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GREENHOUSE GASSES, NATURAL GAS, AND THE D.C. CIRCUIT: ONE AGENCY'S STRUGGLE TO BALANCE THE THREE

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GREENHOUSE GASSES, NATURAL GAS, AND THE D.C. CIRCUIT: ONE AGENCY'S STRUGGLE TO BALANCE THE THREE

All eyes are on the Federal Energy Regulatory Commission when it comes to natural-gas projects and greenhouse-gas emissions. Earlier this year, the Commission issued a policy statement on greenhouse gasses that would have upended how the Commission reviews proposals for new natural-gas projects.[1] But the statement was met with significant resistance. Two Commissioners dissented, and energy companies and several states filed more than a dozen rehearing petitions.

The Commission ultimately backtracked. It reverted the statement into a "draft" and opened a period for public comments.

Now those comments are in, and the results are mixed. Some commenters support the statement, others don't, and still others support the Commission's actions but do not think it went far enough.

While the interested parties are waiting, there can be little question that both sides are preparing for the Commission's next move. Whether the Commission issues a final statement along the lines of the original, backtracks, or takes a different approach altogether, at least some groups of commentators will be left unhappy, and all signs point to litigation.

[1] Formally titled the Interim Policy Statement on Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews.

This WORKING PAPER describes the work of the Commission in this space, what its policy statement would have tried to accomplish, and what legal challenges could arise once the Commission makes its next move.

I. BACKGROUND

Congress passed the Natural Gas Act in 1930 to encourage the development of natural gas.[2] The Act gave the Federal Power Commission—the predecessor agency to the Federal Energy Regulatory Commission—jurisdiction over interstate natural-gas pipelines.

Since then, the Commission's authority in the natural-gas space has grown substantially. In the early 1940s, for example, Congress delegated to the agency the authority to license new natural-gas facilities. This meant that if a company wanted to build an interstate pipeline, it needed the Commission's approval.

Sections 3 and 7 of the Natural Gas Act are most relevant for understanding the Commission's work as it relates to the greenhouse-gas policy statement:

- Section 3 prohibits the import or export of natural gas without the Commission's prior authorization. And the construction of import or export facilities also requires Commission sign-off.[3]
- Section 7 prohibits constructing or operating a facility to transport or sell natural gas in interstate commerce without the Commission's permission.

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[2] *See National Ass'n for the Advancement of Colored People v. Federal Power Commission*, 425 U.S. 662, 670 (1976).

[3] *See Big Bend Conservation All. v. Fed. Energy Regulatory Comm'n*, 896 F.3d 418 (D.C. Cir. 2018); *Distrigas Corp. v. Fed. Power Comm'n*, 495 F.2d 1057, 1064 (D.C. Cir. 1974).

> That permission comes in the form of a "certificate of public convenience and necessity,"[4] also called a Section 7 certificate. For such a certificate to issue, the Commission must find that the proposed project will serve the public interest.

Getting the green light under either section isn't simple. Part of the difficulty stems from the National Environmental Policy Act ("NEPA"), which Congress passed to "encourage productive and enjoyable harmony between man and his environment."[5] NEPA imposes procedural hurdles on federal agencies that require them to analyze the environmental effects of their proposals and actions. And one way for an agency to show its work is to prepare an "environmental impact statement."

The requirements for an environmental impact statement are substantial. Each one must include, among other things, a "detailed statement" of the proposed action's environmental impact, alternatives, and any irreversible resource commitments necessary to implement the project.[6] That makes for a costly and time-intensive process. And it creates a plethora of opportunities for project opponents to run up costs and cause delays for project sponsors.

But not every agency action requires such rigorous analytic effort. Only *major* actions that *significantly affect* the environment trigger impact statements. Others

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[4] 15 U.S.C. § 717f(c)(1)(A).

[5] 42 U.S.C. § 4321.

[6] 42 U.S.C. § 4332(2)(C).

require only an "environmental assessment," which outlines an agency's thinking on whether an impact statement is necessary. If it is, the agency prepares both the assessment and the statement. If it isn't, the agency issues a "finding of no significant impact" to accompany the assessment.

Just because the Commission must assess the environmental impact of a project doesn't mean it must say "no" if there are in fact environmental downsides. NEPA is a procedural law, not a substantive one. As part of its tool belt, the Commission can require environmental-related mitigation efforts as a condition of approval, and it often does so.

The Commission's review process has another aspect to it as well: balancing factors that affect the public interest. If those factors weigh against the proposal, the Commission may deny authorization.

II. THE STATEMENT

The Commission's Greenhouse Gas Statement, issued in February, contained many fundamental changes to the Commission's review process. As summarized below, the statement (1) set a threshold for when the Commission must prepare an environmental impact statement; (2) announced that climate-change considerations must be considered in the public-interest analysis; (3) expanded the types of emissions the Commission would consider when reviewing proposals for new infrastructure; and (4) encouraged project applicants to include mitigation measures

in their proposals. And it set these changes to take effect *immediately*, rather than at a future date, and even declared that the Commission would implement the changes when reviewing already-pending infrastructure applications.

First, the Commission specifically delineated a threshold for an environmental impact statement, quantifying just how much "carbon dioxide equivalent" (a term for describing different greenhouse gases in a common unit) a project needed to produce before the Commission would prepare an impact statement. That number was 100,000 metric tons per year, measured using a project's full burn rate—that is, what it could produce when running at capacity.

Second, the statement announced the integration of climate-change considerations (including greenhouse-gas emissions) into the Commission's public-interest determinations. In other words, a project's impact on climate change was set to become one of the many factors the Commission balanced. And the Commission would also consider proposed mitigation measures on a case-by-case basis.

Third, the statement expanded the types of greenhouse-gas emissions the Commission would consider when reviewing proposals for new infrastructure. Prior to the statement, the Commission considered only direct emissions from the construction and operation of a project. But the statement proclaimed that the Commission would for some Section 7 projects evaluate emissions taking place far from a project or occurring later in time—a considerable shift from Commission

precedent. In other words, the Commission would continue to consider direct emissions for both Section 3 and Section 7 projects. But for Section 7 projects, the Commission planned to consider upstream and downstream emissions on a case-by-case basis.

The Commission grounded its differing treatment for Section 3 and Section 7 projects in two D.C. Circuit opinions: *Freeport*[7] and *Sabal Trail*.[8]

Freeport involved a proposed redesign of a liquefied-natural-gas terminal in Texas to support exports (a Section 3 project). Environmental groups challenged the Commission's NEPA analysis, arguing that the environmental consequences of exporting natural gas from the terminal were indirect effects the Commission should have considered.

The court disagreed. What set the boundaries of the Commission's analysis was whether an effect was a *reasonably foreseeable consequence* of a project. And foreseeability rose and fell with the existence of a *close causal relationship* between the environmental effect and the alleged cause.

Such a close relationship was missing, the court held, because another agency stood between the alleged cause (the Commission's approval of the terminal redesign) and the environmental effect (the burning of *exported* liquified natural gas).

[7] *Sierra Club v. Fed. Energy Regulatory Comm'n*, 827 F.3d 36 (D.C. Cir. 2016).

[8] *Sierra Club v. Fed. Energy Regulatory Comm'n*, 867 F.3d 1357 (D.C. Cir. 2017).

The Department of Energy, not the Commission, had sole authority to license the export of natural gas, which meant that the Commission had no power to prevent those exports—and thus whether there was even exported gas to burn. Or, as the Supreme Court recognized in a case known as *Public Citizen*,[9] if an agency's limited authority means it can't prevent an effect, its actions can't be a legally relevant *cause* of that effect. Applied in *Freeport*, that principle meant that the Commission had no obligation to consider something (the environmental effects of burning *exported* natural gas) it could do nothing about.

Sabal Trail involved the construction of interstate natural-gas pipelines (Section 7 projects). Environmental groups challenged the projects' approval, arguing that the Commission should have accounted for the greenhouse-gas emissions from burning the gas that the pipelines would carry.

This time, the court agreed. It held that the Commission should have estimated the amount of power-plant carbon emissions the pipelines would have produced. That was because the burning of natural gas was a reasonably foreseeable effect of authorizing a pipeline to bring gas to those plants. And it was just as foreseeable that burning natural gas would release into the atmosphere the sorts of carbon compounds that contribute to climate change.

[9] *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004).

The *Sabal Trail* court distinguished both *Freeport* and *Public Citizen*. It explained that *Freeport* rested on the premise that the Commission had no legal authority to prevent the effects of natural-gas exports (because the Department of Energy had sole authority to license exports). And it said that the touchstone of *Public Citizen* was that an agency didn't need to consider environmental information if it had no statutory authority to *act* on that information.

So under *Freeport*, the Commission couldn't consider downstream emissions for a Section 3 project. But under *Sabal Trail*, the Commission had to consider them for a Section 7 project. That is the same line the statement tried to draw:

Section 3 (Import and Export Infrastructure)	Section 7 (Interstate Infrastructure)
▪ Direct emissions	▪ Direct emissions ▪ Upstream emissions (case-by-case) ▪ Downstream emissions (case-by-case)

Finally, the statement built on the Commission's practice of sometimes requiring mitigation efforts as a condition of project approval. The statement specifically encouraged project sponsors to propose mitigation efforts that would minimize climate effects, which the Commission would consider when balancing the need for the project against its environmental impacts. And although the Commission declined to mandate a particular form of mitigation, it made clear it wanted to see

real, verifiable, and measurable emissions reductions.

III. DISSENTS

The statement drew a 3-2 vote, with Commissioners Danly and Christie dissenting—vigorously.

Both Commissioners criticized the statement as exceeding the Commission's authority and making it harder and more expensive to secure approval for Section 3 and Section 7 projects. As they explained, the point of the Natural Gas Act—and, by extension, the Commission's delegated authority—is to *promote* the development of natural-gas facilities. To treat natural gas as harmful (and thus against the public interest) when adjudicating Section 3 and Section 7 applications, then, would have been contrary to the purpose Congress established the Commission to serve.

Both dissenting Commissioners also viewed the statement as a fundamental shift in the Commission's NEPA obligations. The Commission's NEPA regulations use project categories, not emissions thresholds, to determine when to prepare only an environmental assessment or the more-involved environmental impact statement. And those regulations say nothing about greenhouse-gas emissions. So to tie impact statements to an emissions threshold, Commissioner Danly explained, would have been to amend the NEPA regulations by stealth. Commissioner Christie added that the statement seemed to assume that the Commission could use a greenhouse-gas analysis, conducted under its NEPA environmental review, to reject a gas project that

would otherwise be approved under the Natural Gas Act. But NEPA provided no such statutory authority, he said, because it imposes procedural duties, not substantive ones.

Both dissents tried to grapple with *Sabal Trail*, deeming it an outlier opinion and criticizing the statement for relying on it. They added that the opinion conflicts with Supreme Court precedent, including *Public Citizen*. And Commissioner Danly said he expected it to be challenged in the Supreme Court soon.

Both dissents also drew on the Administrative Procedure Act and related doctrines, criticizing the statement for running afoul of well-settled safeguards. Commissioner Danly pointed out that the statement hadn't gone through a notice-and-comment period, which is something the Administrative Procedure Act requires. And Commissioner Christie suggested the emissions threshold was arbitrary, rather than the product of reasoned decision-making. Commissioner Christie also viewed the statement more broadly as in conflict with the major-questions doctrine, under which an agency that seeks to decide an issue of major national significance must have clear statutory authorization to do so. And he said it would have been "deeply unfair" to apply the statement to pending project applications, invoking notions of retroactivity. As he explained, the statement meant that project sponsors who had prepared and submitted applications to meet old standards would have seen the Commission apply a new set of standards—a result that would be markedly unjust.

IV. REHEARING PETITIONS

The dissenting Commissioners weren't the only ones who took issue with the statement. Energy companies, several States, and other organizations filed rehearing petitions to ask the Commission to reconsider what it had done. In all, the Commission received thirteen petitions.

Every petition argued that the statement went beyond the Commission's authority under the Natural Gas Act. So too that the statement was arbitrary and capricious. All but two brought up NEPA, contending that the Commission was treating the law as one of substance, not procedure. Nine of the thirteen complained that the statement hadn't gone through a notice-and-comment period. Five petitions mentioned the major-questions doctrine. Three more challenged the statement's immediate and retroactive application. And one petition, from Louisiana and seventeen other States, claimed that the statement raised serious questions under the Tenth Amendment because upstream and downstream activities are quintessentially within the States' police powers.

V. REHEARING DENIED (SORT OF)

The Commission dismissed the rehearing petitions but walked back almost to where it started. It reclassified the statement as a draft. It said it wouldn't apply the statement's policy changes to pending applications or those filed before a final version issued. And it opened a period for public comments.

VI. PUBLIC COMMENTS

The comment process recently closed. Far more parties commented than asked for rehearing. Unique comments totaled 107, and a handful of individuals submitted essentially identical comments—likely working from a shared script. More comments opposed the statement than supported it, but it was close: 48 to 40.

More comments came from individuals and environmental groups than any other. Energy companies submitted the second most. Then came trade organizations, government organizations, public officials, States, schools, unions, and technology companies—in that order. (For a breakdown of who commented, see Appendix A-1.)

Most of the supporters thought the statement wasn't doing enough; they asked the Commission to go further. For example, the EPA suggested separate measurements for each type of greenhouse gas. The Attorneys General from eleven States and Washington D.C. proposed forcing project sponsors to estimate the social cost, in dollars, that greenhouse-gas emissions from their projects would cause. And Waterspirit, an environmental and spiritual group, wanted to require the Commissioners to visit a project site before they could approve it. (For a breakdown of which positions commenters took, see Appendix A-2. And for a breakdown of which types of commenters took each position, see Appendix A-3.)

Many comments advanced both legal and policy arguments. On the legal side, those who opposed the statement argued that it went beyond the Commission's

powers under the Natural Gas Act and NEPA. They also claimed that the emissions threshold for triggering an impact statement was arbitrary and capricious. Some commenters invoked the major-questions doctrine and other points from Commissioner Danly's and Commissioner Christie's dissents as well.

On the policy side, the oppositions noted the current backlog of infrastructure projects. The statement's changes to the review process, they said, would only make things worse. They also mentioned the uncertainty stemming from Russia's war against Ukraine. Given how quickly the energy landscape changed once the invasion began, the Commission's timing was less than ideal.

Those in support of the statement largely took the opposite positions. They thought that both the Natural Gas Act and NEPA gave the Commission power to implement the statement's policy changes. They said that the emissions threshold was a well-reasoned idea, not an arbitrary one. They urged that the major-questions doctrine was of no moment. And because climate change is a serious problem, they emphasized, the ends the statement pursued justified the means it used.

The opponents and supporters of the statement did share one thing in common, though: neither side seemed satisfied with the lines drawn by the D.C. Circuit. Those who opposed the statement followed the dissenting Commissioners' lead, arguing that *Sabal Trail* was wrongly decided. And those who supported the statement took aim at *Freeport*, arguing that *it* was wrongly decided. Both sides asked

the Commission to ditch reliance on whichever precedent they thought was wrong.

VII. TAKEAWAYS

It is anyone's guess when the Commission will release a final statement, and what the substance will contain. But it is hard to imagine a scenario that doesn't involve at least one trip to court.

If the Commission stays the course and adopts a final statement that largely tracks the draft, there can be little question that the groups who petitioned for rehearing and opposed the statement through public comments will seek relief in an Article III forum. And they will likely be armed with a reinvigorated dissent, emphasizing agency overreach and criticizing the Commission for using NEPA as a means to a substantive end, rather than as the procedural tool Congress intended.

But there's more. Since the public comment period closed, the Supreme Court handed down a landmark decision in *West Virginia v. EPA*, for the first time embracing the major-questions doctrine—and doing so to rein in agency action.[10] There, the Court invalidated an agency rule that would have required existing coal-fired power plants to reduce their energy production or subsidize increased generation by natural-gas, wind, or solar sources. The rule would have restructured the American energy market, forcing a transition away from coal. The Court held that such a major overhaul could be accomplished by an agency only where Congress

[10] No. 20-1530, --- S. Ct. ----; 2022 WL 2347278 (U.S. June 30, 2022).

spoke clearly in providing authority for the change.

Justice Gorsuch's concurrence likened the doctrine to other "clear-statement rules" that protect foundational constitutional guarantees—namely the separation of powers, sovereign immunity, and the prohibition of retroactive legislation. And he provided further guidance on when the doctrine applies: when an agency (1) claims the power to resolve a matter of great political significance; (2) seeks to regulate a significant portion of the American economy or require billions of dollars in spending by private persons or entities; or (3) seeks to intrude into an area that is the particular domain of state law. Those categories track the comments of opponents of the statement, making the major-questions doctrine a likely feature of future litigation.

On the other side, if the Commission rescinds the statement altogether, supporters will be left with nothing—not even what many thought did not go far enough. Many of the groups that filed public comments in favor of the draft statement are no stranger to litigation against the Commission; the Sierra Club, for example, was a party in *Freeport, Sabal Trail*, and five other cases[11] that the D.C. Circuit cited in just those two opinions. Those groups will undoubtedly be ready the next time the Commission approves a project that would have been subject to more

[11] *Kleppe v. Sierra Club*, 427 U.S. 390 (1976); *Sierra Club v. Morton*, 405 U.S. 727, (1972); *Sierra Club v. U.S. Dep't of Energy*, 867 F.3d 189 (D.C. Cir. Aug. 15, 2017); *Sierra Club v. EPA*, 292 F.3d 895 (D.C. Cir. 2002); *Sierra Club v. Marsh*, 976 F.2d 763 (1st Cir. 1992).

rigorous scrutiny had the draft statement become final. And they will be armed not only with the ordinary arguments that the Commission didn't do enough, but with a clear example (via the draft statement) of what the Commission could have done better.

* * *

It is true that all eyes are now on the Commission, as it grapples with the important decision of what, if anything, to do with its draft statement. But that gaze will soon turn to the courts. Although the Commission will have the first word in this space, whatever it decides is bound to be the subject of judicial review, giving the courts the final say.

APPENDIX

To create the charts below, we first gathered all the public comments on the Greenhouse Gas Statement. There were 126.

Then we reviewed the comments with an eye toward who submitted them and what position they took. We selected categories for both attributes that covered the range of all the comments submitted and divvied them up into distinct subgroupings.

We designated the following categories to represent the types of parties that commented:

- Individual / Environmental Group;
- Government Organization;
- Multiple;
- Oil/Energy Company;
- Public Official;
- School;
- State;
- Technology Company;
- Trade Organization; and
- Union

We noted a private citizen as an "Individual / Environmental Group" along with non-profit or environmental organizations.

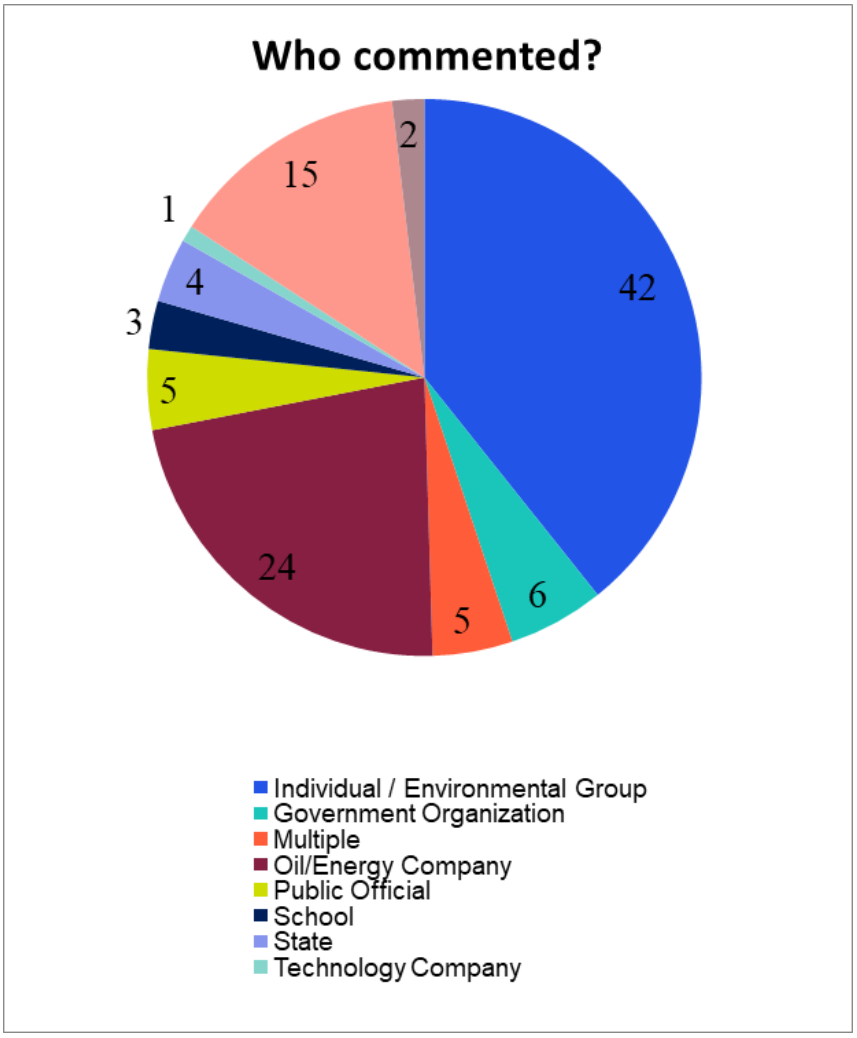
We also chose the following categories to classify the position on the policy that a commenter took:

- Support;
- Support (Expand);
- Against;
- Mixed Position; and
- No Clear Position

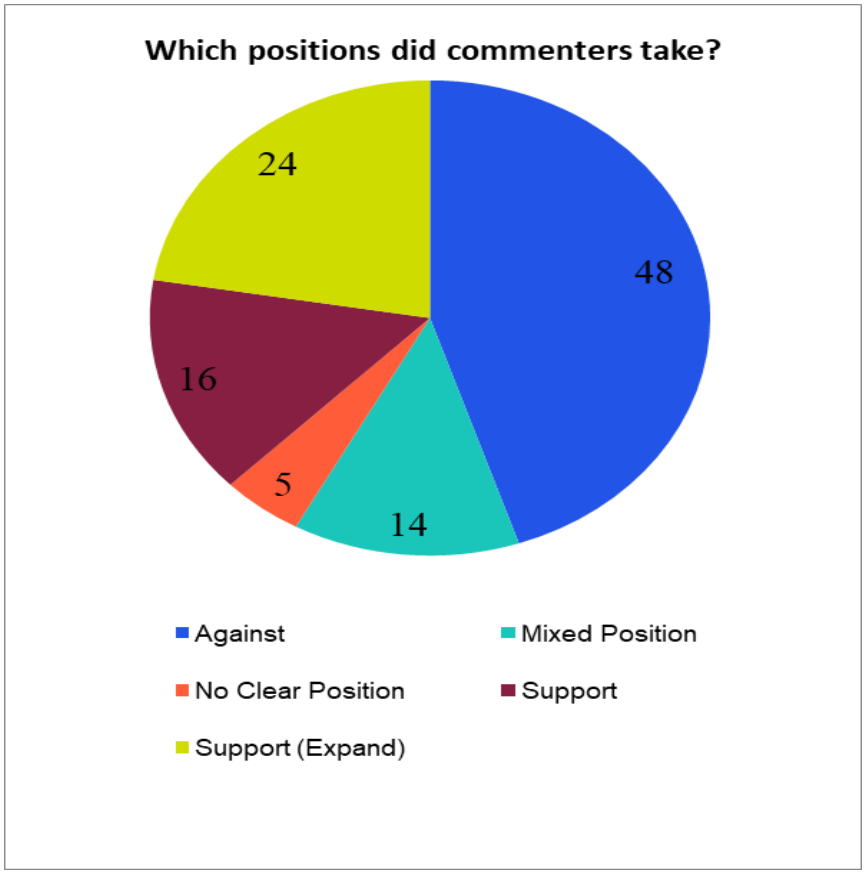
We found it important to differentiate between the comments that supported the policy without expressing any concerns and the comments that supported it but wanted the Commission to go further, so we created the "Support (Expand)" group.

And we listed comments that duplicated other comments verbatim together to provide a clearer picture of the 107 unique comments.

A-1



A-2


Which positions did commenters take?
24
48
16
5
14
Against
Mixed Position
No Clear Position
Support
Support (Expand)

A-3