174 FERC ¶ 61,208
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Richard Glick, Chairman;
Neil Chatterjee, James P. Danly,
Allison Clements, and Mark C. Christie.

Rover Pipeline, LLC, and Energy Transfer Partners, L.P.	Docket No. IN19-4-000

ORDER TO SHOW CAUSE AND NOTICE OF PROPOSED PENALTY

(Issued March 18, 2021)

1. Pursuant to Rule 209(a)(2) of the Commission's Rules of Practice and Procedure,[1] the Commission's Revised Policy Statement on Enforcement,[2] and the Commission's Statement of Administrative Policy Regarding the Process for Assessing Civil Penalties,[3] the Commission directs Rover Pipeline, LLC and Energy Transfer Partners, L.P. (jointly, Respondent or Rover) to show cause why it should not be found to have violated Section 157.5 of the Commission's regulations[4] by misleading the Commission in its Application for Certificate of Public Convenience and Necessity under section 7(c) of the Natural Gas Act (NGA).[5] The Commission directs Rover to show cause why it should not be assessed civil penalties in the amount of $20,160,000.

[1] 18 C.F.R. § 385.209(a)(2) (2020).

[2] *Enforcement of Statutes, Regulations and Orders*, 123 FERC ¶ 61,156, at PP 35-36 (2008).

[3] *Process for Assessing Civil Penalties*, 117 FERC ¶ 61,317, at P 5 (2006).

[4] 18 C.F.R. § 157.5 (2020).

[5] 15 U.S.C. § 717f.

2. Respondent may seek a modification to the penalty amount as warranted.[6] Pursuant to Rule 213(a) of the Commission's Rules of Practice and Procedure,[7] the Commission directs Respondent to file an answer with the Commission within 30 days of the date of this order. Office of Enforcement staff (OE Staff) may reply to Respondent's answer within 30 days of the filing of the answer. The Commission will consider these pleadings as part of its review of this proceeding.

3. This case presents allegations by OE Staff that Respondent violated the Commission's requirement that applications for Certificates of Public Convenience and Necessity contain full and forthright information under 18 C.F.R. § 157.5. These allegations arose out of an investigation conducted by OE Staff and are described in the Enforcement Staff Report and Recommendation (OE Staff Report) submitted to the Commission.[8] Issuance of this order does not indicate Commission adoption or endorsement of the OE Staff Report.

4. The OE Staff Report alleges that Rover misled the Commission in its Application for a Certificate of Public Convenience and Necessity seeking to construct the Rover Pipeline. Specifically, Rover stated that it was "committed to a solution that results in no adverse effects" to the Stoneman House, an 1843 farmstead located near Rover's largest proposed compressor station. In truth, the OE Staff Report alleges, Rover was simultaneously planning to purchase the house with the intent to demolish it, if necessary, to complete its pipeline. The OE Staff Report alleges that Rover purchased the house in May 2015 and demolished the house in May 2016. The OE Staff Report further finds that despite taking these actions during the year and a half that Rover's application was pending before the Commission, Rover did not notify the Commission that it purchased the Stoneman House, intended to destroy the Stoneman House, and did destroy the Stoneman House. The OE Staff Report therefore concludes that Rover violated section 157.5's requirement for full, complete and forthright applications, through its misrepresentations and omissions, including in its March 25, 2016 Application filing of the Draft Environmental Impact Statement response and its updated Landowner List, when it decided not to tell FERC that it had purchased the house and was considering demolishing it, and when Rover demolished it in May 2016 without notifying FERC.

[6] *See* 18 C.F.R. § 385.209(b).

[7] *Id.* § 385.213(a).

[8] The OE Staff Report is attached to this order as Appendix A. The OE Staff Report describes the background of OE Staff's investigation, findings and analysis, and recommended sanctions.

5. Based on the allegations contained in the OE Staff Report, the Commission directs Respondent to respond to this order as set forth above.[9] This order also is the notice of proposed penalty required by the NGA.[10] In its answer to this order, Respondent has the option to pay the proposed assessment or contest the allegations in the OE Staff Report. If Respondent chooses to contest the allegations or the proposed assessment, the Commission will issue a further order.[11] If the record is sufficient, the Commission may assess a civil penalty. If a hearing is needed, the Commission will issue a hearing order and indicate whether the Commission will conduct a paper hearing or a hearing before an Administrative Law Judge (ALJ). If the Commission chooses to conduct a paper hearing, it will issue an order on the paper hearing record. If the matter is set for hearing before an ALJ, the ALJ will conduct a hearing under Part 385 of the Commission's regulations, and, unless otherwise directed in a hearing order, the ALJ will issue an Initial Decision and determine whether a violation or violations occurred. If a violation is found, the Initial Decision will recommend any appropriate penalty, taking into account factors described in the Policy Statement on Enforcement.[12] The Commission will then consider the Initial Decision of the ALJ and any exceptions filed. If the Commission determines that there is a violation, the Commission will issue an order and may assess any appropriate penalty. In accordance with NGA section 19(a) and Rule 713 of the Commission's Rules of Practice and Procedure,[13] Respondent may request a rehearing no later than 30 days after the issuance of the order assessing the penalty. Respondent can appeal a final Commission order to a United States Court of Appeals within the appropriate time for review of a Commission order. If the Commission finds a violation and assesses a penalty, and such penalty is not paid within 60 days of assessment, the Commission will institute a collection action in an appropriate United States District Court.[14]

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[9] Under 18 C.F.R. § 385.213(c), Respondent must file an answer that provides a clear and concise statement regarding any disputed factual issues and any law upon which it relies. Respondent must also, to the extent practicable, admit or deny, specifically and in detail, each material allegation contained in the OE Staff Report and set forth every defense relied upon. Failure to answer an order to show cause will be treated as a general denial and may be a basis for summary disposition under Rule 217. 18 C.F.R. § 385.213(e)(2).

[10] 15 U.S.C. § 717t-1(b); *Process for Assessing Civil Penalties*, 117 FERC ¶ 61,317 at PP 6-7.

[11] *Process for Assessing Civil Penalties*, 117 FERC ¶ 61,317 at PP 6-7.

[12] *Id.*

[13] *See* 15 U.S.C. § 717r; 18 C.F.R. § 385.713 (2020).

[14] *Process for Assessing Civil Penalties*, 117 FERC ¶ 61,317 at P 7.

6. The Commission authorizes OE Staff to disclose information obtained during the course of the investigation as necessary to advance this matter.

The Commission orders:

(A) Within 30 days of the date of this order, Respondent must file an answer in accordance with Rule 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213 (2020), showing cause why Rover should not be found to have violated 18 C.F.R. § 157.5 with respect to Rover's misleading statements regarding the Stoneman House.

(B) Within 30 days of the date of this order, Respondent must file an answer in accordance with Rule 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213 (2020), showing cause why the alleged violations should not warrant the assessment of civil penalties in the amount of $20,160,000, or a modification to that amount as warranted.

(C) In the answer, Respondent should address any matter, legal, factual, or procedural, that it would urge the Commission to consider in this matter. To the extent that Respondent cites any material not cited in the OE Staff Report, Respondent is directed to file non-publicly one copy of such material on CD-ROM or DVD in the captioned dockets and to serve a copy of same on OE Staff.

(D) Within 30 days of the filing of the answer(s) by Respondent, OE Staff may file a reply with the Commission.

By the Commission. Commissioner Chatterjee is concurring with a separate statement attached.
Commissioner Danly is concurring with a separate statement attached.
Commissioner Christie is concurring with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

APPENDIX A

March 4, 2021

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Office of Enforcement, Division of Investigations
888 First Street NE
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FEDERAL ENERGY REGULATORY COMMISSION

Rover Pipeline, LLC
Energy Transfer Partners, L.P.

Docket No. IN19-4-000

Enforcement Staff Report and Recommendation

Stoneman House Investigation

Office of Enforcement

TABLE OF CONTENTS

The Office of Enforcement (Enforcement, OE staff) submits this report to the Federal Energy Regulatory Commission (Commission or FERC) setting forth its findings of fact and conclusions of law regarding the investigation of Energy Transfer Partners, L.P. (Energy Transfer) and Rover Pipeline, LLC (jointly Rover). Enforcement's investigation relates to statements Rover made to the Commission during its Application for a Certificate of Public Convenience and Necessity (Certificate or Certificate Order) under section 7(c) of the Natural Gas Act (NGA) in Docket No. CP15-93-000.[1] Based upon the evidence obtained during its investigation, Rover's written responses to Enforcement's findings, and Rover's response to Enforcement's letter providing notice under 18 C.F.R. § 1b.19 (2020), Enforcement has concluded that Rover violated section 157.5 of the Commission's Regulations[2] which requires that applications for natural gas certificates and attendant filings provide full and forthright information to the Commission.

I. Executive Summary

This matter involves Rover's decision to demolish a historic house as it prepared to construct the estimated $4.22 billion[3] Rover Pipeline Project, an approximately 711 mile long interstate natural gas pipeline designed to transport gas from the Marcellus and Utica shale supply areas through West Virginia, Pennsylvania, Ohio, and Michigan to outlets in the Midwest and elsewhere.[4]

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[1] The initial application filing Rover made was on February 20, 2015 (Application of Rover Pipeline LLC for a Certificate of Public Convenience and Necessity, Docket No. CP15-93-000) (Rover Application), with pertinent attendant documents filed in the subsequent days and months. OE staff refers to the documents collectively as the Application or Application filings. The Commission issued a Certificate to Rover on February 2, 2017, though the Commission denied Rover's request for a blanket certificate under 18 C.F.R. pt. 157, subpt .F (2020), in part because of the conduct at issue in this investigation. *Rover Pipeline LLC,* 158 FERC ¶ 61,109, *order on clar. & reh'g,* 161 FERC ¶ 61,244 (2017), Pet. for Rev., *Rover Pipeline LLC v. FERC,* No. 18-1032 (D.C. Cir. Jan. 29, 2018) (Certificate or Certificate Order).

[2] 18 C.F.R. § 157.5 (2020). Citations herein are to the current regulations and statutes. Unless noted, the relevant portions of the cited regulations and statutes remain unchanged from the time of the conduct at issue.

[3] On May 2, 2019, Rover filed its Cost Comparison Statement, as required by 18 C.F.R. 157.20(c) (2020), averring that the Rover's final cost was then projected to be $6.7 billion. Rover, Cost Comparison Statement, CP15-93-000 (filed May 2, 2019).

[4] Rover Application at 1, 6, and 10.

Enforcement concludes that Rover was not forthright and misled the Commission when it stated in its Application that it was "committed to a solution that results in no adverse effects"[5] to the Stoneman House, a historic 1843 farmstead near Rover's largest proposed compressor station.[6] In truth, Rover was simultaneously planning to purchase the house, which it did in May 2015, with the intent to demolish the house, if necessary, to complete its pipeline. Rover demolished the house in May 2016. Despite taking these extraordinary actions, Rover did not notify the Commission that it purchased the Stoneman House or that Rover later destroyed it. Instead, Rover continued to submit Application filings with the Commission, including several responses to the Commission's Draft Environmental Impact Statement (DEIS) and an update to its Landowner List, which perpetuated Rover's misrepresentation and omitted critical information. As a result, the Commission could not properly fulfill its statutory obligation to examine the pipeline's impact on the historic house. Later, when the Commission discovered the truth and asked Rover to explain its actions, Rover again misrepresented the facts. As set forth in detail herein, Enforcement finds that Rover's misrepresentations and omissions violate section 157.5's mandate that pipeline applications and attendant filings contain full and forthright information.

Enforcement's finding comports with the Commission's 2017 Certificate Order, which denied Rover's request for a blanket certificate to perform certain routine construction activities and operations because:

> Our review of the record for this project shows that Commission staff identified the Stoneman House as an issue of concern early-on during the pre-filing process. Seemingly acknowledging this, Rover committed to developing a solution that would avoid the adverse effect on this structure. Nonetheless, despite staff's concern, Rover's commitment, and staff's recommendations in the final EIS, Rover demolished the structure with no prior notice or forewarning.[7]

Rover first identified the Stoneman House as a historic property that would be impacted by the pipeline as it prepared its Application. The 1843 Stoneman House (pictured below, the structure in the lower right of the photo) was recommended as

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[5] *Id.* at Volume IIA, Resource Report 4 at 4-11.

[6] The house is referred to in this Staff Report, and in the documents cited herein, primarily as the Stoneman House, but also as the Leesville Historical House, 1843 Federal House, the CS1 house, as well as by Ohio's alpha-numeric identifier, CAR0266012. In addition, the OE Staff uses terms historic property, cultural resource, architectural resource and the like, interchangeably, as appropriate, without imposing any legal significance to the terms.

[7] Certificate Order, 158 FERC ¶ 61,109 at P 249 (citations omitted).

eligible for listing in the National Register of Historic Places as "an embodiment of the distinctive characteristics of a middle nineteenth century, rural, I-house that exhibits unique features of the Greek Revival style that appears to represent the work of a master."[8]

[8] Rover, Historic Architectural Survey for the Proposed Rover Pipeline Project, at 216 (Jan. 2015) OHSHPO_005083-516 (Historic Architectural Survey).

The Stoneman House (former location noted by red arrow in post-construction compressor station photo, below) was situated less than 100 feet from the site of Rover's largest proposed compressor station (green arrow), in Carroll County, Ohio.[9]

During a pre-filing meeting on February 5, 2015, as Rover prepared to submit its initial Application filings, staff in the Office of Energy Projects[10] advised Rover that it was concerned that the compressor station would impact the historic Stoneman House. Staff provided informal guidance to Rover indicating that Rover would have to mitigate the project's effects on the structure. Staff also inquired as to whether Rover could move the planned location of its compressor station because of the potential impact on the Stoneman House.[11]

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[9] This image, provided by Rover to the Office of Energy Projects on or about May 2018 from a video overflight, shows Compressor Station 1 and Rover/Energy Transfer's temporary construction at the site of the former Stoneman House. Response of Rover Pipeline, LLC and Energy Transfer Partners, L.P. to Enforcement Staff 1b.19 Notice, Tab 1, Declaration of Brad Fieseler (June 15, 2018) (Rover 1b.19 Response) (Fieseler's declaration describes the use of the property as of June 2018).

[10] Professional staff in the Commission's Office of Energy Projects is referred to herein as OEP staff or staff. OEP staff evaluate, approve, and oversee energy projects such as interstate natural gas pipelines in accordance with the requirements of the NGA, the Natural Gas Policy Act and other laws.

[11] *See infra* Part II.C for a detailed discussion.

The next day, February 6, 2015, Rover internally determined that "there's no chance of moving the compressor station" and made its first known effort to buy the Stoneman House.[12] Rover Project Manager Leon Banta asked Environmental Project Manager Buffy Thomason for more information on the Stoneman House in order to "make sure I am going after the correct one."[13] Internal emails on February 10, 2015, confirm that Rover was "trying to buy the house."[14] By February 19, 2015, Rover was in negotiations with the owners of the Stoneman House to purchase it, along with the surrounding ten-acre parcel of land.[15] By February 19, 2015, Rover's lead executive, Energy Transfer Senior Vice President Joey Mahmoud, told Rover employees he wanted "to tear it down."[16]

Nevertheless, when Rover submitted its initial Application filings, from February 20-23, 2015, it concealed its plans to purchase the house as well as the possibility that it would demolish the house. Instead, Rover specifically assured the Commission that it was "committed to a solution that results in no adverse effects" to the Stoneman House.[17] In addition, Rover reassured the Commission that "Rover is committed to avoiding *any* Project impacts to all [National Register of Historic Places] eligible resources."[18] Later, Rover perpetuated its misleading commitment by: (1) responding to the Commission's DEIS request for a treatment plan for the house with a plan to screen the house from the Compressor Station;[19] and (2) submitting a landowner list after it purchased the

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[12] Email between Buffy Thomason and Heather Millis (Feb. 6, 2015) Rover-00000684-85 (CS1 Email).

[13] Email between Leon Banta, Buffy Thomason, and Mark Vedral (Feb. 6, 2015) Rover-00017213.

[14] Email between Buffy Thomason, Joey Mahmoud, and Leon Banta (Feb. 10, 2015) Rover-00000891-93 (CS1 Historical House Email).

[15] Email between Leon Banta, Buffy Thomason, and Mark Vedral (Feb. 19, 2015) Rover-00001751-52 (Leesville Historical House Email).

[16] *Id.*

[17] Rover Application at Volume IIA, Resource Report 4 at 4-11.

[18] *Id.* (emphasis added).

[19] Rover, Response to Draft Environmental Impact Statement, Docket No. CP15-93-000 (filed Mar. 25, 2016) (Rover Resp. to DEIS).

Stoneman House, which falsely claimed that the house was still owned by the prior owners.[20]

While its Application was pending with the Commission, and during the Ohio State Historic Preservation Office's (SHPO) review of Rover's potential impact to the Stoneman House, Rover continued to keep full and forthright information about the house from the Commission. Rover never amended its earlier sworn Application filing, which had committed to "no adverse effects" to the Stoneman House, and actively hid the information that would have exposed that commitment as misleading and disingenuous. In particular, Rover did not disclose that it: (1) signed a purchase option for the Stoneman House on April 28, 2015;[21] (2) purchased the house on May 11, 2015, for $1.3 million;[22] (3) took steps toward demolition of the Stoneman House in the spring of 2015 (if not earlier) and in the spring of 2016; [23] (4) solicited bids and finalized plans for demolition of the house in May 2016;[24] and (5) demolished the historic Stoneman House from May 25, 2016, to May 31, 2016.[25] Even after Rover demolished the house, the Commission was not made aware of it until months later, when it was alerted by a third party.

Rover's omission of truthful information was not an oversight. On February 10, 2015, ten days before submitting its initial Application filing, Thomason wrote Mahmoud, "I know we are trying to buy the house, but what do I put in the filing?"[26] Again on May 28, 2015, Thomason wrote her consultant, "[w]hat do you think about

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[20] *Id.* at Volume IV, Attachment 1A, Rover Mainline Abutters List (Excel Spreadsheet) at Tab Carroll, Ln. 17.

[21] Rover, Response to Environmental Information Request, Docket No. CP15-93-000, at Attachment 1: Option to Purchase (filed Sept. 26, 2016) (Rover Resp. to 2016 EIR).

[22] *Id.* at Attachment 1: Warranty Deed.

[23] *See* discussion *infra* Parts II.H and II.P.

[24] Email between Leon Banta and John Adamski (Apr. 14, 2016) Rover-00028905-13.

[25] Rover Resp. to 2016 EIR at Attachment 1: Timeline.

[26] CS1 Historical House Email.

saying we're closed on the historical house in the cultural updates for this filing? Let it lie?"[27]

Rover's misrepresentations and omissions materially impaired the Commission's review of Rover's Application. Without information that Rover owned the house, the Commission and the Ohio SHPO could not appropriately assess the options available for mitigation. Absent knowledge that Rover was actively considering demolishing the Stoneman House, the Commission could not appropriately assess the proposed project's would-be impact on the environment.

When the Commission discovered from the Advisory Council on Historic Preservation (ACHP) in August 2016 that Rover had demolished the Stoneman House,[28] staff issued a request asking Rover to explain why it had purchased and demolished the house despite its commitment to avoid adverse effects.[29] On September 26, 2016, Rover responded that it purchased the house "with the intent of converting the House into an operating office for the Energy Transfer Company (ETC) owned and affiliated operating assets in the region."[30] Rover also stated that it had informed the Ohio SHPO of its "purchase of the Property and subsequent intent to remove the House," but that "[i]t did not occur to Rover at that time to report this information to the Commission."[31]

The contemporaneous evidence shows Rover's response to be false and misleading by design. For example, the house was not evaluated for office space until after Rover purchased it, when Energy Transfer's operations director looked at the 1843

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[27] Email chain between Buffy Thomason and Patricia Patterson (May 28, 2015) Rover-00005540. Rover demonstrated a similar calculus when determining what to tell the Ohio SHPO. On March 28, 2016, Thomason wrote internally, "[t]he CS1 house still worries me a lot. We are not planning to keep it intact. If we document it, then remove it, is that just adding insult to injury? Or will that be more satisfactory than removing it without documenting it first?" Email between Heather Millis and Buffy Thomason (Mar. 28, 2016) Rover-00012116-19.

[28] *See* Letter from OEP to ACHP, Docket No. CP15-93-000 (issued Dec. 5, 2016) (FERC Letter to ACHP/Timeline of Events). OEP's letter included a later-compiled timeline of events regarding the Stoneman House in order to assist the ACHP in determining whether Rover violated section 110(k) of the NHPA by engaging in anticipatory demolition. *See infra* Part II.Y for a more fulsome discussion.

[29] FERC, Environmental Information Request for the Rover Pipeline Project, Docket No. CP15-93-000 (issued Sept. 14, 2016) (2016 EIR).

[30] Rover Resp. to 2016 EIR at 1.

[31] *Id.*

house and found it to be unsuitable to serve as a modern office space for a "laundry list" of reasons including simply that "the house was antiquated."[32] Further, Thomason's email alone, which asked "what do you think about saying we're closed on the historical house" [33] exposes as a misrepresentation Rover's statement that "it did not occur to Rover at the time" to tell the Commission that it had purchased the house.[34]

For the reasons set forth in this report, Enforcement concludes that Rover violated section 157.5 of the Commission's Regulations, 18 C.F.R. § 157.5, which provides, in part, that: (1) Applications for natural gas certificates "shall set forth all information necessary to advise the Commission fully concerning the operation, sales, service, construction, extension, or acquisition for which a certificate is requested";[35] (2) "every applicant shall file all pertinent data and information necessary for a full and complete understanding of the proposed project";[36] (3) "every requirement of [Part 157] shall be considered as a forthright obligation of the applicant";[37] and (4) "the burden of adequate presentation in intelligible form as well as justification for omitted data or information rests with the applicant."[38]

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[32] Testimony of Stephen "Dutch" Schuman, at 53-55, 88, 92-93 (Jan. 25, 2017) (Schuman Test.). Schuman did not have the keys on his initial visit, but when he was able to access the house, he was able to determine in about an hour that it was obviously not feasible. *Id.* at 92-93, 170-71.

[33] Email chain between Buffy Thomason and Patricia Patterson (May 28, 2015) Rover-00005540.

[34] Rover Resp. to 2016 EIR at 1.

[35] 18 C.F.R. § 157.5(a). *See also infra* part IV (discussing section 157.5).

[36] 18 C.F.R. § 157.5(a).

[37] *Id.* § 157.5(b).

[38] *Id.* § 157.5(c).

Rover submitted its Application pursuant to the regulatory framework[39] created by the NGA and the National Historic Preservation Act (NHPA)[40] and their implementing regulations. That framework requires that the Commission not issue a certificate[41] without taking "into account the effects of their undertakings on historic properties"[42] in furtherance of the NHPA's objective that "the historical and cultural foundations of the Nation [] be preserved as a living part of our community life and development."[43] As the Commission stated in its Certificate Order, "Rover's commitments . . . are the basis for determining the degree to which the applicant has taken real and meaningful steps to offset its project impacts. This is the most basic application of our established policy under the Certificate Policy Statement."[44] Accordingly, Rover's misrepresentations and omissions undermined the integrity of the Commission's application process, which is designed to ensure that its certificates, and the conditions imposed therein, allow only for pipelines that serve the public convenience and necessity. Rover's actions warrant a significant civil penalty.

This OE staff report begins in part II by relating the facts chronologically, primarily through citation to Rover's filings in the certificate application, contemporaneous emails and documents gathered as part of this investigation, as well as to the testimony taken from witnesses during the investigation. The cited materials will

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[39] The framework includes the National Environmental Policy Act (NEPA) and other federal statutes.

[40] The authority referred to as "section 106" was originally codified as Title 16, United States Code, Section 106. In 2014, the NHPA was migrated to Title 54, where the same requirements are now codified at 54 U.S.C. § 306101-08. Based on the numbering of the original Act, the agency consultation process by which agencies consider the effects of their undertakings on historic resources is referred to as the section 106 process. Because the NHPA is commonly referred to by its sections under the original Title 16 codification, OE staff adopts nomenclature throughout and cites to current United States Code.

[41] *See* discussion *infra* note 204, stating that the Commission may issue a conditional certificate and will not issue a notice to proceed with construction, if appropriate.

[42] 36 C.F.R. § 800.1(a) (2020).

[43] National Historic Preservation Act (NHPA) of 1966, Pub. L. No. 89-665, § 1, as amended by Pub. L. No. 96-515 (1980) (previously codified at 16 U.S.C. 470). (NHPA § 1 was omitted from the text of title 54 but not repealed).

[44] Certificate Order,158 FERC ¶ 61,109 at P 248.

be filed separately with the Commission as a non-public appendix, with a copy sent to counsel for Rover. Part III briefly outlines Enforcement's investigation. Part IV sets forth the legal framework established by the NGA and the NHPA. Part V details OE staff's analysis and findings and addresses Rover's defenses. Part VI articulates the relevant Penalty Guidelines calculation, and recommends a civil penalty of $20,160,000, consistent with the application of those guidelines.

II. Factual Background

A. Rover Was Required to Address Historic Properties Impacted by its Pipeline Project as well as Develop Mitigation for those Impacts

When Rover applied to the Commission for a Certificate of Public Convenience and Necessity, it did so pursuant to the requirements of the NGA, as well as (for purposes of the Stoneman House) the NHPA. Those requirements exist to allow the Commission – as the permitting agency – to consider the effects of its permits on historic properties, as required by the NHPA. Accordingly, Rover was required to identify in Resource Report 4 of its Application any historic properties that would be impacted by its project as well as measures for mitigating the project's "adverse effects" on those properties.[45] Rover was also required to consult with the Ohio SHPO, to determine the nature of and appropriate treatment for any potential adverse effects on the Stoneman House.[46] OEP staff relies on Resource Report 4 to develop FERC's Environmental Impact Statement (EIS), which details the impact of the pipeline project on various environmental elements, and lays out proposed mitigation for those impacts. The Commission, in turn, relies on the EIS to craft certificate conditions that it believes – based on the information provided to it by the applicant – will avoid or lessen adverse impacts to environmental elements including cultural resources. By doing so, the Commission allows the pipeline project to proceed in a manner that serves the public interest.

[45] The process by which Rover was required to identify historic properties, potential adverse effects to those resources, and a treatment plan for the mitigation of those adverse effects, and the attendant consultation with the SHPO, is often referred to as the "section 106 process" and is described in further detail in part IV.

[46] The NHPA requires FERC to commence the section 106 process. FERC then shifts that burden to the applicant to "assist the Commission in meeting is obligations under NHPA section 106 and implementing regulations." 18 C.F.R § 380.14(a)(1) (2020). The applicant "must consult with the SHPO(s) and [Tribal Historic Preservation Offices] as appropriate." *Id.* § 380.14(a)(3).

B. June 26, 2014 to February 4, 2015: Rover Identifies the Stoneman House

Rover initiated its Certificate Application process for the Rover Pipeline by requesting a pre-filing meeting with the Commission in June 2014.[47] Rover first identified the Stoneman House[48] as a historic resource during the initial stages of its pre-filing preparation of Resource Report 4.[49] Rover hired TRC, an engineering and environmental consulting firm, to perform the required investigation of cultural resources along the proposed pipeline corridor. TRC contacted the Ohio SHPO in September 2014, to begin the consultation required by the NHPA.[50] Shortly thereafter, TRC identified the Stoneman House as a historic property, an 1843 federal-style house located across two-lane Azalea Road – and just 95 feet – from proposed Compressor Station 1 (CS 1) near Leesville, Ohio.[51] The Stoneman House had been previously recorded in Ohio as an architectural resource and assigned the identifier CAR0266012.[52] Based on that initial information, Rover filed its first draft of Resource Report 4 with the Commission on November 13, 2014, identifying the Stoneman House as an "1843 federal house" that was

[47] Rover, Request to Initiate the FERC Pre-Filing Review Process, Docket No. PF14-14-000 (filed June 25, 2014); FERC, Approval of Pre-Filing Request, Docket No. PF14-14-000 (issued June 27, 2014). Rover's Application also sought (and ultimately obtained) authorization for the related Panhandle Backhaul Project and Trunkline Backhaul Project, which are also owned by Energy Transfer. For purposes of this OE staff report, the projects are referred to jointly as the Rover pipeline project.

[48] When the house was first identified and through Rover's May 2015 purchase, it was privately-owned and occupied by the owners, the Hunt family. Testimony of Heather Millis, at 64 (Jan. 24, 2017) (Millis Test.).

[49] Rover, First Draft Resource Report 4, Docket No. PF14-14-000, Appendix 4A, at 20 (filed Nov. 13, 2014) (First Draft Resource Report 4).

[50] Testimony of David Snyder, at 23 (Dec. 14, 2016) (Snyder Test.).

[51] Millis Test. at 16-19, 27 (describing the extensive field work undertaken by TRC's team of archaeologists to identify cultural resources along the pipeline corridor).

[52] First Draft Resource Report 4, Appendix 4A at 20.

"within the Ohio Portion of the Project APE"[53] and noting that it believed a "visual effect evaluation" was necessary.[54]

Next, TRC prepared a more detailed "Historic Architectural Survey," which it sent to the Ohio SHPO for comment on January 26, 2015.[55] The Historic Architectural Survey described the Stoneman House as "an intact example of a middle nineteenth century, rural, I-house that exhibits unique features of the Greek Revival architectural style and workmanship," concluding:

> Although research failed to associate the house and/or its original owner(s) with an important historical event or series of events, CAR0266012 is considered potentially eligible for the NRHP [National Register of Historic Places] under Criterion C as an embodiment of the distinctive characteristics of a middle nineteenth century, rural, I-house that exhibits unique features of the Greek Revival style that appears to represent the work of a master.[56]

The Historic Architectural Survey noted that the Stoneman House was located "approximately 95 feet southeast of the proposed Mainline Compressor Station One" and included the photographs and aerial images below.[57] The Historic Architectural Survey stated that the project was expected to have an adverse effect on the house and that further consultation with the Ohio SHPO was necessary to resolve those adverse effects.[58]

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[53] Area of Potential Effects (APE) is defined in the regulations implementing the NHPA as the "geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking." 36 C.F.R. § 800.16(d) (2020). *See also infra* further discussion of the NHPA at part IV.

[54] First Draft Resource Report 4, Appendix 4A at 20.

[55] Historic Architectural Survey; Letter from Rover to TRC (Jan. 26, 2015) OHSHPO004512.

[56] Historic Architectural Survey at 216.

[57] *Id*.

[58] *Id*.

Figure 9.24. CAR0266012; view southeast featuring northwest elevation.

Figure 9.25. CAR0266012; view southeast featuring stone and terracotta inscription.

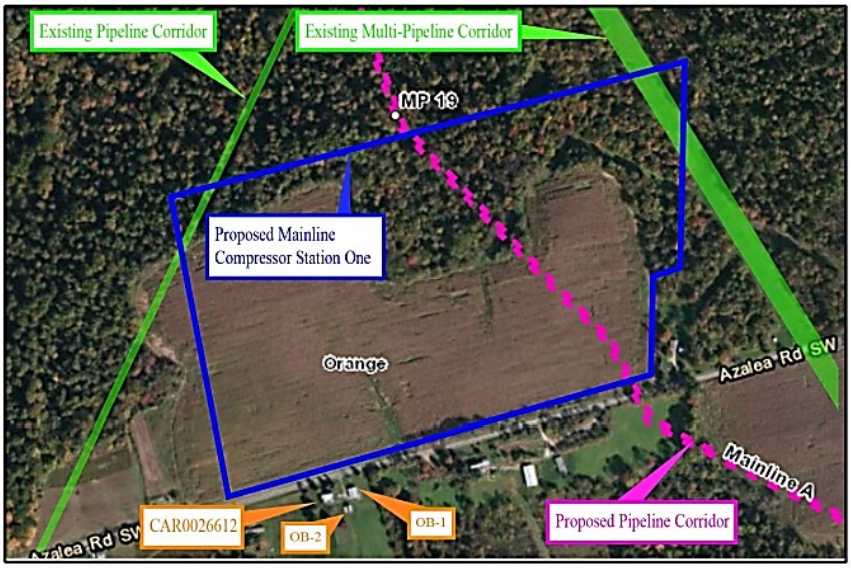

Figure 9.23. CAR0266012; aerial map of property and Project area.

[59]

On January 27, 2015, Rover filed its second draft of Resource Report 4 with the Commission.[60] The draft related that Rover had studied 79 properties within the project study areas during its cultural resources analysis and determined that 36 properties qualified as historic, but that the project would have adverse effects on only one property

[59] *Id.* at 217-18.

[60] Rover, Second Draft Resource Report 4, Docket No. PF14-14-000, Appendix 4A (filed Jan. 27, 2015) (Second Draft Resource Report 4).

in Ohio: the Stoneman House.[61] Rover advised the Commission that "avoidance is the preferred treatment for this situation, but if that is not feasible, further consideration of this resource will be necessary."[62]

C. February 5, 2015: FERC Staff Raises Concern about the Stoneman House and Proposes Relocating the Compressor Station at Pre-Filing Meeting

On February 5, 2015, Rover met with OEP staff at FERC headquarters for a pre-filing meeting, in part to review draft Resource Report 4.[63] The Stoneman House was one of several items discussed.[64] Per OEP staff's timeline, "staff met with representatives from Rover and expressed concern about potential visual impacts on the historic Stoneman House from a proposed compressor station to be sited across the street from the structure."[65]

The question of potential mitigation of adverse effects to the Stoneman House was also discussed at the meeting. As in any cultural resources consultation, a variety of mitigation avenues were available: visual screening, audio screening, reduction of impact, or avoidance, among others.[66] Because the Stoneman House was privately-owned, certain other mitigation avenues were precluded. For example, certain "creative mitigation" measures like donating the house to a local historical society, moving the

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[61] *Id.*

[62] *Id.* at 4-10.

[63] Rover 1b.19 Response at 16; FERC Letter to ACHP/Timeline of Events; *see also* CS1 Email. In addition to this meeting, OEP staff and Rover discussed numerous issues related to the project in preparation for Rover's Application on at least a weekly basis during pre-filing. *See, e.g.*, FERC, Summary of the conference call weekly meeting between FERC Staff and ET Rover Pipeline, LLC, Docket No. PF14-14-000 (filed July 24, 2014).

[64] Rover 1b.19 Response at 16; FERC Letter to ACHP/Timeline of Events; CS1 Email.

[65] FERC Letter to ACHP/Timeline of Events. *See* footnote 28 *supra* for a more detailed explanation of the timeline.

[66] Millis Test. at 49.

house to another location, or memorializing the property through a standards-based video were unavailable.[67]

During the February 5, 2015, meeting, OEP staff explicitly raised the possibility that Rover move the planned location of its compressor station to avoid impacting the Stoneman House.[68]

D. February 6-10, 2015: Rover Decides to "Go After" the Stoneman House; Begins Purchase Negotiations

The day after the pre-filing meeting in which FERC staff expressed its concerns over the potential impacts on the Stoneman House, Banta asked Thomason via email "do you have a drawing with the house outlined? I want to make sure I am going after the correct one."[69] Thomason responded by sending Banta Rover's detailed Historic Architectural Survey of the Stoneman House.[70]

The same day, Thomason also asked TRC archaeologist, Heather Millis, "what's your opinion on how the SHPO will respond to screening with trees?" further stating, "I'm looking for options and the extent of what they may require."[71] Millis indicated that neither Rover nor TRC knew what would satisfy the SHPO, responding:

> [W]e will get back to you with our recommendation for mitigation as soon as possible and then we can contact SHPO to discuss if you would like. I

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[67] *Id.* at 51.

[68] CS1 Email (Millis acknowledged FERC's question in an email to Thomason on February 6, 2015, stating "SHPO is going to have the same question FERC raised – is there any other place to put this instead?"); *see also* Rover 1.b19 Response, Tab 3, Declaration of Patricia Patterson ¶ 8 ("I attended a pre-filing meeting at FERC on or around February 5, 2015. At that meeting, Laurie Boros with FERC project staff raised the issue of the Stoneman House and asked us how we intended to handle the potential adverse effects. She did not ask that the compressor station be moved, and accepted that we did not believe there were viable alternative locations.").

[69] Email between Buffy Thomason and Leon Banta (Feb. 6, 2015) Rover-0000675.

[70] *Id.*

[71] CS1 Email.

> do think SHPO is going to have the same question FERC raised – is there any other place to put this instead? But I do not think they will be unreasonable, just making sure.[72]

Thomason responded "[t]here's no chance of moving the compressor station."[73]

No later than February 10, 2015, it was clear that Rover was: (1) trying to buy the house, (2) considering what to tell FERC; and (3) considering the arguments Rover would make to the Ohio SHPO and FERC in the forthcoming consultation over adverse effects. Buffy Thomason, Rover's Environmental Project Manager, sent the following email to Joey Mahmoud, Rover's top executive, who oversaw Rover's approximately 1,800 employees and contractors as well as the project's permitting, construction, and transition to operations:[74]

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[72] *Id.*

[73] *Id*. The testimony revealed that moving the compressor station at that juncture would have been costly and technically difficult. Thomason testified that to move the compressor station would require Rover to "find another site big enough to house all the equipment close to that location so that, hydraulically, they could move the gas as needed. And then the pipelines coming into and out of it would have to be rerouted." Testimony of Buffy Thomason, at 100-01 (Dec. 7, 2016) (Thomason Test.); *see also* Testimony of Joey Mahmoud, at 65-66 (Dec. 6, 2016) (Mahmoud Test.) and Schuman Test. at 42.

[74] CS1 Historical House Email. This OE staff report contains images of some cited documents. Highlights to those images have been added for emphasis, unless otherwise noted.

From: Thomason, Buffy
Sent: Tue 2/10/2015 12:47 PM (GMT-06:00)
To: Mahmoud, Joey; Banta, Leon
Cc:
Bcc:
Subject: CSI Historical House
Attachments: CS1 Noise Figure.pdf

As an update for the CS1 historical house discussion, the noise study did not catch the facility that is being built east of our site, which is farther along than shown in this aerial. The study showed the existing level at around 60 dBA, Ldn already, and they think we will be at 55 dBA before we do anything specific for the house. Map attached.

I know we are trying to buy the house, but what do I put in the filing? That we don't think we'll have a sound impact over the FERC standard, and we will mitigate any visual impacts and leave it at that? The consultant says that the architectural people at the Ohio SHPO tend to try to overreach. Do you want us to talk to them now or wait until after the filing?

Mahmoud responded:[75]

From: Mahmoud, Joey
Sent: Wed 2/11/2015 9:11 PM (GMT-06:00)
To: Thomason, Buffy; Banta, Leon
Cc:
Bcc:
Subject: RE: CSI Historical House

After the filing. Hopefully we can buy it. Stick to the noise argument only and do not worry about the visual mitigation. Is the house occupied?

[75] *Id.*

In subsequent emails, Thomason replied that it was a "normal-looking, but well-cared for house" and sent Mahmoud photos.[76] Mahmoud replied "[e]ven if they will not sell, we should not impact."[77]

E. February 11, 2015: FERC Reiterates Concern over Stoneman House

On February 11, 2015, OEP staff issued a pre-filing letter providing comments on Rover's second set of draft resource reports.[78] OEP's letter reiterated the need for Rover to "explain how Rover would avoid adverse effects to architectural resource CAR0266012 (1843 Federal House) (e.g., relocate Mainline Compressor Station 1 in Ohio)."[79] The letter further stated that "[a]ny omission of content relevant to these comments could result in a determination that your formal application is incomplete and not ready for processing. If Rover cannot provide the necessary information in its application, Rover should clearly state the timing for all supplemental information."[80]

F. February 19, 2015: Rover Negotiates Purchase of Stoneman House, with Mahmoud Having "said to tear it down"

As of February 19, 2015, Rover was in negotiations to purchase the Stoneman House from its owners, the Hunt family.[81] The negotiations are reflected in the following emails between Thomason, Banta, Mark Roberts, Rover's Right-of-Way Representative, and Mark Vedral, Energy Transfer's Right-of-Way Manager.[82] Those emails also reflect that Mahmoud had, as of February 19, 2015, "said to tear it down."[83]

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[76] *Id.*

[77] *Id.* Thomason further stated that Rover could "make our compressor station look like a barn. And get some fake cows to put in front of it." To which Mahmoud replied "I like it, maybe a few deer and ducks and a flamingo." *Id.*

[78] FERC, Letter Re: Comments on the Second Set of Draft Resource Reports 1-12, Docket No. PF14-14-000 (issued Feb. 11, 2015).

[79] *Id.* at 18.

[80] *Id.* at 1-2.

[81] Leesville Historical House Email (photo redacts name of unrelated homeowner).

[82] *Id.*

[83] *Id.*

From: Mark Roberts
Sent: Thu 2/19/2015 4:02 PM (GMT-06:00)
To: Banta, Leon; Thomason, Buffy
Cc: Vedral, Mark
Bcc:
Subject: Leesville Historical House
Attachments: OPTION TO PURCHASE; [redacted] Defiance.doc

Leon/Buffy,

Owners of the historical house at Leesville want a year to get all their stuff off of the property. March 1, 2016,
the elderly mother lives there and has to find a place to live, but she's good with the situation, just needs time.
Are you good with that and can we use the same option to purchase as the one in Defiance with the house.
See attached [redacted]option to purchase, highlighted paragraph 11,
gave them the right to "remove any of the buildings, structures, improvements and appurtenances which are a part of this Contract"
If the clause is not acceptable, what can they take?

Thanks, Mark R

From: Banta, Leon
Sent: Thu 2/19/2015 4:06 PM (GMT-06:00)
To: Mark Roberts; Thomason, Buffy
Cc: Vedral, Mark
Bcc:
Subject: RE: Leesville Historical House

Let them Take everything/anything they want, but we prefer that they get everything they want and are gone by October 1, 2015 please.

From: Vedral, Mark
Sent: Thursday, February 19, 2015 4:07 PM
To: Banta, Leon; Mark Roberts; Thomason, Buffy
Subject: RE: Leesville Historical House

Is there any type of special protection for the historical house, I have no idea? I remember Joey said to tear it down. Thanks

Mark

From: Banta, Leon
Sent: Thu 2/19/2015 4:08 PM (GMT-06:00)
To: Vedral, Mark; Mark Roberts; Thomason, Buffy
Cc:
Bcc:
Subject: RE: Leesville Historical House

I think we just need to get this part taken care of first, then we will figure out everything else when we are the owners.

In testimony, Mahmoud conceded that it was his intent to tear down the house once Rover owned it:[84]

[84] Mahmoud Test. at 92; *see also id.*at 89.

Q So at the time the house was purchased, was it your intent to tear down the house?

A It was always part of our plan, sure. That's something we do often when we buy properties, is if there's structures on those properties that we're not going to utilize, we typically get rid of those.

Q Why?

A They ultimately become a liability to us from a -- people like to occupy, be in structures for things that are not the intended purpose for what we bought them.

G. February 20-23, 2015: Rover's Initial Application Filings Assure Commission that "Rover is committed to a solution that results in no adverse effects to this resource," but Is Silent on Purchase and Potential Destruction[85]

On February 20, 2015, Rover submitted its initial Application filing to the Commission under section 7 of the NGA.[86] On February 23, 2015, Rover submitted Resource Report 4.[87] Rover did not disclose its negotiations to purchase the Stoneman House, nor did Rover disclose it was considering tearing down the resource. Instead, Resource Report 4 repeatedly assured the Commission of Rover's commitment to *not* adversely affect the house, and indicated that the only impact to the house would be indirect, noting that Rover was working on a "screening plan" for the resource.[88]

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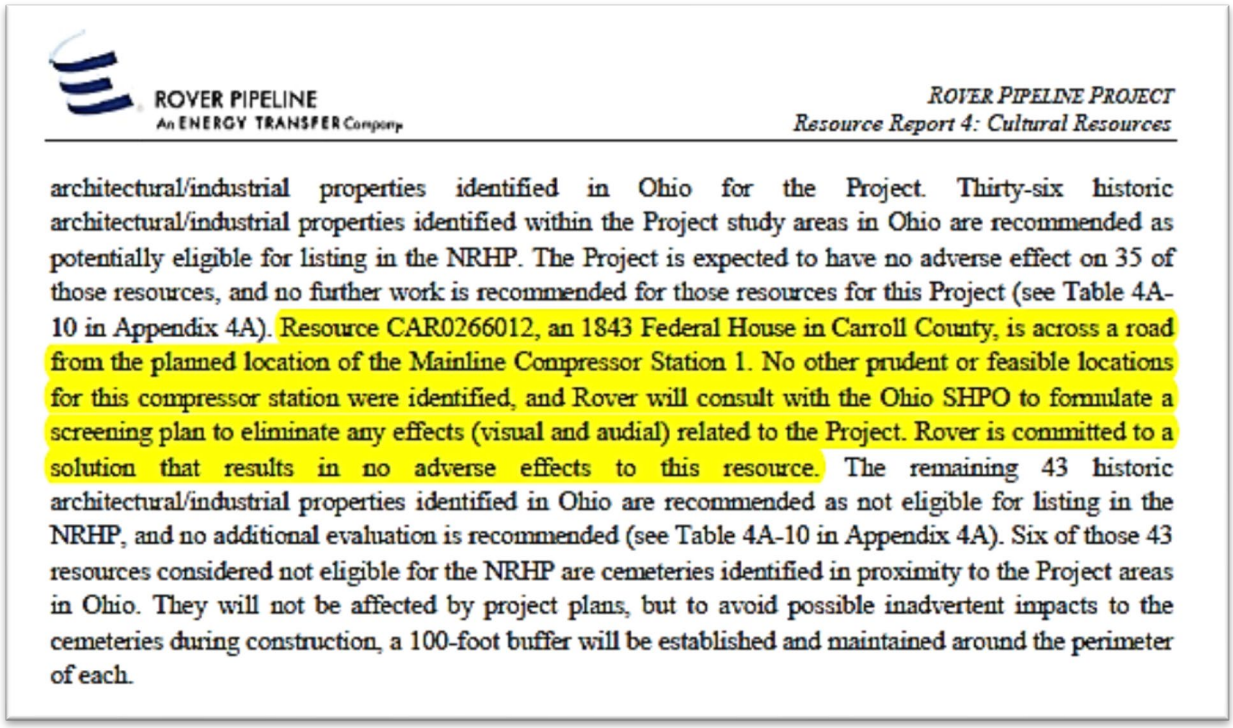
[85] Rover Application at Volume IIA, Resource Report 4 at 4-11.

[86] The Rover Application was verified as required by NGA section 7(d), 15 U.S.C. § 717f (2012) and 18 C.F.R. § 385.2005 (2020) through an attached affidavit signed by Rover's Senior Director of Certificates. Rover Application at Verification Statement of Rover Pipeline, LLC.

[87] Rover Application at Volume IIA, Resource Report 4.

[88] *Id.* at 4-3, 4-11, 4-17.

Resource Report 4 explicitly states that "Rover is committed to avoiding *any* Project impacts to all NRHP eligible resources."[89] Further, the portion of the report relating to the Stoneman House provides:[90]



ROVER PIPELINE
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ROVER PIPELINE PROJECT
Resource Report 4: Cultural Resources

architectural/industrial properties identified in Ohio for the Project. Thirty-six historic architectural/industrial properties identified within the Project study areas in Ohio are recommended as potentially eligible for listing in the NRHP. The Project is expected to have no adverse effect on 35 of those resources, and no further work is recommended for those resources for this Project (see Table 4A-10 in Appendix 4A). Resource CAR0266012, an 1843 Federal House in Carroll County, is across a road from the planned location of the Mainline Compressor Station 1. No other prudent or feasible locations for this compressor station were identified, and Rover will consult with the Ohio SHPO to formulate a screening plan to eliminate any effects (visual and audial) related to the Project. Rover is committed to a solution that results in no adverse effects to this resource. The remaining 43 historic architectural/industrial properties identified in Ohio are recommended as not eligible for listing in the NRHP, and no additional evaluation is recommended (see Table 4A-10 in Appendix 4A). Six of those 43 resources considered not eligible for the NRHP are cemeteries identified in proximity to the Project areas in Ohio. They will not be affected by project plans, but to avoid possible inadvertent impacts to the cemeteries during construction, a 100-foot buffer will be established and maintained around the perimeter of each.

H. March 2015: Rover Continues to Pursue Destruction of the Stoneman House

Eight days after filing its initial Application filings, stating that it was "committed to a solution that results in no adverse effects" to the Stoneman House,[91] Rover continued to internally discuss demolishing the house. Vedral, now for the second time, posed the question whether there were limitations to tearing the house down stating "Any word on what we can do to the house? Can we tear it down or is [it] under some protection due to historical relevance."[92] Right-of-Way Agent Mark Zaccaro informed Rover he had made some efforts to determine local ordinance limitations by contacting the local historical

[89] *Id.* at 4-3 (emphasis added).

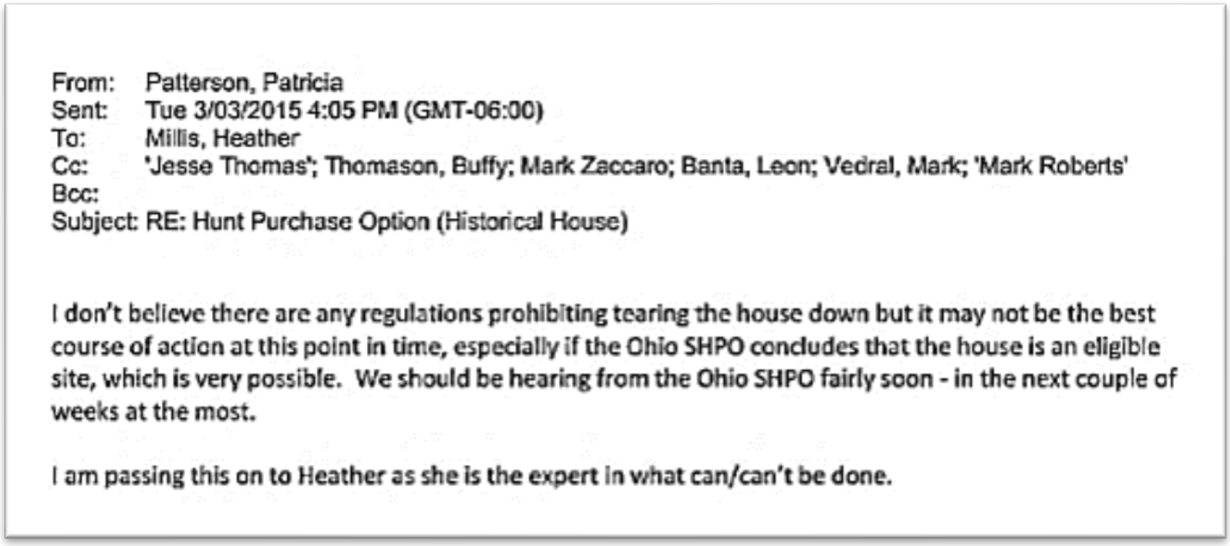
[90] *Id.*

[91] *Id.* at 4-11.

[92] Email between Leon Banta, Heather Mills, et al. (Mar. 3, 2015) Rover-00003817-22 (Hunt Purchase Option Email).

society.[93] Banta requested no additional inquiries about potential limits to destruction, saying, "I do not want to stir up anything additional."[94] Banta then asked for internal advice from Thomason and Millis instead, underscoring, "I want to make sure we have it purchased and then we can deal with what we have to do."[95]

Thomason responded that she did not know of any limitations, but asked TRC's Patricia Patterson (Millis' supervisor), "are there any state regulations that would keep us from tearing it down?"[96] Patterson's response (pictured below) indicated that she believed tearing down the house "may not be the best course of action at this point in time" not because it was prohibited by state or local ordinance, but because of the pending section 106 consultation concerning the house, and mitigation of any adverse effects:[97]



From: Patterson, Patricia
Sent: Tue 3/03/2015 4:05 PM (GMT-06:00)
To: Millis, Heather
Cc: 'Jesse Thomas'; Thomason, Buffy; Mark Zaccaro; Banta, Leon; Vedral, Mark; 'Mark Roberts'
Bcc:
Subject: RE: Hunt Purchase Option (Historical House)

I don't believe there are any regulations prohibiting tearing the house down but it may not be the best course of action at this point in time, especially if the Ohio SHPO concludes that the house is an eligible site, which is very possible. We should be hearing from the Ohio SHPO fairly soon - in the next couple of weeks at the most.

I am passing this on to Heather as she is the expert in what can/can't be done.

Patterson noted that the Ohio SHPO was expected to get back to them soon to indicate whether such consultation would be required because – as Rover and TRC had themselves recommended – the house was "an eligible site" (i.e., a historic property by virtue of its eligibility for the National Register of Historic Places).

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[93] *Id.*

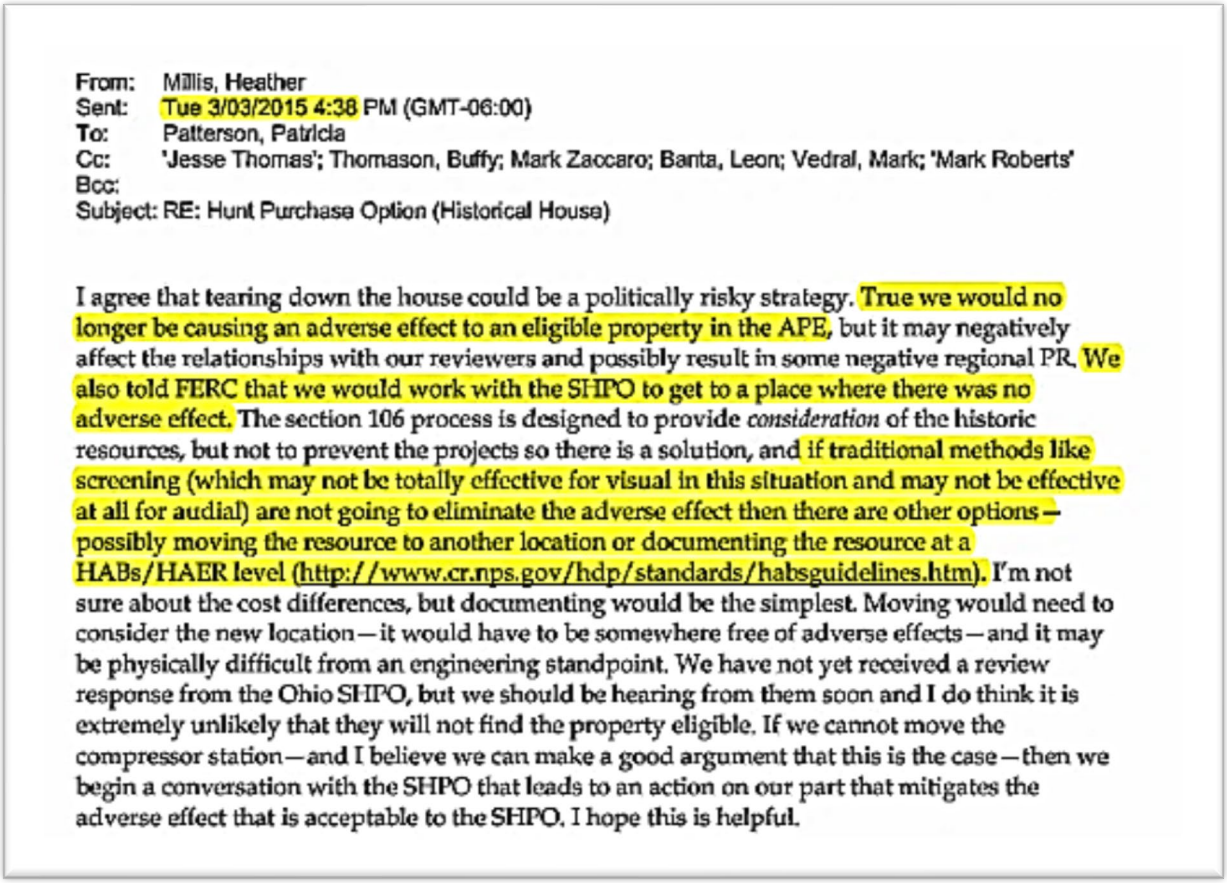
[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.*

Agreeing that destruction was a "politically risky strategy," Millis reminded her client (in the email pictured below) of the representations it made to FERC in its Application, stating "[w]e also told FERC we would work with the SHPO to get to a place where there was no adverse effect."[98] Millis detailed several "other options" for resolving adverse effects if the SHPO determined that visual and audial screening was insufficient:[99]



From: Millis, Heather
Sent: Tue 3/03/2015 4:38 PM (GMT-06:00)
To: Patterson, Patricia
Cc: 'Jesse Thomas'; Thomason, Buffy; Mark Zaccaro; Banta, Leon; Vedral, Mark; 'Mark Roberts'
Bcc:
Subject: RE: Hunt Purchase Option (Historical House)

I agree that tearing down the house could be a politically risky strategy. True we would no longer be causing an adverse effect to an eligible property in the APE, but it may negatively affect the relationships with our reviewers and possibly result in some negative regional PR. We also told FERC that we would work with the SHPO to get to a place where there was no adverse effect. The section 106 process is designed to provide *consideration* of the historic resources, but not to prevent the projects so there is a solution, and if traditional methods like screening (which may not be totally effective for visual in this situation and may not be effective at all for audial) are not going to eliminate the adverse effect then there are other options – possibly moving the resource to another location or documenting the resource at a HABs/HAER level (http://www.cr.nps.gov/hdp/standards/habsguidelines.htm). I'm not sure about the cost differences, but documenting would be the simplest. Moving would need to consider the new location—it would have to be somewhere free of adverse effects—and it may be physically difficult from an engineering standpoint. We have not yet received a review response from the Ohio SHPO, but we should be hearing from them soon and I do think it is extremely unlikely that they will not find the property eligible. If we cannot move the compressor station—and I believe we can make a good argument that this is the case—then we begin a conversation with the SHPO that leads to an action on our part that mitigates the adverse effect that is acceptable to the SHPO. I hope this is helpful.

Banta did not respond directly to Millis's comments and instead reiterated that Rover would have more control over the outcome for the house once it owned it. Specifically, he stated "we can deal with what is needed after we close, it will be ours then."[100]

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[98] *Id.*

[99] *Id.*

[100] *Id.*

I. Spring 2015: Search for Operations Space in the Midwest Has Not Identified the Stoneman House or Property as a Potential Site

On or about April 10, 2015, Stephen "Dutch" Schuman became Energy Transfer's Senior Director of Operations. One of Schuman's responsibilities was to find an office for Energy Transfer's Midwest Division. The email announcing his promotion stated, "I am pleased to announce Dutch Schuman has been promoted to Area Director and will assume responsibilities for the new Rover Pipeline operations. A new Area including these facilities will be established in the Midwest Division, with plans for an Area Office in the Canton, Ohio vicinity."[101] Though the Stoneman House was in the general area, it had not been identified as a potential site in the Midwest. At the time, ETP had not decided whether the operations space would be a new build, existing construction, office space or a broader operations and warehousing space.[102]

J. April 11, 2015: Rover Keeps Purchase Information from FERC

On April 11, 2015, an email from Thomason again indicated that Rover was contemplating whether, when, and how much to tell FERC about its plans for the Stoneman House. In emails discussing Rover's response to FERC's data request concerning Resource Report 4, Thomason wrote Millis, "[w]e're purchasing the house, but we haven't closed on it yet. The landowners are happy, it's just a matter of time to get it done. *I haven't decided how much of that I want to say yet.*"[103] On April 22, 2015, Rover submitted several responses to the Commission's April 2, 2015, Environmental Information Request (EIR) that sought additional information regarding the Stoneman House. Rover's Response noted that it had not yet received comments from the SHPO and omitted that it was negotiating to purchase the home.[104]

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[101] Email between Kari Bacher on behalf of Mark Ryan to a group (Apr. 10, 2015) Rover-00015331-32.

[102] Schuman Test. at 53 (Schuman was asked "And the area – the new area office that this e-mail mentions, was that to be purchased instead of rented?" He answered "[w]e could have done either. There was no determination at this point.") *Id.*

[103] Email between Buffy Thomason and Heather Millis (Apr. 11, 2015) Rover-00004293-94 (emphasis added) (Data Request Email).

[104] FERC, Environmental Information Request for the Rover Pipeline Project, Docket No. CP15-93-000 (issued April 2, 2015) (requesting Rover provide "any resulting Ohio SHPO correspondence and any treatment plan to mitigate potential adverse effects to architectural resource CAR0266012 (1843 Federal House)"); Rover, Response to 2015 Environmental Information Request, Docket No. CP15-93-000, at 91, (filed Apr. 22,

K. May 11, 2015: Rover Buys the Stoneman House, without Informing FERC

On April 28, 2015, Rover entered into a purchase option for the house with the Hunt family.[105] On May 11, 2015, Rover bought the Stoneman House for $1,300,000. It had most recently been appraised at just over $350,000.[106] Rover did not advise the Ohio SHPO or the Commission that it had purchased the Stoneman House.

L. May 28 to June 10, 2015: Rover Decides Not to Tell FERC about the Purchase of the Stoneman House and Opts to "Let it Lie"

On May 28, 2015, as Rover was preparing to file a supplement to the environmental report,[107] Thomason asked Patterson "What do you think about saying that we're closed on the historical house in the cultural updates for this filing? Let it lie?"[108] Patterson responded "I'm going to push Heather [Millis] to find out what the hang up is with OH SHPO comments. According to [Millis], **the problem does not quite go away with the purchase**. Since we don't have SHPO comments, would **let it lie for now**."[109]

2015) (Rover Resp. to 2015 EIR) (responding simply with "[c]omments have not yet been received from Ohio SHPO regarding Phase I Survey Report so consultations have not been initiated regarding mitigation plans for this resource.").

[105] Rover Resp. to 2016 EIR at Attachment 1: Option to Purchase (listing Rover Pipeline LLC as purchaser).

[106] *See* Rover Resp. to 2016 EIR at Attachment 1: Timeline and Warranty Deed (listing Rover Pipeline, LLC as grantee); Email between Buffy Thomason, Heather Millis, and Lisa Adkins (Sept. 12, 2016) Rover-00009126-28.

[107] Email between Buffy Thomason, Kelly Allen, and Fran Smith (June 8, 2015) Rover-00022865-75 (attaching a draft supplement to the environmental report); *see also* Rover, Supplement to the Environmental Report, Docket No. CP15-93-000 (filed June 10, 2015) (June 10, 2015 Landowner List).

[108] Email between Buffy Thomason and Patricia Patterson (May 28, 2015) Rover-00005540.

[109] *Id.* (emphasis added).

Thomason agreed and ultimately nothing was updated in the June 10, 2015, filing, including the affected landowner mailing list which listed the prior owners:[110]

OH-CA-001.200	Robert J & Barbara A Hunt		Mr. & Mrs.		
8468 Azalea Rd SW		Dennison	44621		OH

M. Summer & Fall 2015: Operations Reviews the Stoneman House at Banta's Request, Concludes Land is Perfect, but House Would Impair Rover's Use

During summer of 2015, Banta asked Schuman to review whether the Stoneman property (both house and land) was a suitable space for the area office project. Schuman stated "we had purchased a property, you know, adjacent to CS 1" and Banta directed Schuman to "[go] take a look at it and see what you can use on operations there, because we own this property, and see what we can use for office space there."[111] Schuman testified that Banta told him that there were several potentially useable buildings on the property, but did not tell him the Stoneman House was historic.[112]

Schuman first visited the Stoneman House in the late summer of 2015, following Banta's suggestion, but did not enter the house.[113] The location, Schuman said, "was perfect for us."[114] To determine if the house had any use, Schuman testified that he walked around the outside of the house but did not have keys to enter the property. Further, Schuman noted that the house was "awful close to the road," and as such, it would be "difficult for any type of fencing," to be put around the property which he said was required for any ETP facility.[115] Based on the first visit, Schuman testified that he was unable to determine if the house was suitable for office space and would have to

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[110] June 10, 2015 Landowner List , Resource Report 1 – Project Description, Volume IV, Attachment 1A, Updated Mailing List – Mainline, Abutters at 14 (filed as privileged material).

[111] Schuman Test. at 138.

[112] *Id*. at 139 (as of his testimony in January 2017, Schuman maintained "[m]y knowledge is it is not a historical site. My knowledge as of today is that it was a potential or it got put on a potential list, but it wasn't on the registry as a historical site.").

[113] *Id.* at 132-33.

[114] *Id*. at 94.

[115] *Id.* at 144-45.

return for further consideration.[116] However, by summer of 2015, Schuman's ongoing search for Midwest Division space had evolved. He was now looking for property that would house an office, and also serve a broader operations function, "to warehouse surplus material in that area for multiple projects that were going on in that area, Rover being one of them."[117]

Schuman returned to the Stoneman House around October or November 2015 with Operations Manager, Brad Fieseler.[118] Having entered the home for the first time, Schuman and Fieseler immediately concluded that the Stoneman House itself would not be useful.[119] However, some of the outbuildings and surrounding ten acres of land could be used for other purposes. Schuman explained that "this particular site is one of our largest compressor stations. So it's kind of a geographic reason why we would identify this site."[120] Nevertheless, Schuman recommended against converting the house into office space because only new construction would have allowed for "state of the art IT network, everything included, you know, clean building, new heating, plumbing, and everything."[121] Schuman returned to his Canton, Ohio office and told Banta that he and Fieseler thought the Stoneman House was unsuitable for an office, but that the land could serve several uses.[122] Schuman testified that he understood at that time that "if operations could not use the building, it was going to be taken down."[123]

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[116] *Id.* at 146.

[117] *Id.* at 53-55.

[118] *Id.* at 95, 168-77.

[119] *Id.* at 93.

[120] *Id.* at 168.

[121] *Id.* at 172.

[122] *Id.* at 173.

[123] *Id.* at 180. At least partially explaining Rover's delay in demolishing the Stoneman House, Schuman testified that as of fall 2015, when he assessed that the house was not suitable, "there was no rush" on finalizing the plans for operations space, in part due to a then-pending (ultimately terminated) merger with Williams Cos, and several other variables. *Id.* at 172-73.

N. January 25, 2016: Ohio SHPO Offers Consultation to Resolve Adverse Effects, Though Rover Had Not Disclosed its Ownership or Plans for the Stoneman House

On January 25, 2016, the Ohio SHPO provided its initial comments about the Stoneman House to Rover by letter.[124] The SHPO agreed with Rover's assessment that the Stoneman House was a historic property that would be adversely affected by the project. The SHPO asked Rover to continue to consult with it to determine potential adverse effects on the house and appropriate mitigation of those adverse effects.[125]

The SHPO formulated its recommendation based on the incomplete information that had been provided by Rover. In particular, Rover presented information only on the audial and visual impacts of the project and the potential need for a screening plan.[126] Further, because the SHPO still believed that the house was owned by a third party, it believed Rover was limited in the types of mitigation available. That Rover had owned the house for seven months offered other significant mitigation options, including moving the house or preserving it by other documentation methods. Because the SHPO did not know that Rover owned the house, the SHPO's letter provided only that the "Stoneman House retains integrity of material, style, setting, and feeling. The views of the house from Azalea Road and the views from the house to the agricultural fields help to convey the significance of this farm and should be considered as we consult to resolve the adverse effect."[127]

Even on the basis of the incomplete information that had been provided by Rover, the exact nature of the project's adverse effects to the Stoneman House and any mitigation remained unresolved.[128] Lisa Adkins, Architectural Review Manager with the Ohio SHPO, testified that the SHPO expected that in response to its letter Rover would "provide substantial additional information about the property that could support a

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[124] Letter from Amanda Terrell, Division Director, State Historic Preservation Office, to Heather Millis, TRC Environmental Corp. (Jan. 25, 2016) (Ohio SHPO Letter to Rover).

[125] *Id.*

[126] *See supra* part II.G and discussion of Rover's Application.

[127] Ohio SHPO Letter to Rover at 3-4.

[128] Rover's consultants at TRC, for example, continued to discuss by email what the SHPO would ask for from Rover. Email between Heather Millis, Grace Claudy, and Jessica Burr (Feb. 17, 2016) TRC00037-00039.

detailed conversation about effects that are likely to occur as a result of the project."[129] Adkins explained that the SHPO's expectation was based on experience and "the requirements of 36 CFR 800."[130] Specifically, Adkins stated that the law required consulting parties to first "reach concurrence about the likelihood of having an adverse effect on a historic property;" then to "move on toward the next step in that process . . . resolution of adverse effect," which included avoiding, reducing or mitigating those effects.[131]

After receiving the January 25, 2016, letter, Rover discussed how to negotiate with the Ohio SHPO to come to an agreement concerning mitigation. Millis advised Rover that she did not believe that Rover's forthcoming proposal to screen the Stoneman House from the compressor station with trees would be sufficient. Specifically, Millis testified that the Stoneman House was "such a nice property. And I am not an architectural historian, so I don't have a great grasp of how [the SHPO] come to their decisions, but it was a beautiful structure. And it was close to the compressor station."[132] Millis suggested to Rover that the Ohio SHPO might be satisfied with other, "creative" mitigation (discussion of which would have required disclosure of Rover's ownership of the Stoneman House), including moving the Stoneman House elsewhere, or memorializing the house in standards-based video and architectural drawings.[133]

O. February 19, 2016: FERC Reiterates Concern over the Stoneman House in the Rover Project's DEIS

On February 19, 2016, in the midst of Rover and the SHPO's ongoing consultation regarding the Stoneman House, FERC issued its DEIS. It stated, "One resource (CAR0266012) is an 1843 Federal House located across the road from the proposed Mainline Compressor Station 1. If adverse effects to the resource cannot be avoided, a treatment plan to mitigate potential adverse effects would be required."[134]

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[129] Testimony of Lisa Adkins, at 33 (Dec. 14, 2016) (Adkins Test.).

[130] *Id* .at 34.

[131] *Id.*

[132] Millis Test. at 70.

[133] *Id.*

[134] FERC, Rover Pipeline Project, Draft Environmental Impact Statement, Docket No. CP15-93-000, at 4-207 (issued Feb. 19, 2016) (DEIS).

OEP staff separately recommended that prior to construction, Rover visually screen certain compressor stations – including Compressor Station 1 – from *all* neighbors (regardless of historic status). As the DEIS provided:[135]

> Mainline Compressor Station 1 would be constructed within agricultural land and would abut Azalea Road. There are several residences along Azalea Road that would face the compressor station and have a direct line of sight to the facilities. During construction, these residences would be able to view construction equipment and workers. Once the facility is constructed, residents would be able to see most of the buildings and structures, as well as the lighting within the facility and the fences surrounding these areas. Several of the residences have vegetation buffers on their property that may help screen views of the compressor station. Visual impacts during operation would be moderate and permanent.

Accordingly, OEP staff recommended that Rover file with FERC "a visual screening plan for [the Burgettstown Compressor Station and Mainline Compressor Stations 1 and 3] that minimizes the visual impacts on nearby property owners and residences. The plan shall include (but not be limited to) measures to retain existing vegetation buffers, planting of new vegetation screening, and design of structures to mimic the character of existing structures in the area."[136]

P. March 17, 2016: Rover Communications Reference Plan to Tear Down the Stoneman House

During March 2016, Thomason and Millis engaged in negotiations with the SHPO concerning the scope and type of archaeological surveys for the project that were unrelated to the Stoneman House.[137] An internal Rover email exchanged in the context of those negotiations, on March 17, 2016, indicates that destruction of the Stoneman House was still being actively discussed within Rover. Thomason wrote Millis, "maybe we could study the architectural properties we go near or across (like the one at CS1 that we'll likely tear down – I'm half-kidding)?"[138]

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[135] *Id.* at 4-178.

[136] *Id.* at 5-23.

[137] Email between Buffy Thomason and Leon Banta (Mar. 17, 2016) Rover-00011876-80 (Ohio SHPO Issue Email).

[138] Email between Buffy Thomason and Heather Millis (Mar. 17, 2016) Rover-00011882-85.

Q. March 25, 2016: Rover's Response to the DEIS and Landowner List Contain Omissions and Misrepresentations

Rover submitted its response to the FERC DEIS on March 25, 2016.[139] Though the DEIS directly addressed the Stoneman House, Rover did not advise OEP staff and the Commission that it had purchased the Stoneman House in May 2015. Nor did Rover advise OEP staff and the Commission that it was considering demolishing the Stoneman House. Rover submitted its plan for visual screening, which was responsive to staff's recommendation that Rover screen Compressor Station 1 and other compressor stations from all neighboring properties.[140]

Rover also filed its updated Landowner List on March 25, 2016.[141] Though Rover had owned the Stoneman House since May 11, 2015, the Landowner List set forth the following inaccurate ownership information for the Stoneman House: [142]

151	OH-CA-001.200	HUNT	ROBERT J JR & BARBARA A	8468 AZALEA RD SW	DENNISON	OH	44621

When asked why FERC had not been notified that Rover purchased the Stoneman House, Mahmoud testified that he "thought we told [FERC] we owned the house" but did not know when.[143] Mahmoud went on to say that Rover updated "our landowner list throughout and we would have always to disclosed [sic] the ownership of the land for the abutters" but could not identify when this occurred.[144] Contrary to Mahmoud's testimony, none of Rover's filed Landowner Lists disclosed that Rover had purchased the property at 8468 Azalea Road.[145]

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[139] Rover Resp. to DEIS.

[140] *Id.* at B2-7.

[141] Landowner lists are required by 18 C.F.R. § 380.16(c)(7) (2020).

[142] Rover Resp. to DEIS at Volume IV, Attachment 1A, Rover Mainline Abutters FERC List (Excel Spreadsheet) at Tab Carroll, Ln. 17 (filed as privileged material).

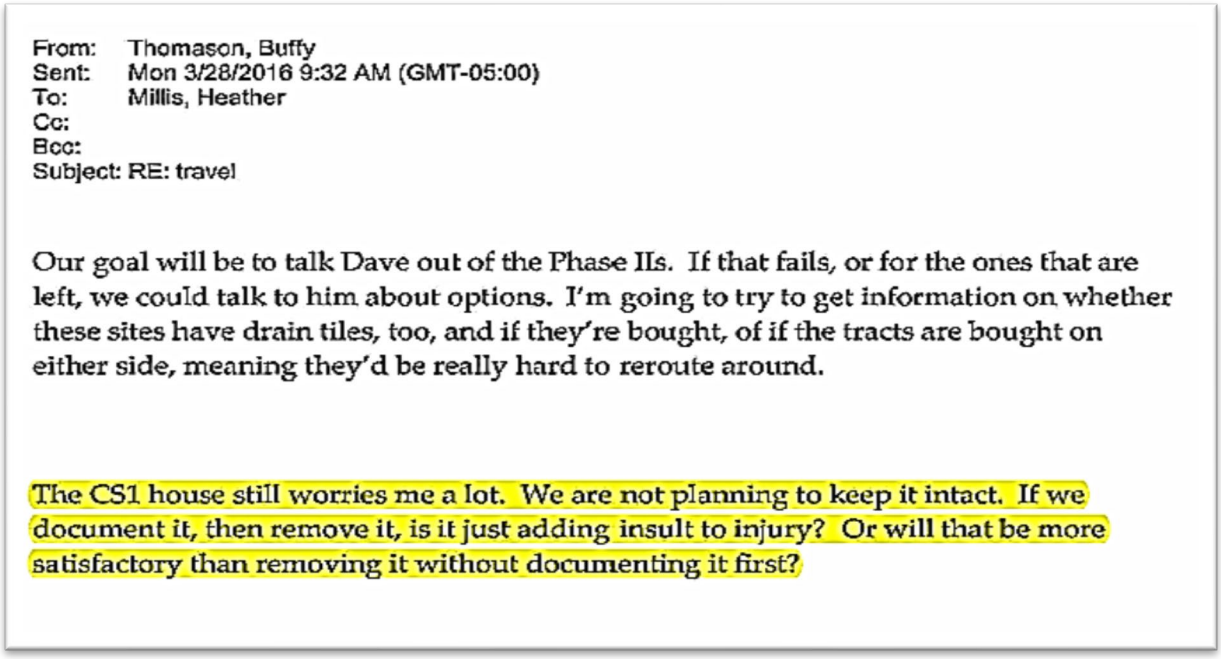
[143] Mahmoud Test. at 127.

[144] *Id.* at 128.

[145] *See generally* Docket No. CP15-93-000. *See also* June 10, 2015 Landowner List, Resource Report 1 – Project Description, Volume IV, Attachment 1A, Updated Mailing List – Mainline, Abutters at 14 ; Rover Response to DEIS at Volume IV,

R. March 28, 2016: Rover Weighs Whether to Tell Ohio SHPO that "we are not planning to keep [the Stoneman House] intact"

On March 28, 2016, in preparation for a scheduled meeting the next day between Rover and the Ohio SHPO, Thomason emailed Millis that Rover planned to demolish the Stoneman House and asked if Rover should tell the Ohio SHPO of its plans:[146]



From: Thomason, Buffy
Sent: Mon 3/28/2016 9:32 AM (GMT-05:00)
To: Millis, Heather
Cc:
Bcc:
Subject: RE: travel

Our goal will be to talk Dave out of the Phase IIs. If that fails, or for the ones that are left, we could talk to him about options. I'm going to try to get information on whether these sites have drain tiles, too, and if they're bought, of if the tracts are bought on either side, meaning they'd be really hard to reroute around.

The CS1 house still worries me a lot. We are not planning to keep it intact. If we document it, then remove it, is it just adding insult to injury? Or will that be more satisfactory than removing it without documenting it first?

Millis advised that Rover not tell the SHPO yet, but raised the idea that the house could still be preserved if Rover was willing to move the house.[147] In testimony, Millis explained that she did not believe Rover was planning to *imminently* demolish the house when she gave that advice.[148] Millis testified that she had never heard of an architectural

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Attachment 1A, Rover Mainline Abutters FERC List (Excel Spreadsheet) at Tab Carroll, Ln. 17.

[146] Email between Heather Millis and Buffy Thomason (Mar. 28, 2016) Rover-00012116-12119. The context and formatting of these emails, as produced by Rover, reveal that Thomason's email precedes Millis's, though the time stamps (perhaps due to different time zones) indicate the reverse.

[147] *Id*.

[148] Millis Test. at 89-90.

resource being destroyed during the consultation process, and that "[i]t did not occur to me . . . that they would remove it before we completed the Section 106" consultation.[149]

Also on March 28, 2016, the day before the meeting with the SHPO, Millis responded to the SHPO's January 25 request for additional information on several Ohio resources. Millis's letter addressed the Stoneman House by continuing to propose screening as a possible mitigation for the project's adverse effects to the house, stating, "[a]s indicated in the accompanying graphic, Rover intends to plant blue spruce trees along Azalea Road across from the Stoneman House that will provide visual and audial screening and mitigate the Project related adverse effects to this resource (Figure 1)."[150] Millis testified that she understood visual screening to be a starting point for negotiations with the SHPO as to what mitigation would ultimately be agreed upon.[151]

S. March 29, 2016: Rover Advises SHPO of Purchase, but Not of Demolition Plans

On March 29, 2016, Rover and the Ohio SHPO met at SHPO headquarters in Columbus, Ohio. Going into the meeting, the SHPO attendees believed that a family owned the Stoneman property and that the house was occupied.[152] During the meeting, Rover notified the SHPO for the first time that Rover had purchased the house.[153] Rover omitted its ownership in the letter sent the previous day, and it remains unclear whether Rover advised in the meeting that it had owned the house for nearly a year.[154] The SHPO told Rover representatives that – in light of the unexpected information that Rover now owned the house – it would have to explore mitigation alternatives, like offering the house to a local historic preservation organization, moving it, or making it available to the public for sale.[155] In a follow-up email, Millis summarized the Ohio SHPO's position

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[149] *Id.* at 71.

[150] Letter from Heather Millis to David Snyder (Mar. 28, 2016) TRC_000078-82.

[151] Millis Test. at 80.

[152] Snyder Test. at 50.

[153] Adkins Test. at 38; Thomason Test. at 221.

[154] Letter from Heather Millis to David Snyder (Mar. 28, 2016) TRC_000078-82.

[155] Adkins Test. at 39-45.

at the meeting, as "[the Ohio SHPO] is likely to ask for more than just the trees, but it is really not clear what."[156]

T. April 5, 2016: Rover Tells Ohio SHPO it Plans to Demolish the Stoneman House; SHPO Expects any Demolition Would Occur Only after Consultation

On April 5, 2016, Thomason called Adkins at the Ohio SHPO, and told her that "we've decided we're going to demolish the Stoneman House, very simply." [157] Upon receiving Thomason's phone call, Adkins did not expect any tear down to be imminent, saying:

> It's been my professional experience that when a demolition might be necessary . . . you need to resolve and conclude consultation about the review before any actions are taken that can preclude alternatives considerations [sic] when you're thinking about effects. So it would never – it did not occur to me that they would take actions in conjunction with the project before they completed their environmental review and their Section 106 review.[158]

Accordingly, Adkins asked Thomason "to please document their decision and provide us with information so that we knew what was going on with the house." Adkins "hoped that through the additional information that they would provide to us about the nature of their decision we could have a conversation that might result in us persuading them not to demolish the building."[159] When Thomason subsequently sent Adkins a one sentence email confirming that Rover intended to demolish the house, Adkins still expected more information to follow, as she explained "it was my expectation that we would continue to consult and that we would still be able to consider alternatives that could reduce the

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[156] Email between Heather Millis, Buffy Thomason, and Patricia Patterson (Mar. 30, 2016) Rover-00012167-68.

[157] Adkins Test. at 48. *See also* email between Buffy Thomason and Lisa Adkins (Apr. 5, 2016) Rover-00012231-32 (Thomason confirming an earlier conversation); *see also* Telephone Conversation Memorandum, Buffy Thomason (Apr. 5, 2016).

[158] Adkins Test. at 52-53.

[159] *Id.* at 48.

effects, if possible. We had not completed consultation as far as our regulations were concerned."[160]

Thomason testified that during her short call to Adkins, she told Adkins that "[t]he house didn't suit our needs, and we were going to remove it."[161] Thomason recalled Adkins asking "if we had considered donating it to a historical society."[162] Thomason testified that Rover had "possibly in passing" considered donating the house to a historical society, but that the house was an impediment to Rover's use of the property. "[T]he way that the property is set up, the house effectively blocks the entrance. So if we submitted it to a historical society, it would seriously affect, if not totally negate our use of the property."[163]

Rover did not inform the Commission of its plan to destroy the Stoneman House during this time frame.

U. May 2016: Rover Demolishes the Stoneman House

During April and May 2016, Rover planned for and completed the destruction of the Stoneman House. In April, Rover solicited and received proposals for asbestos removal and demolition for the Stoneman House and other structures.[164] The process required inspection and sampling of materials from the Stoneman House to prepare an asbestos treatment and demolition plan.[165]

In March or April, Schuman met with the local fire department to discuss the possibility that Rover – as part of community outreach – could allow the fire department

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[160] *Id.* at 49; s*ee also* Email between Lisa Adkins to Dave Snyder (Apr. 5, 2016). Adkins' email to her Ohio SHPO colleague forwarding Thomason's email with the comment "And, this is all I got from her. To be continued . . . ." As Adkins explained in her testimony, the "to be continued . . ." remark was a reflection of her expectation that Rover would send her more information, both in response to the SHPO's January 25, 2016, letter and her request in the March 29 meeting. Adkins Test. at 59.

[161] Thomason Test. at 227.

[162] *Id.*

[163] *Id.* at 227-28.

[164] Email between Leon Banta and John Adamski (Apr. 14, 2016) Rover-00028905-13.

[165] *Id.*; Partners Environmental, Controlled Burn Pre-Demolition Asbestos Survey (May 2, 2016) Rover-00068084-131.

to use the house for a controlled burn.[166] However, because the fire department would have required Rover to "basically tear it down from the inside to allow them to structurally burn it in a safe manner," Banta decided that allowing the fire department the controlled burn "wasn't worth it."[167] Schuman visited the house in April or May with the demolition contractor, in part to make sure the contractor marked the Stoneman House for destruction and the useable outbuildings for preservation.[168]

In April, Rover continued to reach out to other authorities regarding destruction of the Stoneman House but withheld any identifying information from those authorities so that they would not be able to connect the inquiry to the Rover project or the Stoneman House. On April 12, 2016, Millis related to Thomason a conversation Millis had with the Carroll County Regional Planning department stating "I did not tell her anything about myself or the project, but asked about removing an old structure." Millis went on to explain that she hoped to reach the County Historical Society next, saying "I will be equally vague when I do reach them." Thomason responded "[l]et's close the loop. But, yes, please be vague."[169]

Rover then solicited bids for the actual demolition, with Banta and Thomason making the final arrangements for demolition on May 18, 2016:[170]

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[166] *Id*. at 178.

[167] *Id.* at 179.

[168] Schuman Test. at 180-83.

[169] Email between Heather Millis and Buffy Thomason (Apr. 12, 2016) Rover-00012701-02.

[170] Email between Leon Banta and Buffy Thomason (May 19, 2016) Rover-00012826. Thomason testified that her notification to the SHPO consisted of the April 5 phone call. Thomason Test. at 227.

From: Banta, Leon
Sent: Thu 5/19/2016 7:12 AM (GMT-05:00)
To: Thomason, Buffy
Cc:
Bcc:
Subject: RE: Historic house across from CS 1

I have notified the guys to get a schedule to get it taken care of and then move forward. I will share the dates as soon as know they are going to start.

-----Original Message-----
From: Thomason, Buffy
Sent: Wednesday, May 18, 2016 9:47 PM
To: Banta, Leon <Leon.Banta@energytransfer.com>
Subject: Re: Historic house across from CS 1

I am good with it. The SHPO has been informed. I haven't heard anyone cry about it. Thanks for checking, though!

Thank you,
Buffy Thomason
979-571-3113

On May 18, 2016, at 4:00 PM, Banta, Leon <Leon.Banta@energytransfer.com> wrote:

Buffy we have everything in order to demolish the historic house across from CS 1. I am making the final notice before we put it in a truck.....speak now or forever hold your peace!!

Sent from my iPhone

Aside from Thomason's April 5 call to Adkins and her follow-up email, Thomason had not had any further conversations about the Stoneman House with the Ohio SHPO, and had still not responded to the outstanding questions to which Adkins anticipated answers before the pending consultation could be concluded with a recommendation for mitigation.

On May 20, 2016, Banta approved payment for the demolition work.[171] Rover began demolishing the Stoneman House on May 25, 2016:[172]

According to Rover, it completed demolition of the Stoneman House by May 31, 2016.[173]

V. Post-Demolition: Rover Corresponds with the SHPO

After demolition, a June 15, 2016, letter from Millis to the Ohio SHPO addressed the Stoneman House. The letter represented that Rover "intends to remove" the

[171] Email between Leon Banta and Buffy Thomason (May 21, 2016) Rover-00012840-42.

[172] Email between Mark Liston, Stacy McCurdy, and Leon Banta (May 25, 2016) Rover-00057529-31 (transmitting pictures of semi-demolished "haunted" Stoneman House).

[173] *See* Rover Resp. to 2016 EIR at Attachment 1: Timeline.

Stoneman House.[174] The letter further stated "Rover recommends no further consideration of this resource for this Project."[175] Millis testified that the letter was edited and approved by Rover, and that that particular sentence was inserted by Rover during editing as a "gambit" to get the SHPO to agree that Rover did not have to do any mitigation given Rover's demolition of the house.[176] The SHPO took the same meaning. Adkins testified "I took that to mean that they felt that because it was going to be demolished and would no longer be there to be impacted that they felt there would be no mitigation necessary."[177]

The Ohio SHPO did not agree that Rover's intended destruction of the house would alleviate its need to mitigate adverse effects. Still unaware that the house had already been destroyed in May 2016, the Ohio SHPO wrote to Rover on August 12, 2016, and stated "whether the house is to be demolished or to remain in proximity to the proposed Mainline Compressor Station 1, it is our opinion that either alternative will have an adverse effect on this eligible historic property," and requested mitigation.[178] Adkins testified that the SHPO did not learn that the Stoneman House had been demolished until August 18, 2016, through an email from Millis stating that Rover wanted to "discuss mitigation for the two architectural resources on Rover (CAR-622-12 [which is now gone] and CRA-721-03)."[179] Adkins testified "I did not have any understanding as to why [the house was demolished]. No explanation was provided to me, and nothing was provided from the applicant, from Rover, directly, to my recollection."[180]

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[174] Letter from Heather Millis to Amanda Terrell, at 3 (June 15, 2016) Rover-00012905-14. Despite Banta's "final notice" to Thomason about the demolition on May 18, 2016, Thomason testified that she did not know at the time the letter was drafted or reviewed that the house had been demolished. Thomason Test. at 225.

[175] Letter from Heather Millis to Amanda Terrell, at 3 (June 15, 2016) Rover-00012905-14.

[176] Millis Test. at 139.

[177] Adkins Test. at 116.

[178] Letter from Diane Welling to Heather Millis, at 4 (Aug. 12, 2016).

[179] Email between Heather Millis and Lisa Adkins (Aug. 17, 2016) OHSHPO_001512-14 (bracketed text in the original); Adkins Test. at 68-9.

[180] Adkins Test. at 69.

W. July 29, 2016: OEP Issues Final EIS Requesting Treatment Plan to Mitigate Potential Adverse Effects from Rover

On July 29, 2016, unaware that the Stoneman House had been demolished, FERC issued the Final EIS in this matter and addressed the Stoneman House.[181] Specifically, the Final EIS stated "Rover indicated that it would propose screening measures and recommended that the Project would have no adverse effect on this resource. If adverse effects to the resource cannot be avoided, a treatment plan to mitigate potential adverse effects would be required."[182]

X. Fall 2016: Rover's Post-Demolition Explanation to FERC

On August 19, 2016, FERC was notified for the first time – by the ACHP, which had been notified by the Ohio SHPO – that Rover had purchased the Stoneman House on May 11, 2015, and demolished it in May 2016.[183] In response, on September 14, 2016, OEP staff issued a docketed letter to Rover, styled as an EIR. The EIR asked, among other things, for "the basis of Rover's rationale to purchase and demolish the structure" and:

> [A] detailed explanation of why Rover demolished the structure when: i) Rover was aware it was National Register of Historic Places-eligible; ii) the structure had been a topic of discussion since pre-filing; iii) Rover had committed to not adversely affect the property; and iv) Rover had already submitted a visual screening plan for the property.[184]

On September 26, 2016, Rover submitted its response to FERC's EIR, which included the following statements:[185]

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[181] FERC, Final Environmental Impact Statement for Rover Pipeline, Docket No. CP15-93-000 (issued July 29, 2016) (Final EIS).

[182] *Id.* at 4-218.

[183] FERC Letter to ACHP/Timeline of Events.

[184] EIR.

[185] Rover Resp. to 2016 EIR. Portions only are pasted below, for brevity.

Response:

1. On May 11, 2015, Rover Pipeline LLC (Rover) purchased a house (House) situated on 10 acres of property (including outbuildings) located at 8468 Azalea Road in Dennison, Carroll County, Ohio (collectively, the Property). Rover purchased the Property from its then owners in an arms' length transaction because of its central location to Rover's proposed Pipeline and ancillary facilities (together, the Project), as well as the existing and proposed operating facilities of several of Rover's affiliates, with the intent of converting the House into an operating office for the Energy Transfer Company (ETC) owned and affiliated operating assets in the region. Because the House ultimately was determined to be too small and ill-suited for its intended purpose, a decision was made to demolish the structure and two outbuildings and move forward with plans to construct a new structure at the site.

Neither the Property nor the House is or was necessary for the development of the Project or is planned for any use as part of the Project's construction and/or operating footprint. As proposed, the footprint of the Project, including rights-of-way, aboveground facilities, access roads and construction workspace, would not impact the Property. Rover purchased the Property separate and apart from the proposed Project and is managing it as any private landowner would do. Nonetheless, Rover did consult its cultural resources, construction contractor and others to ensure that there were no local, state or federal regulations or ordinances prohibiting the removal of the House (see Attachment 2). Moreover, once the House was determined to be ill-suited for its intended purpose, it was removed in accordance with all laws, ordinances and with all required permits. Notably, the House was never listed as a historic structure on the National Register of Historic Places (NRHP). Rover is unaware of any laws or regulations that would have prevented the removal of a structure on private property, under private ownership, for a private use (see Attachment 2).

c. As reflected above, Rover's purchase of the Property was not for or directly related to the construction and operational footprint of the proposed Project. In this regard, although the House had been identified by Rover as potentially eligible for listing on the NRHP, it was in fact never listed on the NRHP. Moreover, even if it had been listed, as reflected on the NRHP's website, "a property owner can do whatever they want with their property as long as there are no Federal monies attached to the property."[1] As the NRHP website plainly states: "listing in the NRHP places neither restrictions nor requirements on a private property owner. You may do with the property as you wish, within the framework of local laws or ordinances. You are

d. While Rover informed the SHPO of its purchase of the Property and subsequent intent to remove the House as an update to the information included in its January 2015 Report in the context of ongoing consultation, it did not occur to Rover at that time to report this information to the Commission because neither its purchase of the Property nor its removal of the House was directly associated with or a result of the Project, as fully discussed above. In this regard, Rover still intends to implement the proposed visual screening plan as mitigation. However, in retrospect, Rover could have updated its docket with the Commission to reflect that the Property's status had changed.

Thomason drafted the responses and Mahmoud reviewed them and made substantial edits.[186]

Y. Post-Demolition: OEP Staff Determines that Rover Engaged in Anticipatory Demolition

On November 16, 2016, OEP staff consulted the ACHP regarding whether Rover engaged in a potential "anticipatory demolition"[187] of the Stoneman House, under section 110(k) of the NHPA.[188] Section 110(k) prohibits FERC from approving an application if the applicant significantly adversely affected a historic property with the intent to avoid the requirements of section 106.[189]

In a subsequent letter, OEP staff advised the ACHP that "Commission staff believes the Stoneman House was subject to section 106 of the NHPA and that Rover

[186] Thomason Test. at 192-95 (testifying that there were "quite a few [edits]" from Mahmoud that changed the meaning of what she had written, and that she "needed [] him to massage what I had written into something that was more accurate" because she had only a "vague knowledge of what was planned for the facility.").

[187] *See* 54 U.S.C. § 306113 (2012), the codification of section 110(k) of the NHPA.

[188] ACHP, Letter from ACHP to OEP, Docket No. CP15-93-000 (filed Nov. 23, 2016). The violations presented by Enforcement do not require the Commission to re-examine whether section 110(k) applies or to review its assessment (and the ACHP's concurrence) that Rover's actions constituted "anticipatory demolition." The description of the events surrounding the Commission's determinations pursuant to section 110(k) of the NHPA are included only insofar as they provide context for Rover's September 26, 2016, statements. As demonstrated throughout the facts section, significant evidence supports the conclusion that Rover's actions did constitute anticipatory demolition.

[189] 36 C.F.R. § 800.9(c)(1) (2020).

was aware of this fact. As the structure has been demolished . . . the effects are considered adverse . . . . Commission staff's view is that section 110(k) of the NHPA applies to the demolition of the house."[190]

On February 2, 2017, the Commission issued the Certificate Order for the Rover pipeline. The Certificate Order denied Rover's standard request for a blanket certificate pursuant to Part 157, Subpart F, stating,

> Because [the blanket certificate] program allows natural gas companies to undertake certain construction activities, in some cases without even prior notice to the Commission, it depends on the Commission's confidence that a natural gas company will not act contrary to the Commission's regulations and other environmental statutes. Rover's intentional demolition of the Stoneman House raises the question of whether Rover would fully comply with our environmental regulations in future construction activities under a blanket certificate. Therefore, we deny Rover's request for a blanket certificate. In consequence, Commission staff will be able to fully analyze the environmental impacts of Rover's construction that would otherwise occur pursuant to a blanket certificate, prior to the company's being authorized to proceed, thus ensuring that all construction activities by Rover comply with our environmental regulations.[191]

The Commission also stated:

> Rover's commitments made as part of an application or supplements such as environmental mitigation and minimization measures are the basis for determining the degree to which the applicant has taken real and meaningful steps to offset its project impacts. This is the most basic application of our established policy under the Certificate Policy Statement.[192]

The Certificate Order also expressly conditioned the beginning of construction upon Rover's completion of the section 106 consultation, stating "Rover **shall not begin construction of project facilities until FERC** staff concludes its resolution of adverse

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[190] FERC Letter to ACHP/Timeline of Events. FERC and the ACHP nonetheless endorsed certification of the Rover Pipeline project.

[191] Certificate Order,158 FERC ¶ 61,109 at PP 253-54.

[192] *Id.* P 248.

effects as they relate to the Stoneman House, in compliance with section 106 of the National Historic Preservation Act."[193]

Z. Post-Demolition: Memorandum of Understanding and Memorandum of Agreement

Meanwhile, on October 12, 2016, Rover and the Ohio SHPO entered a bilateral Memorandum of Understanding (MOU).[194] Rover agreed to pay the Ohio SHPO $1,331,322.33 (the amount Rover paid for the Stoneman House and its demolition), and to separately establish a $1,000,000 historic education fund in Ohio.[195]

Separately, for the Commission to fulfill its obligations under section 106, a Memorandum of Agreement (MOA) was required to document and explain how Rover would resolve its adverse effects on historic resources, including the Stoneman House. Because the house had been destroyed, the adverse effect to be mitigated was the resource's total destruction, and mitigation options were limited. The February 13, 2017, MOA stated that "the undertaking has an adverse effect on historic properties due to the demolition of the Stoneman House in Carroll County, Ohio and visual effects on architectural resource CRA0072103 in Crawford County, Ohio."[196] The MOA further stated "Rover has proposed plans to resolve the adverse effects of the undertaking on the Stoneman House and provide visual screening at Mainline Compressor Stations 1 and 3."[197] The MOA also provided that Rover would contribute $1.5 million annually for

[193] *Id.* app. B, Environmental Condition 41.

[194] Rover, Memorandum of Understanding: Mitigation Plan for the Preservation of Cultural Resources for the Rover Pipeline Project, Docket No. CP15-93-000 (filed Oct. 12, 2016) (MOU) (filed as Privileged Material) (unlike a Memorandum of Agreement, which is sometimes required pursuant to the NHPA (*see infra* at 196), a Memorandum of Understanding is merely a contractual arrangement between parties).

[195] *Id.*

[196] FERC, Memorandum of Agreement among the Federal Energy Regulatory Commission, the ACHP, the Ohio SHPO, and Rover Pipeline LLC, Docket No. CP15-93-000 (executed Feb. 13, 2017) (Feb. 2017 MOA).

[197] *Id.*

five years to certain historic preservation programs in Ohio.[198] On March 3, 2017, FERC issued the Notice to Proceed with Construction for the Rover pipeline project authorizing Rover to begin constructing the Rover pipeline.[199]

III. Enforcement's Investigation

Enforcement began reviewing this matter in late November 2016, after a referral from OEP (and following Rover's September 26, 2016, response to the EIR). The Commission's February 2, 2017, Certificate Order also stated:

> Our review of the record for this project shows that OEP staff identified the Stoneman House as an issue of concern early-on during the pre-filing process. Seemingly acknowledging this, Rover committed to developing a solution that would avoid the adverse effect on this structure. Nonetheless, despite staff's concern, Rover's commitment, and staff's recommendations in the final EIS, Rover demolished the structure with no prior notice or forewarning. Therefore, in addition to the continued consultation required under the NHPA, we have referred this matter to the Office of Enforcement, for further investigation and action, as appropriate.[200]

During its investigation, Enforcement took the testimony of four Rover employees, two staff members of the Ohio SHPO, and Heather Millis of TRC. Enforcement visited the Ohio SHPO and the site of the former Stoneman House. Enforcement issued several data requests to Rover, the Ohio SHPO, and TRC. Enforcement provided oral preliminary findings on March 2, 2017, and written preliminary findings on April 3, 2017.[201] Rover submitted a written response to preliminary findings on May 3, 2017, which Enforcement reviewed. On July 13, 2017, the Commission issued a Notice of Alleged Violation, indicating its preliminary determination that Rover violated section 7 of the NGA, 15 U.S.C. § 717 (2012), et seq., and section 157.5 of the Commission's Regulations, 18 C.F.R. § 157.7 (2020). Enforcement's subsequent efforts to settle the matter were unfruitful.

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[198] *Id.* Pursuant to an arbitration agreement, the agreement was amended on June 15, 2017, to provide for only one annual payment of $1.5 million to Ohio SHPO. *See* FERC, Amended Memorandum of Agreement among the Federal Energy Regulatory Commission, the ACHP, the Ohio SHPO, and Rover Pipeline LLC, Docket No. CP15-93-000 (executed June 15, 2017).

[199] *Rover Pipeline LLC*, Notice to Proceed with Construction, Docket No. CP-15-93-000 (issued Mar. 3, 2017) (delegated order) (Notice to Proceed with Construction).

[200] Certificate Order, 158 FERC ¶ 61,109 at P 249.

[201] Enforcement Staff Preliminary Findings Letter to Rover (Apr. 3, 2017).

On April 3, 2018, Enforcement notified Rover pursuant to 18 C.F.R. § 1b.19 (2020) that Enforcement staff would recommend to the Commission that it issue an order to show cause why Rover should not be made the subject of a public enforcement proceeding and pay a civil penalty.[202] Along with the notice, OE staff provided Rover with access to transcripts and videos of the testimony taken in the investigation, as well as copies of documents produced by third parties. Rover provided its response on June 15, 2018.[203] Rover's primary defenses are addressed in part V.C.

IV. Legal Framework

Among other federal laws, applications for proposed natural gas pipelines must comply with the NGA and NHPA. The NGA controls all applications for certificates to construct and operate interstate natural gas pipelines. The NHPA requires that the Commission consider the impacts of any such undertaking, including a pipeline and its appurtenant facilities, on historic properties. In the discharge of its NHPA obligation, the Commission's regulations require that applicants identify historic and cultural resources, the adverse effects their proposed project may have on such resources, and their plan for mitigating those adverse effects. That plan must be developed as part of a consultative process between the applicant, the SHPO, other stakeholders, and OEP staff. No certificate may issue and/or construction may proceed[204] until the applicant undertakes the required steps and files the corresponding information with the Commission.

A. The NGA Governs Natural Gas Pipeline Applications

The Commission reviews applications for construction and operation of interstate natural gas pipelines under authority of section 7 of the NGA. Any entity seeking to

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[202] Enforcement Staff 1b.19 Letter to Rover (Apr. 3, 2018).

[203] Rover 1b.19 Response.

[204] In cases where the section 106 consultation is not complete prior to issuing a certificate, as here, the Commission may issue a certificate conditioned upon completion of the section 106 consultation, which includes mitigation of adverse effects. Here, the Commission stated "[w]e will defer to ongoing consultations by Commission staff to develop any appropriate mitigation measures. Because the adverse effects to the Stoneman House requires additional consultation by Commission staff, we have also added Environmental Condition 41, which states that construction of project facilities may not begin until staff concludes its resolution of adverse effects as they relate to the Stoneman House." Certificate Order, 158 FERC ¶ 61,109 at P 247. Engineering condition 41 stated, "Rover **shall not begin construction of project facilities until FERC** staff concludes its resolution of adverse effects as they relate to the Stoneman House, in compliance with section 106 of the National Historic Preservation Act." *Id.* P 120.

construct and operate an interstate natural gas pipeline must apply to the Commission for a Certificate of Public Convenience and Necessity. The Commission will issue a certificate only if "it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder" and if construction and operation of the pipeline "is or will be required by the present or future public convenience and necessity."[205] The NGA provides that "[t]he Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."[206]

NGA section 7(d) requires that applications for certificates "shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information . . . as the Commission shall, by regulation, require."[207] The relevant regulations implementing this statutory mandate are set forth primarily in Part 157 of Title 18 of the Code of Federal Regulations. Section 157.5 sets forth the "purpose and intent" of the regulations applicable to applications for certificates. Section 157.5 mandates that all such applications "shall set forth all information necessary to advise the Commission fully concerning the operation, sales, service, construction, extension, or acquisition for which a certificate is requested."[208] Section 157.5(b) further establishes that "every requirement of this part shall be considered as a forthright obligation of the applicant."[209]

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[205] 15 U.S.C. § 717f (2012).

[206] *Id.*

[207] *Id.* § 7(d).

[208] 18 C.F.R. § 157.5(a).

[209] *Id.* § 157.5(b). *See* discussion *infra* at part IV.D. Further, section 157.14 of the Commission's regulations identifies all exhibits that must accompany a certificate application under NGA section 7. Section 157.14(a)(7) of the Commission's regulations requires that a certificate application must include an Environmental Report as specified in sections 380.3 and 380.12 of the Commission's regulations. 18 C.F.R. § 157.4(a)(7) (2020).

B. The NHPA Requires FERC to Take into Account the Effect of Proposed Pipelines on Historic Properties

In 1966, Congress passed the NHPA to define the federal government's responsibilities concerning the preservation of historic properties,[210] finding that "the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development."[211] NHPA treats historic properties on federal land or under federal control, as well as privately held historic resources that are "potentially affected by agency actions" (like the Stoneman House) as federal "undertakings."[212] For all federal undertakings, the NHPA requires that implementing agencies ensure that affected resources are "given full consideration in planning."[213]

To afford such consideration, the NHPA requires that federal agencies like FERC implement a "process for the identification and evaluation of historic property,"[214] which must include "consultation with State Historic Preservation Officers, local governments, [and other stakeholders, as applicable]."[215] "The goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties."[216]

Though the NHPA is primarily a process-oriented statute, its "teeth" are found in section 106.[217] Section 106 prohibits federal agencies such as the Commission from granting permits before conclusion of the consultation process, stating "the head of

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[210] NHPA defines "historic property" as "any prehistoric or historic district, site, building, structure, or object included on, or eligible for inclusion on, the National Register." 54 U.S.C. § 300308 (2012).

[211] NHPA § 1(b)(2).

[212] 54 U. S. C §§ 306102(b)(3), 300320 (2012).

[213] *Id.* § 306102(b)(3).

[214] *Id.* § 306102(b)(5)(B).

[215] *Id.*

[216] 36 C.F.R. § 800.1(a).

[217] NHPA has been characterized as "a procedural, action-forcing statute designed to ensure that cultural resources are identified and considered in the decision[-]making process." *Wyo. Indep. Producers Ass'n,* 133 IBLA 65, 66 (IBLA 1995). Section 106 has also been described as a "stop, look, and listen" provision. *Ill. Commerce Com'n v. I.C.C.*, 848 F.2d 1246, 1261 (D.C. Cir. 1988).

any . . . independent agency having authority to license any undertaking, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property."[218]

The NHPA further requires agency compliance with the requirements of section 106 by providing, in section 110(k) that "[e]ach Federal agency shall ensure that the agency will not grant a . . . permit . . . to an applicant that, with intent to avoid the requirements of section [106 of the NHPA], has intentionally significantly adversely affected a historic property to which the grant would relate."[219]

C. FERC Requires Information from Applicants so It Can Take into Account a Project's Effects on Historic Properties

The section 106 process for applications occurring under section 7 of the NGA is governed by the Commission's regulations at 18 C.F.R. pt. 380 (2020)[220] as well as the NHPA regulations at 36 C.F.R. pt. 800. Further guidance to applicants for preparing materials to be used for section 106 compliance are contained in OEP's *Guidelines for Reporting on Cultural Resources Investigations for Natural Gas Projects*.[221] Pursuant to those regulations and guidelines, the section 106 consultation must be completed before the Commission may issue a Notice to Proceed with Construction; and the applicant must memorialize that consultation in its application and subsequent filings.[222]

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[218] 54 U.S.C. § 306108 (2012); *see also* 36 C.F.R. § 800.1(c). *See supra* footnote 204 stating that FERC issues conditional certificates but no construction may proceed until the section 106 process is completed.

[219] 54 U.S.C. § 306113.

[220] The relevant sections of Part 380 of the Commission's regulations, specifically sections 380.12 and 380.14 of the Commission's regulations were last amended in 2012 pursuant to *Technical Corrections to Commission Regulations*, Order No. 756, 138 FERC ¶ 61,032 (2012).

[221] FERC, Office of Energy Projects, Guidelines for Reporting on Cultural Resources Investigations for Natural Gas Projects (July 2017), https://www.ferc.gov/industries/gas/enviro/guidelines/cultural-guidelines-final.pdf (OEP Guidelines). The 2002 version is available at https://www.ferc.gov/industries/gas/enviro/AD15-10.pdf.

[222] 18 C.F.R. § 380.12(f)(3) (2020); *id* § (f)(5) ("construction may not begin until all cultural resource reports and plans have been approved.").

The consultation must "identify historic properties potentially affected" by a proposed natural gas pipeline and "seek ways to avoid, minimize or mitigate any adverse effects on historic properties." [223] The consultation begins before an application is filed and must be addressed by the application itself. [224] Often, the consultation starts, as it did here, during the Commission's pre-filing process.[225] The stakeholders whom the applicant must consult are "Commission staff, the [State Historic Preservation Officers], and any applicable [Tribal Historic Preservation Officers] and land-management agencies."[226]

The vehicle in which applicants identify historic resources, potential adverse effects, and proposed mitigation is primarily Resource Report 4. Resource Report 4 – relating to cultural resources – is one of several Resource Reports required to be submitted with an application for a certificate. Generally, Resource Reports are divided according to the type of resource addressed (i.e., geological, water, cultural), numbered, and appended to the application.[227]

The substance required to be submitted to the Commission concerning historic properties is set forth in part in 18 C.F.R. § 380.12(b), which requires that all Resource Reports:

- address conditions or resources that might be directly or indirectly affected by the project;
- identify significant environmental effects expected to occur as a result of the project;

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[223] 36 C.F.R. § 800.1(a).

[224] 18 C.F.R. § 380.12(f)(2). Applicants are required to file documentation of its "initial cultural resources consultation" with their Application for a Certificate of Public Convenience and Necessity. *Id.*

[225] Pre-filing is a benefit available for prospective certificate applicants, upon their request and subsequent approval by OEP staff. 18 C.F.R. § 157.21(b) (2020). *See also* FERC, Pre-Filing Environmental Review Process (schematic), https://www.ferc.gov/resources/processes/flow/lng-1.asp. Once an application is filed, Commission *ex parte* rules apply. 18 C.F.R. § 385.2201(a) (2020). Pre-filing allows the potential applicant to communicate informally with staff without *ex parte* restrictions.

[226] 18 C.F.R. § 380.12(f)(3); *see also* 54 U.S.C. § 302303(b)(9) (2012) (SHPOs are required to consult with Federal agencies on "(A) Federal undertakings that may affect historic property; and (B) the content and sufficiency of any plans developed to protect, manage, or reduce or mitigate harm to that property.").

[227] 18 C.F.R. § 380.12.

- identify the effects of construction, operation and termination of the project, as well as cumulative effects resulting from existing or reasonably foreseeable projects; and
- identify proposed measures to enhance the environment or to avoid, mitigate, or compensate for adverse effects of the project.[228]

In addition, Resource Report 4 must include a detailed Survey Report, which identifies all cultural resources within the area of potential effects[229] and ultimately whether part of the initial application or supplemental filings, Treatment Plans for mitigating the adverse effects of a project on historic properties.[230]

The NHPA regulations set out a non-exclusive list of adverse effects which begins with "[p]hysical destruction of or damage to all or part of the property"[231] and provide that an adverse effect:

> [I]s found when an undertaking may alter . . . any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Consideration shall be given to all qualifying characteristics of a historic property, including those that may have been identified subsequent to the original evaluation of the property's eligibility for the National Register. Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative.[232]

Ultimately, the NHPA regulations impose the responsibility for ensuring the section 106 process has been followed on the federal agency that is permitting the project. The agency is to base its evaluation on the information developed during the consulting process and provided to it in the application made prior to the Commission's

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[228] *Id.*

[229] *Id.* § 380.12(f)(1)-(2), *see* discussion of the "area of potential effects," *supra* note 53 and *infra* note 303.

[230] *Id.* § 380.12(f)(3) (requiring at 18 C.F.R. § 380.12(f)(3)(iii) that treatment plans be implemented only after any certificate issues); *see also* OEP Guidelines at 21-23.

[231] 36 C.F.R. § 800.5(a)(2) (emphasis added).

[232] *Id.* § 800.5(a)(1).

issuance of the Notice to Proceed with Construction.[233] The permitting agency is also required to take into account any comments provided by the public. [234]

For certificate applications, the Commission articulates its analysis of a project's impact on cultural resources (as well as on other environmental elements) in its Environmental Impact Statement (EIS), which it in turn bases on information provided to it by applicants, including – as relates to cultural resources – in Resource Report 4 and its supplements.

D. Commission Regulations, at 18 C.F.R. § 157.5, Require Full, Complete, and Forthright Applications

Pursuant to section 7(d) of the NGA, pipeline applications are to be made "under oath . . . and in such manner as the Commissions shall, by regulation, require."[235] Part 157, in turn, includes a "forthright obligation" that applications include "all information necessary to advise the Commission fully concerning the operation, sales, service, construction, extension, or acquisition for which a certificate is requested."[236] The Commission has interpreted 18 C.F.R. § 157.5 as a straightforward mandate that

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[233] *Id.* ("In consultation with the SHPO . . . the agency official shall apply the criteria of adverse effect to historic properties within the area of potential effects."); *see also* 36 C.F.R. § 800.11 (2020) ("[t]he agency official shall ensure that a determination, finding, or agreement under the procedures in this subpart is supported by sufficient documentation to enable any reviewing parties to understand its basis."); *see also* ACHP, Preservation Initiatives, Guidance on Agreement Documents, https://www.achp.gov/initiatives/guidance-agreement-documents (noting "[a] fundamental goal of section 106 consultation is to ensure an agency's decision on carrying out, financially assisting, licensing, or permitting an undertaking is well informed regarding effects to historic properties and the views of others regarding those effects.").

[234] *See* 36 C.F.R. § 800.5(a) ("[T]he agency official shall consider any views concerning such effects which have been provided by consulting parties and the public."); and 36 C.F.R. § 800.6(a)(4) (2020) ("The agency official shall provide an opportunity for members of the public to express their views on resolving adverse effects of the undertaking. . . . The agency official should also consider the extent of notice and information concerning historic preservation issues afforded the public at earlier steps in the section 106 process to determine the appropriate level of public involvement when resolving adverse effects so that the standards of § 800.2(d) are met.").

[235] 15 U.S.C. § 717f. As required, Rover's February 20, 2015, Application filing was sworn by Stephen T. Veatch, Senior Director of Certificates. *See supra* footnote 86.

[236] 18 C.F.R. § 157.5.

"requires an applicant fully and forthrightly, to disclose all information relevant to the application."[237]

1. Regulatory text of section 157.5

The Commission adopted 18 C.F.R. § 157.5 in 1952, as part of a comprehensive effort to standardize and improve pipeline applications. The Commission sought in part, as it stated in the Notice of Proposed Rulemaking, to (1) eliminate "sketchy and incomplete applications requiring extensive correspondence to supply deficiencies by placing upon the applicant the burden of adequate presentation of certificate applications in intelligible form" and (2) require "general improvement in the form and content of applications."[238] The regulation, particularly in the highlighted portions below, repeatedly underscores an applicant's obligations for forthrightness:

> (a) Applications under section 7 of the Natural Gas Act shall set forth all information necessary to advise the Commission fully concerning the operation, sales, service, construction, extension, or acquisition for which a certificate is requested or the abandonment for which permission and approval is requested. Some applications may be of such character that an abbreviated application may be justified under the provisions of § 157.7. Applications for permission and approval to abandon pursuant to section 7(b) of the Act shall conform to § 157.18 and to such other requirements of this part as may be pertinent. However, every applicant shall file all pertinent data and information necessary for a full and complete understanding of the proposed project, including its effect upon applicant's present and future operations and whether, and at what docket, applicant has previously applied for authorization to serve any portion of the market contemplated by the proposed project and the nature and disposition of such other project.
>
> (b) Every requirement of this part shall be considered as a forthright obligation of the applicant which can only be avoided by a definite

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[237] *Black Marlin Pipeline Co.*, 4 FERC ¶ 61,039, at 61,088 (1978).

[238] *Application for Certificates of Public Convenience and Necessity*, Notice of Proposed Rulemaking, 16 Fed. Reg. 2400 (Mar. 6, 1951) (NOPR). The NOPR also aimed for a rule that would provide a way for minor projects to apply in summary form, a provision adopted in the final rule and presently available under 18 C.F.R. § 157. As noted by the Commission in its rulemaking, which projects would qualify as minor was a matter of debate. However, the final rule made all applications, regardless of the scope of the project or the availability of less burdensome summary applications, subject to the "forthright obligation" captured in section 157.5's "Purpose and Intent of Rules."

> and positive showing that the information or data called for by the applicable rules is not necessary for the consideration and ultimate determination of the application.
>
> (c) This part will be strictly applied to all applications as submitted and the burden of adequate presentation in intelligible form as well as justification for omitted data or information rests with the applicant.

The highlighted portions also underscore that the obligation for forthrightness applies to all application filings.[239]

2. Commission's application of section 157.5

In *Black Marlin,* Black Marlin sought and obtained a Certificate of Public Convenience and Necessity to transport natural gas from the Den Field, located in the Gulf of Mexico, off of Texas' Bolivar Peninsula, to the Union Carbide chemical plant in Texas City, Texas.[240] However, Black Marlin subsequently used its certificate to transport gas from the Chevron and Gulf reserves located near – but not in – the Den Field.[241] *Black Marlin* later sought authority, pursuant to NGA section 7, to continue transporting from the Chevron and Gulf reserve gas.[242] The Commission found that *Black Marlin* "was considering transporting the Chevron and Gulf gas or other gas from outside the Den Field prior to obtaining its 1966 certificate" though *Black Marlin* had not included that information with its application. [243]

The Commission found *Black Marlin* in violation of section 157.5, and underscored the importance of including all relevant information in the application, noting:

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[239] As OEP made clear in its February 11, 2015, pre-filing letter to Rover, an application is not complete until all "relevant" content and "necessary information" is provided to the Commission in its initial filing or through "supplemental" filings. *See supra* section II.E. *See also Panhandle E. Pipeline Co.*, 386 F.2d 607, 610 (3d Cir. 1967) (explaining that when considering a certificate application, "[t]he Commission must see to it that the record is complete and that all relevant facts are before it.") (citation omitted).

[240] *Black Marlin,* 4 FERC at 61,086-87.

[241] *Id.*

[242] *Id.*

[243] *Id.* at 61,088.

> If Black Marlin, at the time of its application, planned, either then or in the future, to transmit gas from sources other than the Den Field, it should have made an explicit reference to such service . . . [a] decision to the contrary would invite the submission of applications drafted with studied ambiguity, in an effort to expand the scope of the resulting certificate as far as possible.[244]

The Commission's decision in *Black Marlin* turned on the fact that other documents not of record in Black Marlin's certificate proceedings "show[ed] a contrary *intention*," and that "Black Marlin was *considering*" taking a course of action that was different from what was set forth in its certificate application and thus was obligated to inform the Commission.[245] The Commission found that 18 C.F.R. § 157.5 "requires an applicant fully and forthrightly, to disclose all information relevant to the application."[246]

E. Commission Regulations Require Applicants to Submit to FERC All Necessary or Relevant Information to Comply with NHPA

Within Part 380 of the Commission's regulations, specific provisions direct the types of information that must be submitted with a certificate application consistent with the requirements of the NHPA.[247] Pursuant to 18 C.F.R. § 380.3(a)(1), any proposed action requiring an environmental report, including Resource Report 4,[248] must "follow the principles" of compliance with NHPA as laid out in section 380.14 of the

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[244] *Id.* (citations and internal quotation marks omitted). The Commission also found that Black Marlin "willfully and knowingly" violated NGA section 7 and the Commission's Regulations, in violation of section 21, which prescribes criminal penalties for willful and knowing violations, though the Commission noted that it would "not refer the matter to the Department of Justice at this time." *Id.* at 61,090. OE staff does not here allege a criminal violation, or recommend a criminal referral by the Commission.

[245] *Id* (emphases added).

[246] *Id.* at 61,088.

[247] Specifically, sections 380.3(c)(2) and 380.6(a)(6)(3) of the Commission's regulations identify the types of natural gas projects that are required to submit an environmental impact statement. 18 C.F.R. §§ 380.3(c)(2) and 380.6(a)(6)(3) (2020). The format and requirements of an environmental impact statement are codified at 18 C.F.R. §§ 380.7 to 380.12 (2020).

[248] 18 C.F.R. § 380.12(f).

Commission's regulations.[249] Further, section 380.3(b) of the Commission's regulations, states that an applicant must provide "all necessary or relevant" environmental information to the Commission."[250] Section 380.3 of the Commission's regulations complements section 157.5 of the Commission's regulations, which more broadly addresses the NGA section 7 certificate application process, by ensuring that the Commission is apprised of information relevant to its specific environmental and cultural resource-related statutory obligations.[251]

V. Analysis & Findings

A. Rover Misled the Commission through Misleading Commitments in its Application Filings, and by Omitting Truthful Information

In its Application filings, Rover kept the truth about its efforts to purchase and destroy or repurpose the Stoneman House from the Commission. Instead, it misled the Commission by affirming that it was "committed to a solution that results in no adverse effects to this resource." [252] Rover's misrepresentations and omissions constitute a clear violation of section 157.5's mandate that pipeline applications contain full and forthright information.[253]

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[249] *Id*; 18 C.F.R. § 380.14 (2020). Section 380.14 of the Commission's regulations requires the non-federal party to "assist the Commission in meeting its obligations under NHPA 106 and the implementing regulations at 36 CFR part 800 by following the procedures at section 380.12(f) (requiring Resource Report 4).

[250] 18 C.F.R. § 380.3(b)(1).

[251] Part 157 explicitly incorporates section 380.3 of the Commission's regulations by requiring all applications to include environmental reports as exhibits. 18 C.F.R. § 157.14 (2020). In the certificate proceeding, the Commission's Order on Clarification and Denying Rehearing, relied in part on 18 C.F.R. § 380.3, in finding that "[p]roject sponsors are required to show documentation of required consultation with the appropriate SHPO. The project sponsor is also under an ongoing obligation to supplement its application with relevant information, namely any known changes to the proposed project's effects, during the NEPA process. Rover did neither." Certificate Order at P 15.

[252] Rover Application at Volume IIA, Resource Report 4 at 4-11.

[253] Considering Rover's continuing forthright obligation to provide full and complete information in support of its broader application under section 157.5, and its obligation under section 380.3 to provide all necessary or relevant information specific to its environmental reports, multiple discrete misrepresentations and/or omissions occurred

1. Rover misrepresented its commitment from the outset

When Rover submitted its initial Application filings on February 20-23, 2015, it was already negotiating with the then-owners to purchase the Stoneman House. On February 10, 2015, Thomason wrote Mahmoud "I know we are trying to buy the house." Mahmoud responded "[h]opefully we can buy it."[254] On February 19, 2015, Roberts emailed Banta and Thomason to advise that the "[o]wners of the historical house at Leesville want a year to get all their stuff off of the property" and to ask what kind of purchase option Rover should use to purchase the property.[255] Furthermore, prior to Rover's February 20-23, 2015, Application filings, Mahmoud had already told Rover employees of his intent to tear down the Stoneman House. Indeed, the day before the initial Application filings were submitted, Vedral asked Banta, Thomason, and Roberts "[i]s there any type of special protection for the historical house, I have no idea? *I remember Joey said to tear it down.*"[256] Similar to the applicant in *Black Marlin,* the contemporaneous evidence demonstrates that when Rover was filing its application, it

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which would have independently triggered a violation under both regulatory provisions. In particular, as detailed in this section, each of the following misrepresentations or omissions could be considered independent violations: Rover's February 20-23, 2015, Application stating, it was "committed to a solution that results in *no adverse effects* to the Stoneman House"; Rover's April 22, 2015, response to a FERC data request regarding Resource Report 4, failing to disclose that Rover was negotiating to purchase the House; Rover's March 25, 2016, response to the Commission's DEIS, failing to disclose that Rover: (1) had purchased the Stoneman House ten months earlier; (2) had long-considered demolition (for at least 13 months); and (3) was in the midst of finalizing plans to demolish the house; Rover's final decision to destroy the house without informing the Commission; Rover's May 2016 demolition of the house without informing the Commission; and Rover's September 26, 2016, post-demolition explanations provided to OEP that were false and misleading.

[254] *See* CS1 Historical House Email. The February 10, 2015, email exchange – taken alone – is unclear regarding Rover's plans for the house upon purchase. Mahmoud, evidently having reviewed TRC's detailed description and photographs of the house, wrote "[l]ooks nice. Even if they will not sell, we should not impact." Based on the exchange that followed (including Mahmoud's comment that they should decorate the compressor station with "a few deer and ducks and a flamingo") it is unclear what the meaning of the "we should not impact" is. *Id.* As further discussed herein, Mahmoud has acknowledged that "it was always part of our plan" to demolish the Stoneman House after purchasing it. Mahmoud Test. at 92.

[255] Leesville Historical House Email.

[256] *Id.* (emphasis added).

had already developed a "contrary intention" and "was considering" taking a course of action that was different from what was set forth in its Application.[257]

When Rover submitted its initial Application filings from February 20-23, 2015, it did not tell the Commission that it was negotiating to buy the house or that it was considering demolishing it. To the contrary, Rover repeatedly assured the Commission of the opposite, averring that "Rover is committed to a solution that results in *no adverse effects* to the Stoneman House."[258] Tearing down the Stoneman House was indisputably an adverse effect. The NHPA regulations that define adverse effects list first "[p]hysical destruction of or damage to all or part of the property."[259] Central to the MOU and the MOA agreed to by Rover after the home was destroyed is Rover's concession that its destruction of the Stoneman House was an adverse effect (i.e., the MOA provides "the undertaking has an adverse effect on historic properties due to the demolition of the Stoneman House").[260] Destruction of a historic resource is the ultimate, irreversible adverse effect. Rover could not simultaneously have been planning for it and intending to avoid it, as it claimed to be when it stated that it was "committed to a solution that results in no adverse effects."[261]

2. Rover omitted and concealed important information from its March 25, 2016 Application filing

Rover was obligated to notify the Commission of its ownership of the Stoneman House and chose not to do so.

Rover's March 25, 2016, Landowner List misrepresented Rover's ownership of the house. Mahmoud testified that Rover's Landowner Lists were the mechanism by which Rover advised FERC of its purchase of the Stoneman House.[262] But ten months after Rover closed on the Stoneman House, and around the same time Mahmoud testified that Rover was "finalizing" plans to demolish it, Rover listed Barbara and Robert Hunt as the owners of the house. Rover thus failed to advise the Commission in its Landowner List that Rover was the current owner of the property. In its September 26, 2016, response to OEP staff's questions about its demolition of the house, Rover acknowledged

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[257] *Black Marlin*, 4 FERC at 61,088.

[258] Rover Application at Volume IIA, Resource Report 4 at 4-11.

[259] 36 C.F.R. § 800.5(a)(2)(i).

[260] Feb. 2017 MOA at 2.

[261] Rover Application at Volume IIA, Resource Report 4 at 4-11.

[262] Mahmoud Test. at 127-128 ("[O]ur landowner list . . . would have always to [sic] disclosed the ownership of the land for the abutters.").

"in retrospect, Rover could have updated its docket with the Commission to reflect that the Property's status had changed."[263]

When Rover filed its response to the Commission's DEIS on March 25, 2016, it was again required to provide a full and forthright update on the status of the Stoneman House.[264] The DEIS addressed the Stoneman House issue directly, reminding Rover that "[i]f adverse effects to the resource cannot be avoided, a treatment plan to mitigate potential adverse effects would be required."[265] At that time, Rover: (1) had purchased the Stoneman House ten months earlier; (2) had long-considered demolition (for at least 13 months); and (3) was in the midst of finalizing plans to demolish the house.[266] Rover did not disclose any of this in its March 25, 2016, filing with the Commission. Instead, it perpetuated and advanced the misrepresentation initially made in its February 2015 Application filing that it was "committed to a solution that results in no adverse effects" by submitting visual screening plans for the Stoneman House.[267] Those screening plans furthered Rover's misrepresentation by conveying that the adverse impact at issue was merely audial and visual.[268]

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[263] Rover Resp. to 2016 EIR at 4.

[264] Three days later, on March 28, 2016, Rover discussed internally whether to tell the Ohio SHPO of its plans to destroy the Stoneman House and decided not to do so. *See* Email between Heather Millis and Buffy Thomason (Mar. 28, 2016) Rover-00012116-12119. In a meeting with the Ohio SHPO the next day, Rover told the SHPO for the first time that it had purchased the house, but still did not reveal its plans to destroy it. Adkins Test. at 38; Thomason Test. at 221.

[265] DEIS at 4-207.

[266] A week earlier, on March 17, 2016, Thomason acknowledged "we'll likely tear down [the Stoneman House] – I'm half-kidding." Email between Buffy Thomason and Heather Millis (Mar. 17, 2016) Rover-00011882-85.

[267] Rover Application at Volume IIA, Resource Report 4 at 4-11; Rover Resp. to DEIS, Appendix B-2 at B2-7.

[268] Perhaps revealing its ultimate plan for destruction of the Stoneman House, Rover never *voluntarily* developed mitigation measures for the house. Rover only developed the screening plans in response to OEP staff's recommendation in the DEIS that Rover develop visual screening plans for specified compressor stations. DEIS at 4-180 to 4-281 and 5-23. Rover obliged with that request by developing the misleading screening plans. Rover Resp. to DEIS, Appendix B-2 at B2-7.

On April 11, 2015, Rover expressly contemplated whether to inform the Commission of the potential purchase of the Stoneman House in response to the Commission's April 2, 2015, EIR. Thomason stated "I haven't decided how much of that I want to say yet" regarding the purchase.[269] When Rover submitted its response on April 22, 2015, it opted not to disclose that it was negotiating to purchase the Stoneman House.[270]

3. Rover failed to inform the Commission when it finalized plans to demolish the Stoneman House

Consistent with the February 2015 stated objective of tearing down the Stoneman House, Rover finalized those plans between March 17 and April 5, 2016.[271] Rover did not advise the Commission of its decision.

When Rover tore down the Stoneman House in May 2016, it similarly failed to advise the Commission. The destruction of the Stoneman House materially impaired the Commission's consideration of the Rover Project. Rover itself had identified the Stoneman House as the object of an adverse effects analysis. That analysis was pending before the Commission. It was for this reason that Rover's own consultant, Heather Millis, recommended that Rover *not* tear down the Stoneman House while its Application was pending. As Millis reminded Rover, demolition would directly contradict the commitment Rover made in its Application "we [] told FERC that we would work [] . . . to get to a place where there was no adverse effect."[272] The Ohio SHPO's Adkins similarly viewed demolition of the house during the pending consultation as beyond the realm of possibility, stating "it did not occur to me that they would take actions in conjunction with the project before they completed their environmental review and their

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[269] Data Request Email.

[270] Rover Resp. to 2015 EIR at 91.

[271] Email between Buffy Thomason and Heather Millis (Mar. 17, 2016) Rover-00011882-85 (Thomason emailed Millis "we'll likely tear down [the Stoneman House] – I'm half-kidding."); Adkins Test. at 48 (Adkins testified that on April 5, 2016, Thomason called Adkins, and told her "we've decided we're going to demolish the Stoneman House, very simply."). *See also* email between Buffy Thomason and Lisa Adkins (Apr. 5, 2016) Rover-00012231-32 (Thomason emailed Adkins, "per our conversation, please accept this email as documentation that Rover intends to remove the Stoneman House) ; *see also* Telephone Conversation Memorandum, Buffy Thomason (Apr. 5, 2016) (memorializing April 5th conversation).

[272] Hunt Purchase Option Email.

Section 106 review."[273] Prior to the destruction, had the Commission known that Rover owned the Stoneman House, it could have issued a certificate conditioned on Rover's preservation of the historic elements of the Stoneman House. For example, the Commission could have required Rover to avoid adverse impact to the house by relocating the compressor station, moving the house to another location, donating the house to be maintained by a historic society, documenting the historic house by photograph, measured drawings, video, or other archive techniques, or taking other mitigating measures. When Rover destroyed the house, those options became entirely unavailable.

4. Rover intentionally misrepresented and omitted information

Rover's misrepresentations and omissions were purposeful and intentional.[274] First, as to the omissions, the evidence reveals that Rover repeatedly considered and rejected telling FERC about the purchase and demolition of the house. On February 10, 2015, as Thomason was preparing Resource Report 4 for submission with the initial Application filing, she asked Banta and Mahmoud, "I know we're trying to buy the house, but *what do I put in the filing*?"[275] On April 11, 2015, in emails discussing a pending FERC data request concerning Resource Report 4, Thomason wrote Millis, "We're purchasing the house, but we haven't closed on it yet. The landowners are happy, it's just a matter of time to get it done. *I haven't decided how much of that I want to say yet*."[276] And again on May 28, 2015, Thomason acknowledged debating how much to disclose to FERC, writing Patterson "**[w]hat do you think about saying we're closed on the historical house in the cultural updates for this filing? Let it lie?**"[277] In their next filing, Rover again chose not to notify FERC that it was the true owner of the Stoneman House. The house continued to trouble Thomason into 2016. When Thomason and Millis concluded that they would reveal to the SHPO that they purchased the house (keeping plans for destruction still hidden) Thomason stated "[t]he CS1 house still

[273] Adkins Test. at 52-53.

[274] Intent is not an element required to prove a violation of 18 C.F.R. § 157.5. Nevertheless, Rover's intentional actions and intent to mislead and conceal material information from the Commission provide important context in making a determination regarding Rover's forthrightness.

[275] CS1 Historical House Email (emphasis added).

[276] Data Request Email (emphasis added).

[277] Email chain between Buffy Thomason and Patricia Patterson (May 28, 2015) Rover-00005540.

worries me a lot. We are not planning to keep it intact."[278] And still Rover chose not to tell FERC.

Second, Rover purposefully included its commitment regarding the Stoneman House in the Application for a reason: to encourage the Commission to view the Rover Pipeline project favorably. The language first appeared only after the February 5, 2015, pre-filing meeting in which staff expressed concern over the Stoneman House and questioned whether the compressor station could be moved. The Stoneman House was the single historic resource in the state of Ohio that the Rover project was then expected to impact. Rover's commitment could only be read as an assurance that Rover would consult in good faith with the Commission and the Ohio SHPO through the section 106 process in order to arrive at a solution where adverse effects to the Stoneman House were resolved. The only reasonable interpretation of Rover's statements was that Rover was making a good faith commitment to that process, even though Rover was simultaneously withholding its intent to tear down the resource.

B. Rover's Post-Demolition Explanation Was False and Misleading

Upon learning that the house had been purchased and destroyed, OEP issued an information request on September 14, 2016.[279] On September 26, 2016, Rover responded, generally distancing Rover from the purchase of the property and the demolition of the House by stating that the House was purchased for Energy Transfer to turn into an office and was only demolished when Energy Transfer deemed it "ill-suited for its intended purpose."[280] Rover attempted to excuse its omissions by saying that it "did not occur to it at the time to report" its plans for the Stoneman House to the Commission.[281]

As detailed below, Rover's September 26, 2016, response violated 18 C.F.R. § 157.5's forthright obligation because those statements were objectively untrue, and because the response on whole was misleading.

1. Rover's statement that it "purchased the Property . . . with the intent of converting the House into an operating office" was not forthright

In its response to FERC's 2016 EIR, Rover stated:

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[278] Email between Heather Millis and Buffy Thomason (Mar. 28, 2016) Rover-00012116-19.

[279] 2016 EIR.

[280] Rover Resp. to 2016 EIR at 1.

[281] *Id.* at 4.

> Rover purchased the Property from its then owners in an arms' length transaction because of its central location to Rover's proposed Pipeline and ancillary facilities . . . with the intent of converting the House into an operating office for [ETC] owned and affiliated operating assets in the region. Because the House ultimately was determined to be too small and ill-suited for its intended purpose, a decision was made to demolish the structure and two outbuildings and move forward with plans to construct a new structure at the site.[282]

Rover's statement is inaccurate and misleading. Mahmoud essentially conceded as much, testifying that "I think there was the intent to convert the house into an office along the way. I think the timing and the generalization as it's contemplated in this paragraph could have been written more clearly . . . we oversimplified our response, unfortunately."[283]

Even assuming *arguendo* that Rover purchased the Stoneman House with the intention of turning the *property* surrounding the house into an operations center that included an office, the evidence shows that at the time it purchased the Stoneman House, Rover did not intend to turn the *house* itself into an office. When negotiations to purchase the house began, Rover's plan was to demolish the house, with Mahmoud having already told his staff he intended to "tear it down."[284] Even if Rover intended at the time to use the property for an operating facility, there is evidence that preserving the *house* was at odds with Rover's intent to utilize the *property*. As Thomason noted, "the way that the property is set up, the house effectively blocks the entrance. So if we submitted it to a historical society, it would seriously affect, if not totally negate our use of the property."[285]

The timing also reveals that Rover could not have "intended" to use the house as an office as of the time of purchase: it did not consider reviewing the property for suitability for office space until after it purchased the house in May 2015. Schuman testified that *after* the Stoneman House had been purchased by Rover in May 2015, Banta asked him to review the house and the ten-acre parcel it sat on for potential use by

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[282] *Id.* at 1.

[283] Mahmoud Test. at 112.

[284] *See* discussion *supra* Part II.F.

[285] Thomason Test. at 227-28.

Operations.[286] Mahmoud similarly recalled that the assessment of the house for office space occurred *after* the purchase of the house, testifying that "we bought the property. And then as we were evaluating the various uses, as we've talked about, for storage of pipe, *that's when the potential of that becoming an operating office* [sic]."[287] Banta similarly testified that he understood that the house may not have been assessed to determine whether it could be used as office space until *after* it was purchased.[288]

Unsurprisingly, the house was deemed unsuitable to use as an office. Recalling a litany of problems with the house that would have been inconsistent with anyone's intent to buy it to use for any type of office space, Schuman testified:

> The wiring, the house was antiquated. The house hadn't been updated. . . . There was an old breaker box in there that still had the screw-in [] fuses. Plumbing, it didn't look like it had updated plumbing. The access doors . . . would have never made the American Disability Act . . . Based off the age of the home and some of the condition, the insulation in there, we would just assume . . . that it's asbestos-containing material . . . Windows, doors. It would take a complete remodeling.[289]

Banta recalled that assessment, testifying "all the utilities were not conducive for using for an operations center."[290]

The distinction between Rover's plans for the house and its plans for the *property* is not one of mere semantics. OEP staff asked Rover why it purchased and demolished the house because the house – not the entire property – was historic. Only the house had been subject to Rover's prior commitment to a solution that would avoid adverse effects, and the Commission had obligations under NHPA to consider adverse effects (including "physical destruction of or damage") to the house before it could issue its notice to proceed with construction. Rover's response coupled the house with the surrounding

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[286] Schuman Test. at 138 (Q: "When Leon came to you initially . . . he said "we have already purchased it"? A: Yes.); *see id.* at 96 ("He just said they had picked up some property near CS 1 and wanted me to take a look at it from an operations perspective to see what we could use there.").

[287] Mahmoud Test. at 109 (emphasis added).

[288] Testimony of Marvin Leon Banta, at 28 (Sept. 28, 2017) (Banta Test.) ("Q: So you may have purchased it and then decided whether or not it was suitable space for offices? A: Absolutely.").

[289] Schuman Test. at 93.

[290] Banta Test. at 17.

property in a way that was demonstrably misleading, in an effort to minimize Rover's responsibility and avoid jeopardizing its pending Application before the Commission.

Finally, if Rover intended to use the property or house as an operations center, it was required to disclose that under the cumulative impacts analysis. 18 C.F.R. § 380.12(b)(3) requires applicants to "identify the effects of construction, operation (including maintenance and malfunctions), and termination of the project, as well as cumulative effects resulting from existing or reasonably foreseeable projects."[291] Rover did not identify the location of the Stoneman House as a potential operations center in its initial Application filings, or subsequent impact analyses.[292] Indeed, had Rover filed the appropriate cumulative impact analysis for an operations center at the site of the Stoneman House, it would have revealed Rover's true intention to demolish the Stoneman House.

2. Rover's statement that it "did not occur to it at the time to report" its plans for the Stoneman House to the Commission was not forthright

In its September 26, 2016, filing, Rover stated that it "did not occur to Rover at the time to report" its purchase and plans to demolish the Stoneman House to the Commission because "neither its purchase of the Property nor its removal of the House was directly associated with or a result of the Project."[293] The evidence directly contradicts Rover's claim because the Rover manager directly responsible for FERC filings repeatedly contemplated and chose not to report Rover's plans to FERC. In particular, Thomason's April 11, 2015, email to Millis expressly considered what to tell FERC about the pending purchase of the house, stating "[w]e're purchasing the house, but we haven't closed on it yet. The landowners are happy, it's just a matter of time to get it done. **I haven't decided how much of that I want to say yet.**"[294] And again on May 28, 2015, Thomason acknowledged debating how much to disclose to the Commission, writing to Patterson "[w]hat do you think about saying we're closed on the historical house in the cultural updates for this filing? **Let it lie?**"[295]

In addition, Rover knew prior to submitting its initial Application filing that OEP was concerned about the potential for adverse effects on the Stoneman House based on

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[291] 18 C.F.R. § 380.12(b)(3).

[292] *See generally* Rover Resp. to 2015 EIR.

[293] Rover Resp. to 2016 EIR at 4.

[294] Data Request Email (emphasis added).

[295] Email chain between Buffy Thomason and Patricia Patterson (May 28, 2015) Rover-00005540.

Rover's proposed location of the compressor station. OEP raised the issue orally on February 5, 2015, and again in writing on February 11.[296] OEP staff was concerned because the compressor station might impact the resource merely by its proximity to the Stoneman House. For Rover to assert that its destruction of the home was not "directly associated with or a result of the Project" defies logic given OEP's inquiries and Rover's familiarity with the process.

3. Rover filed its misleading explanation as the Stoneman House issues impeded its construction goals

When Rover filed its post-demolition explanation, it faced significant time pressures, as well as the possibility that the Commission's concerns over the Stoneman House might cause delay. Thus, Rover had an incentive to demonstrate to the Commission that it should be tolerant of Rover's demolition of the Stoneman House and the statements it had made to the Commission concerning the house.[297] As Rover stated in its December 2016 letter imploring the Commission to issue a certificate, Rover believed a January 2017 "commencement of construction date [was] vital" to Rover's ability to undertake construction; with delays expected to have "devastating implications" for its producer-shippers, and "negative economic impact in the market regions."[298] The Commission's concern over the Stoneman House posed potential obstacles to achieving its construction goals: NHPA's section 110(k) would hamper the Commission's ability to grant a certificate if it found that Rover's decision to demolish the house qualified as anticipatory demolition, and the Commission held significant discretion to adjust the timing and contours of any certificate in consideration of Rover's treatment of the Stoneman House. In that context, what Mahmoud called Rover's unfortunate oversimplification[299] was not a mere mistake: it was an attempt to convince the Commission not to take issue with either Rover's statements in (and omissions from) its Application or its treatment of the Stoneman House.

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[296] Millis Test. at 51; FERC, Letter Re: Comments on the Second Set of Draft Resource Reports 1-12, Docket No. PF14-14-000, at 18 (issued Feb. 11, 2015).

[297] The circumstances under which Rover made its misleading statements to the Commission are discussed here (and elsewhere herein) by way of context, to demonstrate that the statements were inaccurate and misleading, and were not made by mistake or accident. Violations of section 157.5, as fully explained *supra* at part IV.D, do not require Enforcement to prove a separate element of intent.

[298] Rover, Letter to FERC Re: Request for Immediate Action, Docket No. CP15-93-000 (filed Dec. 16, 2016).

[299] Mahmoud Test. at 112 ("[W]e oversimplified our response, unfortunately.").

C. Rover's Defenses Are Unavailing

1. Rover cannot lessen its forthright obligation by labeling its representations about the Stoneman House a "limited commitment"

In an attempt to minimize the affirmative representation it made that it was "committed to a solution that results in no adverse effects," Rover claims that the commitment was "confined to the indirect visual and audial Project-related effects of CS1 on the Stoneman House (as well as other nearby properties)."[300] Rover argues, therefore, that it made a "limited commitment"[301] concerning the Stoneman House, and points to trees it ultimately planted to screen its compressor station as proof of this "limited commitment."[302] By extension, Rover claims it was not required to tell the Commission of its contemporaneous plans to purchase and destroy or repurpose the house because that information related to "non-Project-related activit[y] outside of the proposed project footprint and undertaken for reasons separate from the proposed project."[303] Rover's defense fails.

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[300] Rover 1b.19 Response at 45-46.

[301] *Id.* at 20-21.

[302] *Id.*

[303] *Id.* at 71. Rover also distorts the relevant question, which is not whether adverse effects were "outside of the proposed project footprint" but whether they constituted an effect of the undertaking. Pursuant to the NHPA, the Commission was required to take into account the effect of a federal "undertaking" on historic resources like the Stoneman House. 36 C.F.R. § 800.16; *see also* OEP Guidelines (setting forth the regulatory requirements to ensure compliance); *Muckleshoot Indian Tribe v. United States Forest Serv*., 177 F.3d 800, 805 (9th Cir. 1999) (per curiam). An undertaking is defined as a "project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency." 36 C.F.R. § 800.16(y); *see also National Min. Ass'n v. Fowler*, 324 F.3d 752, 755 (D.C. Cir. 2003) (describing the definition under the NHPA). Agencies are required to take into account the project's adverse effects on resources within the area of potential effects (APE). The APE is the "geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties." 36 C.F.R. § 800.16(d) (providing further that "The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking."). Read together, the limits of a project are delineated for purposes of the NHPA, as *the limits of that project's effects*. Here, Rover itself defined those limits to include the Stoneman

First, Rover's commitment – as it was clearly stated in its Application – was not limited in any way, much less to indirect audial and visual effects. The obvious meaning of Rover's commitment was that Rover was making a good faith assurance not to cause *any* unmitigated adverse effects on the Stoneman House. Rover made the commitment in direct response to staff's pre-filing concerns about the effects the Rover project would have on the Stoneman House. Nothing in the Application supports Rover's contention that its commitment was limited. To the contrary, Rover made an unrestricted commitment twice in its Application, stating: (1) "Rover is committed to avoiding any Project impacts to all NRHP eligible resources";[304] and (2) "Rover is committed to a solution that results in no adverse effects to this resource [the Stoneman House]."[305] The plain meaning of Rover's commitments was as a good faith assurance to the Commission that it would adhere to the consultation process in a way that avoided adverse effects to the Stoneman House.

Second, it was not even possible for Rover to limit its commitment to indirect audial and visual effects. Pursuant to the NHPA and Commission regulations, the nature and resolution of adverse effects are not determined until the conclusion of the section 106 process. As "a procedural, action-forcing statute,"[306] the heart of the NHPA is that it requires a give-and-take consultation between the parties with an interest in the project and its impact on cultural resources (primarily the applicant and the SHPO), and then requires the agency to take the result of that consultation process into account before it approves the project.[307] At the time Rover submitted its initial Application filings with its commitment to a solution that results in no adverse effects, that consultation had just begun. Rover well understood the impossibility of unilaterally limiting the adverse effects consultation at its outset.[308] That understanding undergirded Rover's own

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House when it identified the House in its Survey as "approximately 95 feet southeast of the proposed Mainline Compressor Station One." Historic Architectural Survey at 216.

[304] Rover Application at Volume IIA, Resource Report 4 at 4-3.

[305] *Id.* at 4-11.

[306] *See Wyoming Indep. Producers Ass'n*, 133 IBLA 65, 66 (1995); *see also* discussion of the NHPA, and the section 106 consultation process required therein, and pursuant to Commission Regulations.

[307] *See* discussion *supra* at part IV.B.

[308] For example, Rover's second draft of Resource Report 4 acknowledged that mitigation was the subject of ongoing consideration, stating "[a]voidance is the preferred treatment for this situation, but if that is not feasible, further consideration of this

consultant's surprise at Rover's demolition of the house while the process was underway. Millis was asked, "[i]s it your understanding of the process with the SHPOs or the ongoing consultation with the SHPOs that no adverse effect is to take place on a resource until that consultation is concluded?" She answered "[y]es."[309]

Rover attempts to buttress its "limited commitment" argument by pointing to its eventual planting of trees to screen Compressor Station 1 along the compressor station property line as evidence that Rover committed to indirect mitigation, and indirect mitigation alone.[310] Rover's argument would render meaningless the NHPA consultation process. It is pointless for Rover to screen the compressor station from the view of a historic resource that it has destroyed. Screening as a mitigation measure against adverse effects minimizes the project's "[i]ntroduction of visual, atmospheric or audible elements that diminish the integrity of *the property's significant historic features*."[311] After Rover demolished the Stoneman House, the 10-acre parcel at 8468 Azalea Road was merely another neighboring parcel. There is no reason under the NHPA, aimed at "seek[ing] ways to avoid, minimize or mitigate any adverse effects *on historic properties*,"[312] for screening the compressor station. Rather, Rover had an independent obligation, separate and apart from the section 106 process, to screen *all* neighbors of CS 1 (as well as other

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resource will be necessary." Rover Second Draft Resource Report 4 at 4-10. Rover's internal communications acknowledged that tree screening was likely to be insufficient, with Thomason asking Millis on February 6, 2015, "what's your opinion on how the SHPO will respond to screening with trees?" and Millis persisting over a year later that "the vegetation screening may not be enough." *See* CS1 Email; Email between Heather Millis and Buffy Thomason (Mar. 28, 2016) Rover-00012116-19. Finally, Rover's internal emails revealed that it was navigating the consultation process in an effort to secure the least burdensome mitigation. Rover discussed the back-and-forth with the SHPO as it unfolded in March 2016 by saying, "I may have interpreted it to be more of a 'write me a check' situation than [the SHPO] intended. . . . I'm basically open to anything that would allow concurrence on the route to go through and not hold up construction." Ohio SHPO Issue Email.

[309] Millis Test. at 73 (testifying that even upon being advised that Rover "did not plan to keep the house intact" Millis believed, "still in my mind we were planning to deal with whatever mitigation the SHPO asked and then they could destroy it.").

[310] Rover 1b.19 Response at 43-44 ("Rover always intended to implement the visual screening plan—shielding from sight CS1—whether or not the Stoneman House remained.").

[311] 36 C.F.R. § 800.5(a)(2)(v) (emphasis added).

[312] 36 C.F.R. § 800.1(a) (emphasis added).

compressor stations) from the visual impacts of those stations.[313] That Rover eventually planted trees – as required for all compressor stations – does not retroactively transform Rover's commitment into a "limited commitment" to only indirect mitigation, when it was by law and common sense not so limited.

For these reasons, Rover's commitment was not "limited." It was a commitment to avoid adverse effects through good faith adherence to the section 106 process.[314] Rover erred in misleading the Commission and the Ohio SHPO about the nature of adverse effects at issue from the beginning. Rover cannot diminish its responsibility to provide the Commission with the full, complete and forthright information about the Stoneman House by now insisting that the visual and audial adverse effects that it misled the Commission and the SHPO into focusing on were the only permissible considerations in the section 106 process.

2. Rover cannot escape responsibility through a false distinction from Energy Transfer

In an effort to transform Rover's purported "commit[ment] to a solution that results in no adverse effects" into a truthful statement, despite its outright destruction of the Stoneman House, Rover argues that Rover itself had no impact on the house.[315] To accomplish this, Rover attempts to distinguish itself from its parent company, Energy Transfer, and shift responsibility for the demolition to Energy Transfer alone.[316] Rover

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[313] In the Draft EIS, the Commission required that Rover screen CS 1 from the "several residences along Azalea Road that would face the compressor station and have a direct line of sight to the facilities." DEIS at 4-180.

[314] This clear meaning does not convert Rover's commitment to "a grand commitment to preserve in perpetuity the Stoneman House," as Rover has argued. Rover 1b.19 Response at 43. Full preservation of the House was not necessarily required. Indeed, if Rover had been truthful with the Commission about its intention to purchase and tear down the house, appropriate mitigation – perhaps even including that which would have allowed for removal – could have been discussed. But Rover's unilateral actions eliminated the possibility of any such discussions.

[315] Rover Application at Volume IIA, Resource Report 4 at 4-11; Rover's 1b.19 Response erroneously claims that "[a]ll agree that the Project had no direct effect on the Stoneman House or Property." Rover 1b.19 Response at 15.

[316] Rover makes the following blame-shifting statements: "Energy Transfer decided to remove the Stoneman House"; "[I]t was permissible for Energy Transfer to purchase and later remove the Stoneman House"; "[N]o law barred Energy Transfer from removing the House"; "Energy Transfer purchased the Property with the intent of using it

implies that it made no misrepresentation because Energy Transfer, not Rover, adversely affected the house. Rover's defense strains credulity and should be rejected.

Rover Pipeline, LLC (the Applicant) not Energy Transfer, purchased and demolished the Stoneman House for reasons related to the pipeline project. Rover negotiated the purchase terms and purchased the house.[317] Rover demolished the house.[318] Its own contemporaneous statements reveal that Rover hoped the purchase and destruction of the house would be beneficial to the outcome of the adverse effects consultation for the Rover project. That is, Rover's consultants repeatedly revealed that Rover hoped that the purchase and/or destruction of the house would obviate the need to mitigate adverse effects related to the project. On March 3, 2015, Millis wrote Thomason, "[t]rue we would no longer be causing an adverse effect on an eligible property in the APE."[319] On May 28, 2015, Patterson wrote Thomason, "[a]ccording to Heather [Millis], the problem does not quite go away with the purchase."[320] Over a year later, after destroying the house, Rover continued to equate destruction of the house with the end of its responsibilities with regard to the House, formally writing the Ohio SHPO that "Rover recommends no further consideration of this resource for this Project."[321]

Even if the Commission accepted Rover's claim that the property was purchased to support Energy Transfer's regional assets,[322] the primary regional asset that the property supports *is* the Rover Pipeline Project, whose largest compressor station is a

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to support its operations in the region"; and "Energy Transfer Purchased the Property so Operations Could Support Energy Transfer's Regional Assets." *Id.* at 4, 5, 8, 24, and 25.

[317] *See supra* at part II.K, citing Rover's purchase option and deed for the Stoneman with Rover Pipeline, LLC.

[318] Contemporaneous emails demonstrate no confusion about whether it was Rover or Energy Transfer demolishing the house: Thomason wrote on March 17, 2016, "[m]aybe we could study the architectural properties we go near or across (like the one at CS1 that we'll likely tear down – I'm half-kidding)?" Email between Buffy Thomason and Heather Millis (Mar. 17, 2016) Rover-00011882-85.

[319] Hunt Purchase Option Email.

[320] Email chain between Buffy Thomason and Patricia Patterson (May 28, 2015) Rover-00005540-41.

[321] Letter from Heather Millis to Amanda Terrell, at 3 (June 15, 2016) Rover-00012905-14.

[322] Rover 1b.19 Response at 25.

mere 100 feet away.[323] Rover has stated that the Stoneman property was a good location for an operating center largely *because* it was located directly across the street from Rover's CS1.[324] Rover similarly acknowledged that the trailers that were later placed on the property to support operations there were intended to house Rover employees.[325] Indeed, the Stoneman property now houses an operations manager responsible for overseeing Rover operations, as well as various technicians and mechanics who are "necessary to service the Rover pipeline" and other Energy Transfer assets.[326] There can be no question that the Stoneman House was purchased and destroyed for Rover, or that Rover now uses the Stoneman property as part of its pipeline operations.

Furthermore, for Rover to assert a distinction between itself and Energy Transfer by way of defense is belied by the significant overlap in purpose, function, and personnel between Rover and Energy Transfer. Indeed, Rover leadership was populated by Energy Transfer executives and managers: Joey Mahmoud, Leon Banta, and Buffy Thomason are all Energy Transfer employees. Even in its post-demolition explanation seeking to distance the demolition from the *project*, Rover made no attempt to distance the demolition from *Rover,* stating "*Rover* purchased the Property separate and apart from the proposed Project and is managing it as any private landowner would do,"[327] and "*Rover's* purchase of the Property was not for or directly related to the construction and operational footprint of the proposed Project."[328] Rover cannot escape its obligation to provide the Commission with full, complete, and forthright information by now claiming that its actions were undertaken by the parent company that was intricately involved in its own management and operation.

3. Section 157.5 requires information about cultural resources to be full, complete, and forthright

Rover disputes the applicability of section 157.5 to information about Rover's plans for the Stoneman House.[329] Rover suggests that for the Commission to require Rover to follow section 157.5's mandate of forthrightness with regard to its plans for the

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[323] *See id.* at 17, Fieseler Declaration ¶¶ 2-3, Schuman Declaration ¶ 14.

[324] *Id.*

[325] *Id.* at 26-27.

[326] *Id. at* 26.

[327] Rover Resp. to 2016 EIR at 2 (emphasis added).

[328] *Id.*

[329] Rover 1b.19 Response at 69.

Stoneman House would be for the Commission to "'bootstrap itself into an area in which it has no jurisdiction,"'[330] resulting in a "flood of extraneous, tangential, and irrelevant information from applicants seeking to fulfill their duty to provide the Commission with a 'full and complete understanding' untethered from what the Commission needs to consider in its ultimate decision."[331]

Rover wholly ignores that the Commission's regulations explicitly require cultural resource analysis for all NGA section 7 applications, and that the Commission's compliance with the NHPA is a prerequisite to the issuance of any such certificate or notice to proceed with construction. Information about Rover's identification and resolution of adverse effects was intrinsic to the Application, and directly linked to the requirements of section 157.5. Section 157.5 imposes a forthright obligation on "every requirement of this part."[332] Part 157.6 sets forth the information that must be filed with all applications, to include certain required exhibits.[333] Section 157.14 lists the required exhibits concerning sources of gas supply to include an environmental report "as specified in §§ 380.3 and 380.12."[334] Section 380.12(f), in turn, requires that a "cultural resources" report be included in applications. The resources report must contain, as appropriate, overview and survey reports, comments from the SHPO, among other requirements.[335] Indeed, an unconditional certificate or notice to proceed cannot be granted, pursuant to 18 C.F.R. § 380.12(f)(3), without that information. Further, in preparing the cultural resources report, the application "must follow the principles in § 380.14,"[336] which, in turn, detail the applicant's and the Commission's obligations under the NHPA.

Not only was Rover required to submit information about the Stoneman House pursuant to 18 C.F.R. §§ 380.12 and 380.14, the Commission was required to consider that information before issuing its Certificate. As required by section 106, "[t]he head of any . . . independent agency having authority to license any undertaking, prior to the

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[330] *Id.* at 71 (citing *Office of Consumers' Counsel v. FERC*, 655 F.2d 1132, 1142 (D.C. Cir. 1980) (citation omitted)).

[331] Rover 1b.19 Response at 69 (footnote and emphasis omitted).

[332] 18 C.F.R. § 157.5(b).

[333] *Id.* § 157.6.

[334] *Id.* § 157.14.

[335] *Id.* § 380.12(f)(1).

[336] *Id.*

approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property."[337] In this context, it is clear that information about Rover's plans for the Stoneman House – a cultural resource required to be addressed in Rover's Application and considered by the Commission – is information that directly "concern[s] the operation, sales, service, construction, extension, or acquisition for which a certificate is requested," and thus is subject to the "forthright obligation" of section 157.5.[338]

4. Rover did not "seek FERC Project Staff's input"

Rover claims that it "sought FERC Project Staff's input on what could be done about the house."[339] Rover cites an April 13, 2016, email from Thomason to Banta and Mahmoud, in which Thomason relates, "Lisa [Tonery, attorney for Energy Transfer] talked to Paul Friedman with FERC, and he ultimately said if it wasn't listed on the NRHP and it's not on the pipeline, then it's a non-issue."[340] Rover has not produced any evidence other than this single, third-hand communication indicating that a conversation between Tonery and Friedman occurred. Notably, Rover stops short of arguing that it actually had authority from the Commission or staff to demolish the Stoneman House. When Rover attempted to explain its purchase and demolition of the house to the Commission in its September 26, 2016, EIR response, Rover did not even raise an argument that Rover consulted with FERC staff before demolishing the house, or demolished the house on the belief that FERC staff had been consulted.

Moreover, the evidence shows that Rover did not seek or obtain any manner of endorsement for destroying the Stoneman House from FERC staff. Paul Friedman is an Archaeologist and Senior Technical Expert for Cultural Resources in OEP who has been with the Commission for 28 years.[341] He was never assigned to the Rover project.[342] His declaration states, "I do not recall talking to Ms. Tonery, or anyone else representing Rover, about the Rover Pipeline Project. I do not recall talking to Ms. Tonery about the

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[337] 54 U.S.C. § 306108; *and* 36 C.F.R. § 800.1(c).

[338] 18 C.F.R. § 157.5 (a) (emphasis added).

[339] Rover 1b.19 Response at 34.

[340] *Id.* (citing Email between Buffy Thomason, Leon Banta, and Joey Mahmoud (Apr. 13, 2016) Rover-00012712).

[341] Declaration of Paul Friedman.

[342] *Id.* ¶ 2.

Stoneman House or the destruction of a historical resource."[343] Further, Friedman states, "I cannot and do not offer opinions about projects to which I am not assigned."[344] Friedman has known Tonery for years and speaks with her every few months on a mostly social basis; but as of April 2016 (when Thomason's email reported Tonery's alleged conversation with him), he did not even know that Tonery represented Energy Transfer. Friedman states that Tonery "has informally asked me about hypothetical or theoretical scenarios involving cultural resources," though he had no recollection of any such hypothetical involving either the Stoneman House or the destruction of a historic resource.[345]

Accordingly, the evidence does not establish that the conversation discussed in the April 13 internal Rover email even occurred, much less that, as the email purports, Friedman endorsed destroying the Stoneman House as "a non-issue." To the extent the evidence would support a finding that Tonery had a conversation with Friedman that touched on the issues in this case, that conversation would have necessarily been "hypothetical or theoretical." Even assuming such a conversation did occur, it certainly would not be an example of full, complete, and forthright information. At most, it would constitute a hypothetical scenario to OEP staff *not assigned to the Rover Pipeline Project*, while actively hiding information about the Stoneman House from the Commission and from assigned staff (who had already directly expressed concern over the resource), and without submitting anything in the docket.

VI. Recommended Remedies and Sanctions

Staff concludes that Rover violated section 157.5's requirement for full, complete and forthright applications, through its misrepresentations and omissions, including in its March 25, 2016 Application filing of the DEIS response and updated Landowner List, when it decided not to tell FERC that it had purchased the house and was considering demolishing it (though it finally made those disclosures to the Ohio SHPO in March 2016), and when it demolished in May 2016 without notifying FERC.

Staff recommends a civil penalty of $20,160,000, in recognition of the seriousness of the violation, and consistent with the application of the Penalty Guidelines set forth below. Section 22 of the NGA gives the Commission authority to order civil penalties for violation of the NGA, "or any rule, regulation, restriction, condition, or order made or imposed by the Commission under authority" of the NGA.[346] As the Commission has

[343] *Id.* ¶ 7.

[344] *Id.* ¶ 3.

[345] *Id.* ¶ 4.

[346] 15 U.S.C. § 717t-1 (2012).

noted, "civil penalties are an important tool to achieve compliance."[347] The civil penalties[348] recommended here are well within the Commission's statutory authority for penalties of up to $1,307,164 per day per violation.[349]

When it imposes any civil penalty under section 22 of the NGA, the Commission is to consider: (1) the nature and seriousness of the violation; and (2) efforts to remedy that violation.[350] Here, Enforcement believes a significant fine is necessary, primarily in consideration of the seriousness of the violation. Rover provided inaccurate and misleading information to the Commission, and failed to advise the Commission of other important truthful information relevant to its Application – on a matter that had been specifically highlighted by Commission staff. Rover thus disregarded the fundamental requirement that applicants submit full, complete, accurate information concerning natural gas applications. In doing so, Rover undermined the Commission's carefully balanced process for reviewing applications to ensure that it grants only those certificates that serve the public interest.

Rover did not make an effort to remedy the situation. Not only did Rover provide false information and withhold important additional information, it has since insisted that its statements were accurate and that it had no obligation to accurately report its plans for the Stoneman House. Rover did not remedy the violations in a timely manner by correcting the omissions or misrepresentations.[351]

Section 2B1.1 of the Commission's Penalty Guidelines applies to violations of Commission orders and rules – in this instance, Rover violated a Commission regulation. This section of the Penalty Guidelines measures the seriousness of order-based violations by considering various enhancements applicable to the scope and extent of the violation

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[347] *Revised Policy Statement on Penalty Guidelines*, 132 FERC ¶ 61,216, at P 112 (2010) (FERC Penalty Guidelines).

[348] Disgorgement is not appropriate in this matter because the violation did not result directly in pecuniary gain. Pecuniary gain is "the additional before tax profit to the entity resulting from the relevant conduct of the violation." *Id.* § 1A.1, Application Note 3(g) (citing 18 C.F.R. § 3571(d)).

[349] 15 U.S.C. § 717t-1; 18 C.F.R. § 385.1602(e) (2021).

[350] FERC Penalty Guidelines at P 16; 132 FERC ¶ 61,216 at P 16; *Enforcement of Statutes, Regulations and Orders*, 123 FERC ¶ 61,156, at P 51 (2008).

[351] Rover's 2017 payments to the Ohio SHPO pursuant to terms of the MOU and the MOA in consideration of its destruction of the Stoneman House do not constitute "efforts to remedy the violation" because they relate to the destruction of the house, not the separate harm caused by the violation at issue: Rover's failure to fulfil its forthright obligation in its statements to the Commission.

and estimating the loss, or market harm, caused by the violations.[352] Here, the loss caused by Rover exceeded $2,500,000.[353] The violation continued for 185 days.[354]

Section 1C2.3 of the Penalty Guidelines next assesses a Culpability Score. In determining the Culpability Score, staff considers various aggregating and mitigating factors, including: (1) the involvement in or toleration of the violations by Rover employees with substantial authority in an organization with more than 1,000 employees; (2) Rover's history of violations; (3) whether the instant violations violated a judicial or Commission order or an injunction; (4) whether Rover willfully obstructed or impeded justice, or attempted, aided, abetted, or encouraged obstruction of justice during the investigation; (5) whether Rover had an effective compliance program; and (6) whether

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[352] FERC Penalty Guidelines § 2B1.1, Application Note 2.

[353] The historic value of the Stoneman House forms the basis – by proxy – of the loss in this case. Rover purchased the Stoneman House for $1,300,000. Rover then paid $2,300,000 to the Ohio SHPO in consideration of having destroyed the house, agreeing that the money would be dedicated to forging historic preservation in Ohio, particularly in areas crossed by the pipeline. Accordingly, an amount of $3,600,000 reasonably estimates the intangible loss associated with the destruction of a unique historic home and serves as a proxy for the harm imposed by Rover's failure to be forthright concerning the house. FERC Penalty Guidelines § 2B1.1(b)(1)(J). The Penalty Guidelines allow for harm to be quantified by a measure of loss (or gain where loss is not readily measurable) resulting from the offensive behavior. *Id.* § 2B1.1, Application Note 2. Here, Rover's misrepresentation attempted to circumvent the Commission's certificate application process and avoid creating delays in issuing the certificate. However, the monetary gain to Rover achieved by the lack of delay in FERC's certificate application process is not quantifiable. Nevertheless, by any measure, OE staff used the more conservative figure to form a reasonably related basis for the loss amount. As Joey Mahmoud testified about the $2.3 million dollar payment Rover made to the Ohio SHPO after destroying the Stoneman House, "[a]s far the dollar value, the dollar value in the grand scheme of things, again, over a $4.2 billion project, is minuscule."[353] Mahmoud Test. at 163. In reference to the Stoneman House itself, Mahmoud further testified that "the value of this in a $4.2 billion project is a sneeze." *Id*. at 124.

[354] FERC Penalty Guidelines § 2B1.1(b)(2)(F). For purposes of calculating a penalty, staff considered the duration of the violation to be from March 25, 2016 (the date Rover filed its DEIS response, which included the Landowner List, containing omissions and misrepresentations) at least until September 26, 2016 (the date that Rover responded to OEP's Information Request, stating that Rover bought the house with the intention of using it as office space). Though Rover's misrepresentations were not corrected on September 26, 2016, but thereafter continued, that date forms a conservative end point for the violation, as this investigation began shortly thereafter.

Rover is entitled to credit for self-reporting, cooperating or accepting responsibility for the violations.[355]

Rover has more than 1,000 employees[356] and a high-level individual within the organization participated in, condoned or was willfully ignorant of the violation.[357] As to high-level involvement, VP of Engineering of Energy Transfer Joey Mahmoud was aware of both the representation made in the Application when he was consulted by Thomason (she asked "what do I put in the filing") and testified that he edited the responses to OEP's EIR prior to its submission to the Commission.[358]

Enforcement credited Rover for cooperation in the investigation, because Rover generally produced witnesses and responded to document requests in a timely manner.[359]

The investigation revealed that Rover did not have an effective compliance program.[360] Thomason, to whom Rover assigned responsibility over the entire environmental aspect of the Rover Pipeline project, including interfacing with FERC, testified that she did not know of a compliance program and had not participated in any specialized training on FERC requirements and/or architectural and cultural resources.[361]

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[355] *Id.* § 1C2.3.

[356] Rover Pipeline does not have direct employees but is "staffed and led by Energy Transfer Partners as the operator and owner . . . of the pipeline." Mahmoud Test. at 23-24. For the year 2015, ETP reported on its Form 10-K to the United States Securities and Exchange Commission to have 9,466 employees. *See* Form 10-K, Energy Transfer Partners, L.P. Annual Report for the year ending December 31, 2015. For the year 2016, ETP reported 8,494 people. *See* Form 10-K, Energy Transfer Partners, L.P. Annual Report for the year ending December 31, 2016. Mahmoud testified that 25 – 50 Energy Transfer employees worked for Rover, but that "[t]he total team is somewhere around 1800 people." (Mahmoud Test. at 26) For the purposes of the guideline calculation, Enforcement conservatively applied an adjustment for 1,000 or more employees, rather than 5,000 or more employees.

[357] FERC Penalty Guidelines § 1C2.3(b)(2). "High-level personnel of the organization" is defined in § 1A1.1 as "individuals who have substantial control over the organization or who have a substantial role in the making of policy within the organization. The term includes: a director; an executive officer . . . ."

[358] Mahmoud Test. at 141.

[359] FERC Penalty Guidelines § 1C2.3(g)(2).

[360] *Id.* § 1C2.3(f).

[361] Thomason Test. at 229-30.

VII. Conclusion

For the reasons discussed herein, Enforcement recommends that the Commission direct Rover to show cause why it did not violate 18 C.F.R. § 157.5 by making the statements characterized herein in its Application and response to OEP's EIR. Enforcement further recommends that the Commission direct Rover to show cause why it should not pay a civil penalty in the amount of $20,160,000.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Rover Pipeline, LLC, and
Energy Transfer Partners, L.P.

Docket No. IN19-4-000

(Issued March 18, 2021)

CHATTERJEE, Commissioner, *concurring*:

1. I join the majority in directing Rover Pipeline, LLC and Energy Transfer Partners, L.P. (jointly, Rover) to show cause as to why Rover should not be found to have violated the Commission's Regulations by misleading the Commission in its Application for Certificate of Public Convenience and Necessity. Rover will now have an opportunity to respond, and the Commission will consider its pleadings and OE Staff's reply as part of its further review of this proceeding.

2. However, I believe that the proposed civil penalties in the amount of $20,160,000, which were calculated with reference to the Commission's *Revised Policy Statement on Penalty Guidelines*, would be excessive in this matter. When the Commission adopted those guidelines, it noted that "our decision to adopt a guidelines-based approach does not restrict the discretion that we have always exercised and will continue to exercise in order to make an individualized assessment based on the facts presented in a given case."[1] The Commission's penalty guidelines were developed largely on the basis of a record focused on market manipulation, tariff violations and electric reliability, and thus are an ill fit for the unique circumstances that arise in many if not most certificate cases. Rather than hammering a square peg into a round hole, I would support the Commission exercising its discretion to assess a right-sized penalty amount based on the unique facts of this case should Rover be found to have violated the Commission's regulations.

For these reasons, I respectfully concur.

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Neil Chatterjee
Commissioner

[1] *Revised Policy Statement on Penalty Guidelines*, 132 FERC ¶ 61,216, at P 19 (2010).

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Rover Pipeline, LLC, and
Energy Transfer Partners, L.P.

Docket No. IN19-4-000

(Issued March 18, 2021)

DANLY, Commissioner, *concurring*:

1. I concur in the issuance of an Order to Show Cause in this proceeding because I believe that Office of Enforcement staff (OE Staff) has provided sufficient evidence to suggest that Rover Pipeline, LLC and Energy Transfer Partners, L.P. (jointly, Rover) may have misled the Commission. I remind everyone that there are two sides to every story. I am withholding judgement on whether Rover should be penalized and, if so, the appropriate amount of a penalty. I look forward to carefully reviewing Rover's response and OE Staff's reply.[1]

For these reasons, I respectfully concur.

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James Danly
Commissioner

[1] Section VI of the Staff Report (pages 67-70) lists the various factors that it used to arrive at the proposed penalty of $20,160,000. I note that when these factors are applied to the *Revised Policy Statement on Penalty Guidelines*, 132 FERC ¶ 61,216, at P 112 (2010) (FERC Penalty Guidelines), the result leads to a penalty range of $10,080,000 to $20,160,000. Accordingly, the order proposes a penalty at the highest end of the range provided by the Penalty Guidelines. I would be particularly interested in any evidence offered regarding remedy and whether imposing the highest possible penalty permitted by the Penalty Guidelines under OE Staff's allegations is appropriate given the facts alleged.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Rover Pipeline, LLC, and
Energy Transfer Partners, L.P

Docket No. IN19-4-000

(Issued March 18, 2021)

CHRISTIE, Commissioner, *concurring*:

1. This is one of the first major enforcement orders, at least in terms of the potential penalty, since I arrived at the Commission so I write separately to add the following.

2. I concur with issuing today's Order to Show Cause (OSC) because the allegations describe potentially egregious misconduct, including allegations of intentional actions and deceit that irrevocably destroyed a property and, in so doing, interfered with the Commission's certificate process. These deeply serious allegations need to be further examined with appropriate due process.

3. This OSC is the first step in that process as more fully described in the order.[1] When this matter is fully briefed, if the Commission determines a hearing is needed, the Commission will issue a hearing order and indicate whether the Commission will conduct a paper hearing or a hearing before an Administrative Law Judge (ALJ). I note generally that to the extent permitted by the statutes and regulations, a full hearing before a neutral arbiter appears to me to be the appropriate path in most, if not all, matters involving disagreements over material facts. In enforcement proceedings at the Commission arising under the Natural Gas Act, I understand that process to consist of a hearing including testimony under oath before a neutral ALJ, with no presumptions given to the allegations and with penalties assessed only as to proven violations.

4. FERC, like other federal administrative agencies, combines the roles of prosecutor, judge and jury. If you're uncomfortable with that combination, so were the Framers of the Constitution of the United States, one of the key principles of which was the separation of the prosecutorial power (Executive) from the judging power (Judicial). In addition to the separation of prosecutorial and judicial powers, the Constitution further guaranteed the right to choose that the fact-finding power inherent in the judicial role be exercised by a jury of peer citizens in certain cases. Congress chose to combine all these powers, by statute, in specified administrative agencies so an agency could enforce its own rules and regulations instead of prosecuting them in Article III courts.

[1] Order at P 5.

5. I know from experience as a commissioner of a state regulatory agency that the enforcement of regulations by an administrative agency can and should be done with appropriate regard for due process. I write this concurrence and note the process existing within the scope of the Commission's rules and regulations, to emphasize that I view this to be the first step in a process and my vote today is not a prejudgment as to the ultimate resolution of this matter with respect to either a finding of a violation or any penalty.

For these reasons, I respectfully concur.

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Mark C. Christie
Commissioner