

REBUILDING OUR POWER WITHOUT PROCEDURAL SAFEGUARDS: A FEDERAL RESPONSE TO THE 2005 HURRICANES THAT OUTLASTED THE “EMERGENCY”

Sarah McQuillen Tran\*

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## I. INTRODUCTION

In late summer of 2005, Hurricanes Katrina and Rita blew through the Gulf Coast region of the United States, culminating in the largest natural disaster in U.S. history.<sup>1</sup> The hurricanes threatened to damage much more than homes, natural gas pipelines, and other infrastructure, however. They also threatened to impair government accountability. The November 18, 2005 order (“Hurricane Order”)<sup>2</sup> that the Federal Energy Regulatory Commission (“FERC” or “Commission”) issued without any public input demonstrates how a government agency used the hurricane emergency to expedite its own agenda. From November 18, 2005 until February 28, 2007, the Hurricane Order authorized much larger and more types of natural gas pipeline projects to qualify for the first time for the relaxed regulatory requirements of FERC’s blanket certificate program. In doing so, FERC dramatically raised the risk that the environment would suffer damages and that landowners’ rights would be violated.<sup>3</sup> At the very least, it became virtually certain that citizens would be deprived of their right to express their opinions and concerns.

FERC claimed that the order, which provided pipeline companies with incentives to develop the nation’s natural gas infrastructure, was a corrective measure for the upcoming winter heating season. However, the order went beyond the legitimate grounds for its issuance, potentially violating a variety of laws. The 2005–2006 winter heating season ended within five months,<sup>4</sup> but the order remained in effect through the winter, a spring, a summer, a fall, and another winter without reason.<sup>5</sup> By extending the Hurricane Order

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<sup>1</sup> William L. Waugh Jr., *The Political Costs of Failure in the Katrina and Rita Disasters*, 604 ANNALS AM. ACAD. POL. & SOC. SCI. 10, 13 (2006).

<sup>2</sup> Order Temporarily Waiving Regulations To Raise Blanket Certificate Limits, 113 F.E.R.C. 61,179 (2005) [hereinafter Hurricane Order 1]; Order Extending Deadline for Construction of Facilities Pursuant to Temporary Waiver of Regulations Raising Blanket Certificate Limits, 114 F.E.R.C. 61,186 (2006) [hereinafter Hurricane Order 2]. In the text, “Hurricane Order” refers to the overall program created by the twin orders.

<sup>3</sup> Part IV.C *infra* shows how the order failed to provide adequate environmental protections. Part V.B *infra* discusses how the order interfered with landowners’ rights by enabling pipeline companies to exercise the power of eminent domain and use excessively loud equipment more frequently.

<sup>4</sup> The cost to heat a home fluctuates from year to year and month to month, generally being higher during the winter months, when demand is higher. The winter heating season extends until the end of March. See Energy Information Administration, *In Like a Lion, This Week in Petroleum*, Mar. 9, 2005, <http://tonto.eia.doe.gov/oog/info/twip/twiparch/050309/twipprint.html> (on file with the Harvard Environmental Law Review). As the Hurricane Order was promulgated in mid-November, the winter heating season ended 4.5 months after the order went into effect and seven months after Hurricane Katrina devastated the Gulf Coast on August 29, 2005.

<sup>5</sup> FERC’s decision to promulgate the order in the first place appears to be a rational decision and is not questioned here. Natural gas serves a number of purposes, from heating homes to generating electricity. It also provides many benefits over other types of fuels. It creates fewer adverse environmental impacts, it costs less to residential consumers, it is comparatively well protected from severe weather, and it drives the economy. American Gas Foundation, *Fueling the Future: Natural Gas & New Technology for a Cleaner 21st Century, Benefits of*

to last fifteen months, instead of just five months to alleviate the anticipated winter heating “crisis,” FERC violated the Natural Gas Act<sup>6</sup> (“NGA”), the Administrative Procedure Act<sup>7</sup> (“APA”), and the National Environmental Policy Act<sup>8</sup> (“NEPA”).<sup>9</sup> As a result, decisions were made unilaterally by pipeline companies without other interested parties’ views being represented.

Although the direct effects of the Hurricane Order are nearly impossible to evaluate since the order provided for minimal public involvement in both its promulgation and implementation,<sup>10</sup> FERC’s failure to abide by its procedural mandates carries potentially ominous implications. The environment and landowners are particularly vulnerable to harm from pipeline projects when protective procedural safeguards are ignored.<sup>11</sup> Moreover, the risk arises that FERC will use the Hurricane Order as a model for keeping the public in the dark while it effects even more radical changes to the nation’s regional and national gas transportation systems when the next catastrophe occurs.<sup>12</sup> With global warming predicted to escalate the devastating effect of hurricanes in the future,<sup>13</sup> the issue of how long important procedures should be waived on the grounds of a national emergency will become increasingly important.

The remainder of this paper elaborates upon these arguments. Part II describes how, in response to regulatory blunders that have rendered the nation’s natural gas infrastructure deficient, Congress gave FERC a clear instruction to revamp the infrastructure, a policy the Hurricane Order furthered, but without public input, through two winters. This Part also shows

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*Natural Gas*, <http://www.fuelingthefuture.org/contents/MoreThanEnergy.asp> (last visited Sept. 26, 2007) (on file with the Harvard Environmental Law Review). What this paper challenges are the procedures by which FERC implemented its decision and the length of time it left its relaxed regulatory provisions in effect.

<sup>6</sup> 15 U.S.C. §§ 717-717z (2000 & Supp. V 2005).

<sup>7</sup> 5 U.S.C. §§ 551-559, 701-706 (2000 & Supp. IV 2004).

<sup>8</sup> 42 U.S.C. §§ 4321-4347 (2000).

<sup>9</sup> For an illuminating discussion of how environmental statutes have been used in emergency situations, see Michael B. Gerrard, *Emergency Exemptions from Environmental Laws After Disasters*, NAT. RESOURCES & ENV’T, Spring 2006, at 10. This information provides a larger frame for understanding why FERC need not have acted as it did. However, a full analysis of this issue is beyond the scope of this Article.

<sup>10</sup> Projects undertaken under the blanket certificate program, which the Hurricane Order drastically expanded, involve minimal or no regulatory review. Thus, information about blanket certification projects, if available at all, cannot be easily located by an interested member of the public. See *infra* Part III.A.

<sup>11</sup> See *infra* Parts IV.C.2, V.B.

<sup>12</sup> FERC has a strong reason to use the Hurricane Order as a model for future emergency responses: the Commission has already received an official congratulatory slap on the back for the order from the White House. See THE FEDERAL RESPONSE TO HURRICANE KATRINA: LESSONS LEARNED 142 (2006), available at <http://www.whitehouse.gov/reports/katrina-lessons-learned.pdf>.

<sup>13</sup> P. J. Webster, G. J. Holland, J. A. Curry & H.-R. Chang, *Changes in Tropical Cyclone Number, Duration, and Intensity in a Warming Environment*, 309 SCIENCE 1844, 1844 (2005), available at <http://www.sciencemag.org/cgi/reprint/309/5742/1844.pdf> (showing that intensity of hurricanes has increased); Kerry Emanuel, *Increasing Destructiveness of Tropical Cyclones over the Past 30 Years*, 436 NATURE 686, 686 (2005) (showing that destructiveness of hurricanes has increased over last thirty years and warning of future increase).

that the 2005 hurricanes only created a potential for a natural gas “crisis” extending through one winter heating season at most, but certainly not through two. To examine more closely FERC’s response to the 2005 hurricanes, Part III briefly lays out the key features of the blanket certificate program before discussing how FERC expanded this program through its emergency regulations and the Hurricane Order. This Part then probes why it was only after the crisis had ended that FERC revealed in its October 19, 2006 order (“Order No. 686”)<sup>14</sup> that the Hurricane Order had gone too far. Part IV examines the NGA, APA, and NEPA procedures for emergency circumstances, and determines that the Hurricane Order extended too far beyond the winter heating season to qualify as an “emergency” measure, and that, therefore, FERC could and should have complied with these laws after the first winter ended. Then, Part V discusses why FERC’s failure to comply with its procedural safeguards should be of concern to the public. Finally, Part VI concludes that, in making the Hurricane Order’s relaxed regulatory treatment outlast the emergency for which the order was enacted, FERC created the unsettling precedent that it may use an emergency as an extended excuse to exclude the public from its decision-making processes.

## II. AMERICA’S DEFICIENT NATURAL GAS INFRASTRUCTURE

The inappropriately-lengthened “emergency” provided FERC with an excuse to expedite the construction of significant natural gas infrastructure without procedural encumbrances. In fact, FERC had a compelling reason to want to encourage such development; before the hurricanes, a sequence of regulatory blunders had rendered the U.S. natural gas infrastructure inadequate to meet the nation’s growing demands for natural gas.

### A. Regulatory History

An analysis of the regulatory blunders that have afflicted the natural gas industry must start with the enactment of the NGA<sup>15</sup> in 1938. The NGA gave FERC’s predecessor, the Federal Power Commission (“FPC”), authority to regulate interstate sales of natural gas.<sup>16</sup>

In 1974, the FPC established national rates for natural gas.<sup>17</sup> Unfortunately, because the FPC could generally exercise jurisdiction over interstate gas only,<sup>18</sup> intrastate market prices soon exceeded interstate prices, and only the intrastate market producers had funds to develop new sources of gas.<sup>19</sup>

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<sup>14</sup> Revisions to the Blanket Certificate Regulations and Clarification Regarding Rates, 117 F.E.R.C. 61,074 (2006) [hereinafter Order No. 686].

<sup>15</sup> Pub. L. No. 75-688, 52 Stat. 821 (1938).

<sup>16</sup> WILLIAM F. FOX, JR., FEDERAL REGULATION OF ENERGY 426-27, 436 (1983).

<sup>17</sup> *Id.* at 433.

<sup>18</sup> See Eric C. Dorf, Chapter, *Energy*, 55 GEO. WASH. L. REV. 862, 863 (1987).

<sup>19</sup> See Fox, *supra* note 17, at 436.

By the mid-1970s, shortages of interstate natural gas supplies had become a national crisis.<sup>20</sup> “Schools, factories and other facilities” were shut down, and “residential and small commercial customers” dependent on natural gas suffered immense hardships.<sup>21</sup> In addition, the 1973 oil crisis “contributed to concerns about U.S. supplies of oil and natural gas.”<sup>22</sup>

Congress responded by enacting the Natural Energy Act, which included the Natural Gas Policy Act of 1978 (“NGPA”).<sup>23</sup> The NGPA provided a timetable for deregulation of the sales of certain categories of natural gas,<sup>24</sup> and created a unified national market by expanding the scope of federal regulation into new markets, such as intrastate gas sales.<sup>25</sup> The NGPA also replaced the FPC with FERC, an independent agency within the new Department of Energy.<sup>26</sup> In the same year as the enactment of the NGPA, Congress enacted the Powerplant and Industrial Fuel Use Act of 1978 (“PIFUA”),<sup>27</sup> restricting industrial and power generation uses of natural gas.<sup>28</sup>

The NGPA and PIFUA fell short of establishing a sound natural gas market. In fact, they resulted in a “gas bubble” in the late 1980s and 1990s, characterized by a weakened demand for an excess supply of natural gas.<sup>29</sup> This in turn caused the regulated price of gas eventually to exceed its market price.<sup>30</sup> To take advantage of the situation, most owners of interstate pipelines entered into long-term contracts for supplies of high-priced gas, for which they demanded their customers pay.<sup>31</sup>

Several new legislative and regulatory decisions were implemented to deregulate the natural gas industry. FERC restructured the natural gas industry by issuing a series of orders that created an unbundled, more flexible, and more unified transportation system for natural gas.<sup>32</sup> Congress assisted FERC’s efforts by amending PIFUA in 1987<sup>33</sup> to remove restrictions on the

<sup>20</sup> JAMES H. MCGREW, FERC: FEDERAL ENERGY REGULATORY COMMISSION 58 (2003).

<sup>21</sup> *Id.*

<sup>22</sup> Energy Information Administration, *Repeal of the Powerplant and Industrial Fuel Use Act (1987)*, Jan. 7, 2005, [http://www.eia.doe.gov/oil\\_gas/natural\\_gas/analysis\\_publications/ngmajorleg/repeal.html](http://www.eia.doe.gov/oil_gas/natural_gas/analysis_publications/ngmajorleg/repeal.html) (on file with the Harvard Environmental Law Review).

<sup>23</sup> Pub. L. No. 95-621, 92 Stat. 3350 (codified as amended at 15 U.S.C. §§ 3301-3432 (2000)).

<sup>24</sup> FOX, *supra* note 16, at 437-38; MCGREW, *supra* note 20, at 58.

<sup>25</sup> See generally Pub. L. No. 95-621, 92 Stat. 3350 (codified as amended at 15 U.S.C. §§ 3301-3432 (2000)). The NGPA grants to the President the power to declare a natural gas supply emergency for up to 120 days. 15 U.S.C. § 3361.

<sup>26</sup> MCGREW, *supra* note 20, at 58.

<sup>27</sup> Pub. L. No. 95-620, 92 Stat. 3289 (codified as amended at 42 U.S.C. §§ 8301-8484 (2000)).

<sup>28</sup> I COMMITTEE ON NATURAL GAS, NATIONAL PETROLEUM COUNCIL, BALANCING NATURAL GAS POLICY: FUELING THE DEMANDS OF A GROWING ECONOMY 18 (2003), available at <http://www.npc.org> (follow “Reports by Year” hyperlink).

<sup>29</sup> *Id.* See also MCGREW, *supra* note 20, at 59.

<sup>30</sup> MCGREW, *supra* note 20, at 59.

<sup>31</sup> *Id.*

<sup>32</sup> I COMMITTEE ON NATURAL GAS, *supra* note 28, at 18.

<sup>33</sup> Pub. L. No. 100-42, 101 Stat. 310 (codified as amended at 42 U.S.C. §§ 8301-8484 (2000)).

use of gas in power generation<sup>34</sup> and by enacting the Natural Gas Wellhead Decontrol Act of 1989<sup>35</sup> to remove wellhead price controls. These efforts finally produced a more market-responsive natural gas industry in the early 1990s,<sup>36</sup> but more regulatory measures are still needed to revamp the nation's natural gas infrastructure.

### B. Recent Developments

The demand for natural gas is on the rise. Natural gas demand in the United States grew more than forty percent from sixteen trillion cubic feet per year ("TCF/year") to twenty-three TCF/year between 1986 and 1997.<sup>37</sup> Not only is gas increasingly being used for power generation, but, in the residential sector, the number of natural gas customers grew from 48 million in 1987 to 60 million in 2001.<sup>38</sup>

The high demand for natural gas increases the strains on the nation's natural gas infrastructure.<sup>39</sup> However, certain regulatory policies stifle its further development. Specifically, in the late 1990s, state and federal regulators who wanted to increase competition in the natural gas industry started discouraging long-term contracts.<sup>40</sup> Local Distribution Companies ("LDCs") were historically the dominant parties that contracted for long-term pipeline and storage capacity. Regulatory practices designed to boost industry competition disfavored LDC contracts and thereby reduced the incentives for long-term investments in natural gas infrastructure. Consequently, of the more than 290,000 miles of transmission pipe operated in the United States by pipeline and storage companies by 2006, eighty-eight percent was installed prior to the 1970s.<sup>41</sup> The aging infrastructure, coupled with the increasingly heavy use required by the high demand for natural gas, means that significant ongoing expenditures must be made to maintain safe and reliable operations.<sup>42</sup>

America's deficient natural gas infrastructure has finally drawn full federal attention. After over a decade of congressional silence on energy mat-

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<sup>34</sup> *Id.*; H.R. REP. NO. 100-78, at 271 (1987). The Amendment deleted the following text, which was in former paragraph (6) of section 8301: "to prohibit or, as appropriate, minimize the use of natural gas and petroleum as a primary energy source and to conserve such gas and petroleum for the benefit of present and future generations." PIFUA, Pub. L. No. 95-620, § 102(b)(6) (1978), *repealed by* Pub. L. No. 100-42, § 1(c)(1)(B).

<sup>35</sup> Pub. L. No. 101-60, 103 Stat. 157 (1989).

<sup>36</sup> *See* 2 COMMITTEE ON NATURAL GAS, *supra* note 28, at 21-22.

<sup>37</sup> 1 COMMITTEE ON NATURAL GAS, *supra* note 28, at 18.

<sup>38</sup> *Id.* at 20.

<sup>39</sup> Natural gas production in the continental United States has reached its peak. This, however, does not decrease the nation's need for more natural gas infrastructure. Currently "[t]he Lower 48 States are planning to acquire natural gas from Alaska, Canada, and Mexico via long pipelines." OFFICE OF ENERGY PRODUCTS, FERC, A GUIDE TO LNG: WHAT ALL CITIZENS SHOULD KNOW 1 (2006), available at <http://www.ferc.gov/for-citizens/citizen-guides/citz-guide-Ing.pdf>.

<sup>40</sup> 1 COMMITTEE ON NATURAL GAS, *supra* note 28, at 46.

<sup>41</sup> *Id.* at 43.

<sup>42</sup> *Id.*

ters, Congress issued the Energy Policy Act of 2005 (“EPAAct”).<sup>43</sup> The EPAAct had three principal policy goals that relate to FERC: (1) it reaffirmed FERC’s commitment to increasing competition in the energy industry; (2) it strengthened FERC’s regulatory tools; and (3) it provided for the development of a stronger energy infrastructure.<sup>44</sup> The goals empowered and obligated FERC to take action, while complying with all relevant laws, to enhance the nation’s natural gas infrastructure. Although FERC has busied itself carrying forth this objective, it will be years before the deficient infrastructure problem can be rectified completely.

### C. *The Winter Natural Gas “Crisis”*

The damage the 2005 hurricanes inflicted on the nation’s natural gas infrastructure and production exacerbated the industry’s deficiencies and had the potential to create a crisis that could have extended through the 2005-2006 winter, but no longer. On August 29, 2005, Hurricane Katrina devastated the Gulf Coast region, severely shocking the entire nation and disrupting a significant portion of America’s natural gas industry. Barely a few weeks later, Hurricane Rita swept through, increasing gas outages and slowing recovery. FERC feared that the damage Hurricanes Katrina and Rita inflicted upon the regional production of natural gas and the natural gas infrastructure would result in a national “crisis” that would extend through the 2005-2006 winter heating months.<sup>45</sup> As it turned out, the crisis was not as severe as FERC had worried.

Still, FERC’s fears were well founded. The Gulf Coast region “is a major . . . natural gas supply center for the United States with significant offshore . . . natural gas production.”<sup>46</sup> In fact, federal offshore natural gas production in the region accounts for nineteen percent of total U.S. production.<sup>47</sup> The region also serves as a major import hub and nexus for pipeline infrastructure.<sup>48</sup>

Because Hurricanes Katrina and Rita crossed directly over major zones of natural gas production, processing, and transportation in the Gulf Coast region, they severely damaged production platforms, offshore pipelines, processing plants, and other facilities in the area.<sup>49</sup> Specifically, Hurricane Katrina caused natural gas production in the Gulf Coast to drop immediately by 8.8 billion cubic feet per day (“Bcf/d”).<sup>50</sup> By the third week of October,

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<sup>43</sup> Pub. L. No. 109-58, 119 Stat. 594 (2005).

<sup>44</sup> FERC, FACT SHEET: ENERGY POLICY ACT OF 2005, at 1 (2006), available at <http://www.ferc.gov/legal/fed-sta/epact-fact-sheet.pdf>.

<sup>45</sup> Hurricane Order 1, *supra* note 2, ¶ 1.

<sup>46</sup> *Hurricane Katrina*, SHORT-TERM ENERGY OUTLOOK (Energy Information Administration), Sept. 2005, at 1, available at <http://www.eia.doe.gov/pub/forecasting/steo/oldsteos/sep05.pdf> [hereinafter EIA September Outlook].

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Hurricane Order 1, *supra* note 2, ¶ 1.

<sup>50</sup> *Id.* ¶ 2 (citing EIA September Outlook, *supra* note 46).

over 6.6 Bcf/d of natural gas produced in the Gulf still could not reach the market,<sup>51</sup> and sixteen processing plants in Louisiana and Texas, with capacities of at least 100 million cubic feet per day, remained inactive.<sup>52</sup> Of those plants that were not damaged by the hurricanes, many could not operate because of infrastructure and supply problems.<sup>53</sup> In mid-November, FERC anticipated that at least 650 Bcf of production, which represented over 3.5 percent of U.S. annual production, would be lost, and that 2 Bcf/d would remain incapable of accessing the market during the winter.<sup>54</sup>

Based on information generated in September and October 2005 by the Energy Information Administration (“EIA”), a federal governmental organization that provides official energy statistics, FERC expected complete recovery would take several months, but no longer than that.<sup>55</sup> The EIA had pointed out that losses of natural gas infrastructure following the hurricanes had exacerbated an already tight natural gas market in the entire United States, which could negatively affect both the price and supply of natural gas during the 2005-2006 winter heating season.<sup>56</sup> Fortunately, the EIA had also established that under a worst-case scenario, natural gas production and distribution would achieve or nearly achieve a return to normal operations by December 2005.<sup>57</sup>

The expected rise in winter heating prices did occur, but it was not as dramatic as had been expected.<sup>58</sup> Unusually mild winter weather reduced heating demand, which, in turn, lowered prices for natural gas.<sup>59</sup> On February 1, 2006, FERC acknowledged that “recovery efforts in the Gulf of Mexico . . . [c]ombined with lower consumption because of weather, . . . ha[d] alleviated most of the immediate supply concerns for the winter of 2005-2006.”<sup>60</sup> Thus, the crisis that FERC expected to last a winter barely made it that far, and, as winter ended, the Commission’s fears about the crisis should also have vanished.

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<sup>51</sup> *Id.* (citing ENERGY INFORMATION ADMINISTRATION, DAILY REPORT ON HURRICANE IMPACTS ON U.S. ENERGY (Oct. 21, 2005)).

<sup>52</sup> *See id.* ¶ 3.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* ¶ 2 n.4 (citing COMMISSION STAFF DERIVATION FROM CAMBRIDGE ENERGY RESEARCH ASSOCIATES, MONTHLY GAS BRIEFING: A BAND OF UNCERTAINTY (Sep. 19, 2005) and COMMISSION STAFF DERIVATION FROM CAMBRIDGE ENERGY RESEARCH ASSOCIATES, HERE WE GO AGAIN: HURRICANE RITA ADDS TO HURRICANE KATRINA’S SUPPLY SHOCK (Sept. 23, 2005)).

<sup>55</sup> *See id.* ¶ 3 (citing ENERGY INFORMATION ADMINISTRATION, DAILY REPORT ON HURRICANE IMPACTS ON U.S. ENERGY (Oct. 24, 2005)).

<sup>56</sup> Overview, SHORT-TERM ENERGY OUTLOOK AND WINTER FUELS OUTLOOK (Energy Information Administration), Oct. 2005, at 1, available at <http://www.eia.doe.gov/pub/forecasting/steo/oldsteos/oct05.pdf> [hereinafter EIA October Outlook].

<sup>57</sup> EIA September Outlook, *supra* note 46, at 2. *See also* EIA October Outlook, *supra* note 56, at 2.

<sup>58</sup> FERC, HIGH NATURAL GAS PRICES: THE BASICS 2 (2d ed. 2006), available at <http://www.ferc.gov/legal/staff-reports/high-gas-prices.pdf>.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*



### III. FERC'S RESPONSE TO THE 2005 HURRICANES

Although FERC's 2005 hurricane response was multifaceted,<sup>61</sup> the most drastic and lengthy regulatory measures the Commission took involved one program: the blanket certificate program. This program attempts to strike a careful balance, one which the Hurricane Order disrupted, between ensuring that FERC adequately scrutinizes potentially harmful pipeline projects (by excluding these projects from the program) and achieves administrative efficiency (by providing minimal or no review of less harmful projects).

#### A. *Overview of the Blanket Certificate Program*

To ensure that pipeline projects are properly supervised, section 7 of the NGA requires that before FERC authorizes any requested pipeline project, it must determine that issuing a certificate of authorization to the applicant is required for the "public convenience and necessity."<sup>62</sup> However, it would be impractical and inefficient for the Commission to prohibit a pipeline company from, for instance, adjusting valves until FERC had determined that the adjustment would be required for the public convenience and necessity.<sup>63</sup> In recognition of this fact, the Commission instituted its blanket certificate program in 1982, pursuant to section 7(c) of the NGA, "to provide an administratively efficient means to authorize a generic class of routine activities, without subjecting each minor project to a full, case-specific NGA section 7 certificate proceeding."<sup>64</sup> Under a blanket certificate, a pipeline company may "construct, modify, acquire, operate, and abandon" certain natural gas facilities, as well as "offer a limited set of services."<sup>65</sup>

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<sup>61</sup> Beyond issuing the Hurricane Order, to aid in the 2005 restoration efforts FERC waived record-keeping regulations for several companies, granted one governmental provider of natural gas management services the authority to waive charges incurred by its customers as a direct result of the hurricanes, granted gas companies permission to reroute natural gas, relaxed requirements for electric transmission providers, extended filing deadlines, reported on the status of natural gas transmission and prices, and referred users to Katrina-related reports on the Department of Energy's Office of Electricity Delivery and Energy Reliability. FERC, Industries, <http://www.ferc.gov/industries/eng-sup-dem/hurricane-efforts.asp> (last visited Nov. 8, 2007) (on file with the Harvard Environmental Law Review).

<sup>62</sup> 15 U.S.C. § 717f (2000). See also McGREW, *supra* note 20, at 70 (explaining the purpose of the public convenience and necessity standard: "Congress in its wisdom did not want private companies building interstate pipelines willy-nilly all over the country without adequate regulatory supervision. Obtaining the proper authorization from the regulator is the quid pro quo for obtaining the privilege of owning and operating monopolistic facilities and providing a monopolistic service").

<sup>63</sup> Adjusting a pipeline valve is a day-to-day operation for a pipeline company. Processing millions of such requests on a daily basis would overwhelm FERC's administrative capacity. McGREW, *supra* note 20, at 68.

<sup>64</sup> Order No. 686, *supra* note 14, ¶ 7. As discussed in Parts IV and V *infra*, while the Hurricane Order was in effect, projects that were not minor or routine occurred under blanket certification.

<sup>65</sup> FERC, Blanket Certificates, <http://www.ferc.gov/industries/gas/indus-act/blank-cert.asp> (last visited Nov. 1, 2007).

In response to the 2005 hurricanes, FERC altered the blanket certificate program to provide pipeline companies with incentives to rebuild the nation's natural gas infrastructure. Two aspects of the blanket certificate program are particularly important to understanding why FERC's response to the hurricanes was unduly long lasting: (1) the program's classification system, which determines the level of regulatory treatment a particular pipeline project will receive; and (2) the program's cost and eligibility constraints.

The most distinctive feature of the blanket certificate program is its classification system. FERC regulates projects differently depending on whether they involve: (1) activities that can be *automatically* authorized under the blanket certificate program; (2) those that require *prior public notice*; and (3) those that require *case-specific* consideration and thereby fall outside the blanket certificate program.<sup>66</sup> Under FERC's classification system, automatic projects receive the most relaxed regulatory treatment because they are supposed to involve only minor financial investments in pipeline facilities and produce minimal impacts on pipeline operations or on the rates consumers pay for gas.<sup>67</sup> FERC simply requires that pipeline companies notify potentially affected landowners thirty days before undertaking a planned automatic project.<sup>68</sup> An automatic project may proceed without further FERC approval.<sup>69</sup> No one other than an affected landowner receives notification of a planned automatic project. In addition, the Commission and

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<sup>66</sup> When it promulgated the blanket certificate program, the Commission developed the following criteria to distinguish between automatic, prior public notice, and case-specific projects and to explain the different levels of regulatory scrutiny they receive:

The first category applies to certain activities ["automatic" projects] performed by interstate pipelines that either have relatively little impact on ratepayers, or little effect on pipeline operations. This first category also includes minor investments in facilities which are so well understood as an established industry practice that little scrutiny is required to determine their compatibility with the public convenience and necessity. The second category of activities ["prior public notice" projects] provides for a notice and protest procedure and comprises certain activities in which various interested parties might have a concern. In such cases there is a need to provide an opportunity for a greater degree of review and to provide for possible adjudication of controversial aspects. Activities not authorized under the blanket certificate [those requiring "project-specific, NGA Section 7(c) certificate proceedings"] are those activities which may have a major potential impact on ratepayers, or which propose such important considerations that close scrutiny and case-specific deliberation by the Commission is warranted prior to the issuance of a certificate.

Interstate Pipeline Certificates for Routine Transactions, 47 Fed. Reg. 24,254, 24,255 (June 4, 1982).

<sup>67</sup> *Id.* For instance, Natural Fuel Gas Supply Corp. used its automatic blanket certificate authority during calendar year 2004 to: abandon approximately 22,000 feet of pipeline by either selling it to other pipeline companies or by discontinuing its use; replace and relocate 6,300 feet of pipeline; install a compressor unit at an existing pipeline station; add ten new "receipt points" for other companies; and add one new location where it could deliver gas to a residential community. The most expensive project cost slightly over \$1.7 million. NATURAL FUEL GAS SUPPLY CORPORATION, ANNUAL REPORT UNDER 18 C.F.R. § 157.207, CALENDAR YEAR 2004 (April 27, 2005), available at <http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=10524938>.

<sup>68</sup> See Order No. 686, *supra* note 15, ¶ 50.

<sup>69</sup> 18 C.F.R. § 157.203(b) (2006).

the public have no means to find out which types of automatic projects are undertaken under a blanket certificate until the certificate holder files an annual report with FERC describing the projects it initiated during the prior calendar year.<sup>70</sup>

Pipeline companies must comply with more stringent regulatory requirements for prior public notice projects than automatic projects because FERC anticipates that interested parties might have some concerns about these projects.<sup>71</sup> For prior public notice projects, the pipeline company must “make a good faith effort to notify . . . affected landowners within at least three business days” after FERC assigns a docket number to the project application or “at the time [the company] initiates . . . negotiations [to obtain an easement from the landowner], whichever is earlier.”<sup>72</sup> In addition, through publication in the Federal Register, the company must provide the public with a notice period during which any person or FERC may protest a proposed project.<sup>73</sup> If no one files a protest within the notification period, the project may proceed.<sup>74</sup> If a protest is filed by the public or by Commission staff, the pipeline company has thirty days to resolve the issues raised in the protest.<sup>75</sup> If the issues are not resolved and the protest is not withdrawn or dismissed, FERC will not authorize the project under the company’s blanket certificate.<sup>76</sup> Instead, FERC will treat the proposed project as if it were presented in an application for a case-specific, NGA section 7 certificate proceeding.<sup>77</sup>

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<sup>70</sup> See 18 C.F.R. § 157.207 (2007). The Hurricane Order only expanded the scope of the blanket certificate program; it did not involve FERC’s emergency reconstruction authority. See Notice of Proposed Rulemaking, 115 F.E.R.C. 61,305 ¶ 4 & n.5 (2006). Because the Hurricane Order enabled much larger projects to qualify as automatic projects under the blanket certificate program, the lack of advance notification procedures prevented interested members of the public, like the author, and FERC from learning about potentially harmful projects before they occurred. See *infra* Part V.B.3.

<sup>71</sup> See Interstate Pipeline Certificates for Routine Transactions, 47 Fed. Reg. at 24,267. One example of a prior public notice project involved Williston Basin Interstate Pipeline Company. On January 26, 2005, the company notified FERC and the public of its desire to spend \$7.8 million to construct and operate a new delivery point to provide natural gas service to a refinery in a rural, non-residential area in Yellowstone County, Montana. WILLISTON BASIN INTERSTATE PIPELINE COMPANY, NOTICE OF REQUEST UNDER BLANKET AUTHORIZATION, NO. CP05-56-000 (Jan. 26, 2005), available at <http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=10388811>. This example highlights the difficulties a concerned member of the public faces when trying to determine whether a project authorized under the blanket certificate program is likely to have harmful effects. The cost of this prior public notice project was such that it could have qualified as an automatic project, but FERC’s regulations do not require that pipeline companies, like Williston, explain what issues a project raises that prevents it from qualifying as an automatic project. In this instance, given the remote location of the site in Yellowstone County, it seems likely that the project raised environmental concerns. But, unless such facts are stated, notifying the public of the project does not truly inform the public of the risks it faces.

<sup>72</sup> 18 C.F.R. § 157.203(d)(2).

<sup>73</sup> *Id.* § 157.205(d), (e)(1).

<sup>74</sup> *Id.* § 157.205(h).

<sup>75</sup> *Id.* § 157.205(f).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

Unlike automatic and prior public notice projects, case-specific projects, such as the construction of a Liquefied Natural Gas (“LNG”) facility, do not qualify for the relaxed regulatory treatment available to pipeline companies under the blanket certificate program, for they raise concerns that FERC believes require close examination.<sup>78</sup> Instead, applicants for case-specific projects must undergo a more rigorous and lengthy evaluation by FERC before the project may proceed. Interested parties may participate in a “paper hearing,” in which FERC uses “documents filed with [it] as constituting the ‘record’ on which it bases its decision.”<sup>79</sup>

Besides FERC’s classification of blanket certificate projects, the second aspect of the blanket certificate program that was heavily affected by the Hurricane Order was its restrictions on when a project could qualify for consideration under the blanket certificate program. To ensure that the “public convenience and necessity” constraint is met by a blanket certificate project, section 157.208 of the Commission’s regulations imposes two fundamental restraints on certificate holders under the blanket certificate program: (1) the project must concern an “eligible facility,” and (2) the costs for a particular project must be kept under a specified value.<sup>80</sup> Section 157.202(b)(2)(i) of the Commission’s regulations defines “eligible facility” as “any facility subject to the [NGA] jurisdiction of the Commission that is necessary to provide service within existing certificated levels.”<sup>81</sup> Given the vagueness of this definition, it is more helpful to look at which facilities are *not* eligible. From 1982 until late 2005, FERC stated that the following were not eligible facilities under the blanket certificate program:

- (A) A main line of a transmission system . . . .
- (B) An extension of a main line . . . .
- (C) A facility, including compression and looping, that alters the capacity of a main line;
- (D) A facility required to test or develop an underground storage field or that alters the certificated capacity, deliverability, or storage boundary, or a facility required to store gas above ground in

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<sup>78</sup> Interstate Pipeline Certificates for Routine Transactions, 47 Fed. Reg. 24,254, 24,258 (June 4, 1982).

<sup>79</sup> MCGREW, *supra* note 20, at 70. On September 15, 1999, FERC issued a Statement of Policy (“Policy”) setting out the analytical steps it would use in determining whether to approve a case-specific project. The Policy “provides that when a certificate application is filed, the threshold question applicable to existing pipelines is whether the project can proceed without subsidies from [the applicant’s] existing customers.” FERC next considers whether the applicant has attempted to avoid or mitigate any adverse effects the project could have on: (1) the applicant’s existing customers; (2) the applicant’s competitors and their customers; or (3) “landowners and communities affected by the route of the new pipeline.” If the proposed project will have no adverse effect, the Commission makes a preliminary determination or a final order. If FERC finds that any of the three interested parties will still suffer adverse effects after efforts have been made to minimize them, then FERC will approve an application “only if the public benefits from the project outweigh any adverse effects.” Certification of New Interstate Natural Gas Pipeline Facilities, 90 F.E.R.C. 61,128, 61,389 (2000).

<sup>80</sup> 18 C.F.R. § 157.208 (2005).

<sup>81</sup> *Id.* § 157.202(b)(2)(i).

either a gaseous or liquefied state, or a facility used to receive gas from plants manufacturing synthetic gas or from plants gasifying liquefied natural gas, or wells needed to utilize an underground storage field.

(E) Delivery points . . . .

(F) Temporary compression . . . .

(G) A facility that crosses a state line and is constructed for the primary purpose of transporting gas which is also transported by an intrastate pipeline under section 311(a)(2) of the NGPA.<sup>82</sup>

The Hurricane Order drastically reduced the list of exclusions.<sup>83</sup>

Section 157.208 of the Commission's regulations sets out the cost limitations for blanket certificate projects on an annual basis.<sup>84</sup> As illustrated in Appendix A, the blanket certificate cost limitations have been adjusted on an annual basis to account for inflation.<sup>85</sup> For example, at the end of 2004, automatic project limits increased from \$7.8 million to \$8 million, and prior public notice projects limits increased from \$21.6 million to \$22 million.<sup>86</sup> With the Hurricane Order, FERC simply waived the cost limitations in its regulations instead of actually updating them.<sup>87</sup> FERC's simple classification system enables it to increase its administrative efficiency and allows pipeline companies to perform routine, minor projects, such as those involving maintenance and upgrades, more quickly. In the case of emergencies, when even more expediency is required, the Commission has determined that "the public convenience and necessity" require that it further relax the regulatory requirements of its blanket certificate program.<sup>88</sup>

### B. Existing Regulations and the Recovery

The devastation the 2005 hurricanes inflicted on the nation's natural gas infrastructure threatened to cause the price of natural gas to rise significantly during the upcoming winter heating season. Fortunately, the Commission had already established regulations for emergency situations that empowered the Commission to respond to the 2005 hurricanes.<sup>89</sup>

FERC's pre-existing regulations helped pipeline companies respond to the hurricane damage by expanding the scope of activities already permitted under section 7 blanket certificates. Specifically, the Commission's regulations allowed pipelines to replace physically deteriorated facilities without

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<sup>82</sup> *Id.* § 157.202(b)(2)(ii).

<sup>83</sup> *See infra* Part III.C.1.

<sup>84</sup> FERC's regulations prohibit pipeline owners from segmenting projects to meet the automatic or prior notice cost limitations. 18 C.F.R. § 157.208(a)-(b).

<sup>85</sup> *Id.* § 157.208(d).

<sup>86</sup> *Id.*

<sup>87</sup> Hurricane Order 1, *supra* note 3, ¶ 1.

<sup>88</sup> *See infra* Part IV.A.

<sup>89</sup> For a discussion of how federal statutes and regulations also make exceptions for emergency situations, see *infra* Part IV.

prior, specific authorization from FERC when the new facilities would have a substantially equivalent design capacity and location.<sup>90</sup> Also, in the case of emergencies creating sudden, unanticipated losses of gas supply or capacity that require immediate restoration of interrupted service, the regulations permitted pipeline companies to construct otherwise ineligible facilities under their blanket certificates without receiving prior authorization from FERC.<sup>91</sup>

These provisions greatly benefited pipeline companies in the wake of Hurricanes Katrina and Rita. For example, Chandeleur Pipe Line Company “replace[d] a 6,600-foot segment of 12-inch offshore pipeline that had been damaged as a result of Hurricane Katrina.”<sup>92</sup> Similarly, Southern Natural Gas Company installed temporary compression to increase its access to gas from the Elba Island LNG terminal.<sup>93</sup> Southern Natural Gas thereby mitigated its “loss of gas supply from other portions of its system.”<sup>94</sup> The companies only had to notify FERC of their actions.<sup>95</sup> In other words, FERC did not need to perform case-specific scrutiny for those projects that responded to the immediate adverse impacts of the hurricanes on natural gas supplies, as doing so would have merely delayed projects that were clearly required by the public convenience and necessity.

Besides FERC’s expansion of the scope of permissible projects under section 7 certificates, the NGA and Natural Gas Policy Act also authorize FERC to permit certain pipeline operations without issuing a conventional section 7 certificate. The NGA states:

[T]he Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of [section 7] temporary acts or operations for which the issuance of a certificate will not be required in the public interest.<sup>96</sup>

Pursuant to this authority, FERC can grant pipeline companies two types of emergency authority. First, FERC can issue temporary certificates in an emergency situation to authorize the construction and operation of extensions of facilities, pipeline interconnections, or necessary sales.<sup>97</sup> Second, the Commission’s regulations exempt from the certificate requirements persons and companies who engage in emergency natural gas transactions, including the construction and operation of necessary facilities.<sup>98</sup> Under the

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<sup>90</sup> 18 C.F.R. § 2.55(b).

<sup>91</sup> *Id.* §§ 157.202(b)(2)(i), (b)(13), 157.205(a), 157.208(a).

<sup>92</sup> Hurricane Order 1, *supra* note 3, ¶ 4.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> 15 U.S.C. § 717f(c)(1)(B) (2000).

<sup>97</sup> 18 C.F.R. § 157.17 (2005). For examples of temporary certificates, see *Tex.-Ohio Pipeline, Inc.*, 69 F.E.R.C. 61,145 (1994) and *Distrigas of Mass. Corp.*, 68 F.E.R.C. 62,167 (1994).

<sup>98</sup> 18 C.F.R. § 284.261.

NGPA, these emergency measures extend up to 120 days after the declaration of a natural gas supply emergency.<sup>99</sup> After that point, FERC may waive the 120-day deadline on a case-by-case basis “to the extent required by the public interest.”<sup>100</sup>

Although FERC did not issue any temporary emergency certificates, it perceived the aftermath of Hurricanes Katrina and Rita as a situation that justified exempting pipeline companies from the NGA’s certificate requirements. Under the latter emergency authority, FERC waived the 120-day time limitation and allowed a company to reroute unprocessed gas from a shut-in processing plant to another plant and onto the market for up to one year without obtaining a certificate. In another case, FERC granted waivers to allow a pipeline company to modify its operations temporarily until either its processing plant was operational or the winter heating season ended.<sup>101</sup>

### C. *The Hurricane Order and Reconstruction*

Even though FERC’s existing regulations enabled natural gas supplies to come back online in time for the winter heating season, FERC believed that additional action was needed to restore natural gas supplies; it promulgated the Hurricane Order on November 18, 2005.<sup>102</sup>

#### 1. *Overview of the Hurricane Order*

FERC’s stated purpose in promulgating the Hurricane Order was narrow and clear cut. The order was intended to mitigate price impacts for the 2005-2006 winter heating season.<sup>103</sup> FERC reasoned that by expediting the construction of infrastructure that provided access to natural gas supplies, more natural gas would reach the market, and users of gas would experience less severe price impacts during the upcoming winter heating season.<sup>104</sup>

To effectuate its goal, the Hurricane Order instituted several changes to FERC’s blanket certificate program. First, the Hurricane Order approximately doubled the cost limits for projects completed under the blanket certificate program. The order raised the cost limit for automatic projects from \$8.3 million to \$16 million, and for prior public notice projects from \$22.7 million to \$50 million.<sup>105</sup> In addition, the Hurricane Order expanded the scope of facilities eligible for a blanket certificate to include “a main line, an extension of a mainline, a facility, including compression and looping, that alters the capacity of a main line, and temporary compression that raises the

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<sup>99</sup> 15 U.S.C. § 3361. *See also* note 25.

<sup>100</sup> 18 C.F.R. § 284.271.

<sup>101</sup> *Stingray Pipeline Co., L.L.C.*, 113 F.E.R.C. 61,034 (2005).

<sup>102</sup> Hurricane Order 1, *supra* note 2, ¶¶ 4-5.

<sup>103</sup> *Id.* ¶ 1.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

capacity of a mainline [sic].”<sup>106</sup> Each of these facilities had been previously excluded from the blanket certificate program.<sup>107</sup> In effecting these two changes to the blanket certificate program, FERC did not alter its regulations for the program because the changes were not intended to be permanent, but instead were only to be applied to projects built and in service by October 31, 2006.<sup>108</sup> On February 22, 2006, FERC extended its deadline to February 28, 2007.<sup>109</sup> Then, in March 2007, FERC began the practice of extending the deadline anywhere from several weeks to five months upon request by pipeline companies for project-specific waivers.<sup>110</sup>

FERC’s Hurricane Order, though unnecessarily long lasting, was entirely consistent with the EPAct. By dramatically expanding the blanket certificate program for fifteen months, the Hurricane Order promoted the rapid restoration of the nation’s natural gas infrastructure. Yet, the fact remains that the winter heating crisis lasted five months at most. The Commission’s existing regulations, complemented by a five-month Hurricane Order, would have been more than sufficient for the nation to recover from the hurricane devastation.

## 2. Order No. 686

FERC has already used the Hurricane Order as a model for a non-emergency order, but, at the same time, FERC demonstrated its recognition that the Hurricane Order went too far. On October 19, 2006, before the Hurricane Order had expired, FERC issued Order No. 686.<sup>111</sup> This order revealed, but only implicitly, that FERC could strengthen the nation’s natural gas infrastructure while satisfying the public’s right to information, minimizing adverse impacts to the environment, and preventing later conflicts between pipeline companies and landowners.

Although Order No. 686 permanently altered the Commission’s regulations, instead of temporarily waiving them as the Hurricane Order had done,

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<sup>106</sup> *Id.* ¶ 7.

<sup>107</sup> 18 C.F.R. §§ 157.202(b)(2)(ii)(A), (B), (C), and (F) (2005).

<sup>108</sup> Hurricane Order 1, *supra* note 2, ¶ 6.

<sup>109</sup> Hurricane Order 2, *supra* note 2, ¶ 1. FERC extended the deadline by four months because “projects which cannot be completed in time to provide service at the start of the [2006-2007] heating season, might still deliver the benefits associated with additional gas supply if they are placed into service before the end of the heating season.” *Id.* ¶ 2. Because demand increases predictably in the winter, FERC had no justification to extend its “emergency” hurricane response by four months. Unfortunately, FERC did not address the inconsistencies between the purpose of this extension, the Hurricane Order’s original stated purpose of ameliorating the 2005-2006 winter heating season “crisis,” and the fact that the crisis had long since ended. *See supra* Part II.C.

<sup>110</sup> *See, e.g.*, Letter Order from FERC to Sabine Pipe Line Co. 2, Case No. EM06-5-001 (Mar. 19, 2007) (on file with the Harvard Environmental Law Review) (granting waiver of deadline for five months and clarifying noise limits); Letter Order from FERC to CenterPoint Energy Gas Transmission Co. 2, Case No. EM06-5-001 (March 1, 2007) (on file with the Harvard Environmental Law Review) (granting waiver of deadline for two weeks).

<sup>111</sup> Order No. 686, *supra* note 14.



Order No. 686 was clearly modeled on the Hurricane Order.<sup>112</sup> Like the Hurricane Order before it, Order No. 686 fulfilled the EAct's directive to expedite construction of the nation's natural gas infrastructure. In fact, the Chairman of FERC explicitly stated that the order had been promulgated for this reason.<sup>113</sup> Moreover, just like the Hurricane Order, Order No. 686 raised the cost limits of the blanket certificate program and expanded its definition of the scope of eligible facilities.<sup>114</sup>

Despite the similarities between the Hurricane Order and Order No. 686, FERC proceeded more cautiously with the later order. Unlike the Hurricane Order, the issuance of Order No. 686 involved a transparent, informed decision-making process in which FERC published its proposed changes in the Federal Register, engaged interested parties in a notice and comment period, and made the final order subject to rehearing.<sup>115</sup>

The changes to the blanket certificate program made by Order No. 686 were also less radical than those made by the Hurricane Order. For instance, Order No. 686 increased the cost limits for automatic projects by approximately fifteen percent, and prior notice projects by approximately seventeen percent—far higher than inflation, but significantly less than the approximately fifty percent increase effected by the Hurricane Order.<sup>116</sup> FERC also refused to expand the scope of blanket certificate authority as far as it had done in the Hurricane Order. While the Hurricane Order revised the definition of eligible facility to include “a main line, an extension of a mainline, a facility, including compression and looping, that alters the capacity of a main line, and temporary compression that raises the capacity of a mainline [sic],”<sup>117</sup> Order No. 686 did not expand it as much, adding only mainline facilities, certain LNG and synthetic gas facilities, and certain storage facilities.<sup>118</sup> The order excluded existing underground storage reservoirs that were not operated at the maximum inventory and projected performance levels allowed under their blanket certificates.<sup>119</sup> It also explicitly excluded any

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<sup>112</sup> FERC took one action in Order No. 686 that did not mimic the Hurricane Order: it clarified that its existing regulations authorized “a project sponsor to offer a rate incentive [to induce] customers to commit to a proposed project early.” *Id.* ¶ 65. This clarification served to help pipeline companies secure financing for proposed projects.

<sup>113</sup> Joseph T. Kelliher, Chairman, FERC, Statement at Open Commission Meeting (June 14, 2006), available at <https://www.ferc.gov/news/statements-speeches/kelliher/2006/06-15-06-kelliher-C-1.pdf>.

<sup>114</sup> Order No. 686, *supra* note 14, ¶¶ 2 n.3, 3.

<sup>115</sup> See, e.g., Notice of Proposed Rulemaking, 115 F.E.R.C. 61,338 ¶¶ 29-30 (2006) [hereinafter NOPR to Order No. 686] (providing interested parties with an opportunity to become apprised of and comment on FERC's proposed changes to the blanket certificate program); Order No. 686, *supra* note 14, at “Effective Date Paragraph” (providing for the order to become effective sixty days after publication in the Federal Register).

<sup>116</sup> Order No. 686 raised the cost limits from \$8.2 million to \$9.6 million for automatic authorization projects and from \$22.7 million to \$27.4 million for prior public notice projects. Order No. 686, *supra* note 14, ¶¶ 2-3.

<sup>117</sup> Hurricane Order 1, *supra* note 2, ¶ 7.

<sup>118</sup> Order No. 686, *supra* note 14, ¶ 11.

<sup>119</sup> *Id.* ¶ 31. It is difficult to know for certain whether the Hurricane Order applied to this type of facility because the Hurricane Order used more general terms than Order No. 686.

facility that directly attached to an LNG terminal if a project involving the facility would result in modifications to the LNG terminal.<sup>120</sup> Moreover, all blanket projects involving previously excluded facilities were classified as prior public notice, not automatic, projects under the blanket certificate program.<sup>121</sup> This ensured that the types of projects that had never previously fallen under blanket certificate authority would receive higher regulatory scrutiny than automatic projects. Finally, unlike the Hurricane Order, Order No. 686 revised FERC's procedural requirements for blanket certificate projects, strengthening protections for the environment, general public, and landowners, and thereby highlighted the inadequacies of the Hurricane Order.<sup>122</sup>

#### IV. LEGAL IMPLICATIONS

FERC may have failed to comply with the NGA, the APA, and NEPA. This Article explores FERC's obligations under these three federal laws and argues that the Hurricane Order would not have violated them if it had only been in effect for five months instead of fifteen. The net result of FERC's failure to comply with these three important statutes was that the public was left without adequate information and opportunities to ensure that FERC protected environmental and property interests, and the threat of harm became unjustifiably great.

##### A. *The Natural Gas Act*

FERC can only authorize projects under the NGA if they are required by the "public convenience and necessity."<sup>123</sup> To satisfy this standard, FERC should have geographically limited the Hurricane Order to the Gulf Coast, limited its duration to five months, and carefully assessed its policy implications. Such an action would clearly satisfy the public convenience and necessity standard because the net benefits to the public of restoring pipeline facilities in hurricane-ravaged areas would exceed the limited, detrimental impacts to landowners and the environment in that area. Even just by limiting the duration of the Hurricane Order, FERC would have had a strong argument that the Hurricane Order was required by the public convenience and necessity—the nation as a whole needed more natural gas projects during that time to recover from the devastation the 2005 hurricanes had inflicted on the Gulf Coast, the regional hub of natural gas supplies.<sup>124</sup> Unfortunately, FERC did none of these things. Because the Hurricane Order made arbitrary changes to the blanket certificate program in all corners of

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<sup>120</sup> *Id.* ¶ 23.

<sup>121</sup> *Id.* ¶ 11.

<sup>122</sup> *See infra* Parts IV.C.2 and V.B.

<sup>123</sup> 15 U.S.C. §§ 717f(c), (e) (2000).

<sup>124</sup> *See supra* Part II.C.

the nation for fifteen months in response to a problem that lasted no more than five months and was concentrated among a few Gulf Coast states, the order raises serious questions about FERC's compliance with the NGA's public convenience and necessity standard.

The most significant reason the Hurricane Order violated the NGA is that its duration extended well beyond the emergency that FERC anticipated. FERC claimed that promulgation of the Hurricane Order was necessary to increase the availability of natural gas before the 2005-2006 winter heating season.<sup>125</sup> This purpose would have justified extending the Hurricane Order through the end of the winter heating season at most. But the Hurricane Order was in effect almost entirely through two winters. In contrast, the other measures FERC used to ameliorate the winter heating crisis, such as the measures that expanded the activities permitted under section 7 certification and enabled pipeline companies to take action without section 7 certificates, lasted only 120 days before requiring case-by-case extensions.<sup>126</sup> Unlike a fifteen-month period, the 120-day deadline restricted the "emergency" measures to alleviating the winter heating "crisis."

The duration of the Hurricane Order also looks less like an "emergency" measure when compared to the normal duration of orders altering the blanket certificate program. Each year FERC publishes an order, like Order No. 686, that sets the cost limits that will be in effect for the next calendar year. The Hurricane Order's "temporary" changes to the blanket certificate program extended three months longer than these "permanent" twelve-month cost limits, upon which FERC at least provides opportunities for interested parties to comment.

A strong argument can further be made that, because only the Gulf Region experienced damage from the 2005 hurricanes, the Hurricane Order, with its total lack of geographic restrictions, was not required by the public convenience and necessity.<sup>127</sup> Although FERC has generally applied the blanket certificate program uniformly to all geographic areas, it has not done so for any other localized energy crises. In response to the 2000-2001 electricity crisis in California, during which the price of electricity experienced short-term instability and spikes, FERC altered the blanket certificate program only for pipelines that delivered gas in the Western Systems Coordinating Council region, which encompassed California and other western states that were experiencing the crisis.<sup>128</sup> This demonstrates that FERC has tai-

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<sup>125</sup> Hurricane Order 1, *supra* note 2, ¶ 1.

<sup>126</sup> *See id.* ¶ 5 (citing 18 C.F.R. § 284.264(b)(1) (2005)).

<sup>127</sup> The Hurricane Order said nothing about the geographic scope of its waivers. Thus, its incentives for pipeline reconstruction applied as equally to projects in Montana, which may not have felt any ripples from the hurricanes, as they did to projects in Louisiana, where the hurricanes destroyed much of the pipeline infrastructure.

<sup>128</sup> Removing Obstacles to Increased Electric Generation and Natural Gas Supply in the Western United States, 94 F.E.R.C. 61,272, 61,967-68 (2001), *on requests for clarification & reh'g*, 96 F.E.R.C. 61,155 (2001), *on reh'g*, 97 F.E.R.C. 61,024 (2001). Despite the geographic restraint on these "Electricity Crisis Orders," they were remarkably similar to the Hurricane Order. In the Electricity Crisis Orders, FERC raised the blanket certificate limits

lored its orders to discrete geographic areas during times of need. FERC could argue that, following the 2005 hurricanes, the entire nation needed more natural gas projects, since the hub of natural gas supplies had been impaired. Yet, even this argument does not support the duration of the order because FERC was well aware that national supplies would recover within a matter of months.<sup>129</sup>

Not only was the Hurricane Order overly long and geographically broad, but FERC's method of adjusting the cost limits in the Hurricane Order was overly simplistic. The cost limits were roughly doubled.<sup>130</sup> FERC did not mention how much the costs of construction or materials had increased. Nor did FERC explain why raising the size of projects allowed under the blanket certificate program to those particular levels would help to achieve the stated purpose of ameliorating the winter heating "crisis." Moreover, FERC undertook no detailed assessment of the policy implications of its revised cost levels. Perhaps doubling the cost limits would have been acceptable for an emergency measure that only lasted five months to abate a "crisis." But, one would imagine, the public necessity and convenience did not require that FERC leave arbitrary cost limits in effect fifteen months after such a crisis ceased.

### B. *The Administrative Procedure Act*

Beyond FERC's potential violation of the NGA, the Hurricane Order also raises the question of whether FERC complied with the APA. This Part first discusses the APA procedures FERC may have failed to follow with the Hurricane Order. Next, it discusses whether the Hurricane Order could have been justified by the good cause exception to the APA and concludes that it could have if the order had been circumscribed to the five months required to ameliorate the winter heating season "crisis." By ignoring procedures FERC ran the risk of using the Hurricanes as nothing more than a self-interest-driven excuse to avoid procedural encumbrances that would have served the public interest.<sup>131</sup>

#### 1. *Background*

To understand how FERC's Hurricane Order ran afoul of the APA, it is first helpful to understand how the APA applies to FERC proceedings.

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and, in the exact same manner as the Hurricane Order, expanded the definition of eligible facilities. Electric Generation and Natural Gas Supply, 95 F.E.R.C. 61,225, 61,761, 61,774-76 (2001).

<sup>129</sup> See *supra* Part II.C.

<sup>130</sup> See Hurricane Order 1, *supra* note 2, ¶ 1.

<sup>131</sup> The very potential for agency abuse of the good cause exception motivated the Senate Committee responsible for the APA to warn: "The exemption of situations of emergency or necessity is not an 'escape clause' in the sense that any agency has discretion to disregard its terms or the facts. A true and supported or supportable finding of necessity or emergency must be made and published." S. Doc. No. 79-248, at 200 (1946).

FERC uses rulemakings to promulgate orders, such as the Hurricane Order, that alter the blanket certificate program. Section 553 of the APA requires that FERC follow certain procedures when it conducts a rulemaking, including: (1) publishing notice of the proposed rulemaking in the Federal Register to apprise interested parties of the proposed changes; (2) providing a period for interested persons to comment on the proposed rule, so FERC may consider the comments prior to adopting the rule; and (3) publishing the adopted rule no less than thirty days before its effective date.<sup>132</sup>

Although FERC failed to follow all three procedures required by section 553 of the APA when it promulgated the Hurricane Order—and gave no indication in the Hurricane Order of why it chose not to follow them—FERC could still argue that it did not violate the APA. It would have to argue that the order qualified for the “good cause” exception under section 553(b)(B) of the APA given the circumstances following the 2005 hurricanes. Under the good cause exception, FERC may promulgate an order without following the section 553 procedures when it finds for “good cause” that the procedures are “impracticable, unnecessary, or contrary to the public interest,” and it incorporates this finding and a brief statement of its rationale in the order.<sup>133</sup>

## 2. *The “Good Cause” Exception*

Agencies qualify for the good cause exception to section 553 of the APA when compliance with the APA is “impracticable, unnecessary, or contrary to the public interest.”<sup>134</sup> Case law indicates that the good cause exception to the APA is narrowly construed and infrequently invoked.<sup>135</sup> Federal courts only approve usage of the good cause exception when: (1) immediate action was necessary to avoid a serious threat of harm that was outside the agency’s control; (2) the totality of the circumstances indicated that notice and comment would be inappropriate; and (3) the agency incorporated in the rule a finding of good cause and an explanation for its action. In light of these three factors, it appears that the 2005 hurricanes represented merely an

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<sup>132</sup> 5 U.S.C. § 553 (2000).

<sup>133</sup> *Id.* § 553(b).

<sup>134</sup> Legislative history spells out the grounds for an agency to find good cause:

“*Impracticable*” means a situation in which the due and required execution of the agency functions would be unavoidably prevented by its undertaking public rule-making proceedings. “*Unnecessary*” means unnecessary so far as the public is concerned, as would be the case if a minor or merely technical amendment in which the public is not particularly interested were involved. “*Public interest*” supplements the terms “impracticable” or “unnecessary”; it requires that public rule-making procedures shall not prevent an agency from operating and that, on the other hand, lack of public interest in rule making warrants an agency to dispense with public procedure.

S. REP. NO. 79-752, at 14 (1945) (emphasis added).

<sup>135</sup> *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 214 (5th Cir. 1979) (discussing how the good cause exception “should be read narrowly”), *clarified on other grounds*, 598 F.2d 915 (5th Cir. 1979).

excuse, rather than a good cause, for FERC to evade its procedural obligations.

*a. Immediate Action*

To qualify for retroactive application of the good cause exception to the APA, FERC must prove that it satisfied a threshold requirement: it took immediate action to avoid serious harm.<sup>136</sup>

Federal courts have held that immediate action is necessary when an agency acts to alleviate energy shortages. In *Reeves v. Simon*, the Federal Energy Office (“FEO”) responded to the crisis that the 1973 oil embargo created by issuing a regulation that made it illegal for gasoline service stations to discriminate among customers.<sup>137</sup> Although the FEO promulgated the regulation without following APA rule-making procedures, the Temporary Emergency Court of Appeals found that long lines and violence at service stations created a “temporary, but highly disruptive, national emergency” that required immediate attention and justified the use of the good cause exception to the APA.<sup>138</sup> The court recognized that the good cause exception applied due to “facts so obvious that they may be judicially noticed.”<sup>139</sup>

Courts have also clarified that a serious harm exists when inaction would result in an agency’s not performing its regulatory duties. In *Northern Arapahoe Tribe v. Hodel*, the Secretary of the Interior established a Game Code to regulate hunting on a Native American reservation.<sup>140</sup> The Tenth Circuit Court of Appeals found that unrestricted hunting would have reduced the resources of the Native Americans living on the reservation.<sup>141</sup> The court held that the good cause exception justified imposing regulations as an interim and emergency measure because unrestricted hunting would have interfered with the Secretary’s responsibility to protect reservation resources.<sup>142</sup>

The *Reeves* case closely resembles the situation after the 2005 hurricanes. In both cases a national emergency arose due to an energy shortage. Although Americans did not fight each other or stand in long lines for natural gas, as they did in *Reeves*, FERC recognized that the incapacitation of natural gas “infrastructure exacerbated an already tight natural gas market and ha[d] the potential to negatively affect both the price and supply of natural gas during the upcoming winter heating season. The more natural gas that reache[d] the market, the less the price impact [would] be for users of that gas.”<sup>143</sup> Hence, in both cases the energy shortages created temporary,

<sup>136</sup> *N. Arapahoe Tribe v. Hodel*, 808 F.2d 741, 751 (10th Cir. 1987); *Reeves v. Simon*, 507 F.2d 455, 458-59 (Temp. Emer. Ct. App. 1974).

<sup>137</sup> *Reeves*, 507 F.2d at 457-58.

<sup>138</sup> *Id.* at 458-59.

<sup>139</sup> *Id.* (internal quotation marks and citation omitted).

<sup>140</sup> *N. Arapahoe Tribe*, 808 F.2d at 743-45.

<sup>141</sup> *See id.* at 750-51.

<sup>142</sup> *Id.* at 752.

<sup>143</sup> Hurricane Order 1, *supra* note 2, ¶ 1.

but highly disruptive, problems for the American people. Just as the *Reeves* situation necessitated an immediate governmental response, the crisis that ensued after Hurricanes Katrina and Rita propelled FERC to action to alleviate the anticipated winter heating crisis. In fact, it can quite easily be said that the necessity of issuing the Hurricane Order was “based upon facts so obvious that they may be judicially noticed.”<sup>144</sup>

The *Arapahoe* case also resembles the post-hurricanes natural gas crisis in some respects. Just as the Secretary of the Interior in *Arapahoe* had a duty to act in the best interest of the reservation’s resources for the Native Americans who depended on them, FERC has a duty to maintain the country’s natural gas infrastructure for the American public. Continued unregulated hunting on the reservation in *Arapahoe* would have taken away a basic need, sustainable food, from the Native Americans who lived there. Similarly, the Hurricane Order acted to provide a basic need for the American public: the need for natural gas for the winter. In both cases, the lack of immediate regulatory action would have exposed the people the agencies were supposed to protect to loss. However, once the winter passed, FERC’s situation no longer resembled the circumstances in *Reeves* and *Arapahoe* because the Hurricane Order no longer satisfied an immediate need. At that point, FERC’s ability to satisfy the first good cause factor ceased because of a lack of urgency.

*b. Totality of the Circumstances*

When determining if the good cause exception is met, federal courts also consider the totality of the circumstances.<sup>145</sup> In evaluating the totality of the circumstances, federal courts have been more inclined to uphold an agency’s use of the good cause exception when: (a) the agency initiated prompt follow-up proceedings allowing for public participation;<sup>146</sup> and (b) the emergency rule was of limited scope or duration.<sup>147</sup> Neither of these factors supports the fifteen-month Hurricane Order.

*Kollett v. Harris*<sup>148</sup> illustrates that the good cause exception is inappropriate when an agency fails to allow interested persons an opportunity to

<sup>144</sup> *Reeves*, 507 F.2d at 459 (internal quotation marks and citation omitted).

<sup>145</sup> *Haw. Helicopter Operators Ass’n v. FAA*, 51 F.3d 212, 214 (9th Cir. 1995). See also *Philadelphia Citizens in Action v. Schweiker*, 669 F.2d 877, 885 n.8 (3d Cir. 1982).

<sup>146</sup> *Republic Steel Corp. v. Costle*, 621 F.2d 797, 803-04 (6th Cir. 1980) (“[T]his record indicates that EPA did give serious consideration to the industry comments received in the post promulgation period and made 36 changes or modifications in the previously announced designations.”); JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 111 (4th ed. 2006).

<sup>147</sup> *Mid-Tex Elec. Coop., Inc. v. FERC*, 822 F.2d 1123, 1132 (D.C. Cir. 1987) (“[W]e have consistently recognized that a rule’s temporally limited scope is among the key considerations in evaluating an agency’s ‘good cause’ claim.”); LUBBERS, *supra* note 146, at 111. See also *Am. Fed’n of Gov’t Employees v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981) (discussing how public notice and comment gain in importance “[t]he more expansive the regulatory reach of [agency] rules”).

<sup>148</sup> 619 F.2d 134 (1st Cir. 1980).

comment on a regulation for too long a duration. In *Kollett*, the Secretary of the Department of Health, Education, and Welfare issued interim regulations implementing amendments to the Social Security Act.<sup>149</sup> Disabled children who were aggrieved by the interim regulations sued the agency for not providing notice and comment opportunities.<sup>150</sup> The court focused on the fact that the interim regulations were in effect for fourteen months.<sup>151</sup> In striking down the interim regulations, the court held that no justification could be advanced for the Agency's failure to conduct public notice and comment procedures within the time available.<sup>152</sup>

*Philadelphia Citizens in Action v. Schweiker*,<sup>153</sup> on the other hand, is an example of sufficient public notice under the totality of the circumstances criterion. President Reagan had signed into law an act that required the Department of Health and Human Services ("HHS") to revise the Aid to Families with Dependent Children program.<sup>154</sup> To meet the deadline imposed by the President, the Secretary of HHS revised the program by issuing "interim rules" for a sixty-day period during which it entertained comments on the rules.<sup>155</sup> Two associations made up of recipients of welfare benefits sued the agency for having issued the interim rules without notice and comment.<sup>156</sup> The Third Circuit noted that circulation of a preliminary draft of the interim rules would have done little more than reiterate statutory provisions that were already public knowledge.<sup>157</sup> After finding that the HHS's conduct reflected an effort "to provide as much opportunity for comment as time limitations would, as a practical matter, permit,"<sup>158</sup> the court concluded that HHS's interim rules qualified for the good cause exception to the APA.<sup>159</sup>

Similarly, in *Hawaii Helicopter Operators Ass'n v. FAA*,<sup>160</sup> the Federal Aviation Administration ("FAA") issued special operating rules, procedures, and limitations for airplane and helicopter air tour operators in Hawaii due to a "recent escalation of fatal air tour accidents."<sup>161</sup> An association of helicopter operators sued the FAA for not going through the notice and comment process before issuing the rules.<sup>162</sup> Because the FAA had left the record open for a comment period and had indicated that it might modify the regulation in response to comments, the court concluded that the FAA merited the good cause exception.<sup>163</sup>

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<sup>149</sup> *Id.* at 145.

<sup>150</sup> *Id.* at 135.

<sup>151</sup> *Id.* at 145.

<sup>152</sup> *Id.*

<sup>153</sup> 669 F.2d 877 (3d Cir. 1982).

<sup>154</sup> *Id.* at 878-79.

<sup>155</sup> *Id.* at 880.

<sup>156</sup> *Id.* at 879.

<sup>157</sup> *Id.* at 884.

<sup>158</sup> *Id.* at 884 n.7.

<sup>159</sup> *Id.* at 888.

<sup>160</sup> 51 F.3d 212 (9th Cir. 1995).

<sup>161</sup> *Id.* at 214.

<sup>162</sup> *Id.* at 213.

<sup>163</sup> *Id.* at 215.



The sheer duration of the Hurricane Order diminishes FERC's ability to invoke the good cause exception. Just as the fourteen-month *Kollett* regulation extended too long for the agency to abstain from undertaking notice and comment proceedings, the fifteen-month Hurricane Order also extended too long for FERC not to have solicited the public's input. This is particularly true in light of the fact that the order extended through two winters to address a crisis that ceased at the end of the first winter.<sup>164</sup> Even if it was infeasible for FERC to give interested parties advance notice of the Hurricane Order or provide for public participation in the first five months after promulgating the order, which is a debatable point, FERC had no excuse after the first winter ended not to solicit public comment on the Hurricane Order.

Indeed, FERC's failure to provide any opportunities for interested parties to comment on the Hurricane Order was odd. In the California Electricity Crisis Order, FERC not only provided the public with two days to comment on its proposal to temporarily alter the blanket certificate program,<sup>165</sup> it also made the order subject to rehearing.<sup>166</sup>

The differences between the Hurricane Order and the regulations in *Schweiker* and *Hawaii Helicopter* also cut against FERC's good cause argument. Unlike in *Schweiker*, where the public had advance notice that the agency was statutorily required to revise its regulations, the public in the instant case had no notice that FERC would alter the blanket certificate regulations. The public knew, however, that immediate action was necessary to restore the nation's natural gas infrastructure to mitigate a potential winter heating season crisis.<sup>167</sup> The general public awareness about the winter heating season crisis could have strengthened FERC's ability to invoke the good cause exception until that crisis was resolved, except that FERC—in contrast to both *Schweiker* and *Hawaii Helicopter*—failed to offer interested parties any opportunities for comment after the Hurricane Order went into effect.

### c. *Good Cause Explanation*

Regardless of whether the Hurricane Order met the first two factors for the good cause exception under section 553(b)(B) of the APA, FERC probably failed to satisfy the exception's third requirement—that FERC incorporate a “finding [that it had grounds to avail itself of the good cause exception to the APA] and a brief statement of reasons therefor in the rules issued.”<sup>168</sup> FERC included no such explicit finding or explanation to justify

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<sup>164</sup> See *supra* Part II.C.

<sup>165</sup> Order Removing Obstacles to Increased Electric Generation and Natural Gas Supply in the Western United States, 96 F.E.R.C. 61,115 at 61,667-68 (2001).

<sup>166</sup> See, e.g., Order Removing Obstacles to Increased Electric Generation and Natural Gas Supply in the Western United States, 94 F.E.R.C. 61,272 (2001).

<sup>167</sup> See *Katrina Puts Heat on Natural Gas*, CHICAGO SUN-TIMES, Sep. 2, 2005, available at [http://findarticles.com/p/articles/mi\\_qn4155/is\\_20050902/ai\\_n15651207](http://findarticles.com/p/articles/mi_qn4155/is_20050902/ai_n15651207).

<sup>168</sup> 5 U.S.C. § 553(b)(B) (2000).

applying the Hurricane Order through two winters, nor did it implicitly satisfy this requirement.

In *Tennessee Gas Pipeline Co. v. FERC*,<sup>169</sup> the D.C. Circuit discussed the importance of having agencies explain their rationale for invoking the good cause exception. There, FERC promulgated an interim rule requiring advance notice and disclosure by natural gas pipeline companies of the construction of new facilities or the replacement of existing ones.<sup>170</sup> To justify its decision to issue the rule without notice and comment, FERC emphasized the rule's interim nature, its minimal burden, and the public benefits of construction oversight before a final rule could be promulgated.<sup>171</sup> A gas pipeline company challenged the rule on the grounds that FERC had not satisfied the threshold test for the good cause exception to the APA, and that even if it had, FERC had failed to incorporate its findings and rationale into the rule.<sup>172</sup> In agreeing with the pipeline company, the D.C. Circuit noted:

at a minimum, an agency must indicate the basis for its prediction so that the reviewing court may be in a position to determine whether it acted reasonably. In all cases, a court must "satisfy itself that the agency explains the facts and policy concerns it relies on and that, given these, a reasonable person could have made the judgment the agency did."<sup>173</sup>

After finding that FERC had failed to demonstrate sufficient cause for setting aside the APA's important safeguards, the court vacated FERC's rule.<sup>174</sup>

But case law suggests that the good cause exception does not always need to be explicitly labeled as such.<sup>175</sup> In *Nat'l Customs Brokers & Forwarders Ass'n of Am. v. United States*, the United States Customs Service ("Customs") issued interim regulations allowing a consignee to bring merchandise valued at \$200 or less into the United States without using a licensed customs broker.<sup>176</sup> Customs brokers challenged the interim

<sup>169</sup> 969 F.2d 1141 (D.C. Cir. 1992).

<sup>170</sup> *Id.* at 1142.

<sup>171</sup> *Id.* at 1143.

<sup>172</sup> *Id.* at 1144.

<sup>173</sup> *Id.* at 1145 (citing *Mobil Oil Corp. v. Dep't of Energy*, 728 F.2d 1477, 1492 (Temp. Emer. Ct. App. 1983), *cert. denied*, 467 U.S. 1255 (1984)). See also *Mobil Oil Corp. v. Dep't of Energy*, 610 F.2d 796, 803 (Temp. Emer. Ct. App. 1979) ("It is axiomatic that a mere recital of good cause does not create good cause.").

<sup>174</sup> *Id.* at 1146. For a similar result, see *Bohner v. Daniels*, 243 F. Supp. 2d 1171, 1176 (D. Or. 2003) (finding that agency could not invoke good cause exception because "[n]owhere in its notice in the Federal Register did the [agency] explain that in fact it was invoking the good cause exception nor why notice and comment procedure was impracticable, unnecessary, or contrary to the public interest"), *aff'd sub nom. Paulsen v. Daniels*, 413 F.3d 999 (9th Cir. 2005).

<sup>175</sup> *Nat'l Customs Brokers & Forwarders Ass'n of Am. v. United States*, 59 F.3d 1219 (Fed. Cir. 1995). See also *Kollett v. Harris*, 619 F.2d 134, 144-45 (1st Cir. 1980) ("The failure to incorporate an adequate statement of good cause for dispensing with prior notice and comment has not been held fatal if good cause indeed existed.").

<sup>176</sup> *Nat'l Customs*, 59 F.3d at 1220.

regulations as violating the APA.<sup>177</sup> In addressing Customs' failure to expressly cite section 553(b)(B) in the interim regulations, the Federal Circuit held:

This slight oversight, however, does not prejudice Customs' invocation of the good cause exception. The interim regulations provided a full and reasonable explanation of Customs' reasons for invoking the good cause exception. Moreover, Customs expressly noted that the interim regulations were "not subject to the notice and public procedure requirements of 5 U.S.C. 553."<sup>178</sup>

The court concluded that Customs had clearly indicated its intent to rely on the good cause exception.<sup>179</sup>

Just as Customs neglected to cite section 553(b)(B) in its regulations, FERC failed to mention section 553(b)(B) in the Hurricane Order. Similar to how the *Customs* court found that the Agency "provided a full and reasonable explanation of [its rationale] for invoking the good cause exception" in the interim regulations,<sup>180</sup> FERC could argue that it fully described the problems created by Hurricanes Katrina and Rita that necessitated immediate action. Indeed, it discussed the loss of infrastructure resulting from the hurricanes and the need to expedite reconstruction before winter.<sup>181</sup> This discussion of the facts and policy underlying its decision would probably satisfy *Tennessee Gas* for the first winter.

But FERC can demonstrate this good cause only through the winter. FERC did not provide any explanation in the Hurricane Order why it needed to extend beyond the winter to respond to the gas crisis. The benefits realized by an extension of the Hurricane Order did not relate to recovery from the 2005 hurricanes, but to enhancing the nation's already deficient natural gas infrastructure. While it was appropriate and beneficial for FERC to encourage more projects, doing so without complying with the APA and NEPA was not justified.<sup>182</sup> This was not purely a technical error on FERC's part. As indicated by *Tennessee Gas*, the requirement that an agency clearly justify its deviation from its procedural obligations serves a valid end of ensuring that an agency acted "reasonably." Extending the emergency Hurricane Order far beyond the winter heating crisis was not a "reasonable" action on FERC's part.<sup>183</sup>

In summary, even if the winter heating crisis provided FERC with a "good cause" to ignore its procedural obligations under section 553 of the APA, FERC failed to state any reason why the event continued to present a threat of serious harm necessitating immediate action after five months.

<sup>177</sup> *Id.* at 1220.

<sup>178</sup> *Id.* at 1224 (citation omitted).

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> Hurricane Order 1, *supra* note 2, ¶¶ 1-3.

<sup>182</sup> *See supra* Part III.C.1.

<sup>183</sup> *See supra* Part II.C.

Once the winter heating season ended, FERC could and should have performed at least some form of post-promulgation notice and comment. In failing to do so, FERC lost its opportunity to invoke the good cause exception.

### C. *The National Environmental Policy Act*

FERC also categorically excluded the Hurricane Order from NEPA on the basis that the regulation would not substantially change the effect of the blanket certificate program.<sup>184</sup> FERC grounded its decision not to perform an environmental impact statement (“EIS”) or an environmental assessment (“EA”) for the Hurricane Order on its categorical exemption from NEPA for “actions that do not substantially change the effect of the regulations [being] amended.”<sup>185</sup> An examination of the changes FERC made to the blanket certificate program in the Hurricane Order subsequently demonstrates that, in fact, the order did substantially change the program’s effects on the environment.

The longer the Hurricane Order authorized actions that were neither minor nor routine after the winter heating season ended, the more substantially it changed the effect of the blanket certificate program and the less justified FERC was in avoiding NEPA procedures. By failing to perform at least an EA for the Hurricane Order after the heating season ended, FERC failed to satisfy its NEPA duties.

#### 1. *Background*

NEPA requires that all federal agencies “include [an EIS] in every recommendation or report on proposals for . . . major Federal actions significantly affecting the quality of the human environment.”<sup>186</sup> However, federal agencies may adopt “categorical exclusions” from NEPA for types of agency actions that “do not individually or cumulatively have a significant effect on the human environment.”<sup>187</sup>

FERC classifies its regulatory actions into three categories for purposes of environmental review: projects normally requiring an EIS;<sup>188</sup> projects that normally do not have a significant environmental impact and are therefore categorically excluded;<sup>189</sup> and projects for which EAs are necessary to determine if the project may have significant impacts because no generic determi-

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<sup>184</sup> Hurricane Order 1, *supra* note 2, ¶ 8 n.16. The blanket certificate program as a whole also raises serious procedural questions under NEPA. However, an analysis of whether the program violates NEPA exceeds the scope of this paper.

<sup>185</sup> *Id.* ¶ 8 n.16 (citing 18 C.F.R. § 380.4 (2005)).

<sup>186</sup> 42 U.S.C. § 4332(2)(c) (2000).

<sup>187</sup> 40 C.F.R. § 1508.4 (2007); 18 C.F.R. § 380.2. Hence, the situation under which a categorical exclusion is granted should also be a situation under which no EIS would be necessary.

<sup>188</sup> 18 C.F.R. § 380.6.

<sup>189</sup> *Id.* § 380.4.

nation can be made.<sup>190</sup> If a project is categorically excluded, FERC performs neither an EA nor an EIS.<sup>191</sup> When FERC created its regulations implementing NEPA, the Council on Environmental Quality (“CEQ”), which promulgates regulations to which all federal agencies must conform to comply with NEPA,<sup>192</sup> expressed its fear that “the Commission’s environmental review of particular projects might be rigidly predetermined” by the mere classification scheme.<sup>193</sup> FERC addressed this concern by stating that the classification of a project as categorically excluded does not foreclose further environmental review.<sup>194</sup> It further explained that an EA or EIS would be prepared for the following types of projects that would normally be categorically excluded:

If the project may have an impact on Indian lands, units of the National Park System, National Wildlife Refuges, National Fish Hatcheries and other fish facilities, anadromous fish, endangered species, wilderness areas, wild and scenic rivers, wetlands, and other ecologically significant or critical areas, or if the environmental effects are uncertain.<sup>195</sup>

## 2. *Categorical NEPA Exemption*

The Hurricane Order distinctly altered the purpose of the blanket certificate program. Allowing routine maintenance, the blanket certificate program’s original focus, is wholly different from promoting expeditious and major reconstruction of the nation’s natural gas infrastructure, which the Hurricane Order strove to do.<sup>196</sup> Unlike routine maintenance, reconstruction of the nation’s natural gas infrastructure is a huge undertaking with massive ripple effects. If the Hurricane Order did not substantially change the blanket certificate program’s effects, it is hard to imagine what would.

In addition, the Hurricane Order made several major changes to the blanket certificate program that substantially changed the program’s direct effect on the environment.<sup>197</sup> By lowering the standard of environmental scrutiny for larger projects, FERC increased the likelihood that projects

<sup>190</sup> *Id.* § 380.5.

<sup>191</sup> *Id.* § 380.4.

<sup>192</sup> 40 C.F.R. § 1500.1 (1978).

<sup>193</sup> Regulations Implementing National Environmental Policy Act of 1979, 52 Fed. Reg. 47,897, 47,899 (Dec. 17, 1987).

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> “The blanket certificate program was designed to provide an administratively efficient means to authorize a generic class of routine activities, without subjecting each minor project to a full, case-specific NGA section 7 certificate proceeding.” Order No. 686, *supra* note 14, ¶ 7. In contrast, the Hurricane Order was intended “to expedite the construction of infrastructure to serve to provide access to additional supplies of natural gas [for the winter heating season] . . . .” Hurricane Order 1, *supra* note 2, ¶ 1.

<sup>197</sup> See *supra* Part III.A.

would adversely affect sensitive environmental habitats, wildlife, and cultural resources.<sup>198</sup>

Prior to the Hurricane Order, FERC had already realized that pipeline companies could use their relaxed regulatory treatment for minor transactions “as a vehicle for the construction of much more extensive projects . . . with potentially serious environmental repercussions.”<sup>199</sup> In 1987, Transcontinental Gas Pipe Line Corp. (“Transco”) had ignored section 157.206(d) of FERC’s blanket certificate regulations, which required that the company consult with the Alabama State Historic Preservation Officer before commencing a particular pipeline project.<sup>200</sup> It was estimated that Transco’s unauthorized construction enabled it to receive a “four-year head start over other pipeline applicants in operating pipeline facilities in the . . . area”;<sup>201</sup> twenty-two archeological sites were also seriously damaged or destroyed.<sup>202</sup> As the Hurricane Order expanded the ability of pipeline projects to qualify for more relaxed regulatory scrutiny under the blanket certificate program, this type of irreversible harm became not only much more probable, but also much more difficult to discover due to the minimal notification requirements of the program.<sup>203</sup>

FERC’s recent Order No. 686 presents strong evidence that the Hurricane Order’s increased cost limits substantially increased the risk of harm to the environment. When FERC raised the cost limits in Order No. 686, the Commission found it necessary to augment environmental monitoring, reporting, and notice.<sup>204</sup> For automatic projects, the order revised section 157.203(d)(1) of the Commission’s regulations to increase the advance notice that a pipeline company must provide a landowner before undertaking an automatic project from thirty days to forty-five days.<sup>205</sup> The order also added the requirement for automatic projects that the notification itself inform landowners how to bring environmental mitigation concerns to the company, and, if that does not satisfy them, to the Commission’s Enforcement Hotline.<sup>206</sup> Similarly, the order required that annual reports for automatic projects document the progress toward restoration and discuss problems, unusual construction issues, and corrective actions.<sup>207</sup> This latter change is significant because it applies to all of the projects undertaken since

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<sup>198</sup> See *Transcon. Gas Pipe Line Corp.*, 48 F.E.R.C. 61,189 ¶¶ 2-11 (1989) (illustrating how inadequate regulatory scrutiny of a pipeline project can result in significant damage to historic and cultural resources).

<sup>199</sup> *Interim Revisions to Regulations Governing Construction of Facilities Pursuant to NGPA Section 311 and Replacement of Facilities*, 53 F.E.R.C. 61,140, 61,467 (1990).

<sup>200</sup> *Transcon. Gas Pipe Line Corp.*, 48 F.E.R.C. 61,189 ¶¶ 2-11.

<sup>201</sup> *Id.* ¶ 17.

<sup>202</sup> *Id.* ¶¶ 12, 17.

<sup>203</sup> See *supra* Part III.A.

<sup>204</sup> Beyond the environmental advantages of more rigorous notice requirements, notice provides various other benefits to landowners. See *infra* Part V.B.

<sup>205</sup> Order No. 686, *supra* note 14, ¶ 50.

<sup>206</sup> See 18 C.F.R. § 157.203(d)(1) (2007), Appendix B *infra*.

<sup>207</sup> See *id.* § 157.208(e), Appendix B *infra*.

the beginning of calendar year 2006, a time period representing thirteen of the fifteen months that the Hurricane Order was in effect.

FERC made even more progressive changes in Order No. 686 to the procedural requirements for prior public notice projects. It extended the notification period during which any person could protest a proposed project from forty-five days to sixty days,<sup>208</sup> and required for the first time that the notice describe not only the company's environmental complaint resolution procedure, but also the blanket certificate program, the landowner's rights in Commission and eminent domain proceedings, and more about the company and how the proposed project would affect the landowner.<sup>209</sup> It also required that the sponsor of a prior public notice project maintain a trained Environmental Inspector on site at all times during construction to monitor compliance with environmental requirements and to file a weekly report with FERC.<sup>210</sup> After several pipeline companies objected to the new Environmental Inspector requirements, FERC explained their importance:

The Commission does not believe that it can judge whether a particular project merits weekly reporting before the fact, or that its hotline can serve as a means to monitor ongoing construction progress, or that an after-the-fact summary can identify, prevent, or remedy irregularities in construction.<sup>211</sup>

FERC employed no such measures in the Hurricane Order to mitigate the effects of the cost limit increases on the environment. If the cost limitation increases in Order No. 686 endangered the environment enough to require that FERC implement protective measures, the Hurricane Order's larger increases must have affected the environment even more substantially, even as time passed.<sup>212</sup>

As an example of a project that became eligible for the blanket certificate program due to the Hurricane Order, on November 4, 2006 (well over one year after the 2005 hurricanes), CenterPoint Energy Gas Transmission Company commenced a \$12.7 million "looping" project, which involved construction of new sections of pipeline parallel to an existing pipeline to increase the flow of new natural gas supplies into the pipeline.<sup>213</sup> Due to the cost of this project alone, both before and after the Hurricane Order was in effect, prior public notice was the most relaxed regulatory classification it could have received.<sup>214</sup> Moreover, as a "looping" project, it would not even have been eligible for blanket certificate authorization prior to the Hurricane

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<sup>208</sup> Order No. 686, *supra* note 15, ¶ 50.

<sup>209</sup> See 18 C.F.R. § 157.203(d)(2) (2007), Appendix B *infra*.

<sup>210</sup> *Id.* 157.208(c)(10); Order No. 686, *supra* note 14, ¶¶ 63-64.

<sup>211</sup> Order No. 686, *supra* note 14, ¶¶ 63-64.

<sup>212</sup> See *supra* Part IV.C.

<sup>213</sup> Letter from CenterPoint Energy Gas Transmission Co. to FERC, Case No. EM06-5-001 at 1 (Feb. 23, 2007) (on file with the Harvard Environmental Law Review) (requesting extension of Hurricane Order deadline).

<sup>214</sup> Interstate Pipeline Certificates for Routine Transactions, 47 Fed. Reg. 24,254, 24,255 (June 4, 1982).

Order.<sup>215</sup> However, because the Hurricane Order was in effect, the project received the most relaxed regulatory treatment as an automatic project, and neither the general public nor FERC had any advance notice of the project.

Once again, subsequent to the Hurricane Order, Order No. 686 demonstrates that FERC recognized that including new types of facilities in the blanket certificate program raises concerns about how those facilities could affect the environment. Yet, the Hurricane Order imposed no additional cautionary measures on the facilities that became newly eligible for the blanket certificate program and provided no special requirements for LNG terminals or their related facilities.<sup>216</sup>

Even assuming for the sake of argument that doubling the blanket certificate limits, as FERC did with the Hurricane Order, was not a substantial change to the blanket certificate program, NEPA does not permit FERC to avoid its procedural obligations indefinitely by ignoring small but ongoing incremental changes. NEPA requires that when several proposals for actions that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together.<sup>217</sup> CEQ regulations further instruct that, in evaluating whether the “cumulative impacts” of the Hurricane Order would significantly affect the environment, FERC must consider “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions . . . .”<sup>218</sup>

In considering the cumulative impacts of the Hurricane Order, it is startling to consider how drastically FERC has altered the blanket certificate program from its founding in 1982 to the Hurricane Order in 2005. The 1982 limits for automatic blanket certificates and prior public notice blanket certificates were \$4.2 million and \$12 million respectively.<sup>219</sup> The limits set by the Hurricane Order essentially quintupled these amounts. Inflation, in contrast, has only increased 202 percent over the same period.<sup>220</sup> Despite these dramatic changes to the blanket certificate program, FERC has not prepared an EA for the program since its initiation in 1982.<sup>221</sup>

FERC may argue that the temporary nature of the Hurricane Order prevented it from triggering NEPA. FERC could be partly correct. If such changes had lasted only five months, they might not have been substantial. However, the changes lasted fifteen months and major new construction

<sup>215</sup> Hurricane Order 1, *supra* note 2, ¶ 7.

<sup>216</sup> See *supra* Part III.C.

<sup>217</sup> See 40 C.F.R. § 1508.27(b)(7) (1987); *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 374 (1989).

<sup>218</sup> 40 C.F.R. § 1508.7.

<sup>219</sup> 18 C.F.R. § 157.208(d) (2007).

<sup>220</sup> Bureau of Labor Statistics, United States Department of Labor, Dec. 7, 2007, <http://www.bls.gov/cpi/> (follow “Inflation Calculator”).

<sup>221</sup> Environmental Assessment of Blanket Certification of Routine Gas Pipeline Transactions, 46 Fed. Reg. 35,529 (July 9, 1981).



took place, increasing the risk that the environment would be adversely impacted.<sup>222</sup>

If FERC was not justified in evading its NEPA obligations, the next question is what action FERC should have taken. NEPA would have required that FERC release an EIS, or at least an EA concluding that the program was not going to significantly affect the environment, at the same time it promulgated the Hurricane Order.<sup>223</sup> However, it is understandable, given the extraordinary circumstances following the hurricanes, that FERC did not have an EA or a final EIS prepared by the time it promulgated the Hurricane Order. Draft EISs may take anywhere from three months to several years to prepare.<sup>224</sup> But this does not mean that FERC can completely escape NEPA. CEQ regulations clarify how a federal agency may comply with NEPA when faced with such an emergency: “Where emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these regulations, the Federal agency taking the action should consult with the Council about alternative arrangements.”<sup>225</sup>

Under this framework, in promulgating the Hurricane Order, FERC should have sought a NEPA waiver from the CEQ, instead of attempting to stretch its categorical exemption too far. However, it is unlikely that FERC would have received a NEPA waiver for the entire fifteen months that the Hurricane Order was in effect because the waivers are only granted for actions “necessary to control the immediate impacts of the emergency.”<sup>226</sup> After the winter ended, FERC’s obligation to perform at least an EA would have reemerged.

By completely reforming the purpose of the blanket certificate program, by arbitrarily increasing its cost limits, and by expanding its applicability to new types of facilities for fifteen months without engaging public participation, FERC’s Hurricane Order substantially changed the effect of the blanket certificate program. Had these effects only lasted five months, FERC would have a stronger argument that the effects were not substantial. But once the length of the Hurricane Order extended well past the five-month mark, FERC’s ability to rely on its categorical exemption for insubstantial changes faded as the threat of adverse effects to the environment became more and more substantial. Since FERC designed the order to go into effect for longer than five months, its NEPA duties were triggered at the outset, and it should have discussed with CEQ how to fulfill them.

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<sup>222</sup> See, e.g., *Transcon. Gas Pipe Line Corp.*, 48 F.E.R.C. 61,189 ¶¶ 2-11 (1989).

<sup>223</sup> As far as timing is concerned, NEPA requires that an agency prepare an EIS when it makes a recommendation or report on a proposal for federal action. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 422 U.S. 289, 320 (1985).

<sup>224</sup> COUNCIL ON ENVIRONMENTAL QUALITY, SIXTH ANNUAL REPORT 639 (1975).

<sup>225</sup> 40 C.F.R. § 1506.11 (2006).

<sup>226</sup> *Id.*

## V. ADVERSE IMPACT

By providing the general public and landowners with important procedural protections, the APA, NEPA, and the NGA increase governmental accountability. These protections should not be lightly cast aside by FERC.

### A. General Public

The statutes' emphasis on public participation delivers a variety of benefits. For one, by opening up its decision-making process to the public, FERC increases agency transparency. In the NEPA context, transparency can provide "a framework for public debate concerning environmental decision-making."<sup>227</sup> In addition, FERC's regulatory measures are more defensible in court when they are the product of an involved community effort.<sup>228</sup> The regulatory measures that FERC develops with the public's input reflect more informed decision making as FERC learns about the public's priorities and alternative solutions. Finally, the more information the public has, the better it can protect itself.<sup>229</sup> The ability of an informed community to effectively pressure private companies to comply with environmental laws and reduce environmental and health risks is well-documented. For example, due in large part to the reporting requirements of the Toxics Release Inventory ("TRI"), manufacturing facilities decreased their chemical releases by fifty-eight percent between 1988 (the year after TRI was implemented) and 2005.<sup>230</sup>

Despite the wide-ranging benefits of public participation, FERC in promulgating the Hurricane Order had real incentives to use the winter heating crisis as an excuse to evade its procedural obligations. The Hurricane

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<sup>227</sup> Asmara Tekle Johnson, *Privatizing Eminent Domain: The Delegation of a Very Public Power to Private, Non-Profit and Charitable Corporations*, 56 AM. U.L. REV. 455, 510 (2007). See also Lynton K. Caldwell, *Beyond NEPA: Future Significance of the National Environmental Policy Act*, 22 HARV. ENVTL. L. REV. 203, 205 (1998) ("[T]he procedural reform required by the EIS has improved the quality of public planning and decisionmaking and has been widely adopted in other countries and by international organizations."); Jeanette MacMillan, *An International Dispute Reveals Weaknesses in Domestic Environmental Law: NAFTA, NEPA, and the Case of Mexican Trucks (Department of Transportation v. Public Citizen)*, 32 ECOLOGY L.Q. 491, 520 (2005) ("[I]n addition to improving the internal agency decisionmaking process, NEPA also provides a structured forum for public debate. EISs can serve as useful organizing tools for the communities where projects are planned.")

<sup>228</sup> See Major Lori L. May & Major Jonathan P. Poirier, *Master Environmental Edition II: It's Not Easy Being Green: Are DOD INRMPs A Defensible Substitute For Critical Habitat Designation?*, 58 A.F.L. REV. 175, 194 (2006) (discussing how the public participation requirements of the APA and NEPA could make a Fish and Wildlife Service decision more defensible in court).

<sup>229</sup> Professor Hope Babcock observes that "[a]n informed public can do a better job of protecting itself than an uninformed one, and can provide more useful and specific comments on agency initiatives and plans to protect the public, leading to 'more rational' and better-supported agency decisions." Hope Babcock, *National Security and Environmental Law: A Clear and Present Danger?*, 25 VA. ENVTL. L.J. 136-37 (2007) (citations omitted).

<sup>230</sup> U.S. ENVTL. PROTECTION AGENCY, TOXICS RELEASE INVENTORY (TRI) PUBLIC DATA RELEASE REPORT 4 (2007), available at <http://epa.gov/tri/tridata/tri05/pdfs/2005brochure.pdf>.

Order was consistent with Congress' sweeping pronouncement in the EAct, which came shortly before the 2005 hurricanes, that required FERC to expedite the development of the nation's natural gas infrastructure. FERC may have seen its extension of the Hurricane Order as an efficient means of serving its congressional mandate. FERC might have wanted to avoid NEPA in particular because NEPA has been criticized as being too "time-consuming, expensive, and unduly procedurally-oriented."<sup>231</sup> For instance, the EIS process has helped immobilize projects that adversely affected old-growth forests and the northern spotted owl.<sup>232</sup> Moreover, public participation can result in the redesign, reconsideration, or even withdrawal of federal agency decisions.<sup>233</sup>

The ability of agencies like FERC to cloak self-serving agendas under the guise of an emergency highlights the conflict that arises between the need for agencies to engage public input and the need for them to respond quickly to catastrophes. The APA's good cause exception and the CEQ's ability to authorize exceptions to NEPA demonstrate that even the keepers of the procedural requirements recognize that these requirements must be relaxed during states of emergency. However, the requirement in these exceptions that there be an immediate need for agency action signifies that as the time since the event triggering an "emergency" lengthens, the rationale for employing relaxed procedural requirements lessens.

By forcing FERC to incorporate public participation into its decision-making process, rendering its decisions more transparent and better informed, and by providing for relaxed procedural constraints in the limited situations where necessary, the APA and NEPA balance the needs for public participation and for haste in emergency circumstances. FERC's complete failure to involve the public in any aspect of the Hurricane Order, despite the fact that the order extended well beyond the anticipated winter heating crisis, raises the question whether the order was motivated by a desire to keep the public out of its "expert" decision-making process.<sup>234</sup>

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<sup>231</sup> Johnson, *supra* note 227, at 510. See also, e.g., Brian Cole et al., *Prospects for Health Impact Assessment in the United States: New and Improved Environmental Impact Assessment or Something Different?*, 29 J. HEALTH POL. POL'Y & L., 1153, 1164 (2004) (noting that EISs can cost several hundred thousand to several million dollars to complete).

<sup>232</sup> Thomas Sander, *Environmental Impact Statements and Their Lessons for Social Capital Analysis 2*, <http://www.ksg.harvard.edu/saguaro/pdfs/sandereisandsklessons.pdf> (last visited on Nov. 1, 2007) (citing Mark Bonnet & Mark Zimmerman, *Politics and Preservation: The Endangered Species Act and the Northern Spotted Owl*, 18 ECOLOGY L.Q. 105 (1991)); *N. Spotted Owl v. Hodel*, 716 F. Supp. 479 (D. Wash. 1988) (blocking attempts to log the habitat of the northern spotted owl after the owl was declared a threatened species by the Fish & Wildlife Service).

<sup>233</sup> Caldwell, *supra* note 227, at 207.

<sup>234</sup> The practical ramifications of this concern with respect to the environment were already explored in the NEPA context. See *supra* Part IV.C.

## B. Landowners

Landowners were the members of the public most intimately affected by the Hurricane Order. Prior to the promulgation of the Hurricane Order, the cost and eligibility requirements of the blanket certificate program protected a fundamental American property right: the right to exclude others from one's land. By significantly opening the blanket certificate program up to larger projects and a far more diverse range of projects, FERC's Hurricane Order stripped Americans of this fundamental right for fifteen months without providing them with any opportunities to voice their concerns.<sup>235</sup>

### 1. Notice

FERC's Hurricane Order drastically reduced the amount of time and information a landowner had before a pipeline project occurred on his or her land. By raising the cost limits and expanding the definition of an eligible facility, the Hurricane Order enabled projects that would have otherwise been classified as case-specific projects to qualify for the minimal notice requirements of prior public notice projects, and enabled prior public notice projects to qualify for even less notice than automatic projects.<sup>236</sup> Such notice should not be discarded lightly—it has served the crucial role of enabling landowners to voice their concerns against ill-designed projects.

The more time a landowner has before a project occurs, the more opportunities she has to gain information about her rights and make informed choices. To illustrate, for a pipeline abandonment project to be performed under automatic blanket certificate authority, pipeline companies may agree to remove a pipeline, rather than cap it in place, if a landowner so requests. The further in advance the landowner learns about such an abandonment project, the greater the chance she has to determine her preferences and to work successfully with the pipeline company to achieve them.

Beyond the time component of notice, the procedural benefits of prior public notice over automatic treatment are significant for landowners and can lead to substantive and meaningful changes to projects. For example, on August 8, 2006, Florida Gas Transmission Co. filed a prior notice request for authorization to replace 6.6 miles of its existing pipeline and perform related

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<sup>235</sup> FERC's action could potentially run afoul of the Takings Clause. However, the Supreme Court has determined that a temporary prohibition of the use of land does not effect a taking for which compensation is due. *Tahoe-Sierra Preservation Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002). Given that the Hurricane Order was limited to fifteen months, the Fifth Amendment does not offer landowners much hope for obtaining some compensation for their losses.

<sup>236</sup> As discussed above in Part III.A, affected landowners receive fifteen days less notice for automatic than prior public notice projects. In addition, unlike a prior public notice or case-specific project, for an automatic project, the public cannot protest a project or require that it receive case-specific scrutiny but can only report improper conduct to FERC. *See supra* Part III.A. Case-specific scrutiny involves a more lengthy and rigorous evaluation by FERC.

activities.<sup>237</sup> On August 22, an individual landowner whose living room was located within thirty feet of the proposed project protested.<sup>238</sup> Representatives of the pipeline company met with her several times to discuss her concerns and offered to use alternative construction techniques.<sup>239</sup> Because she never withdrew her protest, FERC rigorously scrutinized the project as a case-specific project.<sup>240</sup> When FERC ultimately approved the project, it imposed additional environmental requirements on the pipeline company due to the proximity of the project to apartments.<sup>241</sup> Had this case been treated as an automatic project, the landowner would have lost her ability to require more stringent scrutiny of the project, and the environmental concerns might not have been addressed.

FERC's own actions indicate that the Hurricane Order's expansion of the blanket certificate program reduced landowners' rights. FERC acknowledged that expanding the blanket certificate program necessitated more notice to enable landowners to raise concerns and seek protection from the Commission:

In view of the proposed expanded scope and scale of blanket certificate authority, *which can be expected to increase the number of automatic authorization projects undertaken and the number of people impacted*, an additional 15 days offers greater assurance that there will be adequate time for landowners to state their concerns and for project sponsors and the Commission to respond.<sup>242</sup>

FERC further indicated the insufficiency of the existing notice requirements for prior public notice projects:

[FERC] contemplates an increase [in] the number, extent, kind, and complexity of facilities subject to blanket certificate authority, yet even for the types of [prior public notice] projects currently permitted, 45 days has proved to be, on occasion, an unrealistically short time for the consultation and analysis required to complete an [environmental assessment].<sup>243</sup>

The Commission concluded in Order No. 686 that these concerns necessitated an addition of fifteen days to the notice periods for automatic and prior public notice projects.<sup>244</sup> FERC required that the notice to landowners include a pamphlet and other information informing landowners of their rights.<sup>245</sup>

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<sup>237</sup> Fla. Gas Transmission Co., 119 F.E.R.C. 61,122 ¶ 1 (May 4, 2007) (order denying protest, granting abandonment, and issuing certificate).

<sup>238</sup> *Id.* ¶ 14.

<sup>239</sup> *Id.* ¶ 18.

<sup>240</sup> *Id.* ¶ 1.

<sup>241</sup> *Id.* ¶ 9.

<sup>242</sup> NOPR to Order No. 686, *supra* note 115, ¶ 69 (emphasis added).

<sup>243</sup> *Id.* ¶ 70.

<sup>244</sup> Order No. 686, *supra* note 14, ¶ 52.

<sup>245</sup> *Id.* ¶ 44.

More recently, on October 18, 2007, FERC amended the blanket certificate program again to strengthen landowner notification requirements and require noise surveys after projects involving compressor facilities are completed.<sup>246</sup> FERC explained that: “[t]hese regulatory revisions are intended to enhance public participation in the Commission’s consideration of proposed projects and ensure that compressor projects completed under the blanket certificate authority will not have a significant adverse environmental impact.”<sup>247</sup> By failing to impose any similar measures in the Hurricane Order, FERC required landowners to bear an unfairly disproportionate burden of the natural gas infrastructural development efforts.

## 2. *Eminent Domain*

The burden on homeowners was further increased as the Hurricane Order increased the risk that homeowners would lose use of their property to eminent domain. The NGA contains an express eminent domain provision that permits a pipeline company to obtain property through the courts if a pipeline operator “cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way.”<sup>248</sup> Pipeline companies often “acquire rights-of-way by negotiation and purchase” rather than through eminent domain.<sup>249</sup> However, the mere possession of the power of eminent domain puts pipeline companies at a significant bargaining advantage when they seek a right-of-way. The pipeline company does not need to come to an agreement with the homeowner when it knows it can force the homeowner to accept a price determined in eminent domain proceedings. When the Hurricane Order expanded the scope of the blanket certificate program, pipeline companies’ ability to exercise the power of eminent domain against the wishes of landowners was thus also greatly expanded.

The eminent domain issue should not be a major concern relevant to the blanket certificate program, which was originally conceived of to speed only minor activities, but because of other changes made by the Hurricane Order, it is. As repairs to pipelines and similar activities only occur on existing pipelines, for which companies have already secured rights-of-way, the eminent domain issue should rarely arise. By increasing the size of projects permitted under the blanket certificate program to levels that support new construction and necessitate the acquisition of land, the Hurricane Order gave pipeline companies more opportunities to flex their power of eminent domain and, conversely, created the very real threat to landowners that their land could be forcibly taken from them.

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<sup>246</sup> Revisions to Landowner Notification and Blanket Certificate Regulations, 121 F.E.R.C. 61,055 (2007).

<sup>247</sup> *Id.* ¶ 1.

<sup>248</sup> 15 U.S.C. § 717f(h) (2000).

<sup>249</sup> Fox, *supra* note 16, at 457.

Even FERC has acknowledged that expanding the scope and applicability of the blanket certificate program makes eminent domain a much more significant issue. In promulgating Order No. 686, FERC revised section 157.203(d)(2)(v) of its regulations to require that pipeline companies include in the notice they give to landowners a “brief summary of the rights the landowner has in Commission proceedings and in proceedings under the relevant eminent domain rules.”<sup>250</sup> This enabled FERC to expand the blanket certificate limitations without entirely stripping landowners of the protection previously afforded them. But unlike in Order No. 686, FERC created no additional notice requirements or other safeguards when it promulgated the Hurricane Order. Nor did FERC give landowners any chance to comment or protest against the changes.

### 3. *Noise*

Beyond protecting landowners from physical intrusions, blanket certificate limitations protect landowners from the excessive noises that accompany pipeline projects. Larger, more complex projects generate more noise than minor repair projects because activities involving drilling and loud compressors become more typical. By allowing for larger projects and more types of projects to fall under the blanket certificate program for all areas of the nation for fifteen months, the Hurricane Order encouraged pipeline companies to disturb the peace and quiet of numerous landowners.

FERC knows how to impose restrictions on noise. For example, in *Transcontinental Gas Pipe Line Corp.*, the Commission conditioned its grant of case-specific certificate authority on verification that post-construction noise from compressor units would not exceed certain noise levels.<sup>251</sup> Similarly, in Order No. 686, FERC recognized that the expanding scope and applicability of the blanket certificate program necessitated new limits on noise.<sup>252</sup> Yet no measures were taken in the Hurricane Order to mitigate the additional noise that resulted from its expansion of the blanket certificate program. For example, in September 2006 (one entire year after the 2005 hurricanes but while the Hurricane Order was still in effect), Sabine Pipe Line LLC (“Sabine”) began installing a mainline compressor, an activity newly eligible for the blanket certificate program.<sup>253</sup> Although Order No. 686 also allowed the installation of such compressors, it did so only after imposing more stringent noise restrictions on certificate holders.<sup>254</sup> Because Sabine’s compressor did not comply with Order No. 686’s noise restrictions, Sabine subsequently sought and received a five-month extension of the Hur-

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<sup>250</sup> Order No. 686, *supra* note 14, ¶¶ 46, 47.

<sup>251</sup> *Transcon. Gas Pipe Line Corp.*, 91 F.E.R.C. 61,268 (2000).

<sup>252</sup> Order No. 686, *supra* note 14, ¶¶ 55, 59.

<sup>253</sup> Letter from Sabine Pipe Line Co. to FERC 2, Case No. EM06-5-001 (Feb. 26, 2007) (on file with the Harvard Environmental Law Review).

<sup>254</sup> Order No. 686, *supra* note 14, ¶ 55.

ricane Order deadline.<sup>255</sup> Sabine's request for a waiver exemplifies the fact that pipeline companies will not mitigate their excessive noise impacts unless FERC explicitly requires them to do so.

The Hurricane Order unjustifiably reduced the basic right of landowners to exclude others from their property. First, the reduction of the restraints on the blanket certificate program necessitated more notice for landowners. In addition, the reduced restraints veered the blanket certificate program away from its original purpose of expediting only *minor* activities and required that FERC develop new ways to help landowners protect themselves against the pipeline companies' power of eminent domain. Finally, the Hurricane Order allowed increased noise without requiring any mitigating regulatory measures, which were necessary to address property-holders' concerns. Perhaps if the Hurricane Order had only been in effect for five months to bring natural gas online for winter, these hardships imposed on landowners would have been justified by the benefit received by the general public. But, by stripping landowners of their rights for fifteen months, well after any immediate natural gas crises had passed, FERC's Hurricane Order unjustifiably went too far.

## VI. CONCLUSION

Regulatory actions taken to respond to emergencies differ fundamentally from actions taken in the normal course of affairs. Although deviations from procedures can sometimes be justified in extraordinary, emergency circumstances, they cannot be so justified in normal circumstances. Procedural requirements raise public awareness of important issues, such as safety and environmental concerns, and give the public a chance to respond to proposals. Given the high importance of procedure, at some point even the rationale for ignoring procedure to respond to an emergency must fade. The more radical and long-term revisions an agency makes to its regulations, the more important it is that the revisions are well-reasoned decisions. These are the premises behind the NGA, the APA, and NEPA.

FERC might well have envisioned the Hurricane Order as fully responding to the 2005 hurricanes while at the same time furthering Congress' directive that it revamp the nation's natural gas infrastructure. But, by extending the order for fifteen months without any public participation, even though the winter heating crisis only lasted five months at most, FERC used the hurricanes as an excuse to go beyond what was necessary to alleviate the "emergency."

In extending the emergency measure substantially beyond the emergency, FERC raised serious government accountability concerns: it violated

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<sup>255</sup> See Letter Order from FERC to Sabine Pipe Line Co., *supra* note 110, at 2; Letter from Sabine Pipe Line Co. to FERC 4, Case No. EM06-5-001 (Mar. 15, 2007) (amending request for extension of Hurricane Order deadline) (on file with the Harvard Environmental Law Review).



the NGA, the APA, and NEPA; unfairly burdened the environment and landowners; and denied citizens their rights to voice their concerns in the agency decision-making process. The totality of the circumstances required FERC at a minimum to offer the public opportunities for notice and comment and to conduct an EA after five months. Because FERC failed to do so, the Hurricane Order created the unsettling precedent that a federal agency can avoid implementing procedural laws on the grounds of a long passed disaster.<sup>256</sup>

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<sup>256</sup> The Commission's unjustified failure to comply with the APA, NEPA, and the NGA rendered it vulnerable to a suit by environmental organizations or concerned landowners. Such a suit is unlikely to occur, however, for political reasons; few are willing to publicly denounce a federal agency that provided a timely response to a national catastrophe. See Gerrard, *supra* note 9, at 10-11 (describing situations when environmental advocacy groups did not object to activities that likely violated environmental statutes due to the exigencies of the circumstances).

## VII. APPENDIX

A. *Blanket Certificate Cost Limits Pursuant to 18 C.F.R. § 157.208(d)*

Year	Limit	
	Automatic Projects cost limit (Col.1)	Prior [Public] Notice Projects cost limit (Col.2)
1982	\$ 4,200,000	\$ 12,000,000
1983	4,500,000	12,800,000
1984	4,700,000	13,300,000
1985	4,900,000	13,800,000
1986	5,100,000	14,300,000
1987	5,200,000	14,700,000
1988	5,400,000	15,100,000
1989	5,600,000	15,600,000
1990	5,800,000	16,000,000
1991	6,000,000	16,700,000
1992	6,200,000	17,300,000
1993	6,400,000	17,700,000
1994	6,600,000	18,100,000
1995	6,700,000	18,400,000
1996	6,900,000	18,800,000
1997	7,000,000	19,200,000
1998	7,100,000	19,600,000
1999	7,200,000	19,800,000
2000	7,300,000	20,200,000
2001	7,400,000	20,600,000
2002	7,500,000	21,000,000
2003	7,600,000	21,200,000
2004	7,800,000	21,600,000
2005	8,000,000	22,000,000
2006 <sup>257</sup>	8,200,000	22,700,000
	9,600,000	27,400,000
2007	9,900,000	28,200,000

Source: 18 C.F.R. § 157.208(d) (2007).

<sup>257</sup> FERC revised the cost limitations for 2006. Order No. 686, *supra* note 14, ¶ 3.

*B. Select Blanket Certification Regulations Altered by Order No. 686*

*18 C.F.R. § 157.203(d)(1)*

Order No. 686 revised the Commission’s regulations to require that all of the following information be included in a notification:

- (i) A brief description of the facilities to be constructed or replaced and the effect the construction activity will have on the landowner’s property;
- (ii) The name and phone number of a company representative who is knowledgeable about the project;
- (iii) A description of the company’s environmental complaint resolution procedure that must:
  - (A) Provide landowners with clear and simple directions for identifying and resolving their environmental mitigation problems and concerns during construction of the project and restoration of the right-of way;
  - (B) Provide a local or toll-free phone number and a name of a specific person to be contacted by landowners and with responsibility for responding to landowner problems and concerns, and who will indicate when a landowner should expect a response;
  - (C) Instruct landowners that if they are not satisfied with the response, they may call the company’s Hotline; and
  - (D) Instruct landowners that, if they are still not satisfied with the response, they may contact the Commission’s Enforcement Hotline. . . .
- (iv) An explanation of the Commission’s Enforcement Hotline procedures, as codified in §1b.21 of this chapter, and the Enforcement Hotline telephone number.<sup>258</sup>

Prior to Order No. 686, the Commission’s regulations only required subparts (i), (ii), and (iv).<sup>259</sup>

*18 C.F.R. § 157.208(e)*

Order No. 686 revised the Commission’s regulations to require that annual reports for automatic projects include all of the following:

- (1) A description of the facilities installed pursuant to this section, including a description of the length and size of pipelines, compressor horsepower, metering facilities, taps, valves, and any other facilities constructed;

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<sup>258</sup> 18 C.F.R. § 157.203(d)(1) (2007).

<sup>259</sup> 18 C.F.R. § 157.203(d)(1) (2006).

- (2) The specific purpose, location, and beginning and completion date of construction of the facilities installed, the date service commenced, and, if applicable, a statement indicating the extent to which the facilities were jointly constructed;
- (3) The actual installed cost of each facility item listed pursuant to paragraph (e)(1), separately stating the cost of materials and labor as well as other costs allocable to the facilities;
- (4)(i) A description of the contacts made, reports produced, and results of consultations which took place to ensure compliance with the Endangered Species Act, the National Historic Preservation Act and the Coastal Zone Management Act;
  - (ii) Documentation, including images, that restoration of work areas is progressing appropriately;
  - (iii) A discussion of problems or unusual construction issues, including those identified by affected landowners, and corrective actions taken or planned; and
  - (iv) For new or modified compression, a noise survey verifying compliance with § 157.206(b)(5).<sup>260</sup>

Prior to Order No. 686, part (4) did not include subparts (ii), (iii), or (iv).<sup>261</sup>

*18 C.F.R. § 157.203(d)(2)*

Order No. 686 revised FERC's regulations to require that notices include at least:

- (i) A brief description of the company and the proposed project, including the facilities to be constructed or replaced and the location (including a general location map), the purpose, and the timing of the project and the effect the construction activity will have on the landowner's property;
- (ii) A general description of what the company will need from the landowner if the project is approved, and how the landowner may contact the company, including a local or toll-free phone number and a name of a specific person to contact who is knowledgeable about the project;
- (iii) The docket number (if assigned) for the company's application;
- (iv) A general description of the blanket certificate program and procedures, as posted on the Commission's Web site at the time the landowner notification is prepared, and the link to the information on the Commission's Web site;

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<sup>260</sup> 18 C.F.R. § 157.208(e) (2007).

<sup>261</sup> 18 C.F.R. § 157.208(e) (2006).

(v) A brief summary of the rights the landowner has in Commission proceedings and in proceedings under the relevant eminent domain rules; and

(vi) The following paragraph: This project is being proposed under the prior notice requirements of the blanket certificate program administered by the Federal Energy Regulatory Commission. Under the Commission's regulations, you have the right to protest this project within 60 days of the date the Commission issues a notice of the pipeline's filing. If you file a protest, you should include the docket number listed in this letter and provide the specific reasons for your protest. The protest should be mailed to the Secretary of the Federal Energy Regulatory Commission, 888 First St., NE, Room 1A, Washington, DC 20426. A copy of the protest should be mailed to the pipeline at [pipeline address]. If you have any questions concerning these procedures you can call the Commission's Office of External Affairs at (202) 208-1088; and

(vii) The description of the company's environmental complaint resolution procedure as described in paragraph (d)(1)(iii) of this section.<sup>262</sup>

Prior to Order No. 686, the Commission's regulations did not include subparts (iv), (v), and (vii), and subparts (i) and (ii) were less detailed.<sup>263</sup>

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<sup>262</sup> 18 C.F.R. § 157.203(d)(2) (2007).

<sup>263</sup> 18 C.F.R. § 157.203(d)(2) (2006).

