IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 08-72265

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT,
PETITIONER,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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ON PETITION FOR REVIEW OF ORDERS OF THE
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BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUE

Whether the Federal Energy Regulatory Commission ("FERC" or "Commission") adequately considered potential air quality impacts resulting from an expansion of an interstate gas pipeline ("Project") under the requirements of the Natural Gas Act, the National Environmental Policy Act and the Clean Air Act, when it evaluated the air quality impacts of the authorized construction and operation, but, with regard to potential air quality impacts associated with the

consumption of natural gas, relied on standards established by the state agency with jurisdiction.

STATEMENT REGARDING JURISDICTION

This Court has jurisdiction under section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes and regulations are contained in the Addendum.

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSITION BELOW

In the orders on review, the Commission issued a certificate of public convenience and necessity under section 7(c) of the Natural Gas Act ("NGA"), 15 U.S.C. § 717f(c), to North Baja Pipeline, LLC ("North Baja"), authorizing North Baja to expand and modify its interstate natural gas interstate pipeline system to facilitate the importation of regasified liquefied natural gas ("LNG") from Mexico. *North Baja Pipeline, LLC*, 121 FERC ¶ 61,010 (Oct. 2, 2007) ("Certificate Order"), R. 1:135[1], *reh'g and stay denied*, 123 FERC ¶ 61,073 (Apr. 24, 2008) ("Rehearing Order"), R. 1:168. In considering North Baja's application for a

[1] Citations to record documents follow the format used in Petitioner's Excerpts of Record. The first number refers to the volume of the Excerpts, the second to the record item number, and the third, where present, to the page number within that document.

certificate, the Commission prepared both draft and final environmental impact statements ("EIS") under the National Environmental Policy Act ("NEPA"), addressing a wide range of potential environmental impacts, including impacts on air quality. The final EIS concluded that with the implementation of recommended mitigation measures, the proposal would be environmentally acceptable. *See* Final EIS, R. 3-4:115. The final orders, adopting the EIS findings, impose the recommended mitigation measures as conditions of the certificate. Certificate Order, R. 1:135:41-42, App. B. Further, the final orders reflect the Commission's consideration of all factors bearing upon the public interest, as required by NGA section 7, including environmental issues. *See, e.g.*, Rehearing Order, R. 1:168:38.

Petitioner South Coast Air Quality Management District ("South Coast"), a governmental body responsible for regulating stationary sources of air pollution in the South Coast Air Basin ("Basin"),[2] participated in the Commission's proceeding by filing comments on the draft and final EIS. *See* R. 3:119 (South Coast comments on final EIS), R. 5:86 (South Coast comments on draft EIS). Before this Court, as before the Commission, South Coast contends that the Commission

[2] The Basin consists of four California counties (Orange County, and the non-desert portions of Los Angeles, Riverside and San Bernardino Counties) which, together with the Riverside County portions of the Salton Sea Air Basin and the Mojave Desert Air Basin, comprise South Coast's jurisdictional area. Certificate Order, R. 1:135:13 n.23. As in the Commission's orders, references to the Basin in this brief are intended to encompass South Coast's entire jurisdictional area.

inadequately considered the potential air quality impacts in the Basin resulting from the end-use consumption of the regasified LNG to be transported by the Project under the NGA, NEPA and the Clean Air Act ("CAA"). *See* Br. 1.[3] In particular, South Coast, having unsuccessfully appealed, in state court, the adequacy of the California Public Utilities Commission's ("California Commission") gas quality standards with regard to air quality concerns, challenges the Commission's reliance upon the state standards in the orders on review. *See South Coast Air Quality Mgmt. Dist. v. Pub. Utils. Comm'n of Cal.*, Case No. S1151156, 2008 Cal. LEXIS 8866 (Cal. July 16, 2008).

II. STATEMENT OF FACTS

A. Statutory And Regulatory Framework

The NGA, 15 U.S.C. §§ 717, *et seq*., grants the Commission jurisdiction over the transportation and wholesale sale of natural gas in interstate commerce, with jurisdiction over sales for end-use consumption and facilities for local distribution reserved to the states. NGA § 1(b), 15 U.S.C. § 717(b). Under section 7 of the NGA, 15 U.S.C. § 717f(c)(1)(A), "a natural gas company must obtain a certificate of public convenience and necessity . . . from FERC before it can engage in the acquisition, construction, operation or extension of any facility." *Williston Basin Interstate Pipeline Co. v. An Exclusive Gas Storage Leasehold &*

[3] Throughout this Brief, "Br." refers to South Coast's opening brief.

Easement in the Cloverly Subterranean Geological Formation, 524 F.3d 1090, 1092 (9th Cir. 2008) (discussing NGA in context of pipeline's condemnation claim against natural gas producer). Under NGA section 7(e),

> a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, 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 this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity . . . .

NGA § 7(e), 15 U.S.C. § 717f(e). "FERC can also attach 'reasonable terms and conditions as the public convenience and necessity may require.'" *Public Utils. Comm'n of Cal. v. FERC*, 100 F.3d 1451, 1456 (9th Cir. 1996) (quoting NGA § 7(e), 15 U.S.C. § 717f(e)) (dismissing as moot appeals concerning the scope of FERC's jurisdiction over intrastate facilities).

NEPA, 42 U.S.C. §§ 4321, *et seq.*, sets out procedures to be followed by federal agencies to ensure that the environmental effects of proposed actions are "adequately identified and evaluated." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989), *cited in U.S. Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 768 (2004). "'NEPA itself does not mandate particular results' in order to accomplish these ends." *Public Citizen*, 541 U.S. at 756 (quoting *Robertson*, 490 U.S. at 350); *see also Bering Strait Citizens for Responsible Res.*

Dev. v. U.S. Army Corps of Eng'rs, 524 F.3d 938, 947 (9th Cir. 2008). "Rather, NEPA imposes only procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions." *Public Citizen*, 541 U.S. at 756-57 (citation omitted). In particular, a federal agency must prepare an EIS for any "major Federal action significantly affecting the quality of the human environment," 42 U.S.C. § 4332(2)(C), detailing, *inter alia*, the impact of the proposed action and any unavoidable adverse environmental effects. *See Public Citizen*, 541 U.S. at 757.

The CAA, 42 U.S.C. §§ 7401, *et seq*., requires the development of "national air quality standards and deadlines for their attainment," with individual states having the authority and responsibility to create and enforce implementation plans to achieve attainment. *Public Citizen*, 541 U.S. at 758; *see also* 42 U.S.C. §§ 7409 (mandating air quality standards), 7410(a) (requiring state implementation plans). As relevant here, the CAA prohibits Federal agencies from supporting or approving activities that "do[] not conform to an implementation plan." 42 U.S.C. § 7506(c)(1). If the emissions from an activity exceed established thresholds, a Federal agency "must . . . undertake a conformity determination . . . to ensure that its action is consistent" with 42 U.S.C. § 7506. *Public Citizen*, 541 U.S. at 771.

B. The Commission's Proceedings And Orders

1. Background

North Baja's existing natural gas pipeline system extends 80 miles from an interconnection with El Paso Natural Gas Company near Ehrenberg, Arizona, through southeast California, to the international border between Yuma, Arizona and Mexicali, North Baja Mexico. Certificate Order, R. 1:135:2. Prior to the Commission orders in the underlying proceeding, the North Baja system was authorized to transport 512,000 dekatherms of natural gas per day, southbound only, primarily for the purpose of supplying United States natural gas to electric-generation facilities in Mexico. *Id*.

2. North Baja's Proposal And The Commission's Review

North Baja commenced the underlying FERC proceeding in 2006 by applying, under NGA section 7(c), 15 U.S.C. § 717f(c), for a certificate of public convenience and necessity authorizing the modification of its system to allow the northbound flow of gas and to expand the system to accommodate such northerly flows. Certificate Order, R. 1:135:2. The expansion will facilitate North Baja's plan to import regasified LNG from Mexico into Arizona, California, and other southwestern markets. *Id*. Although North Baja will continue to offer southbound service, once completed the expanded facilities would be able to transport 2,932,000 dekatherms of natural gas per day northbound from the international

boundary. At the time of the Commission's orders, North Baja intended to receive regasified LNG from Sempra Energy's new LNG terminal on the coast of Baja California, Mexico. *Id*. at 2-3. The newly authorized facilities would be constructed in LaPaz County, Arizona, and Imperial and Riverside Counties, California. *Id*. at 3-4.

The Commission evaluated the impacts of the Project in draft and final environmental impact statements and a proposed land use plan amendment, prepared jointly with the California State Lands Commission. Rehearing Order, R. 1:168:4-5.

Regarding air quality impacts, the final EIS addressed comments on the draft EIS from South Coast and others arguing that the regasified LNG to be imported would, *when consumed*, adversely affect air quality. Regasified LNG is anticipated to have a higher Wobbe Index than existing domestic gas supplies. Certificate Order, R. 1:135:13 & n.24. The Wobbe Index measures the heating potential, or potential Btu content, of natural gas. *Id*. at n.24. A higher Wobbe Index indicates a higher heating value, and the combustion of gas with higher heating values results in the possibility of increased nitrogen oxide emissions. *Id*. at n.24. Petitioner South Coast argued that allowing higher Wobbe Index gas into the Basin would therefore adversely affect air quality and make attainment of applicable air quality standards more difficult. South Coast Comments on Draft

EIS, R. 5:86:2-3; *see also* Certificate Order, R. 1:135:13-14 & n.23 (discussing comments and describing South Coast); Final EIS, R. 4:115:6-123 (noting South Coast's authority to regulate stationary sources of air pollution within the Basin, including sources that would be fueled by the regasified LNG at issue). Project facilities are not located in the Basin, which is at least 100 miles from the Project. Certificate Order, R. 1:168:33 n.80.

Responding to South Coast's comments and related comments by others, including the U.S. Environmental Protection Agency ("EPA") (R. 4:108), the final EIS explained that gas consumption by end-users in the Basin is not part of the Project and is therefore outside the scope of the EIS. Final EIS, R. 3:115:1-23; *see also* Final EIS, R. 4:115:6-111 – 6-143 (detailed responses to South Coast's comments on the draft EIS). In any event, the EIS explained that North Baja's contracts with shippers already require that gas delivered into its system meet the most stringent gas quality standards applicable to downstream pipelines, as set by the California Commission and South Coast. *Id*. at 1-7; Final EIS, R. 4:115:6-123 (discussing South Coast's authority); *see also* Rehearing Order, R. 1:168:22-23 (explaining that the California Commission is the "regulatory agency responsible for setting the appropriate gas quality and interchangeability standards for gas") (quoting Final EIS, R. 4:115:6-12 – 6-13). The EIS referenced in particular the California Commission's recent decision lowering the maximum Wobbe Index for

gas received by Southern California Gas Company, which delivers gas throughout the Basin. Final EIS, R. 3:115:1-6 – 1-7 (describing California Commission's authority and decision). The final EIS did, however, evaluate the air quality impacts from the construction and operation of the proposed facilities, as well as the construction and operation of new compressor stations located in Mexico and the potential changes in emissions from power plants located adjacent to one of the compressors in Mexico. *See* Final EIS, R. 3:115:4-200 – 4-205; *see also* Rehearing Order, R. 1:168:5-6.

Ultimately, the final EIS determined that while the construction and operation of the Project facilities would result in adverse environmental impacts, most of those impacts would be reduced to less than significant levels and the Project would be environmentally acceptable, with the implementation of recommended mitigation measures. Final EIS, R. 3:115:ES-27 – ES-28; Certificate Order, R. 1:135:14.

3. The Commission's Orders On Review

On October 2, 2007, the Commission issued a certificate of public convenience and necessity to North Baja, authorizing the construction of the new facilities to expand the existing pipeline and allow bi-directional flows, subject to 21 enumerated environmental conditions. Certificate Order, R. 1:135:1; *see id.* at App. B (environmental conditions). In an earlier order, the Commission

determined that, subject to the results of the then-pending environmental review and based upon a balancing of the required public interest factors, the Project is required by the public convenience and necessity, *id*. at 5-6, and will provide a "much-needed new source of natural gas to the southwest region of the United States." *Id*. at 11. The Certificate Order confirmed that the Commission's environmental review, as well as amendments to North Baja's proposal, did not alter these findings. *Id*. at 11. The Commission adopted the final EIS' recommended mitigation measures as conditions to the authorization and affirmed the final EIS' conclusion that, with these measures, North Baja's Project is an environmentally acceptable action. *Id*. at 41-42 (findings), App. B (conditions).

The Certificate Order addressed comments filed on the final EIS, including comments on air quality concerns filed by South Coast and the EPA. The Commission rejected South Coast's argument that the consumption of Project gas and the effects of consumption in the Basin must be evaluated under NEPA, respectively, as a "connected action" and an "indirect impact" of the Project. Certificate Order, R. 1:135:20, 21-23 (connected action), 23-32 (indirect impact). In response to South Coast's argument that the final EIS failed to include the conformity determination required by the CAA, the Commission determined that emissions from the consumption of gas transported by the North Baja pipeline are not "indirect emissions" of the Project under the applicable regulations because

they are not "caused by" the Commission's pipeline certification. *Id*. at 34-35. The Certificate Order also responded to comments on the final EIS by other commenters concerning emissions from facilities located in Mexico, and by EPA concerning potential water quality impacts. *Id*. at 36-38, 40-42.

Only South Coast sought rehearing of the Certificate Order, again claiming that the Commission had, under the NGA, NEPA and the CAA, inadequately evaluated and mitigated potential impacts on air quality resulting from the eventual consumption of regasified LNG in the Basin. South Coast Request for Rehearing, R. 2:142:1-2; *see also* Rehearing Order, R. 1:168:2. South Coast also sought a stay of the Certificate Order to the extent it permits North Baja to transport regasified LNG into the Basin. Rehearing Order, R. 1:168:2.

On rehearing, the Commission held that South Coast had failed to demonstrate the requisite causal connection, under NEPA and the CAA, between North Baja's Project and the potential air quality impacts from the consumption of regasified LNG in the Basin. Rehearing Order, R. 1:168:10, 36. "While the Commission does not dispute that the consumption of regasified LNG with a relatively higher [Wobbe Index] can have air quality impacts . . . any such impacts would be the result of the [California Commission's] having established what [South Coast] purports to be inadequate interchangeability and gas quality

standards, specifically the . . . adoption of an outer [Wobbe Index] limit of 1385 for California." *Id*. at 10.

Notwithstanding this finding, however, the Commission in fact considered the potential for air quality impacts in the Basin and found that the California Commission's standards "should be sufficient to prevent the introduction of additional supplies of LNG into California from resulting in a material change in air quality in the Basin." *Id*. at 31. Moreover, with regard to South Coast's NGA claims, the Commission explained that it has considerable discretion in balancing the factors it assesses under section 7 of the NGA, but that it had taken into consideration the potential for air quality impacts in the Basin by making compliance with the California Commission's gas quality standards a condition of the authorization. *Id*. at 38-39.

SUMMARY OF ARGUMENT

The NGA establishes the parameters of the Commission's review of North Baja's Project, guiding the Commission's consideration of a wide range of public interest factors – from economics to the environment – but also defining the limits of the environmental effects that the Commission must consider and, where appropriate, mitigate, under both NEPA and the CAA. Notwithstanding South Coast's baseless suggestions that the Commission's analysis entirely disregards air quality, the Commission, to the extent it could without encroaching on the

authority of the California Commission, both considered air quality impacts from the consumption, in the Basin, of regasified LNG transported by the Project and acted to prevent any material increase in emissions.

The Commission's balancing of the public interest factors under the NGA is guided by the purpose of the Commission's certificating authority: encouraging the orderly development of supplies of natural gas at reasonable prices. Accordingly, while the Commission considered potential air quality impacts in the Basin, it reasonably found that those potential impacts do not outweigh the benefits of the Project. In particular, by increasing supplies of natural gas in the Southwest, the Project will displace the need for other, more environmentally damaging fuels. Despite these findings, the Commission recognized the possibility for air quality impacts in the Basin and acted, consistent with the limits of its authority, to require that all North Baja Project gas complies with the strictest applicable gas quality standards imposed by state and local authorities.

With regard to South Coast's claims that potential air quality impacts in the Basin from the consumption of Project gas warrant analysis as "connected actions" or "indirect impacts" under NEPA, the Commission reasonably found that South Coast had failed to establish the causal link demanded by NEPA. Record evidence establishes that the Project will in fact serve the entire southwest United States and, without the Project, the high Wobbe Index gas to which South Coast objects will

continue to be consumed in the Basin. Put another way, the Commission reasonably concluded that because it lacks the authority over the importation of gas and the quality of gas consumed in California, the Commission's authorization of the Project is not the legally relevant cause of any potential air quality impacts. Nevertheless, in order to fully address the concerns expressed by both South Coast and the EPA, the Commission examined the California Commission's standards and concluded that adherence to those standards should reasonably ensure the prevention of air quality impacts in the Basin.

The CAA requirements for preparing a conformity determination, which South Coast seeks here, likewise require a strong causal connection between the Project and the claimed emissions. South Coast's arguments once again fail to establish this connection. Under the CAA and EPA's regulations, emissions in the Basin are neither "caused by" the Project nor are they "reasonably foreseeable." Perhaps most important, however, the Commission reasonably determined that requiring it to leverage its NGA authority and intrude upon the California Commission's jurisdiction over gas quality and consumption – an area the Commission cannot "practicably control" – would dismantle the very division of authority established by the CAA and carefully preserved in the EPA's regulations.

ARGUMENT

I. STANDARD OF REVIEW

Under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A), the Court reviews Commission orders to determine whether they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A); *see Fall River Rural Elec. Coop. v. FERC*, 543 F.3d 519, 525 (9th Cir. 2008). "In determining whether an agency's action is arbitrary or capricious," the Court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1097 (9th Cir. 2003) (quoting *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 573 (9th Cir. 1998)) (internal quotation marks and citation omitted). This standard likewise applies to the Commission's application of the CAA to North Baja's expansion project. *City of Olmsted Falls v. FAA*, 292 F.3d 261, 269 (D.C. Cir. 2002); *City of S. Pasadena v. Slater*, 56 F. Supp. 2d 1106, 1135 (C.D. Cal. 1999) (applying the APA standard of review to both CAA and NEPA challenges).

As to South Coast's NEPA claims, this Court's "task . . . 'is simply to ensure that [FERC] has adequately considered and disclosed the environmental impact of its actions . . . .'" *American Rivers v. FERC*, 201 F.3d 1186, 1194-1195 (9th Cir. 1999) (quoting *Association of Pub. Agency Customers, Inc. v. Bonneville Power*

Admin., 126 F.3d 1158, 1183 (9th Cir. 1997) (citing *Baltimore Gas & Elec. Co. v. Natural Res. Defense Council*, 462 U.S. 87, 97-98 (1983)); *see also National Comm. for the New River v. FERC*, 373 F.3d 1323, 1327 (D.C. Cir. 2004) (denying NEPA objections to FERC certification of a pipeline extension project). Under the "rule of reason" adopted by this Court for evaluating the adequacy of an agency's EIS, "'once [the Court is] satisfied that a proposing agency has taken a 'hard look' at a decision's environmental consequences, [its] review is at an end.'" *American Rivers*, 201 F.3d at 1194 (quoting *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1519 (9th Cir. 1992) (citation omitted)); *see also Fuel Safe Wash. v. FERC*, 389 F.3d 1313 (10th Cir. 2004) (affirming FERC's application of NEPA in authorizing a new natural gas pipeline). "The rule of reason analysis and the review for an abuse of discretion are essentially the same." *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1376 (9th Cir. 1998).

With regard to the Commission's factual findings, "[t]he court cannot substitute its judgment for that of the Commission . . . and it must uphold the Commission's factual findings if they are supported by substantial evidence." *National Comm. for the New River*, 373 F.3d at 280 (internal citations omitted) (citing NGA § 19(b), 15 U.S.C. § 717r(b); *Texaco Inc. v. FERC*, 148 F.3d 1091, 1095 (D.C. Cir. 1998)); *see also California Gas Producers Ass'n v. FPC*, 383 F.2d 645, 648 (9th Cir. 1967) ("we owe the Commission the same deference to its

expertise that courts generally owe to the specialized boards and commissions created by the Congress to deal with complex and difficult problems in the field of economic regulation"). Substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. If the evidence is susceptible of more than one rational interpretation, we must uphold [FERC's] findings." *Bear Lake Watch, Inc. v. FERC*, 324 F.3d 1071, 1076 (9th Cir. 2003) (internal quotation marks and citation omitted) (discussing identical language in Federal Power Act).

Finally, the Commission's interpretation of the statute it administers, here the NGA, is entitled to deference where the language is ambiguous and the Commission's interpretation is reasonable. *Port of Seattle v. FERC*, 499 F.3d 1016, 1032 (9th Cir. 2007) (citing *Chevron U.S.A., Inc. v. Natural Res. Defense Council*, 467 U.S. 837, 842 (1984)). The Commission's interpretation of other statutory and regulatory authority is reviewed *de novo*. *California Trout, Inc. v. FERC*, 313 F.3d 1131, 1134 (9th Cir. 2002).

II. CONSISTENT WITH THE NGA AND COMMISSION PRECEDENT, THE COMMISSION APPROPRIATELY CONSIDERED AND BALANCED ALL THE "PUBLIC INTEREST" FACTORS IN APPROVING THE PROJECT.

When evaluating a proposal, such as North Baja's, for a certificate of public convenience and necessity under NGA section 7, the Commission balances a number of factors to determine "that the proposed service, sale, operation,

construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity." NGA § 7(e), 15 U.S.C. § 717f(e). The Commission has, by policy statement and through established precedent, set "criteria for determining whether there is a need for a proposed project and whether the proposed project will serve the public interest." Certificate Order, R. 1:135:9 (citing *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999) ("Policy Statement"), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000)); *see also* Rehearing Order, R. 1:168:38 (citing same). "The Commission identifies and considers *all factors* bearing on the public interest, consistent with its mandate to fulfill the statutory purpose of the NGA, which is to encourage the development of adequate natural gas supplies at reasonable prices." Rehearing Order, R. 1:168:38 (citation omitted). "Among the factors that the Commission considers in the balancing process are the proposal's market support, economic, operational, and competitive benefits, and environmental impact." *Id*. (quoting Policy Statement, 88 FERC at 61,743).

In this case, the Commission considered South Coast's comments and concerns with regard to potential air quality impacts from gas consumption in the Basin. Rehearing Order, R. 1:168:39; *accord Henry v. FPC*, 513 F.2d 395, 403-05 (D.C. Cir. 1975) (NGA section 7 requires consideration of all factors bearing upon

the public interest, including matters outside its direct regulatory jurisdiction). To guard against potential adverse impacts, the Commission has required North Baja to "only deliver gas that meets the strictest applicable gas quality standards imposed by state regulatory agencies on downstream [local distribution companies] and pipelines." Rehearing Order, R. 1:168:39; *see also* Certificate Order, R. 1:135:16 n.29.

Moreover, assuming South Coast's concerns with regard to air quality impacts to be true, the Commission determined that "approval of North Baja's expansion project under the NGA is nevertheless sound policy as it will increase gas supplies, thereby serving to make natural gas more economical and, consequently, a relatively attractive fuel when compared to more environmentally damaging alternatives." Rehearing Order, R. 1:168:39; *see* Certificate Order, R. 1:135:9-12 (discussing other public interest factors). The Commission referenced the final EIS' comparison of the air emissions of natural gas, fuel oil and coal, showing that "the use of either fuel oil or coal would increase emissions significantly." Rehearing Order, R. 1:168:39-40 (internal quotation marks and citation omitted). And, both the final EIS and the California Commission, in its gas quality standards proceeding, concluded that discouraging new gas sources could lead to such adverse environmental consequences. *Id*. at 40 (quoting California Commission Decision 06-09-039, R. 6:A:156) ("further restrictions on

the [Wobbe Index] 'could clearly discourage some [natural gas] supplies from entering the state").

Contrary to South Coast's assertions (Br. 60-63), nothing in the NGA or related precedent requires the Commission – so long as it has *considered* all the public interest factors and enunciated a reasoned basis for its public interest findings – to interfere with the California Commission's authority over gas quality. As the D.C. Circuit has explained, the Commission's authority to consider all the necessary public interest factors

> means authority to look into those factors which reasonably relate to the purposes for which FERC was given certification authority. It does not imply authority to issue orders regarding any circumstance in which FERC's regulatory tools might be useful.

Office of Consumers' Counsel v. FERC, 655 F.2d 1132, 1147 (D.C. Cir. 1980); *see also, e.g., Bonneville Power Admin. v. FERC*, 422 F.3d 908, 921-22 (9th Cir. 2005) (finding that the Commission exceeded its statutory authority in requiring non-jurisdictional entities to make refunds); *Transmission Agency of N. Cal. v. FERC*, 495 F.3d 663, 673 (D.C. Cir. 2007) ("FERC is a creature of statute, and the agency has only those authorities conferred upon it by Congress") (internal citation marks and citation omitted)). Consistent with this precedent, and as the Courts have previously held, the words "public interest" in the NGA take their meaning from the purpose of the Act which is "to encourage the orderly development of plentiful supplies of natural gas at reasonable prices." Rehearing Order, R. 1:168:39

(internal quotation marks and citation omitted); *see also National Ass'n for the Advancement of Colored People v. FPC*, 425 U.S. 662, 669 (1976) (construing the NGA and the Federal Power Act, and explaining that "the use of the words 'public interest' in a regulatory statute is not a broad license to promote the general public welfare").

Thus, the Commission properly relied on the California Commission's gas quality standards. The California Commission is "the agency with sole jurisdiction for setting standards for gas that can be consumed by electric generators and other end users in the Basin." Rehearing Order, R. 1:168:2; *see also id*. 22-23 (further describing California Commission's authority); Final EIS, R. 3:115:1-6 – 1-7; *see also* California Commission Decision 07-02-032, R. 6:B:9. South Coast makes much of the fact that the California Commission did not perform an assessment under the California Environmental Quality Act. Br. 63. The California Commission's decision, however, rested in part on its finding that "the enactment of stricter gas quality regulations than those currently in place (the "baseline") would not result in any significant, adverse environmental effects . . . ." California Commission Decision 07-02-032, R. 6:B:10. Further, the California Commission did determine that lowering the acceptable Wobbe Index to the level South Coast advocated "would have more adverse environmental consequences because any further restrictions on the [Wobbe Index] 'could clearly discourage some [natural

gas] supplies from entering the state.'" Rehearing Order, R. 1:168:40 (quoting California Commission Decision 06-09-039, R. 6:A:156) (first alteration added)); *see also id*. at 30-31 (discussing the tradeoff between environmental protection and increasing natural gas supplies in the California Commission's decision). This finding further supports the Commission's independent public interest finding that the benefits of the Project outweigh the potential adverse effects. Rehearing Order, R. 1:168:39.

Moreover, South Coast neglects to mention that the California Commission's decision not to perform a full environmental assessment, while unsatisfactory to South Coast, was affirmed by the California Supreme Court. *See* California Commission Decision 06-09-039, R. 6:A:168-69, *reh'g denied*, Decision 07-02-032, R. 6:B:9-12, *aff'd, South Coast Air Quality Mgmt. Dist. v. Pub. Utils. Comm'n of Cal.*, *supra* p. 4. South Coast cannot properly compel the Commission to intrude upon the California Commission's jurisdiction as a remedy. "[A] need for federal regulation," which South Coast asserts exists here (Br. 50), "does not establish [FERC] jurisdiction that Congress has not granted." *Office of Consumers' Counsel*, 655 F.2d at 1147 (quoting *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 635-36 (1972)).

With regard to the issuance of a NGA section 7 certificate, "Congress has vested considerable discretion in the Commission; the burden is upon petitioners to

show that it has been abused." *California Gas Producers Ass'n v. FPC*, 383 F.2d at 648 (denying appeal of certificate where Commission order was supported by substantial evidence). Here, the Commission took air quality impacts into account in balancing all the public interest factors under the NGA, and its reliance on the California Commission – the jurisdictional authority with regard to the relevant standards – cannot reasonably be characterized as an abuse of discretion.

III. THE COMMISSION ADEQUATELY ADDRESSED POTENTIAL AIR QUALITY IMPACTS FROM THE CONSUMPTION OF HIGH WOBBE INDEX GAS UNDER NEPA.

Consistent with NEPA, the Commission prepared an EIS for North Baja's Project addressing a wide range of impacts associated with the construction and operation of the Project. Nevertheless, South Coast argues that the Commission erred in excluding from its analysis the potential air quality impacts of the consumption, in the Basin, of the regasified LNG to be transported by the Project. Br. 22-36. NEPA requires the Commission to consider "three types of actions (connected, cumulative, and similar actions), three types of impacts (direct, indirect, and cumulative) and three types of alternatives (a no action alternative, other reasonable courses of action, and mitigation measures not in the proposed action)." Rehearing Order, R. 1:168:11 (citing 40 C.F.R. § 1508.25). South Coast seeks Commission consideration of the Basin air quality impacts as either a

"connected action" or an "indirect impact," and asserts that the Commission failed to properly consider mitigation for the claimed air quality impacts. Br. 22-38.

A. The Commission Reasonably Concluded That The Consumption Of Gas In The Basin Is Not A "Connected Action" Requiring Analysis In The EIS.

South Coast relies upon an unreasonable application of the controlling NEPA regulations in arguing (Br. 30-36) that the use of LNG transported by North Baja's Project in the Basin is so "connected" to the Commission's certification of North Baja's facilities that it is a "connected action" requiring formal analysis in the EIS. Rehearing Order, R. 1:168:13. Looking first to the definition of "action" in the NEPA regulations, the Commission reasoned that gas consumption by private end users is not an "action" as that term is used in NEPA. The regulations "set forth a more limited definition of 'actions' than advocated by" South Coast, meaning not "any act or activity," but "the types of actions generally undertaken by governmental agencies . . . ." *Id*. at 14 n.28; 40 C.F.R. § 1508.18 ("Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals"). By attributing to the Commission the "actions" of innumerable end users (residential, commercial and industrial) South Coast "is attempting to apply the connected action provision in a way for which it was not

designed." Rehearing Order, R. 1:168:14 (citing *Hammond v. Norton*, 370 F. Supp. 2d 226, 256 (D.D.C. 2005) (finding that a private action was not a "connected action" because it was not a "major federal action" under NEPA)); Certificate Order, R. 1:135:21-23 (discussing cases applying "connected action" analysis to determine whether agency is improperly segmenting an action to avoid a finding of significant environmental impact).

Furthermore, regardless of the identity of the consumer, the consumption, in the Basin, of regasified LNG transported by the Project is not a *connected* action in the NEPA context. Actions are connected if they

> (i) Automatically trigger other actions which may require environmental impact statements.
>
> (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.
>
> (iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

40 C.F.R. § 1508.25(a)(1). While South Coast argues that the Project is dependent on the consumption of gas in the Basin (Br. 31-36), the Commission found, based upon facts in the record, that

> North Baja's expansion facilities will not bring gas only to the Basin, or even only to southern California. Rather, the expansion facilities will bring new supplies of gas to the entire southwest United States. *Without the potential end use of the gas in the Basin, the project would still have utility* as a means of transporting gas supplies for use in the rest of the southwest United States.

Rehearing Order, R. 1:168:15 (citing Final EIS, R. 3:115:1-5) (emphasis added); *see also* Certificate Order, R. 1:135:31 n.75 (explaining that, due to capacity limitations in the Southern California Gas Company system, some gas may be delivered to Phoenix and other areas east of California, and that not all gas delivered to Southern California Gas will be delivered to the Basin) (citing North Baja Reply Comments on Draft EIS, FERC-ER[4] 12-13 (Jan. 22, 2007); Sempra LNG Reply Comments on Draft EIS, FERC-ER 4 (Jan. 10, 2007)). By contrast, South Coast points to nothing in the record to support a conclusion that the Project would not proceed absent consumption of the gas in the Basin.

Because North Baja's Project has utility even absent the potential consumption of gas in the Basin, the cases South Coast relies upon concerning the primacy of the purpose or motivating force behind a project are inapplicable. South Coast correctly explains that in each of those cases the proposed action (here, North Baja's Project) could not be justified in the absence of the "connected action" (here, consumption of Project gas in the Basin). Br. 31-33 (citing *Save the Yaak Comm. v. Block*, 840 F.2d 714 (9th Cir. 1988), and *Western Land Exch. Project v. Bureau of Land Mgmt.*, 315 F. Supp. 2d 1068 (D. Nev. 2004)). Undoubtedly, "some of the LNG-sourced gas transported by North Baja will likely

[4] "FERC-ER" refers to record items included in the Commission's Supplemental Excerpts of Record filed concurrently with this Brief.

be consumed in the Basin" (Rehearing Order, R. 1:168:7), but as the Commission found, this Project indeed has a "life of its own" (Br. 31 (quoting *Barnes v. Babbitt*, 329 F. Supp. 1141, 1160 (D. Ariz. 2004)) as the facilities will serve the entire southwest United States. Rehearing Order, R. 1:168:15 (citing Final EIS, R. 3:115:1-5 (Project gas "would provide markets in California and the Southwest with access to LNG-source gas, either physically or through displacement"); *see also id.* at n.33 (distinguishing cases). Accordingly, South Coast's unreasonable construction of "connected action" cannot overcome the Commission's finding, based upon the record, that the Project has utility independent of the consumption of gas in the Basin.

B. The Commission Reasonably Determined That Potential Air Quality Impacts From the Burning Of High Wobbe Index Gas In The Basin Are Not Indirect Impacts, Under NEPA, Of North Baja's Project.

Notwithstanding South Coast's arguments to the contrary, the Commission reasonably applied NEPA regulations and precedent to conclude that any air quality impacts in the Basin are not "indirect impacts," under NEPA, of the Commission's approval of North Baja's Project. Indirect impacts "are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8(b). The Commission's Rehearing Order focused on causation and reasonably determined that the causal link between the air quality impacts and the Commission's certification decision is "too

attenuated" for a causation finding. Rehearing Order, R. 1:168:19; *see also* Certificate Order, R. 1:135:31-32 (finding that, even if causation is established, impacts on air quality are not "reasonably foreseeable"). And, in any event, the Commission also determined, applying relevant precedent, that "the consumption of gas with a [high] Wobbe Index . . . will occur whether or not the Commission approves the North Baja expansion project, because the [California Commission] has exercised its authority to permit it." Rehearing Order, R. 1:168:25.

1. The Commission's Orders Are Not The Relevant "Cause" Of Any Potential Air Quality Impacts In The Basin.

South Coast's argument that the Commission's orders "cause" the impacts of burning higher Wobbe Index gas relies primarily on the fact that some of the gas to be transported by the Project will likely be consumed in the Basin (Br. 28-30, 38-42),[5] while neglecting the parameters established by NEPA and through

[5] South Coast's brief leaves uncertainty as to whether it claims that the "delivery of high Wobbe Index gas to the Basin" or the "impacts of burning the high Wobbe Index gas" are indirect impacts of the Commission's action. Br. 28; *see also* Br. 29 ("the Project is an 'indispensable prerequisite' to transport of the . . . LNG for burning"). The delivery or transport of gas, however, is not itself the *impact* that South Coast has sought the Commission to analyze, and, as South Coast makes clear, the Commission does not dispute that the Project will likely result in the delivery of some regasified LNG to the Basin. *E.g.*, Br. 22. Accordingly, the Commission interprets South Coast's brief to argue, as South Coast also claimed on rehearing (*see, e.g.*, R. 2:142:30), that the impacts of burning the high Wobbe Index gas must be analyzed as indirect impacts. *See* Rehearing Order, R. 1:168:17 ("the material issue [is] whether the Commission's authorization of North's Baja's transportation of regasified LNG will bear a causal relationship to air quality impacts in the Basin").

precedent. As noted above, an indirect impact must be "caused by" the proposed action, but the term "caused by" is not defined in NEPA or the implementing regulations. *See Public Citizen*, 541 U.S. at 772. As discussed at length in the Commission's orders, however, this Court and the Supreme Court have provided agencies like the Commission with ample guidance for determining whether an indirect impact is "caused by" a proposed action. *See, e.g.*, Certificate Order, R. 1:135:25-28; Rehearing Order, R. 1:168:19-22.

Following this Court's precedent, the Commission first considered whether the potential air quality impacts from the consumption of higher Wobbe Index gas could "exist independently" of North Baja's project. Certificate Order, R. 1:135:26 (discussing *Wetlands Action Network v. U.S. Army Corps of Eng'rs*, 222 F.3d 1105 (9th Cir. 2000) (agency did not violate NEPA by limiting analysis to the direct impacts of the proposed action on wetlands, and not considering the impact on a larger development of which the wetlands were a part) and *Sylvester v. U.S. Army Corps of Eng'rs*, 884 F.2d 394, 400 (9th Cir. 1989) (agency did not violate NEPA by concluding that the indirect impacts of a golf course did not include other planned resort facilities because "each could exist without the other, although each would benefit from the other's presence")); *see also, e.g., California Trout v. Schaefer*, 58 F.3d 469, 472-74 (9th Cir. 1995) (affirming agency decision not to prepare EIS for the portion of a project controlled by another federal agency).

Similarly, based on *City of Davis v. Coleman*, 521 F.2d 661 (9th Cir. 1975), the Commission considered whether North Baja's Project is an "indispensable prerequisite" or an "essential catalyst" to potential air quality impacts of gas consumption in the Basin. Certificate Order, R. 1:135:26-27 (citing *City of Davis*, 521 F.2d at 674 (finding that agency was required to analyze industrial development as an effect of a proposed freeway interchange where the interchange's "only credible economic justification," *id*. at 677, was to provide access for development)).

Applying these principles, the Commission explained that the consumption of gas is occurring without North Baja's Project, and will continue to occur regardless of whether North Baja's Project is completed; therefore, the Project and any air quality impacts from consumption can exist independently and the former does not cause the latter. Certificate Order, R. 1:135:28. Specifically, the Commission pointed to evidence showing that high Wobbe Index (or high Btu) gas is being consumed in southern California, and will continue to be consumed regardless of whether the Project is completed. *Id*. at 29 (noting that a "number of existing domestic supply sources have [Wobbe Index] values that are comparable to those of the potential Mexican LNG supplies") (citing Sempra LNG Reply Comments on Draft EIS, FERC-ER 3). At the same time, North Baja's Project will serve all markets in the Southwest – not just the Basin – and record evidence

demonstrates that not all of the Project gas will be delivered to the Basin. *Id*. at 30-31 & n.75. Further, because volumes of gas shipped south will be netted against volumes shipped north, "domestic gas will displace some of the regasified imported LNG that would otherwise come into the United States." Rehearing Order, R. 1:168:18.

Based upon these facts, the Commission held that

> the causal connection between North Baja's pipeline expansion project and the end use of regasified LNG transported by its expansion facilities is too attenuated to support a finding that North Baja's pipeline expansion project will have indirect air quality impacts in the Basin, given the need for North Baja's project to deliver gas supplies to areas other than the Basin and the uncertainty over how much regasified LNG will be delivered from North Baja's facilities to the Basin and how much gas with similar [Wobbe Index] values would be used in any event.

Rehearing Order, R. 1:168:19; *see also* Certificate Order, R. 1:135:30 ("North Baja's project is not an 'indispensable prerequisite' or 'essential catalyst' to the . . . end use of high Btu-content gas"). South Coast disputes the Commission's factual findings, for the first time on appeal, arguing that the "factual premises of FERC's position are untenable" (Br. 39) based on the relative amounts and location of existing high Wobbe Index gas use, and its assertion that the North Baja Project will be the first to import LNG into the western United States. Br. 39-41. Because the Commission first made the challenged findings in the Certificate Order (R. 1:135:28-32), however, South Coast's failure to raise these issues on rehearing

deprives this Court of jurisdiction under the NGA. NGA § 19(b), 15 U.S.C. § 717r(b); *California Dep't of Water Res. v. FERC*, 341 F.3d 906, 910-11 (9th Cir. 2003). But, in any event, South Coast's assertions do not detract from the Commission's finding that high Wobbe Index gas has been and will continue to be used in the Basin regardless of North Baja's Project. *See, e.g.*, Certificate Order, R. 1:135:29.

On rehearing, the Commission additionally considered the applicability of the Supreme Court's decision in *Public Citizen*. *Public Citizen* involved a challenge to the Federal Motor Carrier Safety Administration's decision not to consider the environmental effects of increased cross-border operations of Mexican motor carriers. 541 U.S. at 764. By statute, the agency was required to grant registration to qualified carriers, including the Mexican motor carriers at issue, and only those carriers granted registration could enter the United States. *Id*. at 766. But, only the President, not the agency, could categorically exclude Mexican motor carriers from entering the U.S. and the agency had no authority to require emissions controls on those motor carriers. *Id*.

The Supreme Court held that the agency need not consider the environmental effects of the cross-border operation. The Court explained, consistent with prior precedent, that "a strict 'but for' causal relationship 'is insufficient to make an agency responsible for a particular effect under NEPA and

the relevant regulations.'" Rehearing Order, R. 1:168:19 (quoting *Public Citizen*, 541 U.S. at 767). Rather, "NEPA requires 'a reasonably close causal relationship'" such as that established by the "familiar doctrine of proximate cause . . . ." *Public Citizen*, 541 U.S. at 767. On the facts of the case before it, the Court determined that "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect" and it need not consider that effect under NEPA. *Public Citizen*, 541 U.S. at 770; *see* Rehearing Order, R. 1:168:21. Further, as this Court recently explained, the Supreme Court's decision also turned on the principle that "[k]nowledge of the environmental impacts would not affect [agency] decisionmaking, since [the agency] 'simply lacks the power to act on whatever information might be contained in the EIS.'" *Center for Biological Diversity v. Nat'l Hwy. Traffic Safety Admin.*, 538 F.3d 1172, 1213 (9th Cir. 2008) (quoting *Public Citizen*, 541 U.S. at 768).

Applying *Public Citizen* to the facts of this case, the Commission explained that it lacks authority to determine whether the importation of gas is in the public interest, and has "no authority to dictate the quality of gas consumed in California . . . ." Rehearing Order, R. 1:168:21; *see also id*. at 21-22. First, the Department of Energy, not the Commission, "has the sole authority to approve or disapprove applications to import and export gas." *Id*. at 22 (explaining that while the

Department of Energy has delegated authority to the Commission over the siting and construction of import and export facilities, the Department itself retains the authority to approve or disapprove applications to import and export gas) (citing NGA § 3, 15 U.S.C. § 717b); *see also id*. at 26 (same). Thus, the Commission found that it would be inappropriate to "exercise or condition our authority over the construction of pipeline facilities in a manner that would have the result of substituting our judgment for [the Department of Energy's] as to whether importation and exportation of particular gas volumes is in the public interest." *Id*. at 22.

Second, "it is the [California Commission] which has jurisdiction to set standards for the gas consumed in California, and which has permitted gas with a [Wobbe Index] of up to 1385 to be consumed in California." Rehearing Order, R. 1:168:22. In September 2006, the California Commission revised its gas quality standards in a proceeding examining the adequacy of natural gas supplies and infrastructure. *Id*. at 23-24. Prior to the 2006 decision, suppliers in the Basin were permitted to accept gas with a maximum Wobbe Index of 1437. *Id*. at 24. And, while the five-year historical Wobbe Index average consumed in the Basin was 1332, deliveries into southern California had ranged as high as 1380 in the past three years. *Id*. (citing Final EIS, R. 4:115:6-13; Sempra LNG Reply Comments on Draft EIS, FERC-ER 3; Southern California Gas Company Answer, FERC-ER

19 (Dec. 21, 2007)). In the 2006 order the California Commission ultimately adopted a *more restrictive* Wobbe Index limitation (though not as restrictive as South Coast would prefer), imposing a four percent band around the five-year historical average of 1332. Rehearing Order, R. 1:168:25. The resulting, currently effective, standard is a maximum of 1385 and a minimum of 1279. *Id*. (citing California Commission Decision 06-09-039, R. 6:A:157-60).

Notwithstanding South Coast's arguments, the "Commission has no authority to keep gas with a [Wobbe Index] up to 1385 out of southern California or to place further [Wobbe Index] restrictions on the gas being consumed in southern California." *Id*. at 25-26. "[T]he consumption of gas with a [Wobbe Index] as high as 1385 will occur whether or not the Commission approves the North Baja expansion project . . . ." *Id*. at 25; *see also id*. at 24 n.64 (citing Southern California Gas Company Answer, FERC-ER 19). "*Public Citizen* sends a clear message that the scope of an EIS does not expand to attribute to a federal agency responsibility for the acts of another entity." *Id*. at 26. Thus, "it is the action of the [California Commission] which is the proximate cause of the consumption of the regasified LNG . . . and any associated emissions in the Basin, not the Commission's authorization of North Baja's expansion project." *Id*. at 22; *cf. Center for Biological Diversity*, 538 F.3d at 1213-14 (finding *Public Citizen*

inapplicable where agency did not lack statutory authority, as the Commission does here, but was constrained only by its own regulation).

South Coast argues that, despite this division of jurisdiction, the Commission can condition North Baja's Project to prevent the entry of high Wobbe Index gas into the Basin. Br. 44-47. The Commission does have broad authority to consider impacts and impose conditions under NEPA and the NGA. Indeed, here it did explicitly direct North Baja to amend its tariff to require compliance with the strictest applicable downstream gas quality standards. Certificate Order, R. 1:135:16 n.29, 45 para. (F); *see also* Rehearing Order, R. 1:168:22 n.60.[6]

But, the Commission reasonably determined that doing more, specifically, imposing the additional measures South Coast seeks, would require it to "substitute [its] judgment for that of the [California Commission] and usurp its jurisdiction . . . ." Rehearing Order, R. 1:168:26; *see, e.g.*, *Northwest Central Pipeline v. State*

[6] The Commission's authority concerning gas quality standards extends only to natural gas companies subject to the Commission's jurisdiction, and not to end-users. Thus, the Commission has, in a separate proceeding, set a policy on gas quality and interchangeability issues which provides that only gas quality standards set forth in pipeline tariffs will be enforced by the Commission. *See Policy Statement on Provisions Governing Natural Gas Quality & Interchangeability in Interstate Natural Gas Pipeline Co. Tariffs*, 115 FERC ¶ 61,325 at para. 29 (2006). *See, e.g., Washington Gas Light Co. v. FERC*, 532 F.3d 928 (D.C. Cir. 2008) (affirming in part and remanding in part FERC's decision concerning gas quality issues related to pipeline safety and reliability in the context of a NGA section 7 proceeding).

Corp. Comm'n, 489 U.S. 493, 512 (1989) ("The NGA was designed to supplement state power and to produce a harmonious and comprehensive regulation of the industry. Neither state nor federal regulatory body was to encroach upon the jurisdiction of the other."). *See also* California Commission Decision 06-09-039, R. 6:A:158 ("Federal and state agencies are also considering specific LNG projects, and since revising the gas quality tariff could have implications on those specific projects, it is in the interest of the reviewing agencies to have this issue settled . . . ."). Under *Public Citizen*, as discussed above, NEPA does not require such action **and** under other well-established precedent, NEPA does not permit such action. "NEPA, as a procedural device, does not work a broadening of the agency's substantive powers." *Natural Res. Defense Council, Inc. v. U.S. EPA*, 822 F.2d 104, 129 (D.C. Cir. 1987) (citing cases); *Havasupai Tribe v. United States*, 752 F. Supp. 1471, 1492 (D. Ariz. 1990) ("NEPA does not expand the authority of the Forest Service to include rejection of an otherwise reasonable plan of operations."), *aff'd*, 943 F.2d 32 (9th Cir. 1991); *see also Vermont Yankee Nuclear Power Corp. v. Natural Res. Defense Council, Inc.*, 435 U.S. 519, 558 (1978) ("NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural."). South Coast errs by asking this Court to rely on NEPA's procedural requirements to compel the Commission to take action indirectly that it cannot take directly. *See, e.g., Altamont Gas*

Transmission Co. v. FERC, 92 F.3d 1239, 1248 (D.C. Cir. 1996) (granting appeal to the extent "the Commission was indeed attempting to do indirectly what it could not do directly, that is, intercede in a matter that the Congress reserved to the State").

South Coast's endeavor to employ the Commission's authority to undermine the California Commission's decision is tantamount to a collateral attack on the California Commission's revised Wobbe Index standards. Rehearing Order, R. 1:168:26. But, South Coast's (dis)satisfaction with the California Commission's standards is irrelevant for purposes of determining, under NEPA, whether the Commission must *consider* air quality impacts in the Basin. That question turns on whether the Project can "exist independently" of the consumption of high Wobbe Index gas in the Basin, and whether the Commission has the authority to prevent the consumption of such gas in the Basin. The Commission reasonably answered these questions, respectively, affirmatively and negatively, based upon facts in the record, and that application of NEPA to the facts of this case satisfies NEPA's requirements. *See, e.g., American Rivers*, 201 F.3d at 1195 (noting "the strong level of deference we accord an agency in deciding factual or technical matters") (citation omitted).

2. In Any Event, The Commission Considered The Project's Potential Effects On Air Quality In The Basin And Reasonably Concluded That A Material Change Is Not Likely.

Notwithstanding the Commission's decision, discussed above, that the Commission is not required to consider air quality impacts in the Basin, the Commission did in fact consider South Coast's claims. The Commission determined that the North Baja certificate, as conditioned upon compliance with the California Commission standards, will not produce a material change in air quality in the Basin. *See* Rehearing Order, R. 1:168:31. South Coast's arguments that the Commission improperly relies on the state standards not only reflect a misunderstanding of the state's decision, but as explained above, are also a collateral attack on that decision.

The Commission reasonably relied upon the California Commission's standards as adequate to prevent a material change in air quality in the Basin. Contrary to South Coast's claims, the California Commission in fact considered the effect of its revised Wobbe Index standards on emissions and air quality. *See* Rehearing Order, R. 1:168:29-31. The California Commission initiated its proceeding based on indications that "there may not be sufficient natural gas supplies or infrastructure to meet the long-term needs of the state[] . . . ." (California Commission Decision 06-09-039, R. 6:A:4), and the anticipated "introduction of gas supplies derived through [LNG]." *Id*. at 2. The California

Commission "considered LNG to be an important new source of natural gas supply" (*id*. at 4), and determined that "[p]olicies that increase natural gas supply and lower natural gas costs help to address many of California's most critical environmental challenges." Rehearing Order, R. 1:168:29 (quoting R. 6:A:156).

The California Commission, however, expressed "concern[] with the potential impacts of high Wobbe gas on emissions . . . ." California Commission Decision 06-09-039, R. 6:A:157. Recognizing that additional information concerning, *inter alia*, impacts on emissions needs to be gathered, the California Commission found that it "should adopt a gas quality standard that is consistent with the best information currently available." *Id*. at 158. Accordingly, the California Commission relied upon the NGC+ White Paper on Natural Gas Interchangeability and Non-Combustion End Use (White Paper),[7] which is the consensus recommendation of a range of industry representatives. *Id*. The White Paper recommended adoption of a Wobbe Index standard based on a four percent band around the five-year historic average, resulting in the range of 1279 to 1385

[7] The White Paper was prepared by a group of Natural Gas Council stakeholders at least partly in response to FERC initiatives, filed with the FERC in Docket No. PL04-3, and later relied upon by the FERC in its *Policy Statement on Provisions Governing Natural Gas Quality & Interchangeability in Interstate Natural Gas Pipeline Co. Tariffs*, 115 FERC ¶ 61,325 at para. 32. The White Paper is available on FERC's docket, at http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=10432051.

ultimately adopted by the California Commission. Significantly, the White Paper's recommendation

> is based on its conclusion that a [Wobbe Index] within that range will not prevent gas supplies from meeting the NGC+ White Paper's definition of "interchangeability," which is the "ability to substitute one gaseous fuel for another in a combustion application without materially changing operational safety, efficiency, performance *or materially increasing air pollutant emissions*."

Rehearing Order, R. 1:168:30 n.85 (quoting White Paper at 2) (emphasis added). Moreover, the California Commission found that "the enactment of stricter gas quality regulations than those currently in place (the "baseline") would not result in any significant, adverse environmental effects . . . ." California Commission Decision 07-02-032, R. 6:B:10. Because the California Commission followed the White Paper recommendations, the standard adopted reflects the goal of avoiding material increases in air pollutant emissions.

It is "disingenuous" for South Coast to now claim (Br. 49) that the California Commission did not consider emissions and air quality in tightening the Wobbe Index standard because South Coast is the very party who raised those issues in the California Commission's proceeding. Rehearing Order, R. 1:168:30-31 (citing R. 6:A:118-22 (summary of South Coast's arguments)). As noted above, the California Supreme Court denied South Coast's appeal of the California Commission's decision, and in particular its decision not to prepare the California Environmental Quality Act analysis. Further, while FERC did not have an

opportunity to respond to South Coast's argument (Br. 49-50) that the California Commission expected FERC to assess air quality impacts, because it was not raised on rehearing, the California Commission has indicated its concurrence with FERC's decision here. *See* California Commission Motion for Leave to Intervene, 9th Cir. No. 08-72265 (June 30, 2008) (seeking leave to intervene in support of the Commission).

The California Commission's decision certainly "represent[s] a tradeoff between impacts on air emissions and equipment performance and the need for new supply." Rehearing Order, R. 1:168:31. But, as the California Commission and FERC have both determined, increasing natural gas supplies will help to ease California's environmental challenges. California Commission Decision 06-09-039, R. 6:A:156; Rehearing Order, R. 1:168:18 ("North Baja's expansion project will mitigate the need for the use of other fuels, such as coal, fuel oil and other hydrocarbon fuels, which have more potential than regasified LNG to increase [nitrogen oxide] and other harmful emissions in the Basin."). Accordingly, the Commission's reliance on the California Commission's standards is not unreasonable and demonstrates that the Commission has "adequately considered and disclosed the environmental impact of its actions." *American Rivers*, 201 F.3d at 1194-95; *see also Fuel Safe Wash.*, 389 F.3d at 1332 (finding that FERC's reliance on a building code in its NEPA mitigation analysis was reasonable).

Finally, in requiring compliance with the California Commission's standards, the Commission "followed the recommendation" of the EPA. Rehearing Order, R. 1:168:31. Specifically, the EPA recommended that the Commission "require that the natural gas meet, within some reasonable level of variability, the quality of natural gas currently flowing in the Southwest natural gas transmission pipeline system." EPA Comments, R. 4:108:6. Contrary to South Coast's assertions concerning the EPA's position (Br. 51), the Commission found that the requirement for compliance with the California Commission's standard achieves precisely this result. As explained above, the California Commission "actually *reduced* the permissible level of variability to a four percent band around the five-year historical [Wobbe Index] average." Rehearing Order, R. 1:168:32. The Commission reasonably concluded – and the EPA did not seek rehearing or judicial review of the orders to indicate its disagreement – that this reflects "a reasonable level of variability of the gas that has historically been consumed in southern California . . . ." *Id*. at 32 & n.93 (noting that EPA did not seek rehearing). Accordingly, South Coast's assertions concerning EPA's position on the North Baja Project are meritless.

C. The Commission Reasonably Concluded That It Was Not Required To Consider South Coast's Proposed Mitigation Measures.

South Coast errs in suggesting that the Commission was required to consider proposed measures to mitigate potential air quality impacts in the Basin. Br. 25, 36-38. Under NEPA, an EIS must include discussion of measures "to mitigate adverse environmental effects." 40 C.F.R. § 1502.16(h). Here, because the Commission concluded that any air quality impacts are not effects of North Baja's Project, the Commission "is not required to consider mitigation measures to address such effects." Certificate Order, R. 1:135:31. While South Coast challenges the Commission's underlying decision not to consider air quality impacts in the Basin, it appears to recognize that in the absence of an adverse effect, mitigation measures need not be considered. Br. 38. Moreover, consideration of South Coast's proposed measures would not "foster[] informed decision-making and informed public participation," because the Commission found mitigation unwarranted in light of the absence of air quality impacts caused by North Baja's Project. *California v. Block*, 690 F.2d 753, 767 (9th Cir. 1982) ("[j]udicial review of the range of alternatives considered by an agency is governed by a 'rule of reason' that requires an agency to set forth only those alternatives necessary to permit a 'reasoned choice'") (internal quotation marks and citation omitted). But, in any event, the Commission, *see supra* Part III.B, went on to

consider the potential air quality impacts and found that requiring compliance with the California Commission's standards, as it had in the Certificate Order (R. 1:135:16 n.29), would in fact provide mitigation, by preventing material changes in air quality in the Basin. Rehearing Order, R. 1:168:28-31.

IV. THE COMMISSION REASONABLY APPLIED THE EPA'S RULES UNDER THE CAA IN DECLINING TO "LEVERAGE" ITS NGA AUTHORITY IN AN EFFORT TO REGULATE NATURAL GAS CONSUMPTION IN CALIFORNIA.

Under the CAA, a federal agency may not "engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity which does not conform to" a state air quality implementation plan. 42 U.S.C. § 7506(c)(1). Compliance with this section may require an agency to prepare a conformity analysis. South Coast alleges that the Commission was required to prepare such an analysis for Project impacts in the Basin, which is classified as "non-attainment" for purposes of compliance with federal air quality standards. Br. 54-59.

Under EPA's rules implementing the CAA

> a conformity determination is required for each criteria pollutant or precursor where the total of *direct and indirect emissions* of the criteria pollutant or precursor in a nonattainment or maintenance area caused by a Federal action would equal or exceed

the rates specified in EPA's regulations. 40 C.F.R. § 93.153(b) (emphasis added). South Coast does not argue that any direct emissions from the Project are at issue. "Indirect emissions," as used in this rule

> means those emissions of a criteria pollutant or its precursors that:
>
> (1) Are caused by the Federal action, but may occur later in time and/or may be farther removed in distance from the action itself but are still reasonably foreseeable; and
>
> (2) The Federal agency can practicably control and will maintain control over due to a continuing program responsibility of the Federal agency.

40 C.F.R. § 51.852. The Commission, applying EPA's rules, found that a conformity determination was not required for the Basin because any emissions in the Basin are not "caused by" the Project and such emissions are not "reasonably foreseeable." *See* Certificate Order, R. 1:135:33-35; Rehearing Order, R. 1:168:33-36; Final EIS R. 3:115:4-197 – 4-199. The EPA, for its part, raised no objection to the Commission's application of its rules in its comments on the final EIS, and did not seek rehearing or judicial review of the Commission's orders. *See* EPA Comments on Final EIS, R. 2:124.

As discussed in *Public Citizen*, EPA's regulations provide that emissions are "caused by" an agency's action if the "emissions . . . would not . . . occur in the absence of" that action. 40 C.F.R. § 51.852; *Public Citizen*, 541 U.S. at 772; *see* Br. 56-57. Here, the Commission reasonably determined that emissions from the consumption of gas in the Basin are not "caused by" the Project because the

Commission "cannot prevent natural gas supplies with [Wobbe Index values] up to 1385 from being consumed in California" and record evidence shows that "natural gas at the upper end of the parameters adopted by the [California Commission] is currently being consumed in southern California." Rehearing Order, R. 1:168:36 & n.108 (citing parties' comments). In other words, consumption of high Wobbe Index gas, and associated emissions, will occur "regardless of the Commission's action in this case." *Id*. at 36.

Moreover, the Commission appropriately determined, based upon the available information, that "emissions from the consumption of regasified LNG imported from Mexico" are not "reasonably foreseeable." *Id*. at 34.

> Reasonably foreseeable emissions are projected future indirect emissions that are identified at the time the conformity determination is made; the *location* of such emissions is known and the emissions are *quantifiable*, as described and documented by the Federal agency based on its own information and after reviewing any information presented to the Federal agency.

40 C.F.R. § 51.852 (emphasis added); Rehearing Order, R. 1:168:34. In considering this issue, the Final EIS identified several unknown factors, including

> (1) the Wobbe Index value for the gas ultimately delivered to the Basin by the North Baja facilities, due to blending that will occur in North Baja's facilities;
>
> (2) the Wobbe Index value of the gas delivered to end users in the Basin for consumption, again due to blending, but here within the local distribution system;
>
> (3) the sector of the gas market in the Basin to which the gas would be delivered, *i.e.* identified end users in the Basin; and

(4) whether gas transported by North Baja will be consumed within the Basin.

Rehearing Order, R. 1:168:34; Final EIS, R. 3:115:4-198. Again, the EPA offered no objection to the Commission's findings in this regard. South Coast's assertions concerning the availability of information (Br. 52-53, 54, 59) permitting analysis of potential air quality impacts fail to take into account these issues, most particularly blending and the inability to track individual molecules of gas, which derive from the nature of a natural gas pipeline. Although South Coast suggests that emissions are "reasonably foreseeable" even if they cannot be pinpointed (Br. 59 (citing *Determining Conformity of General Federal Actions to State or Federal Implementation Plans*, 58 Fed. Reg. 63,214, 63,223 (1993) ("EPA Final Rule") (explaining that a regional calculation may be sufficient)), here crucial information concerning the Wobbe Index of the gas to be delivered to the Basin, the Wobbe Index of the gas once mixed with other gas within the Basin, how (*i.e.* by what facilities) the gas would be consumed within the Basin, and even the quantity of the gas that will be consumed within the Basin (as opposed to transported through the Basin for use elsewhere), remains unknown. The Commission's lack of jurisdiction over these matters – all concerning consumption – undoubtedly contributes to this information gap.

Finally, the Commission will not "practicably control" and cannot maintain control of emissions from consumption of high Wobbe Index gas in the Basin. *See*

40 C.F.R. § 51.852. As the Commission explained, EPA's rulemaking promulgating the definition of indirect emissions adopted an "exclusive" definition – that is, excluding emissions that the agency cannot "practicably control." Rehearing Order, R. 1:168:35 & n.103 (citing EPA Final Rule, 58 Fed. Reg. at 63,218). EPA explained that "achievement of the clean air goals is not primarily the responsibility of the Federal government," but of the state and local authorities. 58 Fed. Reg. at 63,220. And, while Federal agencies must "do their part in achieving clean air" (*id*.), neither the language of the CAA "nor [EPA's] regulation requires that a Federal agency attempt to 'leverage' its legal authority to influence or control nonfederal activities that it cannot practicably control, or that are not subject to a continuing program responsibility, or that lie outside the agency's legal authority." *Id*. at 63,221 (*quoted in* Rehearing Order, R. 1:168:35); *see also id*. at 63,220 (neither NEPA nor the CAA "requires the Federal agencies to unilaterally solve local air quality problems").

Like the Commission in the orders below, the Supreme Court in *Public Citizen* relied upon EPA's rulemaking and these principles in determining that the challenged agency properly excluded emissions from the motor carriers at issue in that case from its analysis of the need for a conformity determination. 541 U.S. at 773 (quoting EPA Final Rule, 58 Fed. Reg. at 63,221) ("The EPA does not believe that Congress intended to extend the prohibitions and responsibilities to cases

where, although licensing or approving action is a required initial step for a subsequent activity that causes emissions, the agency has no control over that subsequent activity . . . .") As the Court explained, once the agency issued its decision it "would have no ability to regulate any aspect of vehicle exhaust from the[] Mexican trucks." *Id*. at 772.

Here, the Commission likewise lacks authority to regulate the end users of any natural gas transported by the North Baja Project. *See Panhandle E. Pipe Line Co.* v. *Pub. Serv. Comm'n of Ind.*, 332 U.S. 507, 517 (1947) (explaining that the NGA "cut[s] sharply and cleanly between sales for resale and direct sales for consumptive uses," excluding sales for consumption from Commission jurisdiction). Even the Commission's broad authority under the NGA, which South Coast would have the Commission leverage to resolve local air quality problems (Br. 58), cannot prevent the consumption of high Wobbe Index gas in the Basin. Rehearing Order, R. 1:168:36; *see also Altamont Gas Transmission Co*., 92 F.3d at 1248 (holding that the Commission may not use its NGA section 7(e) certificating authority to "pressure the [California Commission] to regulate [a state-regulated pipeline] as the Commission desired but could not itself require"). As the EPA aptly reasoned, requiring the Commission to so leverage its authority "would infringe on the air quality roles of the [responsible] State or local agency." EPA Final Rule, 58 Fed. Reg. at 63,222.

CONCLUSION

For the foregoing reasons, the petition for review should be denied in all respects.

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STATEMENT OF RELATED CASES

Respondent is not aware of any related cases pending before this or another Court.

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i) and Circuit Rule R.32-1, I certify that the Brief of Respondent Federal Energy Regulatory Commission is proportionally spaced, has a typeface of 14 points, and contains 11,960 words, not including the tables of contents and authorities, the certificates of counsel, and the addendum.

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