imminent based upon Gulfport's public statements."[63] Likewise, FERC disagreed that it "improperly applied the *Mobile-Sierra* doctrine to the hearing process in the absence of a requested abrogation by Gulfport"[64] because Gulfport cited "no authority for the proposition that a *Mobile-Sierra* determination cannot be made in advance of an anticipated abrogation."[65] The Commission also determined that Gulfport improperly relied on *FirstEnergy*[66] because

> that decision explicitly rejected the argument that a rejection is analogous to a breach of contract, finding that: 'an analogy to breach of contract outside of bankruptcy is also inapt inasmuch as Supreme Court caselaw . . . gives FERC authority to compel specific performance of an unprofitable or even illegal contract.'[67]

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54. *Id.*
55. *Rockies Express Pipeline LLC*, 173 FERC ¶ 61,099 at P 1 (2020).
56. *Id.* at P 34 (citing United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332 (1956) (*Mobile*); FPC v. Sierra Pac. Power Co., 350 U.S. 348 (1956) (*Sierra*) [collectively and hereinafter *Mobile-Sierra*]).
57. *Id.*
58. *Id.* at P 35 (citing 5 U.S.C. § 706(2)(E)).
59. 173 FERC ¶ 61,099, at P 40.
60. *Id.*
61. *Rockies Express Pipeline LLC*, 173 FERC ¶ 61,135 at P 1 (2020).
62. *Id.* at P 13.
63. *Id.*
64. *Id.* at P 14.
65. 173 FERC ¶ 61,135, at P 14 (citing *Mobile-Sierra*, *supra* note 56).
66. In re FirstEnergy Solutions Corp., 945 F.3d 431, 446, 452-55 (6th Cir. 2019).
67. 173 FERC ¶ 61,135, at P 15 (citing *FirstEnergy*, 945 F.3d at 442).

The Commission also rejected "Gulfport's arguments that the Commission violated its due process rights"[68] by pointing out that Gulfport "was able to submit both direct and rebuttal testimony for review by the Commission in reaching its determination in Docket No. RP20-1220-000"[69] and "balancing of interests in setting proceedings for hearing [was] a proper exercise of Commission discretion."[70] Finally, the Commission rejected Gulfport's argument that the Commission had "infringed on the jurisdiction of the bankruptcy courts in granting the petition" by noting that it had already addressed this jurisdictional argument in prior proceedings.[71]

"On September 21, 2020, Midship Pipeline Company, LLC (Midship) filed a petition for declaratory order" in anticipation of a potential bankruptcy filing by Gulfport.[72] The petition had four specific ruling requests: (1) a "firm transportation service agreement dated February 21, 2020, associated negotiated rate agreement, and surviving terms in Gulfport's foundation shipper precedent agreement, all as amended and approved in FERC Docket No. RP20-1114-000, between Midship and Gulfport" (the Agreement) is a Commission-jurisdictional agreement reflecting a filed rate

> "approved by the Commission pursuant to its exclusive jurisdiction under the NGA; (2) if Gulfport seeks to reject the Agreement in bankruptcy, the Commission's approval is required to abrogate, modify, or amend the filed rate pursuant to Section 5 of the NGA[73]; (3) any bankruptcy reorganization plan or other action in a bankruptcy proceeding that purports to authorize the modification or rejection of the Agreement cannot be confirmed unless and until the Commission agrees, or the plan or other such action is made contingent on Commission approval, as reflected in a Commission order; and (4) the Commission should establish proceedings that can move forward expeditiously to consider the relevant public interest issues in the event that Gulfport elects to file for bankruptcy and proposes to reject the Agreement.[74]

Midship argued that the first three rulings reflected the Commission's holdings in *ETC Tiger*, and that the factors considered by the Commission in that case [were] equally applicable here.[75] On October 2, 2020, the Commission granted Midship's petition and established a new proceeding to determine whether the public interest required abrogation or modification of the Agreement.[76]

On November 6, 2020, the Commission issued the order on the paper hearing it established on October 2, 2020.[77] Based on the examination of the record in the proceeding, "including the parties' direct and rebuttal briefs and testimony, [the

68. *Id.* at P 16.
69. *Id.*
70. *Id.*
71. 173 FERC ¶ 61,135, at P 17 (citing 172 FERC ¶ 61,155, at P 3).
72. *Midship Pipeline Co.*, 173 FERC ¶ 61,011 at P 1 (2020).
73. 15 U.S.C. § 717d (1938).
74. 173 FERC ¶ 61,011, at P 8.
75. *Id.* at P 10.
76. *Id.* at P 1.
77. *Midship Pipeline Co.*, 173 FERC ¶ 61,130 (2020).

Commission] [found] that the record did not support a finding that the public interest presently require[d] abrogation or modification of the Agreement."[78]

Gulfport sought rehearing of the Commission's October 2, 2020 order.[79] The Commission denied Gulfport's rehearing request on November 12, 2020.[80] In doing so, it disagreed with allegations that the order "was unlawfully premature or administratively imprudent," finding that "Midship had a reasonable expectation that a bankruptcy filing could be imminent based upon Gulfport's public statements."[81] The Commission also disagreed that it "improperly applied the *Mobile-Sierra* doctrine to the hearing process in the absence of a requested abrogation by Gulfport," ruling that Gulfport cited "no authority for the proposition that a *Mobile-Sierra* determination cannot be made in advance of an anticipated abrogation."[82] The Commission also rejected the argument that it had violated Gulfport's due process rights, pointing out that FERC has "broad discretion over the establishment of hearing proceedings."[83] Finally, the Commission disagreed with Gulfport's argument that FERC had "infringed on the jurisdiction of the bankruptcy courts in granting the petition," noting that it had previously addressed its jurisdiction "over the abrogation or modification of filed rates in prior proceedings."[84]

"On September 21, 2020, ANR Pipeline Company (ANR), Columbia Gas Transmission, LLC, (Columbia Gas) and Columbia Gulf Transmission, LLC (Columbia Gulf) (collectively, TC Energy Pipelines) filed a petition for declaratory order" in anticipation of a potential bankruptcy filing by Gulfport.[85] The petition had two specific requests: (1) a declaration that if Gulfport files for bankruptcy, the Commission will have concurrent jurisdiction under sections 4 and 5 of the NGA[86] with the United States Bankruptcy Court with respect to TC Energy Pipelines' firm transportation service agreements with Gulfport, consistent with the *ETC Tiger* proceedings;[87] and (2) that the Commission establish an expedited adjudicatory hearing on the *Mobile-Sierra*[88] public interest implications of continued performance under the Gulfport TSAs, consistent with *Energy Harbor*.[89]

On October 5, 2020, the Commission issued a declaratory order holding that if Gulfport filed for bankruptcy, "the Commission [would] have concurrent jurisdiction under sections 4 and 5 of the NGA[90] with United States Bankruptcy Courts" with respect to Gulfport's firm TSAs with the TC Energy Pipelines.[91] The

78. *Id.* at PP 1, 44-75.
79. *Midship Pipeline Co.*, 173 FERC ¶ 61,136 (2020).
80. *Id.* at P 1.
81. *Id.* at P 15.
82. *Id.* at P 16.
83. 173 FERC ¶ 61,136, at P 18.
84. *Id.* at P 19.
85. ANR Pipeline Co., 173 FERC ¶ 61,018 at P 1 (2020).
86. 15 U.S.C. §§ 717c, 717d.
87. 171 FERC ¶ 61,248; 172 FERC ¶ 61,155.
88. *Mobile-Sierra*, *supra* note 56.
89. *Energy Harbor LLC*, 170 FERC ¶ 61,278 (2020).
90. 15 U.S.C. §§ 717c, 717d.
91. 173 FERC ¶ 61,018, at p. 61,088.

order also "establishe[d] a new proceeding to determine whether the public interest require[d] abrogation or modification of the Gulfport TSAs."[92] On November 12, 2020, the Commission denied Gulfport's request for rehearing of the order[93] ruling that (1) the order was not "unlawfully premature or administratively imprudent"[94]; (2) it had not "improperly applied the *Mobile-Sierra* doctrine to the hearing process in the absence of a requested abrogation by Gulfport"[95]; (3) there was no reason to reverse its holding that "rejection of a contract in bankruptcy is broader than a breach in the ordinary course of business, as rejection is a court-ordered breach that may result in cessation of the entire contract"[96]; and (4) the Commission did not violate Gulfport's due process rights.[97]

On November 9, 2020, the Commission issued an order on the paper hearing established in the October 5 order.[98] Again, the Commission affirmed that the public interest standard of review under the *Mobile-Sierra* doctrine governed its analysis in the proceeding.[99] It concluded that Gulfport TSAs did "not seriously harm the public interest" and remained "just and reasonable."[100] Finally, the Commission rejected Gulfport's procedural arguments.[101]

On September 22, 2020, Rover Pipeline LLC (Rover) filed a request for declaratory order in anticipation of a potential bankruptcy filing by Gulfport.[102] The petition had three specific requests: (1) a declaration that a firm transportation agreement and an interruptible transportation agreement between Rover and Gulfport (the Gulfport TSAs) are Commission-jurisdictional reflecting filed rates approved by the Commission pursuant to its exclusive jurisdiction under the NGA; (2) a declaration "that if Gulfport files for bankruptcy, the Commission will have concurrent jurisdiction under sections 4 and 5 of the NGA . . .[103] with the United States Bankruptcy Court with respect to the Gulfport TSAs,"[104] consistent with the *ETC Tiger* proceedings[105]; and (3) that the Commission establish an expedited adjudicatory hearing on the *Mobile-Sierra*[106] public interest implications of continued performance under the Gulfport TSAs, consistent with *Energy Harbor*.[107] On October 5, 2020, "the Commission grant[ed] Rover's petition and establish[ed] a

92. *Id.* at P 1.
93. *ANR Pipeline Co.*, 173 FERC ¶ 61,137 (2020).
94. *Id.* at P 13.
95. *Id.* at P 14.
96. *Id.* at P 15 (citing 172 FERC ¶ 61,155, at P 30).
97. 173 FERC ¶ 61,018, at P 16.
98. *ANR Pipeline Co.*, 173 FERC ¶ 61,131 (2020).
99. *Id.* at P 28.
100. *Id.* at PP 34, 48.
101. *Id.* at P 56.
102. *Rover Pipeline LLC*, 173 FERC ¶ 61,019 at P 1 (2020).
103. 15 U.S.C. §§ 717c, 717d.
104. 173 FERC ¶ 61,131, at P 2.
105. 171 FERC ¶ 61,248; 172 FERC ¶ 61,155.
106. *Mobile-Sierra*, *supra* note 56.
107. 170 FERC ¶ 61,278.

new proceeding to determine whether the public interest requires abrogation or modification of the Gulfport TSAs."[108]

On November 9, 2020, the Commission examined "the record developed in th[is] proceeding, including the parties' direct and rebuttal briefs and testimony", it established in the October 5 Order and concluded the record did "not support a finding that the public interest presently requires abrogation or modification of the Gulfport FTA."[109] The Commission explained that "the public interest standard of review under the *Mobile-Sierra* doctrine governs [its] analysis in the proceeding, which examines one question: whether the public interest presently requires the Gulfport FTA to be modified or abrogated as filed rates."[110] The Commission concluded that "the filed rates, terms, and conditions of the Gulfport FTA does not seriously harm the public interest."[111] Accordingly, it held "that the Gulfport FTA remains just and reasonable."[112] On November 12, 2020, FERC denied "rehearing of the October 5 Order."[113]

C. *Force Majeure*

1. Transcontinental Gas Pipe Line Company, LLC

On March 31, 2021, Transcontinental Gas Pipe Line Company, LLC (Transco) filed

> revised tariff records pursuant to section 4 of the Natural Gas Act and Part 154 of the Commission's regulations. In its filing, Transco propose[d] to revise the tariff provisions that set forth the reservation charge credits due [its] customers when Transco orders the interruption or reduction of firm contract storage service under the provisions of section 11.3 of the General Terms and Conditions of its tariff.[114]

The Commission "accept[ed] the tariff records subject to conditions, effective May 1, 2021, as requested" by Transco.[115]

"When a service interruption is within the pipeline's control (*i.e.*, non-force majeure) Commission policy generally requires the pipeline to fully refund the reservation charge."[116] The Commission first determined "that Transco properly follows this 'Full Credits' method for non-force majeure outages" and further determined "that Transco will continue using this Full Credits method for force majeure outages" under rate schedules that were not under consideration in Transco's filing.[117]

108. 173 FERC ¶ 61,019, at P 1.
109. *Rover Pipeline LLC*, 173 FERC ¶ 61,133 at P 1 (2020).
110. *Id.* at P 40.
111. *Id.* at P 46.
112. *Id.*
113. *Rover Pipeline LLC*, 173 FERC ¶ 61,138 at P 1 (2020).
114. 175 FERC ¶ 61,085, at P 1.
115. *Id*.
116. *Id*. at P 15.
117. *Id*.

"For force majeure and certain similar service interruptions, the Commission allows pipelines to limit the amount of reservation charge credits a pipeline provides."[118] The Commission previously has approved the "No-Profit" method, the "Safe Harbor" method, and "any other method provided it results in the same type of risk-sharing as the two approved methods do."[119] The No-Profit method is "where the pipeline provides for partial refunds starting on the first day of the interruption in service, covering the portion of the pipeline's reservation charge that represents the pipeline's return on equity and associated income taxes," while the Safe Harbor method is "where reservation charges must be credited in full to the shippers after a short grace period when no credit is due the shipper (*i.e.*, 10 days or less)."[120]

For Transco's filed tariff records, it proposed to "base all reservation charge credits on a shipper's most recent nominations."[121] When a party has no "advance notice of an outage, this method is just and reasonable, and indeed is generally required."[122] However, in contrast, "when the pipeline proposes less than full credits", and when a party has "advance notice of an outage, credits for that day must be based solely on a measure of each shipper's historical usage, and not on the shippers' recent nominations."[123] Accordingly, the Commission concluded this "one particular aspect of Transco's proposal was not just and reasonable."[124] Therefore, the Commission "accept[ed] Transco's proposed tariff records, subject to revision by Transco within 30 days of its order, to use an impartial mechanism for basing credits on historical usage in the context of pre-announced notices of force majeure outages."[125]

By its order, the Commission's accepted Transco's tariff records, subject to Transco submitting the compliance filing directed above within 30 days.[126]

2. *Dominion Energy Cove Point LNG, L.P. v. Mattawoman Energy, LLC*, Slip Op., No. 1:20-cv-611, 2020 WL 9260246 (E.D. Va. Oct. 20, 2020)

Dominion Energy Cove Point LNG, L.P. ("Dominion") and Mattawoman Energy, LLC ("Mattawoman") entered into a series of agreements in 2019, pursuant to which Dominion agreed to supply natural gas to a new power plant Mattawoman planned to construct in Virginia.[127] Their Precedent Agreement contemplated Limited Firm Transportation Services and required Mattawoman to provide Dominion with a $747,600 security payment assuring Dominion it could meet its

118. 175 FERC ¶ 61,085, at P 16.
119. *Id.* (internal citations omitted).
120. *Id*. (internal citations omitted).
121. *Id*. at P 19.
122. 175 FERC ¶ 61,085, at P 19 (internal citations omitted).
123. *Id.* (internal citations omitted).
124. *Id*.
125. *Id*. (internal citations omitted).
126. 175 FERC ¶ 61,085, at P 19.
127. Dominion Energy Cove Point LNG, L.P. v. Mattawoman Energy, LLC, No. 1:20-cv-611, 2020 WL 9260246, at *1 (E.D. Va. Oct. 20, 2020) (internal citation omitted).

financial obligations.[128] They also executed a Security Deposit Agreement securing Mattawoman's creditworthiness.[129] Months later, the parties entered into a 20-year Service Agreement under Dominion's LTS rate schedule, authorized by the Federal Energy Regulatory Commission, which took effect in December 2019.[130]

Pursuant to the Service Agreement, Dominion agreed to reserve and, if requested by Mattawoman, "deliver up to 140,000 Dth/day in nominated gas at a primary delivery or interconnect point" in Virginia 350 days a year.[131] The Service Agreement incorporated "all the terms and conditions contained in Dominion's separate FERC-approved 'Tariff,' . . . govern[ing], among other things, Dominion's gas delivery processes, rate setting, and business practices."[132] These agreements laid the foundation for their gas supply arrangement, but by the time they signed the Service Agreement, Mattawoman still "lacked a power plant [with which] to receive Dominion's gas."[133]

Mattawoman's financing ultimately collapsed, and "[w]ithout a power plant to receive Dominion's gas, Mattawoman refused to pay for the [firm] pipeline capacity it [had] reserved."[134] After Mattawoman's debt reached $3.4 million in April 2020, Dominion filed suit for breach of contract.[135] Mattawoman denied liability and asserted several affirmative defenses, including "act of God" associated with the COVID-19 pandemic.[136] Dominion replied with a Rule 12(c) motion for judgment on the pleadings.[137]

The district court considered Dominion's FERC Tariff, the parties' Security Deposit Agreement and Service Agreement, and granted Dominion's motion.[138] For the following reasons, the district court specifically rejected Mattawoman's Act of God defense.[139] According to the district court, first, an Act of God is limited to "causes in which no man has any agency whatever" and Mattawoman failed "to suggest that no human intervention in response to COVID-19 could have salvaged its access to capital."[140] Second, Mattawoman failed to identify, and the district court was unaware of, "any case in which a virus or pandemic was found by any court to constitute an 'Act of God.'"[141] Third, frequently, private parties separately allocate the contractual risks of Acts of God and viral pandemics.[142] Fourth, according to the district court, "from a practical perspective, judicial

128. *Id*.
129. *Id.*
130. *Id*. at *2.
131. *Dominion Energy*, 2020 WL 9260246 at *2.
132. *Id*.
133. *Id*. at *3.
134. *Id*. at *4.
135. *Dominion Energy*, 2020 WL 9260246 at *4.
136. *Id*. at *8-9.
137. *Id*. at *4.
138. *Id*. at *5-6.
139. *Dominion Energy*, 2020 WL 9260246 at *4.
140. *Id.* at *8.
141. *Id*. (citations omitted).
142. *Id*. (citations omitted).

recognition of COVID-19 as an 'Act of God' contract defense would wreak havoc on settled economic expectations and destabilize the economy by rendering most of this year's bargained-for exchanges voidable."[143] Fifth, "even if COVID-19 were considered an Act of God, Dominion correctly observ[ed] that Mattawoman fail[ed] to allege that COVID-19 rendered it impossible for Mattawoman to obtain financing."[144]

Dominion's Rule 12(c) motion for judgment on the pleadings was, therefore, granted and Mattawoman's counterclaims for breach of contract and conversion were dismissed with prejudice.[145]

D. *Gas Quality*

1. Dominion Energy Transmission, Inc.

On October 30, 2020, Dominion Energy Transmission, Inc. (n.k.a. Eastern Gas Transmission and Storage, Inc.) ("Eastern"), filed revised tariff records to incorporate gas quality provisions in its tariff specific to renewable natural gas ("RNG").[146] "On November 30, 2020, the Commission issued an order accepting and suspending Eastern's tariff records to be effective upon motion May 1, 2021, subject to refund and the outcome of a technical conference established therein."[147]

In its October 30, 2020 filing, Eastern indicated that "numerous RNG developers had shown interest in delivering RNG on its pipeline and that it was interested in facilitating the acceptance of such gas."[148] However, according to Eastern, "RNG differs from traditional natural gas in that it may contain additional constituents not present in geologically-derived natural gas and that these constituents could have adverse effects on pipeline integrity, human health, and the environment."[149] Eastern proposed to establish limits for constituents to be found in RNG, and to add the following definitions for "Biogas" and "RNG":

> Biogas" [is] natural gas substantially composed of methane, oxygen, carbon dioxide, nitrogen, and other constituents produced by the breakdown of organic matter, especially in the absence of oxygen. Common sources from which this gas is captured include decomposing waste at dairies, feedlots, landfills, publicly owned treatment works, sewage treatment plants, and wastewater plants.[150]

"'RNG' [is] Biogas that has been processed to remove oxygen, carbon dioxide, nitrogen, and other constituents to meet Pipeline's gas quality standards and prepare the Biogas for pipeline transportation."[151]

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143. *Dominion Energy*, 2020 WL 9260246 at *8.

144. *Id.*

145. *Id.* at *28.

146. *Dominion Energy Transmission, Inc.*, 175 FERC ¶ 61,091 at P 1 (2021).

147. *Id.* at P 1; *Dominion Energy Transmission, Inc.*, 173 FERC ¶ 61,188 (2020) (prior Suspension Order).

148. 175 FERC ¶ 61,091 at P 1.

149. *Id.* at P 2. "Eastern's constituents of concern include ammonia, hydrogen, siloxanes, fluorine, chlorine, mercury, arsenic, copper, and a general requirement that received RNG be "commercially free of" objectionable matter, particulates, and biologicals." *Id.* at n 4.

150. *Id.* at P 2.

151. *Id.*

Commission staff convened a technical conference in January 2021, "at which time Eastern and the various parties made presentations describing their support or opposition to Eastern's proposal."[152]

On April 30, 2021, the Commission issued an Order Following Technical Conference in which it rejected Eastern's proposed tariff records, finding them to be unjust and unreasonable.[153] Borrowing heavily from its Policy Statement on Provisions Governing Natural Gas Quality and Interchangeability in Interstate Natural Gas Pipeline Company Tariffs (the "Policy Statement"),[154] the Commission observed that the Policy Statement enumerates the principles and criteria for approving natural gas quality standards for interstate natural gas pipeline tariffs, and that the Commission "will assess the justness and reasonableness of proposed gas quality and interchangeability tariff provisions 'on a case-by-case basis, on a record of fact and technical review.'"[155] Accordingly, the Commission's ruling focused on the record brought before it that is specific to Eastern. The Commission found that, "although its order may serve as guidance in future cases, it does not establish nationwide RNG policy."[156]

The Commission stated that tariff proposals must "balance safety and reliability concerns with the importance of maximizing supply, as well as recognizing the evolving nature of the science underlying gas quality and interchangeability specifications."[157] According to the Commission, "Eastern must show that: (1) the restricted constituents cause a specific problem on the pipeline's system; (2) the proposed tolerance levels would solve the problem; and (3) there are not lower-cost or lower-impact solutions."[158] Instead, because Eastern "failed to provide evidence regarding the prevalence of these constituents in current or expected RNG supplies, as well as their prevalence in the geologic natural gas already shipped on its system," the Commission could not evaluate how Eastern's "proposed change in its subject tariff or practice would affect the existing rights of shippers" and whether the proposed changes are just and reasonable.[159] Eastern failed to document any gas quality concerns specific to its system that it sought to address with its proposal.[160]

The Commission "require[s] the pipeline to come forward with persuasive support for its proposed tariff change in order to meet its burden of proof under section 4 of the NGA."[161] "In addition, section 154.7(a)(6) of the Commission's regulations requires a pipeline to include a detailed explanation of the need for a

152. 175 FERC ¶ 61,091, at P 3.

153. *Id*.

154. *Id*. at P 20; *Provisions Governing Natural Gas Quality and Interchangeability in Interstate Natural Gas Pipeline Company Tariffs*, 115 FERC ¶ 61,325 (2006).

155. 175 FERC ¶ 61,091, at P 20.

156. *Id*.

157. *Id*.

158. *Id*. at P 21.

159. 175 FERC ¶ 61,091, at P 22.

160. *Id*.

161. 175 FERC ¶ 61,091, at P 24.

change or addition to its tariff."[162] "Specifically, when a pipeline proposes to tighten its gas quality standards, the Commission requires it to demonstrate an operational or other reason to support its proposal."[163]

Although Eastern attempted "to provide evidence to support its proposal by referring to outside off-system sources," the Commission found "such reliance upon evidence from outside the pipeline's own system to be insufficient."[164] "The Commission requires that each determination must be 'based on findings that the relevant standards were just and reasonable for those specific pipelines.'"[165] "All of Eastern's evidence was off-system, mostly from studies that did not involve NGA-jurisdictional pipelines."[166] "A pipeline's assertions must be backed by 'substantial evidence in the record of that proceeding,'[167] giving "weight to the testimony of witnesses with substantial experience operating that pipeline."[168] "Especially considering that Eastern already has authority to reject gas that is not merchantable or that is demonstrably damaging its system, 'general concerns of potential operational problems' and references [to] various industry studies and recommendations," did not suffice to afford adequate support for Eastern's proposal."[169]

Eastern "relies on the non-binding findings of research reports on systems and situations unrelated to its own system and proposes to meld these findings into the binding context of its tariff provisions."[170] Eastern "provided little information concerning how testing protocols will be implemented" and "provided only vague descriptions of how its proposed tariff provisions interact with its pre-existing gas quality provisions."[171] The Commission found "the information provided by Eastern regarding RNG receipt point designation, physical receipt point requirements, and gas testing protocols . . . insufficient, and lack[ing] any specific detail."[172] For example, the record was "unclear whether it is even feasible for Eastern to monitor" the relevant constituents.[173]

The Commission concluded that Eastern failed to meet its evidentiary burden under NGA section 4 "to show it would be just and reasonable and not unduly discriminatory and preferential to impose these additional restrictions upon RNG supplies in order to preserve the safe and reliable operation of its system."[174] The Commission encouraged Eastern and "interested parties to work collaboratively to

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162. *Id*.
163. *Id*.
164. *Id*.
165. 175 FERC ¶ 61,091, at P 24 (citing *Gulf South Pipeline Co*., 120 FERC ¶ 61,076, at P 39 (2007)).
166. *Id.*
167. *Id*. (*citing ANR Pipeline Co.,* 117 FERC ¶ 61,286, at P 28 (2006)).
168. *Id*.
169. 175 FERC ¶ 61,091, at P 24.
170. *Id*.
171. *Id*. at P 25.
172. *Id.*
173. 175 FERC ¶ 61,091, at P 25.
174. *Id*. at P 26.

resolve any and all issues through cooperative discussion" and settlement was encouraged to help develop industry standards in the field of RNG.[175]

The Commission's order rejected the tariff records filed by Eastern without prejudice to subsequently refiling them with proper support.[176]

E. Jurisdiction

FERC granted declaratory orders requested by several interstate natural gas pipelines confirming that it would assert its concurrent jurisdiction under section 4 and 5 of the Natural Gas Act with the United States Bankruptcy Court over firm transportation agreements between the pipelines and Gulfport Energy Corporation ("Gulfport") in the event Gulfport filed for bankruptcy protection because Gulfport's contracts are also filed rates governed by sections 4 and 5 of the NGA.[177] FERC also established further proceedings to determine whether the public interest requires abrogation or modification of the Gulfport contracts with each pipeline under the *Mobile-Sierra* doctrine[178] and in each case concluded that "the record did not support a finding that the public interest required abrogation or modification of the transportation agreements."[179]

Following an order to show cause to New Fortress Energy,[180] FERC issued an order finding that New Fortress' LNG handling facility in the Port of San Juan, Puerto Rico is subject to jurisdiction under NGA section 3 and directing "New Fortress to file an application for authorization to operate the facility." FERC also allowed the operation of the facility to continue during the pendency of an application consistent with the public interest.[181] Specifically, FERC ruled that New Fortress (i) is an LNG import facility that meets the definition of an LNG facility in section 2(11) of the NGA;[182] (ii) the construction, siting, and operation of its facility is subject to FERC's jurisdiction under section 3 of the NGA[183]; (iii) is located at the point of import and capable of transferring LNG from an ocean-

175. *Id.* (quoting *Suspension Order*, at 173 FERC ¶ 61,188 (2020)).

176. *Id.* at P 26.

177. *See, e.g., Rover Pipeline LLC,* 173 FERC ¶ 61,019, *reh'g denied,* 173 FERC ¶ 61,138 (2020); *ANR Pipeline Co., Columbia Gas Transmission, LLC, and Columbia Gulf Transmission, LLC,* 173 FERC ¶ 61,018, *reh'g denied,* 173 FERC ¶ 61,137 (2020); *Midship Pipeline Co.,* 173 FERC ¶ 61,011, *reh'g denied,* 173 FERC ¶ 61,136 (2020); *Rockies Express Pipeline, LLC,* 172 FERC ¶ 61,279, *reh'g denied,* 173 FERC ¶ 61,135 (2020); *see also ETC Tiger Pipeline, LLC,* 171 FERC ¶ 61,248 , *reh'g denied,* 172 FERC ¶ 61,155 (2020) (regarding a potential bankruptcy filing by Chesapeake Energy Marketing, LLC).

178. United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332 (1956); FPC v. Sierra Pac. Power Co., 350 U.S. 348 (1956).

179. *See, e.g., Rover Pipeline LLC,* 173 FERC ¶ 61,133 (2020); *ANR Pipeline Co., Columbia Gas Transmission, LLC, and Columbia Gulf Transmission, LLC,* 173 FERC ¶ 61,131 (2020); *Midship Pipeline Co.,* LLC., 173 FERC ¶ 61,130 (2020); *Rockies Express Pipeline, LLC,* 172 FERC ¶ 61,279 (2020).

180. *New Fortress Energy LLC,* 171 FERC ¶ 61,230 (2020).

181. *New Fortress Energy LLC,* 174 FERC ¶ 61,207 at P 1, *reh'g,* 176 FERC ¶ 61,031 (2021) (addressing requests to deny continued operation under Section 3).

182. *Id*. at P 11.

183. *Id*. at P 16.

going LNG tanker;[184] and is connected to a pipeline to send out gas.[185] FERC found that public benefits of the project to Puerto Rico are not relevant to its jurisdictional determination.[186] FERC concluded that although New Fortress "constructed an LNG terminal subject to the NGA jurisdiction without obtaining the necessary prior authorization," it would not take enforcement action provided that New Fortress complies with FERC's requirements of this order.[187]

F. Open Seasons

On October 15, 2020, the Commission issued an order granting complaints against Northern Border Pipeline Company.[188] The order responded to two complaints filed against the pipeline's award of six packages of capacity to an affiliated shipper based on pre-arranged deals. The complainants had alleged that the capacity had not been posted in advance of the pre-arranged deals,[189] that the restrictions on the permitted bids (as to maximum rate, maximum term, maximum receipt point quantities, and primary receipt points) guaranteed that the award would be to the affiliated, pre-arranged shipper and would deprive other potential bidders of a "meaningful opportunity to obtain the capacity,"[190] that certain of the packages were inconsistent with the pipeline's tariff in that they were tied to another project,[191] and that the transactions violated the Standards of Conduct.[192] Other intervenors supported the complaints.[193] The pipeline answered that it was not required to post the capacity in light of the future effective dates of the packages,[194] that it properly imposed bidding parameters and properly awarded the capacity to the pre-arranged deal shipper,[195] that its actions were consistent with the Standards of Conduct,[196] and that rescission was not the proper remedy.[197] The Commission concluded that the awards of capacity violated Commission policy, provided undue preference to the affiliated shipper and discriminated against other, similarly-situated shippers.[198] The Commission found that the pipeline had been obligated to post the pre-arranged capacity in advance,[199] and that, although pipelines may define criteria for weighing bids, they cannot undercut Commission open access policies, and that here, the conditions admittedly guaranteed that the

184. *Id.* at PP 18, 21.
185. 174 FERC ¶ 61,207, at P 28.
186. *Id*. at PP 29-30.
187. *Id*. at P 36.
188. *All. for Open Mkts. v. N. Border Pipeline Co.*, 173 FERC ¶ 61,065 (2020).
189. *Id*. at P 8.
190. *Id*. at P 9.
191. *Id*. at P 10.
192. 173 FERC ¶ 61,065, at P 11.
193. *Id*. at PP 15-16.
194. *Id.* at P 17.
195. *Id.* at P 18.
196. 173 FERC ¶ 61,065, at P 19.
197. *Id*. at P 20.
198. *Id*. at P 21.
199. *Id.* at PP 22-23.

affiliated, pre-arranged shipper would obtain the capacity.[200] The Commission found that the awards granted undue preference to the pre-arranged deal shipper and other similarly-situated shippers, without providing a factual basis for justifying such disparate treatment.[201] The Commission ordered the pipeline to refrain from entering into such discriminatory awards in the future, to structure future open seasons to avoid the specific flaws identified in the order, to revise its tariff, and also rescinded the six awards of capacity and to hold a new open season consistent with Commission policy.[202]

III. Infrastructure

A. Pipelines

1. *Environmental Defense Fund v FERC*, 2 F.4th 953 (D.C. Cir. June 22, 2021).

On June 22, 2021, the U.S. Court of Appeals for the District of Columbia Circuit vacated Spire STL Pipeline's ("Spire STL") certificate of public convenience issued by the Federal Energy Regulatory Commission ("FERC") to construct a new natural gas pipeline in the St. Louis area.[203] Spire STL announced its intent to build a natural gas pipeline in the St. Louis area in 2016 and in August of that year, Spire STL held an "open season," but no shippers committed to the project.[204] Spire STL then entered into a precedent agreement with one of its affiliates, Spire Missouri Inc. ("Spire Missouri") for 87.5 percent of the pipeline's 400,000 dekatherm-per-day transport capacity.[205]

On January 26, 2017, Spire STL submitted its application to FERC stating that the proposed pipeline would enhance reliability and supply security, providing access to new sources of natural gas supply, and eliminate reliance on propane "peak-shaving" during periods of high demand.[206] Spire STL relied on its precedent agreement with Spire Missouri to evidence need.[207] According to the Court, the project was not intended to serve new demand.[208] Several parties protested the application, such as the Environmental Defense Fund ("EDF") which stated that the precedent agreement should have only limited probative value because the two companies were corporate affiliates.[209] Julie Steck also contested several deficiencies to the Environmental Assessment, particularly in its treatment of the need for

200. 173 FERC ¶ 61,065, at P24.
201. *Id*. at P 25.
202. *Id.* at P 27.
203. Env't Def. Fund v. FERC, 2 F.4th 953 (D.C. Cir. June 22, 2021).
204. *Id.* at 959.
205. *Id.*
206. *Id.* at 963.
207. *Env't Def. Fund,* 2 F.4th at 960.
208. *Id.*
209. *Id.*

the project and the lack of a climate change analysis.[210] On August 3, 2018, FERC approved Spire STL's proposed project and on November 21, 2019, FERC denied requests for rehearing.[211]

In its review of the case, the Court held that "Steck [did] not have standing to pursue her claims against FERC" because "she does not own land transected by Spire STL's pipeline and has not had property rights taken via eminent domain" and dismissed her petition for review.[212] However, the Court found that EDF had standing to pursue its claims because "EDF's members include at least four individuals who own land transected by Spire STL's pipeline, each of whom have had property rights taken via eminent domain."[213]

Regarding FERC's certificate order and rehearing order that approved the pipeline, the Court vacated the orders.[214] The Court noted that "precedent agreements are 'always . . . important evidence of demand for a project' . . . [a]nd in some cases, such agreements may demonstrate both market need and benefits that outweigh adverse effects of a new pipeline."[215] There is, however, according to the Court, "a difference between saying that precedent agreements are always important versus saying that they are always sufficient to show that construction of a proposed new pipeline 'is or will be required by the present or future public convenience and necessity.'"[216] According to the Court, FERC "was presented with strong arguments as to why the precedent agreement between Spire STL and Spire Missouri was insufficiently probative of market need and benefits of the proposed pipeline."[217] The Court held that rather than addressing the issue, "the Commission seemed to count the single precedent agreement between corporate affiliates as conclusive proof of need."[218]

The Court further explained that there is no judicial authority endorsing a FERC certificate

> in a situation in which the proposed pipeline was not meant to serve any new load demand, there was no . . . finding that a new pipeline would reduce costs, the application was supported by only a single precedent agreement, and the one shipper who was party to the precedent agreement was a corporate affiliate of the applicant who was proposing to build the new pipeline.[219]

Moreover, the Court held that FERC "failed to adequately balance public benefits and adverse impacts."[220]

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210. *Id.*
211. *Env't Def. Fund,* 2 F.4th at 960, 967.
212. *Id.* at 968-70.
213. *Id.* at 971.
214. *Id.* at 977.
215. *Env't Def. Fund,* 2 F.4th at 972.
216. *Id.*
217. *Id.* at 973.
218. *Id.*
219. *Env't Def. Fund,* 2 F.4th at 973.
220. *Id.*

The Court found that "EDF and others have identified plausible evidence of self-dealing. This evidence include[d] that the proposed pipeline is not being built to serve increasing load demand and that there is no indication the new pipeline will lead to cost savings."[221] According to the Court, "FERC's failure to engage with this evidence did not satisfy the requirements of reasoned decision making."[222] The Court explained that "FERC's ostrich-like approach flies in the face of the guidelines set forth in the Certificate Policy Statement."[223] "The challenges raised by EDF and others were more than enough," the Court maintained, "to require [FERC] to 'look behind' the precedent agreement in determining whether there was market need."[224]

In short, the Court held that:

> [I]t was arbitrary and capricious for [FERC] to rely solely on a precedent agreement to establish market need for a proposed pipeline when (1) there was a single precedent agreement for the pipeline; (2) that precedent agreement was with an affiliated shipper; (3) all parties agreed that projected demand for natural gas in the area to be served by the new pipeline was flat for the foreseeable future; and (4) FERC neglected to make a finding as to whether the construction of the proposed pipeline would result in cost savings or otherwise represented a more economical alternative to existing pipelines.[225]

Regarding the remedy, the Court vacated FERC's certificate order and rehearing order. The Court did this due to the identified deficiencies in FERC's orders.[226] Furthermore, the Court noted that "it is far from certain that FERC 'chose correctly'" when it issued a certificate to Spire STL.[227] The Court stated it understands that the pipeline is operational, and thus there may be some disruption because of this "interim change," *i.e.*, de-issuance of the certificate, caused by vacatur.[228] However, the Court stated that it identified serious deficiencies in FERC's orders. Moreover, it is not clear if FERC can rehabilitate its rationale.[229]

2. *PennEast Pipeline Co., LLC v. New Jersey*, 141 S. Ct. 2244 (2021)

On June 29, 2021, the Supreme Court of the United States issued an opinion that held that the Natural Gas Act ("NGA") §717f(h) "authorizes certificate holders to condemn" all necessary rights-of-way, whether owned by private parties or States.[230] In the decision, the Supreme Court reversed the Third Circuit order in *In re PennEast Pipeline Co.*, 938 F.3d 96 (3rd Cir. 2019).[231]

221. *Id.* at 975.
222. *Id.*
223. *Env't Def. Fund,* 2 F.4th at 975.
224. *Id.*
225. *Id.*
226. *Id.*
227. *Env't Def. Fund*, 2 F.4th at 976.
228. *Id.*
229. *Id.*
230. PennEast Pipeline Co., LLC v. New Jersey, 141 S. Ct. 2244 (2021).
231. *Id.* at 2246.

"In January 2018, FERC granted PennEast Pipeline a certificate of public convenience and necessity authorizing the construction of a 116-mile pipeline from Pennsylvania to New Jersey."[232] Subsequently, PennEast filed several complaints in Federal District Court in New Jersey "in order to exercise its federal eminent domain power to obtain rights-of-way along the pipeline route approved by FERC."[233] "As relevant here, PennEast sought to condemn two parcels in which New Jersey asserts a possessory interest, and 40 parcels in which the State claims nonpossessory interests, such as conservation easements."[234] New Jersey challenged PennEast's complaints on sovereign immunity grounds.[235] The District Court denied New Jersey's challenge and granted PennEast's request for a condemnation order and preliminary injunctive relief.[236] On appeal, the Third Circuit, in September 2019, vacated the District Court's order and concluded that a pipeline cannot condemn State property, or property in which the state owns a conservation easement, in federal court, without the consent of the State.[237] The matter was appealed and, on February 3, 2021, the Supreme Court "granted certiorari to determine whether the NGA authorizes certificate holders to condemn land in which a State claims an interest."[238]

In the opinion, delivered by Chief Justice John Roberts and joined by Justices Breyer, Alito, Sotomayor, and Kavanaugh, the Supreme Court held that "the Federal Government can constitutionally confer on pipeline companies the authority to condemn necessary rights-of-way in which a State has an interest."[239] The Supreme Court stated that "[a]lthough nonconsenting States are generally immune from suit, they surrendered their immunity from the exercise of the federal eminent domain power when they ratified the Constitution."[240] Moreover, the Court stated that, because the NGA "delegates the federal eminent domain power to private parties, those parties can initiate condemnation proceedings, including against state-owned property."[241] The Supreme Court explained that "[s]ince its inception, the Federal Government has wielded the power of eminent domain, and it has delegated that power to private parties.[242] The eminent domain power may be exercised—whether by the Government or its delegates—within state boundaries, including against state property."[243]

The Supreme Court summarized that over the course of "history, the Federal Government and its delegates have exercised the eminent domain power to give

232. *Id.* at 2247, 2253.
233. *Id.* at 2253.
234. *PennEast Pipeline*, 141 S. Ct. at 2253
235. *Id.*
236. *Id.*
237. *Id.* at 2247.
238. *PennEast Pipeline*, 141 S. Ct. at 2254.
239. *Id.* at 2251.
240. *Id.* at 2251-2252.
241. *Id.* at 2252.
242. *PennEast Pipeline*, 141 S. Ct. at 2257.
243. *Id.* at 2263.

effect to that vision, connecting our country through turnpikes, bridges, and railroads—and more recently pipelines, telecommunications infrastructure, and electric transmission facilities."[244]

Moreover, the Court has "repeatedly upheld these exercises of the federal eminent domain power—whether by the Government or a private corporation, whether through an upfront taking or a direct condemnation proceeding, and whether against private property or state-owned land."[245] The NGA fits well within this tradition. "By its terms, §717f(h) authorizes FERC certificate holders to condemn all necessary rights of-way, whether owned by private parties or States."[246]

3. *Algonquin Gas Transmission, LLC*, 174 FERC ¶ 61,126 (2021)

On February 18, 2021, FERC issued an order seeking additional briefing in *Algonquin Gas Transmission, LLC and Maritimes & Northeast Pipeline, LLC*, due to concerns raised regarding the Atlantic Bridge Project's operations.[247] On January 25, 2017, the Commission issued Algonquin "a certificate authorizing the construction and operation of the Weymouth Compressor Station as part of the Atlantic Bridge Project."[248] On September 24, 2020, FERC issued an order to place the Weymouth Compressor Station into service.[249] Following the authorization order, several groups and individuals filed for rehearing of that order, expressing safety concerns about the operation of the Atlantic Bridge Project. On February 18, 2021, FERC issued an order to further address the concerns raised regarding the project.[250] Specifically, FERC sought comment on the following questions:

1. In light of the concerns expressed regarding public safety, is it consistent with the Commission's responsibilities under the Natural Gas Act to allow the Weymouth Compressor Station to enter and remain in service?

2. Should the Commission reconsider the current operation of the Weymouth Compressor Station in light of any changed circumstances since the project was authorized? For example, are there changes in the Weymouth Compressor Station's projected air emissions impacts or public safety impacts the Commission should consider? We encourage parties to address how any such changes affect the surrounding communities, including environmental justice communities.

3. Are there any additional mitigation measures the Commission should impose in response to air emissions or public safety concerns?

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244. *Id.*

245. *Id*.

246. *PennEast Pipeline*, 141 S. Ct. at 2247.

247. Algonquin Gas Transmission, LLC and Maritimes & Northeast Pipeline, LLC, 174 FERC ¶ 61,126 (2021).

248. *Id.* at P 2 (Danly, dissenting).

249. *Id.* at P 9 (Danly, dissenting).

250. *Id.* at P 1.

4. What would the consequences be if the Commission were to stay or reverse the Authorization Order?[251]

Commissioners Danly and Christie dissented and issued separate statements.[252] Commissioner Danly noted in his dissent that "the certificate order and authorization order are both final" and that "rehearing was denied by operation of law and the opportunity to appeal lapsed without a petition for review."[253] Thus, this attempt to revisit the certificate proceeding is contrary to law. He further noted that the Commission's goal in this order is to re-litigate the certificate order absent breach or "violation of the certificate terms and conditions," something the Commission has never done before.[254] Moreover, Commissioner Danly stated that "this order threatens the certainty of the certificate upon which the pipeline's business is founded, disregards the principles of final judgement upon which all litigants rely, and violates the specific statutory procedures devised by Congress to render and challenge final orders."[255]

Commissioner Christie noted in his dissent that re-litigating a project that was approved 4 years ago "is inconsistent with the purpose and principle behind a future-looking review of certification applications" and violates the "standards of regulatory due process and regulatory finality."[256] He further noted that FERC's actions created more questions rather than answers and may impact investment in all infrastructure projects.[257]

B. LNG Projects

1. Freeport - Order Granting Authorization Under Section 3 of the Natural Gas Act

On June 21, 2021, under section 3 of the Natural Gas Act ("NGA"), the Commission granted "Freeport LNG Development, L.P., FLNG Liquefaction, LLC, FLNG Liquefaction 2, LLC and FLNG Liquefaction 3, LLC (collectively "Freeport LNG") . . . authorization to site, construct, and operate modifications to Freeport LNG's existing pretreatment facility in Brazoria County, Texas, to add jurisdictional tie-ins connecting the facility to a proposed non-jurisdictional helium extraction and purification plant," known as the Noble Gas Project.[258] The Commission determined that the "Noble Gas Project will not affect the existing terminal's LNG import or export operations."[259]

251. 174 FERC ¶ 61,126, at P 2.
252. *Id.*
253. *Id.* at P 17 (Danly, dissenting).
254. *Id.* at P 20 (Danly, dissenting).
255. 174 FERC ¶ 61,126, at P 32 (Danly, dissenting).
256. *Id.* at P 1 (Christie, dissenting).
257. *Id.* at P 6 (Christie, dissenting).
258. *Freeport LNG Development, L.P.,* 175 FERC ¶ 61,237, P 1 (2021).
259. *Id.* at P 11.

2. Golden Pass – Order Amending Section 3 Authorization

On January 19, 2021, the Commission granted Golden Pass LNG Terminal LLC's ("Golden Pass LNG") request to increase the total LNG production capacity of the three liquefaction trains associated with the Golden Pass Export Terminal Project, from 15.6 million tonnes per annum ("MTPA"), to 18.1 MPTA.[260] Golden Pass LNG indicated that the "increase in production capacity is based on, among other things, capturing the design margins, richer feed-gas composition, and maintenance processes that promote production efficiencies (e.g., reduced downtime)."[261] The Commission recognized that accurately calculating a facility's production capacity may not be possible at the time the initial application is filed, and held that "it is appropriate for the ultimate authorization to reflect the maximum capacity at optimal conditions," because such maximum capacity represents "the actual potential production of LNG."[262]

3. Golden Pass – Order Amending Authorizations Under Sections 3 And 7 of the Natural Gas Act

On July 10, 2020, FERC vacated the NGA section 7 certificate authorization issued to Golden Pass Pipeline LLC to construct and operate certain compression and pipeline facilities originally authorized as part of the Golden Pass Pipeline Expansion Project.[263] In the same order, the Commission amended Golden Pass LNG Terminal LLC's ("Golden Pass LNG") NGA section 3 authorization to include "authorization to site, construct, and operate" the vacated facilities as part of the previously approved LNG export facilities.[264] FERC found that transferring the authorization would not impact the findings in the prior Environmental Impact Statement, and held that vacating the section 7 certificate authorization "will not result in a change to the previously authorized initial rates for service on the Golden Pass Pipeline Expansion Project."[265]

4. Orders Granting Limited Waiver

On September 17, 2020, the Commission granted Golden Pass LNG Terminal LLC ("Golden Pass LNG") a limited waiver from the Commission's buy/sell prohibition,[266] for any transaction in which Golden Pass LNG enters into: (1) an agreement to purchase natural gas from a potentially affiliated supplier; and (2) an agreement to sell LNG to Ocean LNG Limited, an affiliate of Golden Pass LNG.[267] The Commission held that there is "value in fostering a robust marketplace for LNG and agreed with Golden Pass LNG that the waiver may help provide it with

260. *Golden Pass LNG Terminal LLC,* 174 FERC ¶ 61,053 at P 1 (2021).

261. *Id.* at P 6.

262. *Id.* at P 9.

263. *Golden Pass LNG Terminal LLC and Golden Pass Pipeline LLC*, 172 FERC ¶ 61,021 (2020).

264. *Id*. at P 3.

265. *Id.* at P 11.

266. *Golden Pass LNG Terminal LLC*, 172 FERC ¶ 61,252 (2020).

267. *Id.* at P 16.

the capability to manage varying demands and conditions in its portfolio of supply and transport capacity."[268]

On January 19, 2021, the Commission granted Driftwood Holdings LLC and Driftwood LNG LLC (collectively "Driftwood") a limited waiver from the Commission's buy/sell prohibition,[269] for future "transactions in which Driftwood enters into: (1) an agreement to purchase natural gas from a potentially affiliated supplier; and (2) an agreement to sell LNG to affiliates in foreign commerce."[270] The Commission found that "any future proposed transaction by Driftwood may help foster an efficient, transparent international market for natural gas and provide Driftwood the flexibility to manage its supply and transport capacity to allow for LNG export."[271] The Commission held such waivers are "in the public interest because the import and export of LNG brings . . . flexibility to [American] natural gas markets."[272]

5. New Fortress – Order on Show Cause

On March 19, 2021, the Commission issued an Order on Show Cause to New Fortress Energy LLC, which has been converted into New Fortress Energy Inc. ("New Fortress"), finding that New Fortress' operational LNG handling facility at the Port of San Juan in Puerto Rico is subject to the Commission's jurisdiction under NGA section 3 and directing New Fortress Energy to file an application for authorization to operate the facility within 180 days of the order.[273] The Commission further held that the facility could continue to operate during the pendency of such application.[274]

On April 19, 2021, requests for rehearing relating to the March 19 order, were filed by New Fortress[275] and various NGOs.[276] On May 20, 2021, the Commission issued a notice denying the requests by operation of law and providing for further consideration.[277] On May 24, 2021, a Petition for Review was filed by New Fortress with the D.C. Circuit seeking judicial review of the Commission's March 19 order.[278] On July 15, 2021, the Commission issued an Order Addressing Arguments Raised on Rehearing, modifying the discussion in the March 19 order but continuing to reach the same result.[279] On July 23, 2021, New Fortress petitioned the D.C. Circuit to review the July 15 order and the March 19 order and the case

268. *Id.* at P 15.

269. *Driftwood Holdings LLC and Driftwood LNG LLC*, 174 FERC ¶ 61,041 (2021).

270. *Id.* at P 11.

271. *Id.* at P 10.

272. *Id.*

273. *New Fortress Energy LLC*, 174 FERC ¶ 61,207 (2021).

274. *Id.* at P 39.

275. *FERC Reaffirms New Fortress Decision on Rehearing New Fortress and Eleven NGOs Separately Sought Rehearing of Commission's Decision*, 37 No. 9 NAT. GAS TRANSP. INFO. SERV. NEWSL. 18 (2021).

276. *Id.*

277. *New Fortress Energy LLC,* 175 FERC ¶ 62,108 (2021).

278. New Fortress Energy, Inc. v. FERC, No. 21-1122 (D.C. Cir. May 24, 2021).

279. *New Fortress Energy, LLC*, 176 FERC ¶ 61,031 at P 1 (2021).

is currently pending before the court and has been consolidated with the May 24 petition for review.[280]

IV. DEPARTMENT OF ENERGY

In the past year, the Department of Energy ("DOE") has issued two final policy statements regarding LNG exports pursuant to NGA section 3. First, on July 29, 2020, DOE issued a final policy statement adopting a standard term for authorizations to export natural gas from the lower-48 states—including domestically produced LNG, compressed natural gas, and compressed gas liquid—to countries with which the United States does not have a free trade agreement ("FTA") requiring national treatment for trade in natural gas, and with which trade is not prohibited by United States law or policy.[281] Existing long-term non-FTA export authorization holders, and applicants with applications currently pending before DOE, may apply to extend their export term (or requested export term if pending) through December 31, 2050.[282] Any future long-term export authorization applicant will be authorized for an export term lasting through December 31, 2050, unless they request a shorter time.[283]

Second, on December 18, 2020, DOE issued a policy statement halting its practice of issuing separate long-term and short-term authorization for exports of natural gas from the same facility.[284] Instead, to streamline procedures, DOE revised practices such that certain long-term authorizations to export domestically produced LNG will include additional authority to export the same approved volume pursuant to transactions with terms of less than two years on a non-additive basis.[285] As the policy statement applies only to future long-term export authorizations, DOE concurrently issued a blanket order amending existing export authorizations to be consistent with the policy statement.[286]

A. Abandonment

In *Northern Natural Gas Company,*[287] FERC for the first time evaluated the impact of greenhouse gas ("GHG") emissions and their contribution to climate change in the context of a gas pipeline abandonment and replacement project.[288]

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280. New Fortress Energy Inc. v. FERC, No. 21-1157 (D.C. Cir. July 23, 2021).

281. Notice of Final Policy Statement and Response to Comments, *Extending Natural Gas Export Authorizations to Non-Free Trade Agreement Countries Through the Year 2050*, 85 Fed. Reg. 52,237, 52,238 (2020).

282. *Id.* at 52,239.

283. *Id.*

284. Policy Statement, *Including Short-Term Export Authority in Long-Term Authorizations for the Export of Natural Gas on a Non-Additive Basis*, 86 Fed. Reg. 2,243 (2021).

285. *Id.*

286. U.S. DEP'T OF ENERGY, Order No. 4641, ORDER AMENDING LONG-TERM AUTHORIZATIONS FOR THE EXPORT OF NATURAL GAS TO INCLUDE SHORT-TERM EXPORT AUTHORITY ON A NON-ADDITIVE BASIS, AND VACATING RELATED SHORT-TERM AUTHORITY IN SEPARATE ORDERS (2020).

287. *Northern Natural Gas Co.*, 174 FERC ¶ 61,189 at P 32 (2021).

288. *Id*. at P 29. However, in a subsequent order addressing only abandonment and not replacement of an offshore platform and pipeline facilities, the Commission did not consider GHG impacts. *See Transcontinental Gas Pipe Line Co.,* 175 FERC ¶ 62,174 (2021).

The order notes that there was no need to review downstream GHG impacts because the project involved no new capacity.[289] FERC granted the requested abandonment pursuant to section 7(b) of the NGA and certificate authorization and concluded that the abandonment of existing pipeline and replacement with new pipeline would not contribute significantly to climate change.[290]

Enable Mississippi River Transmission, LLC filed to amend a certificate to reduce a storage field's certificated cushion gas capacity and convert that capacity to working gas, but did not propose to abandon lost cushion gas in the field.[291] The pipeline did not seek abandonment because FERC had ruled in a previous proceeding that abandonment authorization was necessary because the pipeline's predecessor had not proposed to abandon "any portion of its facilities, or any service rendered by its facilities . . . ."[292]

FERC granted abandonment of a limited jurisdiction certificate held by a non-jurisdictional gatherer because the 8.3 mile pipeline, which had been used to deliver gathered, processed gas to the interstate market, was no longer needed as currently operated and no customers were served.[293] A portion of the pipeline facilities were sold to a steel manufacturer that represented that it "would seek [FERC] authorization in the future prior to operating the [pipeline] or will request a determination from [FERC] regarding the jurisdictional status of the line based on the use and ownership at that time."[294]

B. *Office of Public Participation*

On December 27, 2020, President Trump signed in to law an additional COVID-19 relief package which contained language directing FERC to inform Congress within 180 days how it will design, fund, and operate the Office of Public Participation.[295] The Office of Public Participation stems from a 1978 amendment to the Federal Power Act (FPA) whereby Congress added section 319, "Office of Public Participation." FPA section 319 directs the Commission to establish an Office of Public Participation (OPP) to be led by a Director to coordinate assistance to the public.[296]

In the first six months of 2021, the Commission sought public comment during six listening sessions, a full-day Commissioner-led workshop, and a written comment period.[297] On June 24, 2021, the Commission issued its report to Congress stating that:

289. *Id.* at P 29, n. 43.

290. *Id.* at P 36. *See also Northern Natural Gas Co.,* 175 FERC ¶ 61,238 at P 24 (2021).

291. *Enable Mississippi River Transmission, LLC*, 175 FERC ¶ 61,050 at P 1 (2021).

292. *Id.* at P 5, n. 11 (citing *CenterPoint Energy-Mississippi River Transmission Corp.,* 135 FERC ¶ 61,049 at P 1, n.3 (2011)); *but see Saltville Gas Storage Co.,* 172 FERC ¶ 61,257 at P 25 (2021).

293. *Breitburn Operating L.P.*, 175 FERC ¶ 62,013 at PP 1, 10 (2021).

294. *Id.* at P 4.

295. PUBLIC CITIZEN, PUBLIC CITIZEN STATEMENT ON CREATION OF THE OFFICE OF PUBLIC PARTICIPATION 1 (2020), https://www.citizen.org/news/public-citizen-statement-on-creation-of-the-office-of-public-participation/.

296. FERC, REPORT ON THE OFFICE OF PUBLIC PARTICIPATION, https://ferc.gov/media/ferc-report-office-public-participation.

297. *Id.* at i.

- the Commission intends for the OPP to grow over the course of a four-year period before reaching its full operating status by the close of Fiscal Year (FY) 2024.
- The Commission intends to hire the OPP Director, Deputy Director, and an administrative staff member by October 1, 2021 (the beginning of FY2022).
- The Commission plans to assess OPP's workload and reevaluate needed resources for additional growth into and beyond FY2024 to ensure meaningful and consistent compliance with FPA Section 319.
- The official mission of the OPP is to coordinate and provide assistance to members of the public to facilitate participation in Commission proceedings.
- The OPP will provide the following functions:
    - Engage with the public through direct outreach and education to facilitate greater understanding of Commission processes and solicit broader participation in matters before the Commission.
    - Act as a liaison to members of the public affected by and interested in Commission proceedings, by providing ongoing process information on individual proceedings and responding to requests for technical assistance.
    - Coordinate with Commission program offices to improve existing Commission processes in a manner responsive to public input, with the goal of ensuring processes are inclusive, fair, and easy to navigate.
    - Provides advice and recommendations to the Commission with respect to intervenor funding.[298]
- The OPP will work closely with the Commission's Office of External Affairs intergovernmental advisor, the Office of General Counsel including the Senior Counsel for Environmental Justice and Equity, and the Office of Energy Projects to better ensure that the concerns of Tribal members, environmental justice communities, and other historically marginalized communities are fully and fairly considered in Commission proceedings.[299]

The report also noted that under FPA section 319, the Commission may, under rules promulgated by it, provide funding to compensate "any person whose intervention or participation substantially contributed to the approval, in whole or in part, of a position advocated by such person."[300] The report did not address whether this intervenor compensation would extend to Commission proceedings pursuant to the Natural Gas Act.

298. *Id.* at i, 10.
299. *Id.* at 10.
300. FERC, REPORT ON THE OFFICE OF PUBLIC PARTICIPATION, https://ferc.gov/media/ferc-report-office-public-participation.

V. PHMSA & PIPELINE SAFETY

A. Protecting Our Infrastructure of Pipelines and Enhancing Safety (PIPES) Act of 2020

In response to the Merrimack Valley Incident in 2018, the Protecting our Infrastructure of Pipelines and Enhancing Safety Act of 2020 ("PIPES Act 2020") was signed into law on December 27, 2020.[301] This act reauthorizes funding for pipeline safety programs through 2023 and amends the pipeline safety laws overseen by the Pipeline and Hazardous Materials Safety Administration ("PHMSA").[302] The following summary highlights the most impactful elements of the Act on the natural gas industry.

The PIPES Act 2020 requires PHMSA to implement regulations for leak detection and repair, inspection, and maintenance plans.[303] The regulations will impact operators of regulated gas gathering Class 2, Class 3, and Class 4 locations, as well as operators of gas transmission distribution pipelines.[304] The regulations must address the elimination of hazardous leaks, by minimizing natural gas releases and through the replacement and/or remediation of pipelines that are known to leak based on their material, design or previous operating and maintenance history.[305] These regulations must be implemented by PHMSA within one year of enactment.[306]

As a result of PIPES Act 2020, Distribution Integrity Management Plans ("DIMP") must include evaluation of risks that could lead to over-pressurization. Operators cannot rely exclusively on historic operating conditions and must avoid ranking risks as zero unless there is strong evidence to support the ranking. Operators were required to submit updated DIMPs to PHMSA and state authorities within 60 days from the date the PIPES Act 2020 was enacted (i.e., February 25, 2021).[307]

The PIPES Act 2020 requires PHMSA to adopt regulations mandating distribution system operators to have emergency response plans that include written procedures for contacting local emergency personnel, local authorities and the general public, including an opt-in mass communication system.[308] PHMSA will also update its regulations for operations and maintenance manuals to address management of over-pressurization response, technology changes and equipment

301. VAN NESS FELDMAN LLP, PIPELINE SAFETY UPDATE- ISSUE NO. 163 1 (2021), https://www.vnf.com/pipeline-safety-update-issue-no-163.

302. *Id.*

303. AMERICAN GAS ASS'N, AGA SUMMARY OF 2020 PIPES ACT 2 (2020), https://www.aga.org/contentassets/de600ecb7c9646c5af6bdb96b1d36ea2/aga-pipeline-safety-reauthorization-pipes-act-summary-dec.-2020-002.pdf.

304. *Van Ness Feldman LLP*, *supra* note 301, at 2.

305. *Id.*

306. *Id.*

307. *American Gas Ass'n., supra* note 303, at 1.

308. *Id.*

on the distribution system, as well as steps for ensuring that qualified personnel review and approve construction plans.[309]

PHMSA must submit a report to Congress showing the use of Pipeline Safety Management Systems ("SMS") by pipeline operators in accordance with the American Petroleum Institute's Recommended Practice 1173.[310] A pipeline SMS is a systematic approach to managing the safety of the workforce, public and the physical assets of the pipeline.[311] PHMSA and state regulators will assess the existing pipeline operator SMS framework and promote SMS use for the entire industry, including self-reporting of errors or deviations from regulatory standards.[312]

PHMSA will adopt regulations that will require operators to implement record keeping procedures for pipeline safety practices.[313] The record keeping procedures must allow for traceable, reliable, and complete records that are available for inspection.[314] These procedures must be accessible to construction and engineering personnel.[315] In addition to record keeping requirements, pipelines must also have qualified agents monitor and control gas flow during construction projects and have operators assess and upgrade regulator stations to minimize overpressurization.[316]

The PIPES Act 2020 has provided direction on definitions for key terms related to the act.[317] The definition of an idled pipeline is detailed as a pipeline that has ceased operations and will not resume service for at least 180 days, has been isolated from its sources and has been purged of combustibles and hazardous materials and maintains a low pressure with nonflammable gases.[318] PHMSA must adopt regulations addressing verification of and risk associated with purging idled pipelines.[319] Prior to any idled pipelines resuming operations, facilities will need to be inspected and must comply with all current regulations.[320] In addition to

309. OPERATIONS & MAINTENANCE ENFORCEMENT GUIDANCE: PART 192 SUBPARTS L AND M at 16, 28, 164, https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/docs/regulatory-compliance/pipeline/enforcement/5776/o-m-enforcement-guidance-part-192-7-21-2017.pdf.

310. VOLUNTARY INFORMATION-SHARING SYSTEM WORKING GROUP FEDERAL ADVISORY COMMITTEE at 5, 21 (2019), https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/docs/standards-rulemaking/pipeline/71576/vis-recommendation-report-and-chair-letter-06-10-19.pdf.

311. 2020 PIPELINE SMS ANNUAL REPORT at 4 (2021), https://pipelinesms.org/.

312. PIPELINE SAFETY UPDATE - ISSUE NO. 163 at 3, https://www.vnf.com/pipeline-safety-update-issue-no-163.

313. OPERATIONS & MAINTENANCE ENFORCEMENT GUIDANCE: PART 192 SUBPARTS L AND M at 108, https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/docs/regulatory-compliance/pipeline/enforcement/5776/o-m-enforcement-guidance-part-192-7-21-2017.pdf.

314. *Id.*

315. *Id.*

316. *Id.* at 9, 76, 146.

317. U.S. Department of Transportation Pipeline and Hazardous Materials Safety Administration: PIPES Act of 2020 Overview at 1 (2021), https://www.phmsa.dot.gov/legislative-mandates/pipes-act-2020-overview.

318. PIPELINE SAFETY UPDATE - ISSUE NO. 163 at 2, https://www.vnf.com/pipeline-safety-update-issue-no-163.

319. *Id.*

320. *Id.*

defining and addressing idle pipelines, as well as other regulations promoting environmental enhancement, PHMSA must also incorporate new definitions of "coastal beaches" and "certain coastal waters" into its regulations in order to determine whether high consequence areas are impacted by a pipeline.[321]

LNG facilities are specifically implicated in the Act, which provides updates to LNG facilities standards as well as fees for reviewing certain facilities.[322] Of note, PHMSA is authorized to create procedures for the collection of fees for LNG facilities with construction costs over $2.5 billion.[323] The fees are intended to cover expenses associated with PHMSA's role inspecting LNG facilities in order to determining compliance with Part 193 siting requirements.[324] The Part 193 maintenance and operating standards will be reviewed and updated in order to increase the level of safety compared with current standards.[325] Additionally, PHMSA will establish a center of excellence for LNG safety if appropriated funds are available.[326]

PHMSA publicly posts updates of each final rulemaking relating to implementation of the PIPES Act 2020, and must notify Congress at the time of each publication.[327] PHMSA has prepared and made publicly available a rulemaking chart that relates to the implementation of the PIPES Act 2020.[328]

The PIPES Act 2020 provides regulatory power and funding for PHMSA to update pipeline safety laws.[329] This Act is specifically aimed at reducing the risk of unnecessary releases of methane for both safety and environmental purposes.[330] Gathering lines, distribution pipelines and LNG facilities are impacted by new regulations and procedures to improve operations and maintenance, emergency responses and safety practices. PHMSA, in conjunction with state regulators, will oversee the implementation of this Act and report to the Comptroller General as well as Congress through 2023.[331]

B. Gas Pipeline Regulatory Reform, Docket No. PHMSA-2018-0046 (Issued January 11, 2021; effective March 12, 2021)

On January 11, 2021, PHMSA amended the Federal Pipeline Safety Regulations ("PSR") at 49 CFR Parts 191 and 192 to ease regulatory burdens associated with construction, maintenance and operation of gas transmission, distribution,

321. *Id.*

322. PIPELINE SAFETY UPDATE - ISSUE NO. 163 at 3, https://www.vnf.com/pipeline-safety-update-issue-no-163.

323. *Id.*

324. *Id.* at 3.

325. *Id.* at 3-4.

326. PIPELINE SAFETY UPDATE - ISSUE NO. 163 at 3-4, https://www.vnf.com/pipeline-safety-update-issue-no-163.

327. *Id.* at 2.

328. *Id.* at 9.

329. *Id.* at 1.

330. Pipeline Safety: Gas Pipeline Regulatory Reform, 84 Fed. Reg. 2,210 (Jan. 11, 2021) (to be codified at 49 C.F.R. pts. 191, 192).

331. *Id.*

and gathering systems.[332] The January 11, 2021 final rule followed a June 9, 2020 notice of proposed rulemaking and public comment period.[333] The final rule became effective on March 12, 2021, and compliance is required beginning October 1, 2021.[334]

PHMSA's final rule identifies ten specific areas for alterations to the existing regulations.[335] These revisions address farm taps, exemptions for master meter systems from DIMP requirements, and remote inspection of certain facilities. The final rule also modifies reporting requirements related to mechanical fitting failures and adjusts the monetary threshold of incident reporting to update for inflation.[336] Further, PHMSA modifies a number of inspection, testing, and authorization requirements related to plastic pipe, atmospheric corrosion, pressure vessels, and welding.[337] Finally, PHMSA extends the existing authorization for pre-testing of fabricated units and short segments of steel pipe prior to installation on high-stress operating conditions to pipelines operating at lower-stress operating conditions.[338]

In addition to making the above referenced modifications to the PSR, the final rule also withdraws the "Exercise of Enforcement Discretion Regarding Farm Taps" (March 29, 2019) and the unpublished October 27, 2015 letter to the Interstate Natural Gas Association of America announcing a stay of enforcement pertaining to certain pressure vessels.[339]

C. PHMSA Security Directive Pipeline-2021-01, effective May 28, 2021

In April 2021, a significant ransomware attack on Colonial Pipeline Company occurred that led to widespread fuel and gasoline shortages on the East Coast.[340] As a result of this event, the Transportation Security Administration ("TSA"), issued a ruling effective May 28, 2021.[341] The ruling is directed at owners and operators of critical hazardous liquid and natural gas pipelines and liquified

332. *Id.*

333. *Id.*

334. *Id.*

335. PIPELINE SAFETY UPDATE - ISSUE NO. 163 at 5 (2021), https://www.vnf.com/pipeline-safety-update-issue-no-163.

336. *Id.* at 5-6.

337. *Id.* at 6.

338. *Id.* at 7.

339. PIPELINE SAFETY UPDATE - ISSUE NO. 163 at 5 (2021), https://www.vnf.com/pipeline-safety-update-issue-no-163.

340. Will Englund & Ellen Nakashima, *Panic buying strikes Southeastern United States as shuttered pipeline resumes operations*, THE WASHINGTON POST (May 12, 2021, 6:37 PM), https://www.washingtonpost.com/business/2021/05/12/gas-shortage-colonial-pipeline-live-updates/.

341. Erica Youngstrom, *First-Ever Mandatory Cybersecurity Directive for Oil and Gas Pipelines Signals More Robust Regulations to Come*, PILLAR & POST (June 14, 2021), https://www.bakerlaw.com/alerts/first-ever mandatory-cybersecurity-directive-for-oil-and-gas-pipelines-signals-more-robust-regulations-to-come

natural gas facilities ("Impacted Companies") and requires that any identified incidents must be reported to the Cybersecurity and Infrastructure Security Agency ("CISA").[342] The enhanced directive is effective until May 28, 2022.[343]

The directive identifies three critical actions for Impacted Companies. First, Impacted Companies must "report cybersecurity incidents to the Department of Homeland Security's CISA."[344] Second, Impacted Companies "must designate a cybersecurity coordinator to be available to TSA and CISA" on a daily and around the clock basis in order to coordinate cybersecurity practices and address any incidents that arise.[345] Third, Impacted Companies must submit a vulnerability assessment to CISA.[346]

Impacted Companies must have the "Cybersecurity Coordinator designated at the corporate level," and they must submit the name and contact information to CISA.[347] Cybersecurity Coordinators must "be United States citizens who are eligible for a security clearance," be available on a daily and around the clock basis, "serve as the primary contact" for the TSA, and be responsible for coordinating internal and external cyber and related security practices.[348]

All incidents must be reported to CISA "no later than 12 hours after the incident has been identified."[349] Incidents that must be reported include: unauthorized access; "discovery of malicious software" in IT or Operational Technology; "physical attacks on infrastructure"; and "any other cybersecurity incident resulting in operational disruption."[350] The incident report to CISA must satisfy the reporting requirements in Security Directive Pipeline-2021-01.[351] This includes providing: the contact information of the reporting individual; specify that the report is to "satisfy the reporting requirements in Security Directive Pipeline-2021-01"; indicate the affected infrastructure and/or hazardous liquid and its location; and a full description of the threat or incident that includes "who has been notified and what action has been taken."[352] "Any relevant information collected by an Impacted Company, such as IP addresses, domains, malware, and any known threats," should also be included in the report.[353] The report must have "a description of the threat's impact on IT and Operational Systems including actual, imminent, or potential delays, thefts" and all information that explains the "impact or potential

342. *Id.*

343. TRANSP. SEC. ADMIN., U.S. DEP'T. OF HOMELAND SEC., SD PIPELINE-2021-0, SECURITY DIRECTIVE, at 1 (2021).

344. *Id.*

345. *Id.*

346. *Id.*

347. TRANSP. SEC. ADMIN., U.S. DEP'T. OF HOMELAND SEC., SD PIPELINE-2021-0, SECURITY DIRECTIVE, at 2 (2021).

348. *Id.*

349. *Id.* at 3.

350. *Id.* at 2-3.

351. TRANSP. SEC. ADMIN., U.S. DEP'T. OF HOMELAND SEC., SD PIPELINE-2021-0, SECURITY DIRECTIVE, at 3-4 (2021).

352. *Id.* at 3.

353. *Id.* at 3-4.

impact of the incident."[354] Lastly, the report must include a description of the planned response to the incident.[355]

Impacted Companies were required to provide a vulnerability assessment to indicate compliance with section 7of the TSA 2018 Pipeline Security Guidelines within 30 days of the effective date of the directive.[356] The vulnerability assessment must evaluate current practices in order to determine if they align with TSA guidelines, identify any deviations, and provide remediation measures.[357] "The assessment and identification [must be done] using the form provided by the TSA."[358]

As a result of the directive, critical infrastructure pipelines have ongoing binding cybersecurity reporting obligations, including vulnerability assessment requirements, and must have a primary company representative available at all times to report to and communicate about cybersecurity issues with TSA.

VI. ENVIRONMENTAL

A. *Clean Air Act*

1. *Am. Lung Ass'n v. Env't Prot. Agency*, 985 F.3d 914 (D.C. Cir. 2021)

Petitioners sought review of the Environmental Protection Agency's (EPA's) new Affordable Clean Energy Rule (ACE Rule) promulgated under the Clean Air Act (CAA).[359] The EPA issued greenhouse gas emission standards for new and modified power plants in 2015, finding that "fossil fuel-fired [power plants] emit almost one-third of all U.S. [greenhouse gas] emissions".[360] The EPA then sought to determine the best system of emission reduction that had been adequately demonstrated for existing fossil-fuel-power plants, per the requirements of §7411(a)(1) of the CAA, and then build on the established system and methods already adopted by the power sector.[361] These EPA regulations and standards "came to be known as the Clean Power Plan."[362] The Clean Power Plan combined "three existing methods of emission reduction" to form the "best system of emission reduction".[363] These methods included "technological measures to improve efficiency at coal-fired steam power plants, substituted increased generation from lower-emitting existing natural gas combined cycle units for generation from higher-emitting affected steam generating power plants (mostly coal-fired)", and

354. *Id.* at 4.

355. TRANSP. SEC. ADMIN., U.S. DEP'T. OF HOMELAND SEC., SD PIPELINE-2021-0, SECURITY DIRECTIVE, at 4.

356. *Id.*

357. *Id.*

358. *Id.*

359. Am. Lung Ass'n. v. EPA, 985 F.3d 914, 935 (2021); ACE Rule, 84 Fed. Reg. at 32,575-32,584 (codified at 40 C.F.R. pt. 60, subpart Ba).

360. *Am. Lung Ass'n*, 985 F.3d at 941 (quoting New Source Rule, 80 Fed. Reg. at 64,531).

361. *Id.* at 936.

362. *Id.* (citing 80 Fed. Reg. 64,663).

363. *Id.* (citing 42 U.S.C. § 7411(a)(1)).

prioritization of "electricity generated from zero-emitting renewable-energy sources over electricity generated from fossil-fuel-fired power plants".[364]

> The EPA issued a new rule in 2019 that repealed and replaced the Clean Power Plan, the ACE Rule, explaining that it felt statutorily compelled to do so because "the plain meaning of section 7411(d) unambiguously limits the best system of emission reduction to only those measures that can be put into operation *at* a building, structure, facility or installation.[365]

Thus, in viewing its agency authority under section 7411 as limited to "physical changes to power plants", the EPA determined that the best system of emission reduction under the ACE Rule was only applicable to coal-fired power plants.[366] The agency did not address in its rulemaking the regulation of "greenhouse gas emissions from other types of fossil-fuel-fired power plants, such as natural gas or oil."[367] However, the EPA noted that "natural gas co-firing and carbon capture and storage was excluded from its own "best system", due to cost, geographical, and operation concerns."[368]

The issue before the Court was "whether the EPA acted lawfully in its 2019 adoption of the ACE Rule to regulate power plants' emissions of greenhouse gases."[369] Ultimately, the Court held that it did not, and while it validated the EPA's legal authority to adopt rules regulating greenhouse gases under the Clean Air Act, the central terms of the ACE Rule combined with the repeal of its predecessor Clean Power Plan rule was entirely based upon a fundamental misconstruction of section 7411(d) of the Clean Air Act.[370] The Court also found the ACE Rule's regulatory framework as arbitrary and capricious, due to its slowing of the process for reducing emissions, and thus vacated the ACE Rule entirely.[371]

B. Clean Water

1. *Mountain Valley Pipeline, LLC v. N.C. Dep't of Env't Quality*, 990 F.3d 818 (4th Cir. 2021)

The North Carolina Department of Environmental Quality (NCDEQ) denied a pipeline operator certification under the Clean Water Act (CWA), to build an extension to a main "natural gas pipeline through North Carolina and its rivers, streams, and wetlands."[372] The Court held that the state did not exceed its authority to institute comprehensive water quality standards under the CWA, finding that North Carolina's riparian buffer rules fell within its authority to maintain existing, beneficial uses of water and its requirements to decrease degradation and negative

364. *Id.* (quoting 80 Fed. Reg. 64,667).
365. *Id.* at 937-938 (quoting 84 Fed. Reg. 32,523-24). (emphasis added).
366. *Am. Lung Ass'n*, 985 F.3d at 938.
367. *Id.* at 938 (citing 84 Fed. Reg. 32,533).
368. *Id.* at 939 (citing 84 Fed. Reg. 32,544-45, 32,547-48).
369. *Id.* at 930 (citing 84 Fed. Reg. 32,520).
370. *Am. Lung Ass'n*, 985 F.3d at 930 (citing 80 Fed. Reg. 64,662).
371. *Id.*
372. Mountain Valley Pipeline, LLC v. N.C. Dep't of Env't Quality, 990 F.3d 818, 821 (2021).

impacts upon its rivers, streams and wetlands affiliated with the pipeline extension. [373] However, as some bases for the NCDEQ to deny CWA certification were found to be arbitrary and capricious in violation of the Administrative Procedure Act, the pipeline operator's petition for administrative review was granted.[374]

2. *N.Y. State Dep't of Env't Conservation v. FERC,* 991 F.3d 439 (2nd Cir. 2021)

The New York State Department of Environmental Conservation (DEC) petitioned for review of FERC orders which had decided that the DEC had waived its authority under the Clean Water Act (CWA) to issue or deny a water quality certification for a natural gas pipeline project.[375] The Court found that the CWA section providing that states must act on a request for water quality certification within a year of receiving the request (or otherwise their certification authority is waived) does "prohibit the certifying agency from entering in an agreement with an applicant to alter the beginning of the review period."[376] Thus, the DEC could not extend the CWA's one-year time limit to issue or deny a water quality certification for the natural gas pipeline project through its agreement with the natural gas company to alter the receipt date of the company's certification application in order to extend the deadline by 36 days; the DEC had effectively waived its certification authority by failing to act within the one-year time deadline of the actual receipt of the natural gas company's application.[377]

C. NEPA

1. Vecinos para el Bienestar de la Comunidad Costera v. FERC, ---F.4th---, 2021 WL 3354747 (August 3, 2021)

Residents and environmental groups petitioned for review of FERC decisions that authorized construction and operation of liquified natural gas (LNG) export terminals and two 135-mile pipelines carrying the LNG to one of those terminals.[378] Under the Natural Gas Act, an exporter of LNG shall obtain authorization from the United States Department of Energy in order to export it, as well as authorization from FERC to construct and operate its facilities.[379] Prior to FERC granting authorization to construct and operate LNG facilities or pipelines, FERC must conduct an environmental review under NEPA.[380] This environmental review forces agencies to take a "hard look at the environmental consequences of its actions, including alternatives to its proposed course, and to ensure that these environmental consequences, and an agency's consideration of them, are disclosed

373. *Id.* at 829 (citing PUD No. 1 of Jefferson Cty. v. W.A. Dep't of Ecology, 511 U.S. at 700, 713 (1994)).

374. *Id.* at 833.

375. N.Y.S. Dep't of Env't Conservation v. FERC, 991 F.3d 439, 442 (2020); *see* Clean Water Act, 33 U.S.C. § 1341.

376. *N.Y.S. Dep't of Env't Conservation*, 991 F.3d at 450 (2020).

377. *Id.*

378. 169 FERC § 61130 (2019), 169 FERC § 61131 (2019), 169 FERC § 61132 (2019).

379. 15 U.S.C. § 717b (e)(1).

380. *Id.*; 42 U.S.C. § 4332 (2)(C).

to the public."[381] The Court found that FERC's environmental impact analyses upon environmental justice communities for the construction and operation of two LNG export terminals and pipelines the carry LNG to one terminal were deficient under both NEPA and the Administrative Procedure Act.[382] FERC's deficient orders warranted remand without vacatur, since the Court found it reasonably likely that FERC could redress its failure of explanation for the NEPA analyses on remand and vacating the orders would needlessly disrupt completion of the projects.[383]

2. *Colom. Riverkeeper v. U.S. Army Corp of Eng'rs*, ---F.Supp.3d---, 2020 WL 6874871 (November 23, 2020)

Environmental advocacy organizations brought an action challenging permits issued by the United States Army Corps of Engineers (Army Corps) approving a refinery, export facility, and pipeline supplying the refinery with natural gas.[384] NEPA forces agencies to take a "hard look" at the environmental consequences of their proposed actions and requires preparation of an environmental impact statement for any federal actions that would significantly affect the quality of the human environment.[385] In this case, the appellate court found that the Army Corps' failure to prepare an environmental impact statement violated the NEPA, that failure to consider expansion of an existing regional gas pipeline system as a cumulative indirect effect of the proposed refinery violated NEPA, and that failure by the Army Corps to consider reasonable foreseeable greenhouse gas emissions outside Washington and Oregon was arbitrary and capricious.[386]

D. Nationwide Permit

1. Sierra Club v. U.S. Army Corps of Eng'rs, 981 F.3d 251 (4th Cir. 2020)

Environmental groups petitioned for review of the United States Army Corps of Engineers (Army Corps) issuance of a Clean Water Act (CWA) verification that discharged material into federal waters for a natural gas pipeline construction project as meeting criteria to operate in an Army Corps district under nationwide permit (NWP).[387] This verification thus excused the natural gas pipeline construction project from the time-consuming individual permitting process and seeking reinstatement of a prior verification of the project in a different Army Corps district.[388]

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381. *Id*.

382. *Id.*; 5 U.S.C. § 706.

383. 5 U.S.C. § 706; Exec. Order No. 12,898.

384. Columbia Riverkeeper v. United States Army Corp of Engineers, No. 19-6071 RJB, 2020 WL 6874871 (W.D. Wash. Nov. 23, 2020), *adhered to on denial of reconsideration sub nom.* Riverkeeper v. United States Army Corp of Engineers, No. 19-6071 RJB, 2020 WL 7241366 (W.D. Wash. Dec. 9, 2020), *appeal dismissed sub nom.* Columbia Riverkeeper v. United States Army Corps of Engineers, No. 21-35053, 2021 WL 3116067 (9th Cir. June 16, 2021).

385. 42 U.S.C. § 4332 (2)(C).

386. *Columbia Riverkeeper*, WL 6874871 at 10.

387. Sierra Club v. United States Army Corps of Engineers, 981 F.3d 251 (4th Cir. 2020).

388. 33 U.S.C. § 1344.

Usually, potential CWA permittees who seek a NWP for a project must submit pre-construction notifications to the Army Corps for verification that the project would comply with the NWP.[389] Under the CWA's implementing regulation, the division engineer of the Army Corps will make special conditions issued prior to the NWP permitting process regional conditions of the NWP.[390] However, the regulation does not allow a division engineer to do so where a state has modified a special condition *after* the issuance of the NWP (emphasis added).[391] The appellate court held that the petitioners environmental groups seeking a stay of the Army Corps' issuance of a CWA verification for the natural gas pipeline project was likely to succeed on the merits of their challenge due to the Army Corps' incorporation of a modified special condition allowing the Secretary of Army Corps division to decide on a case-by-case basis whether to require individual water quality certification for pipelines over 36 inches in diameter and/or those crossing navigable-in-fact rivers; since verification was likely unlawful, the subsequent reinstatement of verification was also unlawful.[392] The Court also held that the environmental groups would likely suffer irreparable harm in absence of a stay of the Army Corps' unlawful CWA verification issuance and reinstatement of verification, since dredging could occur while the case was being decided and could not be undone.[393] This potential of irreparable harm outweighed the financial harm to the pipeline operator, as the court found that environmental injury could not be adequately remedied by money damages, and that overall, the public interest supported the Court's grant of a stay.[394]

VII. Policy Statements

A. Certification of New Interstate Natural Gas Facilities – Docket No. PL18-1-000

On February 18, 2021, the Commission issued a Notice of Inquiry (NOI) seeking additional stakeholder input to help the Commission explore whether it should revise its approach under its currently effective policy statement on the certification of new natural gas facilities, consistent with the standard is established in section 7 of the Natural Gas Act (NGA).[395] This was the second NOI the Commission issued on whether to consider its so-called Certificate Policy Statement.[396] Previously, on April 19, 2018, the Commission issued an NOI seeking input on four areas of inquiry: (1) whether and how the Commission should adjust determination of need for a proposed project; (2) consideration of potential exer-

389. *Id.*
390. 33 U.S.C. § 1341.
391. *Id.*
392. *Id.*
393. *Id.*
394. 33 U.S.C. § 1341.
395. 174 FERC ¶ 61,125 (2021) (2021 NOI).
396. 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000).

cise of eminent domain and of landowner interests; (3) evaluation of environmental impact of a proposed project; and (4) how the Commission can improve the efficiency and effectiveness of its certificate process.[397] Despite accepting comments on the 2018 NOI, the Commission never acted on it. Rather, it issued the 2021 NOI, which identified a new area of examination—the impact of FERC projects on environmental justice communities—and added questions to the other categories of questions from the 2018 NOI.[398]

For the first area of inquiry—determination of need—the Commission asked questions regarding whether and how the Commission should adjust how it determines whether there is need for the project.[399] Under this inquiry the Commission asked specific questions regarding what benefits the Commission should consider, the role precedent agreements should play in its needs determination, whether and how the Commission should consider a project's end use, and whether the Commission should assess need differently when two or more projects are proposed in the same geographic region.[400] With respect to the second area of inquiry, the Commission invited new and revised comments on whether and how the Commission adjust its consideration of the potential exercise of eminent domain, whether and how applicants take measures to minimize use of eminent domain, whether the Commission should consider changing how it balances the potential use of eminent domain against the showing of need for the project, and whether the current process adequately take landowner interests into account.[401] The Commission also added new questions to the 2021 NOI addressing "whether Commission has authority under the NGA to condition a certificate holder's exercise of eminent domain."[402]

For its environmental review of a project, particularly under the requirements of the National Environmental Policy Act (NEPA), the 2021 NOI requested comments regarding, among other things, whether and how the Commission should consider broadening its alternatives analysis, whether the Commission should broaden its cumulative impacts analysis, whether and how the Commission could consider upstream impacts (*e.g.* drilling of wells) and downstream end-use impacts, including greenhouse gas (GHG) emissions, how the Commission could determine the significance of a project's GHG emission on contribution to climate change, whether and how the Commission use the Social Cost of Carbon (SCC) analysis, and whether the Commission is permitted to mitigate GHG emissions under the NGA.[403] As to possible improvements to the efficiency of the Commission's review process, the 2021 NOI requested feedback on the following topics, which were identical to the questions asked in the 2018 NOI, including whether certain aspects of the review process (*i.e.*, pre-fling, post-filing, and post-order-

397. 163 FERC ¶ 61,042 (2018) (2018 NOI).
398. 174 FERC ¶ 61,125.
399. *Id.* at P 12.
400. *Id.* at P 21.
401. *Id.* at P 11.
402. 174 FERC ¶ 61,125, at P 12.
403. *Id.* at P 17.

issuance) be condensed, performed concurrently with other activities, or eliminated, and what specific changes should the Commission implement, how the Commission can ensure most effective participation by stakeholders, whether and how the Commission can work more efficiently with other agencies that have a role in the certificate review process, and whether there are classes of projects that should appropriately be subject to a more efficient process.[404]

Finally, the 2021 NOI opened a line of inquiry into a new topic: environmental justice.[405] The Commission noted that Executive Order 14008, issued by President Biden on January 27, 2021, directed federal agencies to develop "programs, policies, and activities to address disproportionately high and adverse human health, environmental, climate-related and other cumulative impacts on disadvantaged communities, as well as the accompanying economic challenges of such impacts."[406] While the Commission is not technically subject to the Executive Order, the 2021 NOI requested stakeholders address whether and how the Commission should change how it identifies potentially affected environmental justice communities, whether there are concerns regarding environmental justice communities' participation in past Commission proceedings, what measures the Commission could take to ensure effective participation by environmental justice communities in the review process, whether the Commission should change how it considers the location or distribution of a project's impacts, whether the Commission should change how it considers multiple or cumulative adverse exposures and historic patterns of exposure to pollution or other environmental hazards, whether the NGA, NEPA, or other federal statutes set specific duties for the Commission to fulfill regarding environmental justice, whether and how the Commission should establish a method for evaluating mitigation of environmental justice impacts, and whether the NGA, NEPA, or other federal statute set forth specific remedies with respect to environmental justice.[407]

Comments on the 2021 NOI were due April 26, 2021.[408] The Commission has not yet acted on the 2021 NOI.[409]

404. *Id*. at P 19.
405. *Id*. at P 4.
406. Exec. Order No. 12008, § 219, 86 F.R. 7619 (Jan. 27, 2021).
407. 174 FERC ¶ 61,125.
408. *Id*.
409. As of November 5, 2021.