ORAL ARGUMENT NOT SCHEDULED

In the United States Court of Appeals for the District of Columbia Circuit

No. 13-1015

DELAWARE RIVERKEEPER NETWORK, *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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FINAL BRIEF: August 13, 2013

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties:

To counsel's knowledge, the parties before this Court and before the Federal Energy Regulatory Commission in the underlying agency proceeding are as listed in Petitioners' brief.

B. Rulings Under Review:

1. Order Issuing Certificate and Approving Abandonment, *Tenn. Gas Pipeline Co., L.L.C.*, 139 FERC ¶ 61,161 (May 29, 2012) ("Certificate Order"), R. 479, JA 752; and

2. Order on Rehearing, Clarification and Stay, *Tenn. Gas Pipeline Co., L.L.C.*, 142 FERC ¶ 61,025 (Jan. 11, 2013) ("Rehearing Order"), R. 754, JA 957.

C. Related Cases:

The following are related cases:

1. *George Feighner v. FERC*, No. 13-1016 (D.C. Cir. Feb. 8, 2013) (order denying motion for a stay) and (D.C. Cir. May 2, 2013) (order dismissing petition for review); and

2. *In re Delaware Riverkeeper Network and New Jersey Highlands Coalition*, No. 13-1004 (D.C. Cir. Jan. 17, 2013) (order denying All Writs Act petition seeking stay).

/s/ Karin L. Larson
Karin L. Larson
Attorney

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REGULATIONS:

GLOSSARY

300 Upgrade Project	Tennessee Gas Pipeline Company's 127.4-mile pipeline upgrade project on the 300 Line approved by FERC's May 14, 2010 certificate order, *Tenn. Gas Pipeline Co., L.L.C.*, 131 FERC ¶ 61,140 (2010)
Certificate Order	*Tenn. Gas Pipeline Co., L.L.C.*, 139 FERC ¶ 61,161 (May 29, 2012), JA 752
Commission or FERC	Federal Energy Regulatory Commission
EA	Environmental Assessment for the Northeast Upgrade Project, issued November 21, 2011, JA 393
EIS	Environmental Impact Statement
JA	Joint Appendix
MPP Project	Tennessee Gas Pipeline Company's 7.9-mile pipeline upgrade project on the 300 Line approved by FERC's August 9, 2012 certificate order, *Tenn. Gas Pipeline Co., L.L.C.*, 140 FERC ¶ 61,120 (2012)
NEPA	National Environmental Policy Act
Northeast Supply Diversification Project	Tennessee Gas Pipeline Company's 6.8-mile pipeline upgrade project on the 300 Line approved by FERC's September 15, 2011 certificate order, *Tenn. Gas Pipeline Co., L.L.C.*, 136 FERC ¶ 61,173 (2011)
Pipeline	Tennessee Gas Pipeline Company, L.L.C., sponsor of the Northeast Upgrade Project

Project	Tennessee Gas Pipeline Company's Northeast Upgrade Project, the subject of this appeal, comprised of (i) 40.3 miles of 30-inch diameter pipeline looping from Bradford County, Pennsylvania, across the Delaware River into New Jersey, (ii) modifications of four existing compressor stations including the addition of approximately 22,310 horsepower of compression at two stations, and (iii) upgrades at one meter station
R.	Record Citation
Rehearing Order	*Tenn. Gas Pipeline Co., L.L.C.*, 142 FERC ¶ 61,025 (January 11, 2013), JA 957
Riverkeeper	Petitioners Delaware Riverkeeper Network, New Jersey Highlands Coalition, and Sierra Club, New Jersey Chapter
Upgrade Projects	Tennessee Gas Pipeline Company's 300 Upgrade, Northeast Upgrade, Northeast Supply Diversification, and MPP projects

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BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUE

The Federal Energy Regulatory Commission ("Commission" or "FERC") approved the construction and operation of a 40.3-mile natural gas pipeline upgrade project, after carefully considering and balancing the public need for the pipeline against its public costs. The question presented on appeal is:

Whether the Commission satisfied its procedural responsibilities under the National Environmental Policy Act ("NEPA"), when it issued a comprehensive environmental assessment that considered all potential environmental harms in

their appropriate context, and when it attached numerous conditions and mitigation measures designed to protect against adverse impacts.

STATUTORY AND REGULATORY PROVISIONS

Pertinent statutes and regulations are set out in the Addendum.

COUNTERSTATEMENT REGARDING JURISDICTION

This Court has jurisdiction over the challenged orders under section 19(b) of the Natural Gas Act ("NGA"), 15 U.S.C. § 717r(b). However, NGA section 19(b) limits judicial review to objections that were "urged before the Commission in [an] application for rehearing unless there is reasonable ground for [the petitioner's] failure to do so." 15 U.S.C. § 717r(b). The rehearing request also must "set forth specifically the ground or grounds upon which such application is based." 15 U.S.C. § 717r(a). The jurisdictional provisions in the NGA are strictly applied. *Columbia Gas Transmission Corp. v. FERC*, 477 F.3d 739, 741 (D.C. Cir. 2007) (citing *ASARCO, Inc. v. FERC*, 777 F.2d 764, 774 (D.C. Cir. 1985)).

As explained in the Argument, Petitioners' brief presents multiple issues not raised with adequate specificity on rehearing. *See infra* pp. 33 (cumulative impacts on soil, water quality, wetlands, vegetation, and wildlife), 37-38 (direct impacts on wildlife and migratory birds). Accordingly, the Court lacks jurisdiction over these issues.

INTRODUCTION

In the orders on review, the Commission issued a certificate of public convenience and necessity under section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c), to Tennessee Gas Pipeline Company, L.L.C. ("Pipeline"), authorizing it to build and operate the Northeast Upgrade Project ("Project"). *See Tenn. Gas Pipeline Co., L.L.C.*, 139 FERC ¶ 61,161 (May 29, 2012) ("Certificate Order"), R. 479, JA 752, *on reh'g*, 142 FERC ¶ 61,025 (Jan. 11, 2013) ("Rehearing Order"), R. 754, JA 957. The Project is a 40.3-mile upgrade of a portion of the Pipeline's existing "300 Line," a natural gas pipeline system that extends throughout the northeastern United States. The majority of the Project is pipeline looping: i.e., new pipe placed adjacent to an existing pipeline and connected to it at both ends. Looping allows more natural gas to be moved through the original system. The Project will add 636,000 dekatherms per day of transportation capacity on Pipeline's 300 Line to meet customer demand in the Northeast. *See* Certificate Order PP 8, 15, JA 756, 758 (Project capacity fully subscribed).

In agency proceedings extending over two years, and resulting in the detailed 200-page Environmental Assessment, the Commission thoroughly examined the environmental impacts of the Project. Certificate Order PP 39-201, JA 766-823; *see also* Environmental Assessment for the Northeast Upgrade Project, Docket No. CP11-161-000 (Nov. 21, 2011) ("EA"), R. 350, JA 393-664.

Ultimately, the Commission determined that the Project, upon the Pipeline's satisfaction of numerous environmental conditions and mitigation measures, is consistent with the public convenience and necessity under section 7(e) of the Natural Gas Act, 15 U.S.C. § 717f(e). Certificate Order PP 201, 203, and Ordering Para. E, JA 823-824 and 825. The final orders reflect the Commission's balancing of all factors bearing upon the public interest, as required by NGA section 7(e), 15 U.S.C. § 717f(e), including environmental issues. *See, e.g.*, *id.* PP 12-13, 17, JA 757-758, 759.

Petitioners Delaware Riverkeeper Network, New Jersey Highlands Coalition, and Sierra Club, New Jersey Chapter (collectively, "Riverkeeper"),[1] participated throughout the Commission's proceeding, raising numerous challenges regarding the Commission's environmental analysis. *Id.* PP 42, 65, JA 768, 776. The Commission addressed all of Riverkeeper's objections to the EA. *See id.* PP 124-200 (addressing need for an Environmental Impact Statement, public health and safety threats, impacts on unique geographic areas and scientific, cultural, and historical resources, endangered and threatened species, waterbodies, wetlands, drinking water, violation of federal and state statutes, cumulative impacts of Marcellus Shale development activities and other pipeline projects, cumulative

[1] The Commission referred to Riverkeeper as "Sierra Club" in both the Certificate and Rehearing Orders.

effects on various resources, and delegation to other agencies), JA 794-823; *see also* Rehearing Order PP 30-103 (addressing segmentation, cumulative impacts, mitigation measures, project alternatives, and need for the Project), JA 763-787.

This appeal followed, with the scope of challenged environmental issues narrowed to three alleged deficiencies in the EA: (1) unlawful segmentation, (2) inadequate cumulative impacts analysis, and (3) inadequate analysis of wildlife and wetlands impacts and mitigation measures to support the Commission's "finding of no significant impact."

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY BACKGROUND

The principal purpose of the Natural Gas Act is "to encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices." *Pub. Utils. Comm'n of Cal. v. FERC*, 900 F.2d 269, 281 (D.C. Cir. 1990) (quoting *NAACP v. FPC*, 425 U.S. 662, 670 (1976)). To that end, NGA sections 1(b) and (c) grant the Commission jurisdiction over the transportation and wholesale sale of natural gas in interstate commerce. 15 U.S.C. § 717(b) and (c). Under NGA section 7(c), any person seeking to construct or operate a facility for the transportation of natural gas in interstate commerce must first obtain a certificate of public convenience and necessity from the Commission. 15 U.S.C. § 717f(c)(1)(A). Under NGA section 7(e), the Commission shall issue a certificate

to any qualified applicant upon finding that the proposed construction and operation of the pipeline facility is required by the public convenience and necessity. 15 U.S.C. § 717f(e); *see also Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 964 (D.C. Cir. 2000) (describing the "flexible balancing process" FERC employs to evaluate gas pipeline projects).

The Commission's issuance of a certificate of public convenience and necessity triggers NEPA. *See* 42 U.S.C. §§ 4321, *et seq.* NEPA 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); *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. 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 (quoting *Robertson*, 490 U.S. at 349-50); *see also Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 503 (D.C. Cir. 2010) (NEPA ensures a "fully informed and well-considered decision, not necessarily the best decision"). Under NEPA, an agency must "take a 'hard look' at the environmental consequences before taking a major action." *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983)

(citation omitted).

Regulations implementing NEPA require agencies to consider the environmental effects of a proposed action by preparing either an Environmental Analysis ("EA"), if supported by a finding of no significant impact, or a more comprehensive Environmental Impact Statement ("EIS"). 40 C.F.R. § 1501.4 (detailing when to prepare an EIS or EA); *see also Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23, 28 (D.C. Cir. 2008) (summarizing regulations governing agency's determination whether an EIS is needed). Once the agency issues a finding of no significant impact, it has fulfilled NEPA's documentation requirements. *See TOMAC, Taxpayers of Mich. Against Casinos v. Norton*, 433 F.3d 852, 857 (D.C. Cir. 2006) (citing 40 C.F.R. §§ 1501.4(e), 1508.9, 1508.13).

II. THE COMMISSION'S REVIEW OF THE PIPELINE PROJECT

A. The Project

On March 31, 2011, the Pipeline filed with the Commission an NGA section 7(c) application for authorization to construct and operate the Project: five 30-inch diameter pipeline loop segments, totaling 40.3 miles in Pennsylvania and New Jersey. Certificate Order P 5, JA 753. Eighty-four percent of the Project is collocated, immediately adjacent to the right-of-way for Pipeline's existing 24-inch diameter 300 Line. Rehearing Order P 2, JA 957. Pipeline intentionally routed 6.4 miles (16 percent) of the looping outside of the Pipeline's existing right-of-way to

circumvent a national park. *Id.* The Project also includes the addition of approximately 22,310 horsepower of compression at two existing compressor stations, as well as modifications to other compressor and meter stations. Certificate Order P 5, JA 753.

The Project will add 636,000 dekatherms per day of natural gas delivery capacity (enough gas to heat more than 1.5 million homes per year). This additional capacity gives shippers increased options for moving natural gas being produced from the Marcellus Shale[2] supply area with delivery to Pipeline's mainline system at Mahwah, New Jersey, where the 300 Line interconnects with another pipeline. *Tennessee Gas Pipeline Co.*, Abbreviated Application for a Certificate of Public Convenience and Necessity at 1, Docket No. CP11-161-000 (Mar. 31, 2011), R.155, JA 187.

B. The Commission's Environmental Review

Eight months before the Pipeline filed the Project application, the Commission began its environmental review of the Project using its pre-filing process. Certificate Order P 39, JA 766. On October 8, 2010, the Commission issued a notice of intent to prepare an Environmental Analysis for the Project and

[2] Marcellus Shale is a black shale geological formation containing natural gas reserves that are developed using horizontal drilling and hydraulic fracturing techniques. The Marcellus Shale formation extends from Ohio through West Virginia, Pennsylvania, and southern New York. EA 2-121, JA 551.

requested comments on potential environmental issues. *Id.* In addition, the Commission invited all agencies with jurisdiction or special expertise to act as "cooperating agencies" in connection with the Commission's environmental review process.[3] The U.S. Fish and Wildlife Service and U.S. Army Corps of Engineers, each with special expertise with respect to certain environmental impacts, respectively wildlife and wetlands, assisted in preparing the EA. EA 1-1, 1-4, JA 406, 409.

The Commission, in response to its outreach, received numerous comments from landowners, other stakeholders, federal and state agencies, and other organizations, including Riverkeeper. Certificate Order PP 41, 42, 54, 62, JA 767, 768, 773, 775. After considering all substantive comments, the Commission issued the 200-page EA. *Id.* P 64, JA 776.

The EA analyzes the Project's impacts on the following resources: geology, soils, water resources, wetlands, vegetation, fisheries, wildlife, threatened and endangered species, land use, recreation, visual resources, cultural resources, air quality, noise, safety, reliability, and socioeconomics. *Id.* Where adverse impacts are identified, the EA details recommended mitigation measures that, if imposed,

[3] "Cooperating agencies" may participate in the environmental scoping process, assume responsibility for preparing environmental analyses concerning their areas of special expertise, and make staff available to enhance the lead agency's interdisciplinary capability. 40 C.F.R. §§ 1501.6(b), 1508.5.

would reduce or resolve the respective impact. *See* EA 4-1 to -6, JA 580-585. The EA also considers the cumulative impacts of the Project coupled with other projects in the general Project area. *Id.* at 2-121 to -134, JA 551-564. Ultimately, the EA recommends a finding of no significant impact based on implementation of mitigation measures listed in the EA. *Id.* at 4-1, JA 580.

C. The Certificate Order

On May 29, 2012, the Commission issued a certificate of public convenience and necessity to the Pipeline authorizing the construction of the Project. Certificate Order P 1, JA 752. The Commission found significant demand for the Project's capacity, as evidenced by the Pipeline's contracts with two anchor shippers for 100 percent of the design capacity of the Project for 20-year terms. *Id.* PP 8-9, JA 756. Thus, the Commission concluded that the Project would serve the public interest by alleviating pipeline constraints and increasing pipeline capacity to the high-demand markets in the Northeast. *Id.* P 15, JA 758; *see also* EA 1-25 (noting that numerous gas producers in the Marcellus Shale production area have sought to interconnect with the 300 Line), JA 430.

In the Certificate Order, the Commission conducted a thorough environmental review of the Project, taking into account the EA and all substantive comments on the EA. *See* Certificate Order PP 39-200, JA 766-823. The Commission addressed all of Riverkeeper's comments including the issues which

were ultimately raised in this appeal: adequacy of the EA and need for an EIS (*id.* PP 124-177, JA 794-813); wetlands (*id.* PP 147, 170-172, JA 802, 811-812); cumulative impact analysis of other FERC-jurisdictional pipeline projects (*id.* PP 194-195, JA 820-821); wildlife (*id.* PP 139, 196-198, JA 799, 821-822); and adequacy of the mitigation measures (*id.* PP 134-135, 199-200, JA 798, 822-823). The Commission also addressed segmentation in response to the Pike County Conservation District's comments. *Id.* P 92, JA 784. After consideration of the information and analysis contained in the record, including the EA, regarding the potential environmental effect of the Project, the Commission concluded that the Project, as mitigated, would have no significant environmental impact. *Id.* P 201, JA 823. Further, upon balancing the evidence of public benefits against the identified potential adverse effects of the Project, coupled with the environmental analysis, the Commission determined that the Project, with appropriate environmental conditions and mitigation measures, is required by the public convenience and necessity. *Id.* PP 201, 203, JA 823, 824.

D. The Rehearing Order

Of the many interested parties that commented on the EA, Riverkeeper was one of only two intervening parties to seek rehearing of the Certificate Order. *See* Rehearing Order P 10, JA 961. Riverkeeper's overarching claim is that the Commission violated NEPA by relying on a deficient EA and failing to prepare an

EIS. *See* Request for Rehearing Submitted by Riverkeeper, Docket No. CP11-616-000 (June 28, 2012) ("Rehearing Request"), R. 574, JA 835. On rehearing, the Commission addressed the following seven specific issues raised by Riverkeeper: segmentation (Rehearing Order PP 30-49, JA 967-974); whether an EIS is required (*id.* PP 50-54, JA 974-975); adequacy of the finding of no significant impact (*id.* PP 55-71, JA 976-982); cumulative impacts of other pipeline projects and Marcellus Shale gas development activities (*id.* PP 72-87, JA 982-988); mitigation measures (*id.* PP 88-94, JA 988-990); alternatives (*id.* PP 95-99, JA 990-991); and whether the Project was in the public interest (*id.* PP 100-103, JA 992-993).

The Commission, after addressing, in detail, these alleged deficiencies in the EA, concluded that the EA and Certificate Order thoroughly analyzed the potential impacts from Project construction and operation, and held that, with the numerous Commission-imposed environmental conditions and mitigation measures, the Project will not have a significant impact on the environment. *Id.* P 25, JA 966. Ultimately, the Commission affirmed its finding that the Project is in the public interest, and determined, on balance, that the public benefits of the Project outweigh the potential adverse impacts. *Id.* PP 101-103, JA 992-993.

E. Motion For Stay

In January 2013, Riverkeeper filed with this Court an emergency motion for a stay seeking to halt Project construction pending judicial review. Upon

consideration of the pleadings, this Court denied Riverkeeper's stay request. *Delaware Riverkeeper Network v. FERC*, No. 13-1015 (D.C. Cir. Feb. 6, 2013) (order denying motion for stay) (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (articulating the four-factor test for a stay, the first prong of which is the stay applicant's likelihood of success on the merits)). *See also George Feighner v. FERC*, No. 13-1016 (D.C. Cir. Feb. 8, 2013) (order similarly denying landowner's motion for stay of Project construction).

Since issuance of the Court's orders denying stay, the Pipeline has proceeded with Project construction consistent with Commission authorization, with an anticipated in-service date of November 1, 2013. *See* Rehearing Order P 20, JA 964.

SUMMARY OF ARGUMENT

The Commission satisfied all of its statutory responsibilities in approving the Project. Its comprehensive environmental assessment informed the Commission's decision-making and allowed it to balance potential environmental impacts against the public benefits of the Project, which will add vital pipeline capacity to transport natural gas from the Marcellus Shale producing area in Pennsylvania to Northeast markets. Any potential adverse impacts, identified in the EA and the many comments on the EA, will be mitigated by the multiple conditions on pipeline construction and operation imposed by the Commission.

Substantial record evidence shows that each of Pipeline's four projects upgrading different parts of Pipeline's 300 Line system, which were separately developed, reviewed, approved, and constructed over a five-year period, is an independent stand-alone project. This Project reflects the reality that natural gas infrastructure projects involve considerable time and effort to develop, often with segments proceeding at different speeds. A project is not improperly segmented, whether the project is the first leg of a larger system or is the last piece that completes a system, where, as here, the Commission's environmental review provided a full picture of the project's impacts. Here, the Project is a separate, viable gas transportation project, with utility independent of any further construction of any other project. The Project does not foreclose future options, and if prior or subsequent looping projects on the 300 Line were never constructed, the Project would nevertheless provide a much needed service.

The Commission's decision, after developing the 200-page Project EA, that an even more detailed EIS is unnecessary, was an informed and reasoned decision. The lengthy EA fully identifies, describes, and analyzes the Project's potential environmental impacts on all relevant resources, the cumulative impacts of other related projects, and appropriate mitigation measures to address identified adverse impacts. The EA disproves any argument that the Commission's finding of no significant impact was uninformed or arbitrary.

As permitted, the Commission relies on mitigation measures identified in the EA, which are supported by substantial evidence, to make a finding of no significant impact. Despite Riverkeeper's claims to the contrary, the Commission reasonably relied on mitigation measures to be developed by other relevant federal and state agencies with expertise and responsibility over the particular subject matter. Those measures are subject to the Commission's review and enforcement. Where, as here, the Commission identified and detailed Project impacts, imposed enforceable mitigation measures (whether drafted or to be developed), and required future monitoring to ensure their success, the Commission's finding of no significant impact is entirely consistent with reasoned decision-making. With potential adverse impacts effectively mitigated, the Commission was justified in concluding, after balancing Project benefits and impacts, that the Project advances the public interest.

ARGUMENT

I. STANDARD OF REVIEW

The Administrative Procedure Act's arbitrary and capricious standard applies to NEPA challenges. *Nevada v. Dep't of Energy*, 457 F.3d 78, 87 (D.C. Cir. 2006). Thus, "under NEPA, the court's role is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious." *Nat'l Comm. for the*

New River, Inc. v. FERC, 373 F.3d 1323, 1327 (D.C. Cir. 2004) (denying appeal of FERC pipeline certificate decision) (quoting *Balt. Gas & Elec.*, 462 U.S. at 97-98). *See also Robertson*, 490 U.S. at 350-51 (NEPA merely prohibits uninformed – rather than unwise – agency action).

Actions of administrative agencies taken pursuant to NEPA are entitled to a high degree of deference. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 377-78 (1989). This Court evaluates agency compliance with NEPA under a "rule of reason" standard. *Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 75 (D.C. Cir. 2011) (citing *Nevada*, 457 F.3d at 93). This Court has consistently declined to "'flyspeck' an agency's environmental analysis, looking for any deficiency no matter how minor." *Id.* "[A]s long as the agency's decision is 'fully informed' and 'well-considered,' it is entitled to judicial deference and a reviewing court should not substitute its own policy judgment." *Natural Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288, 294 (D.C. Cir. 1988) (quoting *North Slope Borough v. Andrus*, 642 F.2d 589, 599 (D.C. Cir. 1980)).

II. THE COMMISSION'S BALANCE OF PROJECT BENEFITS AND ENVIRONMENTAL IMPACTS SATISFIED ITS STATUTORY RESPONSIBILITIES

The Commission's comprehensive EA served its purpose – to provide sufficient information and analysis for determining whether to prepare an EIS or issue a finding of no significant impact. *See* 40 C.F.R. § 1508.9(a)(1). The EA

thoroughly evaluates Project impacts and cumulative impacts, along with measures intended to mitigate identified environmental impacts. Indeed, the EA contains a level of detail on par with an EIS such that the preparation of an EIS would serve no purpose in light of NEPA's regulatory scheme as a whole. *See Public Citizen*, 541 U.S. at 767 (a "rule of reason" governs agency determination whether to prepare an EIS based on usefulness of additional information).

Consistent with its responsibilities under the NGA and NEPA, the Commission considered all views in its orders and in the comprehensive EA that informed those orders. Riverkeeper's comments throughout the agency proceeding – like every commenter's concerns – were considered as part of the Commission's public interest balance under NGA section 7(c), 15 U.S.C. § 717f(c). The Commission is, as it must be under the statutes it administers, sensitive to all perspectives and responsive to all arguments, whether economic or environmental in nature. The Commission satisfied its statutory responsibilities here by balancing the public benefits offered by the Project against its potential impacts. *See* Certificate Order P 17, JA 759; Rehearing Order PP 102-103, JA 992-993. *See also Midcoast Interstate*, 198 F.3d at 967 (as long as any adverse environmental effects are identified and evaluated, FERC may decide that other values outweigh the environmental costs).

Riverkeeper focuses solely on Project impacts, not benefits, and – as

explained in the following sections of this brief – fails to demonstrate that the Commission falls short of the "hard look" requirement of NEPA. *See Balt. Gas & Elec.*, 462 U.S. at 97 (agency took a "hard look" where it adequately considered and disclosed the environmental impact of its actions).

Just last year, another court of appeals reviewed the Commission's environmental record in a similar case, which case raised many of the same issues. Specifically, the Second Circuit affirmed the Commission's issuance of a certificate authorizing the construction of a 39-mile pipeline in a new utility corridor traversing previously undisturbed forest interiors and, in particular, upheld the agency's finding of no significant impact. *See Coal. for Responsible Growth and Res. Conservation v. FERC*, 485 Fed. Appx. 472 (2d Cir. June 12, 2012) (unpublished order included in the Addendum). Petitioners in that case, like Riverkeeper here, challenged the adequacy of the Commission's EA, alleging deficiencies in: (i) the scope and depth of the cumulative impacts analysis, (ii) the analysis of impacts on forests and migratory birds resulting from edge effect and forest fragmentation, and (iii) the Commission's reliance on mitigation measures to be developed in conjunction with other state and local agencies. *See Cent. N.Y. Oil and Gas Co., LLC*, 137 FERC ¶ 61,121 (2011), *on reh'g*, 138 FERC ¶ 61,104 (2012). The Second Circuit concluded that the Commission took the necessary "hard look" at the possible effects of that pipeline project where it considered and

addressed the environmental concerns identified by commenting parties. *Coal. for Responsible Growth*, 485 Fed. Appx. at 474-75.

III. THE COMMISSION'S ENVIRONMENTAL ANALYSIS FULLY COMPLIES WITH NEPA

Riverkeeper's brief repeats the three alleged NEPA violations that were the basis of its unsuccessful January stay motion: unlawful segmentation; an inadequate cumulative impacts analysis; and an unsupported finding of no significant impact. These challenges are without merit. The record belies any assertion that the Commission failed to take a "hard look" at the potential environmental impacts of the Project.

A. A Programmatic EIS Is Not Required

Riverkeeper challenges the Commission's decision to not develop a programmatic EIS covering the Project and three other upgrades on the 300 Line System: the 300 Upgrade project, the Northeast Supply Diversification project, and the MPP project[4] (together, with the Project, the "Upgrade Projects"). *See* Br. 8-30 (alleging FERC improperly segmented its NEPA analysis). *See also* Rehearing Order P 5 (describing Upgrade Projects), JA 958. This segmentation claim fails as each Upgrade Project is a stand-alone project designed to serve specific customers, with different capacity amounts, in different time frames.

[4] "MPP" is not an acronym; the letters do not stand for individual, identifying words.

1. The Commission Did Not Impermissibly Segment The Project From The Other Upgrade Projects

Agencies may not evade their responsibilities under NEPA by artificially dividing a major federal action into smaller components. Here, however, there is no violation of this rule against segmentation as each of Pipeline's Upgrade Projects has independent utility. *See Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 298 (D.C. Cir. 1987) (finding independent utility in four-mile section of mass transit project originally planned as 18.6 miles). When evaluating a segmentation claim, courts consider whether the proposed segment (1) has substantial independent utility, (2) has logical termini, and (3) does not foreclose the opportunity to consider alternatives. *Id.* (citations omitted). This Court focuses on the "independent utility" factor. *Coal. on Sensible Transp. v. Dole*, 826 F.2d 60, 69 (D.C. Cir. 1987). "The proper question is whether one project will serve a significant purpose even if a second related project is not built." *Id.* The answer with respect to the Project, as well as each of the other Upgrade Projects, is yes.

a. Each Project Has Independent Utility

The Pipeline's Upgrade Projects were individually designed to provide a contracted-for volume of gas to specific (and different) customers within distinct time frames. Certificate Order P 92, JA 785. The shippers for the Upgrade Projects are as follows:

Project	Shippers	Contracted for Capacity Amount	Contract Term (Primary Term)
300 Upgrade	EQT Energy	350,000 Dth/day	15 years
Northeast Upgrade	Chesapeake & Statoil	636,000 Dth/day	20 years
Northeast Supply Diversification	Anadarko, Seneca & Cabot	250,000 Dth/day	15 years
MPP	Southwestern & Chesapeake	240,000 Dth/day	15 years

See id. PP 8-9, JA 756; *Tenn. Gas Pipeline Co., L.L.C.*, 131 FERC ¶ 61,140, at PP 9, 34 (2010) (300 Upgrade certificate order); *Tenn. Gas Pipeline Co., L.L.C.*, 136 FERC ¶ 61,173, at PP 9-13 (2011) (Northeast Supply certificate order); and *Tenn. Gas Pipeline Co., L.L.C.*, 140 FERC ¶ 61,120, at P 5 (2012) (MPP certificate order). The Project, like each of the Upgrade Projects, meets the specific customer demand for transportation service that Pipeline marketed through "open seasons." Certificate Order P 92, JA 784-785; Rehearing Order P 42, JA 971. Thus, as Riverkeeper points out (Br. 17-18), if potential shippers wanted more gas transportation capacity above the 350,000 Dth/day provided by the 300 Upgrade project, Pipeline would have to build more pipeline. It is Pipeline's "prerogative . . . to determine the project's goals and the means of achieving them." *Nat'l Comm. for the New River*, 373 F.3d at 1332. Moreover, the fact that two of the upgrade projects are completed and in-service is further evidence that they operate independent of the new Project. *See* Rehearing Order PP 5, 39 (300 Upgrade placed into service on November 1, 2011, prior to the issuance of the

Project EA; Northeast Supply project placed into service in 2012), JA 958-959, 970.

Riverkeeper's argument that the Upgrade Projects are "interdependent" is primarily based on its allegation that the 300 Upgrade's long-term safety and functionality was dependent on the construction of the Project and the other two Upgrade Projects. *See* Br. 18-19, 22. But there is no deficiency in the Commission's analysis, as safety was one of the many issues studied and evaluated in the EA. *See* EA 2-113 to -117, JA 543-547; Certificate Order PP 86, 88, 129, JA 782, 783, 796. The Department of Transportation is the federal agency authorized to administer and ensure pipeline safety under 49 U.S.C. Chapter 401 – not FERC. *See* Certificate Order P 88, JA 783; *see also* EA 2-114 (pipelines must be designed, constructed, operated, and maintained in accordance with the Transportation *Minimum Federal Safety Standards*), JA 544. The Transportation safety standards are comprehensive; thus the Commission does not impose additional safety standards. EA 2-113, JA 543. Accordingly, the Commission determined, based on its engineering review and given the application of the Transportation requirements, that the Project's operation would not increase gas velocities above safety design standards in the existing or proposed pipeline. Certificate Order P 86, JA 782-783; *see also* EA 2-117, JA 547.

Moreover, Riverkeeper's safety allegation is unsupported by any record evidence. Riverkeeper relies solely on two reports by its expert, Richard Kuprewicz of Accufacts Inc., neither of which is part of the agency's record. *See* Br. 19 (citing a January 22, 2013 Accufacts Report submitted with its brief as AD22-24 and a June 27, 2012 Accufacts Report submitted as Exhibit B to Riverkeeper's Rehearing Request, JA 900-912).

As for the 2013 Report, neither the Commission nor Pipeline has had the opportunity to address the validity of the report or the methodology and calculations employed. *See Theodore Roosevelt Conservation*, 616 F.3d at 514 (rejecting petitioner's extra-record evidence to support its NEPA challenge). However, the report's conclusion – that the 300 Line is not being operated safely – fails to account for the fact that the Project, like every pipeline, including the 300 Line and the 300 Upgrade, is subject to Transportation-mandated monitoring of system pressures, flows, and customer deliveries, 24 hours per day, 365 days a year. *See* EA 2-117, JA 547. Moreover, Pipeline certified to the Commission that each of its Upgrade Projects would be designed, installed, inspected, tested, constructed, operated, and maintained in accordance with federal safety standards. *See* EA 2-113 (citing 18 C.F.R. § 157.14(a)(9)(vi)), JA 543. No more is required.

The 2012 Accufacts Report is similarly unhelpful. *See* Rehearing Order P 28 (rejecting 2012 Report after Riverkeeper failed to state good cause why the

new study should be admitted after the close of the record and issuance of the dispositive order), JA 967. The Commission nevertheless found that the 2012 Report provided no support for the assertion that the Project's gas velocities are inconsistent with prudent design standards and safety margins. *See id.* P 43 (discussing 2012 Report's flaws, including lack of engineering support or any citation to scientific papers), JA 972. Here, the Commission's determination regarding disputed technical facts is based upon its expertise and is entitled to deference. *See NRG Power Marketing, LLC v. FERC*, No. 11-1201, slip op. at 29 (D.C. Cir. June 14, 2013) (court defers to FERC's informed discretion on issues that require technical expertise).

Riverkeeper also claims that the Upgrade Projects enjoy a "functional interdependence" as the design of the earlier Upgrade Projects supports the later projects (Br. 23) – an argument the Commission rejected. *See* Certificate Order P 41, JA 767. In this regard, an interstate natural gas transportation system such as the 300 Line System is much like a highway network. As this Court has recognized, "it is inherent in the very concept of a highway network that each segment will facilitate movement in many others; [but] if such mutual benefits compelled [NEPA] aggregation, no project could be said to enjoy independent utility." *Coal. on Sensible Transp.*, 826 F.2d at 69 (finding independent utility of a

highway widening project from interchange upgrade projects along the same highway).

b. Each Project Has Logical Termini And Does Not Foreclose Alternatives

The other two segmentation factors, logical termini and opportunity to consider alternatives, also demonstrate that the Project is a legitimate stand-alone project. Riverkeeper asserts that Pipeline selected the termini for the 300 Upgrade project to evade environmental review. Br. 24-25. This claim is countered by the fact that Commission policy prohibits overbuilding of capacity. *See* Certificate Order P 92 (citing *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,277, at 61,750 (1999)), JA 784-785. Here, Pipeline designed the Project to meet a distinct, demonstrated market need that was separate from the other Upgrade Projects, as evidenced by each project's unique contracts. *Id.* Moreover, even where a project has been segmented, if one terminus is no more logical than another, the agency's choice is not arbitrary or capricious. *Coal. on Sensible Transp.*, 826 F.2d at 69.

The "opportunity to consider alternatives" factor indicates unlawful segmentation only "when a given project effectively commits decisionmakers to a future course of action." *Id.* (that highway widening project restricts alternatives for future projects is not enough to mandate a programmatic EIS). Riverkeeper fails to point to any evidence that the construction of the 300 Upgrade compelled

the construction of the Project. *See* Br. 25-26. As discussed *supra* at pp. 22-24, Riverkeeper's sole allegation supporting this claim – that the 300 Upgrade project could not be safely operated at its contracted-for capacity level – is unfounded. Moreover, not building the Project was one of the alternatives considered in the EA. *See* EA 3-1, JA 565. Thus, developing an EA for the Project, instead of a programmatic EIS encompassing all of the Upgrade Projects, did not "irretrievably commit" the Commission to any course of action. None of Riverkeeper's contentions amounts to "persuasive evidence" that the Commission acted arbitrarily by not preparing a programmatic EIS for the four Upgrade Projects. *Nat'l Wildlife Fed'n v. Appalachian Reg'l Comm'n* , 677 F.2d 883, 891 (D.C. Cir. 1981) (arbitrary and capricious standard applies to segmentation of environmental review).

2. Project Timing Defeats Riverkeeper's Segmentation Claim With Respect To The 300 Upgrade And MPP Projects

In addition to the independent utility of the Upgrade Projects, the timing of the 300 Upgrade and MPP projects – one a completed project, the other a merely contemplated project – precludes them from consideration with respect to Riverkeeper's segmentation claim. A court's review of project segmentation considers only "projects" which, under NEPA, are proposals in which action is imminent. *O'Reilly v. U.S. Army Corps of Eng'rs*, 477 F.3d 225, 236 (5th Cir. 2007) (citing 40 C.F.R. § 1508.23). Thus, courts, in evaluating a segmentation

argument, are concerned solely with projects that have reached the proposal stage, not actions that are merely contemplated. *Id.* at 237; *see also Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139, 146 (1981) (mere contemplation of an action is not a sufficient basis for requiring the preparation of an EIS). A potential new pipeline first becomes a "proposal" for NEPA purposes when the developer files the project application with the Commission. *See Theodore Roosevelt Conservation*, 616 F.3d at 513 (agency's issuance of a notice of intent to prepare an EIS merely reflects the "incipient notion" of a project).

Riverkeeper incorrectly asserts that the Project and the MPP project "were in the proposal stage at the same time." Br. 15. Here, the MPP project was first proposed (certificate application filed with FERC on December 9, 2011) after the Project EA issued (November 21, 2011). *See* Timeline of Upgrade Projects (appended in the Addendum); *see also* Rehearing Order PP 39, 44, JA 970, 972. *See also Coal. on Sensible Transp.*, 826 F.2d at 69 (segmentation impacts the scope of the EA). Contrary to Riverkeeper's claim (Br. 15), the timing of the "open season" for the MPP project is irrelevant. A pipeline is merely contemplating an action when it conducts an open season to gauge shipper interest in a potential project. For example, Pipeline conducted multiple non-binding open seasons for the Northeast Supply project to solicit interest in two potential project

paths, and revised the project path twice before submitting its certificate application. *Tenn. Gas Pipeline Co.*, 136 FERC ¶ 61,173, at PP 6-9 (2011).

Similarly, because a segmentation analysis is forward-looking, the Court need not consider already-completed projects such as the 300 Upgrade project. *See* Rehearing Order P 44 (EA for the 300 Upgrade issued in February 2010, before the certificate proposals for any of the other three Upgrade Projects were filed), JA 972. Specifically, "[a]n analysis of improper segmentation . . . requires that where 'proceeding with one project will, because of functional or economic dependence, foreclose options or irretrievably commit resources to future projects, the environmental consequences of the projects should be evaluated together.'" *O'Reilly*, 477 F.3d at 236 (quoting *Fritiofson v. Alexander*, 772 F.2d 1225, 1241, n.10 (5th Cir. 1985)). The environmental review of the 300 Upgrade was completed and that project was approved before the Commission initiated the environmental review of the Project on July 6, 2010. *See Tenn. Gas Pipeline Co.*, 131 FERC ¶ 61,140 (2010) (issuing certificate approving 300 Upgrade on May 14, 2010). Because an EA is a forward-looking instrument, even new construction that solely finishes off work already done does not trigger an obligatory EIS evaluating program-wide effects. *See Nat'l Wildlife Fed'n*, 677 F.2d at 889 (programmatic EIS not required for ongoing, mostly completed, highway project). It, therefore, would be meaningless to require a programmatic EIS here. *See* Rehearing Order

P 48 (because the 300 Upgrade is completed and in-service, there is no purpose in drafting a single environmental document that includes those projects), JA 974.

Thus, the Project was not unlawfully segmented from either the 300 Upgrade (past project) or the MPP project (future, merely contemplated project), particularly where, as here, there is no evidence that the project timing was manipulated. *See Nat'l Comm. for the New River*, 373 F.3d at 1329 (no unlawful segmentation where FERC delayed environmental review of portions of the project at sensitive environmental areas). *See also* Rehearing Order P 39 (NEPA does not require FERC to delay natural gas development just to conduct more comprehensive environmental reviews), JA 970.

B. FERC Carefully Considered The Cumulative Effects Of Other Activities In The Project Area

Riverkeeper next makes the related claim (Br. 30-39) that the Commission failed to take a hard look at the cumulative impacts of the Pipeline's three other Upgrade Projects. The contents of the EA contradict this claim. The Court will not disturb the Commission's cumulative impacts analysis "absent a showing of arbitrary action." *Kleppe v. Sierra Club*, 427 U.S. 390, 412-14 (1976). As demonstrated below, there is nothing arbitrary about the Commission's cumulative impacts analysis of the Project.

1. FERC Properly Excluded Geographically Distant Projects From The Cumulative Impacts Analysis

Riverkeeper argues that the Commission erroneously excluded from the cumulative impacts analysis the Northeast Supply and MPP projects. Br. 30-34, 39-40. There is no such error. The Commission appropriately excluded projects that were outside the identified geographic scope and those which were not reasonably foreseeable at the time the EA issued.

As required, the EA's cumulative impacts section identifies FERC-jurisdictional natural gas pipeline projects that would potentially cause a cumulative impact when considered with the Project. *See* EA 2-121 to -124 (list of projects evaluated for potential cumulative impacts), JA 551-554. Only activities that will impact a resource "within all, or part of, the Project area" are to be included in the cumulative impact analysis. *Id.* at 2-121 (citing *Considering Cumulative Effects Under the National Environmental Policy Act*, Council on Environmental Quality (Jan. 1997)), JA 551.

In this case, the Commission determined that projects located over 25 miles away would not significantly contribute to the cumulative impacts in the Project area. EA 2-127, JA 557. Thus, the Northeast Supply project was excluded from the cumulative impacts analysis because it was too distant (over 25 miles) from the Project to be relevant. *Id.* "Identification of the geographic area within which [cumulative impacts] may occur is a task assigned to the special competency of the

appropriate agencies." *Kleppe*, 427 U.S. at 414. The Court should reject Riverkeeper's request that it re-draw that line for FERC. *See Coal. on Sensible Transp.*, 826 F.2d at 66 ("NEPA process involves an almost endless series of judgment calls," decisions that are vested with the agency).

The MPP project was excluded because it was unknown at the time the EA issued, and therefore was not "reasonably foreseeable." Rehearing Order P 86 (MPP project application filed after the Project's EA issued), JA 987. NEPA regulations only require consideration of reasonably foreseeable future actions. *See* 40 C.F.R. § 1508.7 (defining "cumulative effect"). A potential project for which an application has yet to be filed is not reasonably foreseeable. *See Theodore Roosevelt Conservation*, 616 F.3d at 512-14 (projects for which notices of intent to prepare an EIS were issued are not "reasonably foreseeable" as the projects were too preliminary to meaningfully estimate their cumulative impacts). Regardless, the MPP project, like the Northeast Supply project, is over 25 miles away from the Project, and therefore was outside the geographic zone identified by the Commission. *See* Certificate Order P 195, JA 821; *see also* Rehearing Order P 86, JA 987. In any event, the Commission found that, because the MPP project would be collocated in an existing pipeline right-of-way, it would not result in significant cumulative impacts if added to the effects of the other projects in the Project area. *Id.*

Next, Riverkeeper's concern regarding the interrelationship of the Northeast Supply and MPP projects with the 300 Upgrade project (Br. 33, 39) is outside the scope of this proceeding. The cumulative impacts of those two projects coupled with the 300 Upgrade were properly discussed in the environmental analyses prepared for the Northeast Supply and MPP projects. *See* Environmental Assessment of MPP project at 51-56, Docket No. CP12-28-000 (May 18, 2012) (discussing cumulative impacts of 300 Upgrade); and Environmental Assessment of Northeast Supply project at 62, 66-72, Docket No. CP11-41-000 (June 30, 3011) (same). Yet, Riverkeeper was not concerned enough to intervene or participate in either of those cases. *See Tenn. Gas Pipeline Co.*, 140 FERC ¶ 61,120, at App. A (2011) (listing intervenors in MPP proceeding) and *Tenn. Gas Pipeline Co.*, 136 FERC ¶ 61,173, at App. B (2011) (listing intervenors in Northeast Supply proceeding).

2. FERC Fully Considered The Cumulative Impacts On Soil, Water, Wetlands, Vegetation, and Wildlife

Notwithstanding Riverkeeper's claims to the contrary (Br. 32-34), the Commission took the requisite hard look at the cumulative impacts of recently completed, ongoing, and planned projects in the Project area, including the 300 Upgrade project. *See* EA 2-128 to -134 (seven-page discussion of cumulative effects on soils, water/wetlands, vegetation and wildlife, land use, recreation, special interest areas, visual resources, socioeconomics, air quality and noise, and

climate change), JA 558-564. The Commission determined that the cumulative impacts of the Project combined with the 300 Upgrade would be minor because most of the 300 Upgrade project's "construction impacts were temporary in nature and will be separated by time and distance from the impacts of the [] Project." Certificate Order P 195, JA 821.

Now on appeal, Riverkeeper questions the adequacy of the cumulative impacts analysis on the following five specific resources: soil, water quality, wetlands, vegetation, and wildlife – issues Riverkeeper failed to raise in its rehearing request before the Commission. *See* Rehearing Request 39-50 (cumulative impacts argument devoid of these issues), JA 873-884. Emission of pollutants is the only resource-specific issue mentioned in the rehearing request. *Id.* 49-50, JA 883-884. Section 19(b) of the NGA prohibits the court from considering an objection to a Commission order unless the objection was "urged before the Commission in [an] application for rehearing" and was specifically set forth in the rehearing request. 15 U.S.C. § 717r(a) and (b); *see supra* p. 2 (discussing statutory prerequisites).

If given the opportunity on rehearing, review of the EA would have contradicted Riverkeeper's assertions (Br. 35) and shown the Commission's careful attention to cumulative impacts on each of these resources. Regarding soils and surface water quality, as the Commission explained, Project impacts on soil

and surface water are "greatest during construction and would quickly diminish after construction," and thus are "temporary." EA 2-129 (cumulative impacts analysis of soils, ground water, and surface water), JA 559. Likewise, the construction impacts from the 300 Upgrade on soil and surface water were also temporary in nature, and would be "separated by time" from the impacts from the Project. Certificate Order PP 195-196 (300 Upgrade completed before the Project EA issued), JA 821-822. Thus, most of the impacts from the 300 Upgrade were ameliorated by the time Pipeline began construction, over a year later, on the Project. *Id.* P 195, JA 821; *see also* Rehearing Order P 86 (300 Upgrade placed into service on November 1, 2011 with restoration activities completed in 2012), JA 987.

On wetlands, Riverkeeper makes the unsupported claim that the "EA relies entirely on the bare assumption that other entities will address cumulative wetland impacts for the [Project] and all other nearby projects." Br. 36. The EA addressed cumulative impacts on wetlands, and ultimately concluded that although the Project, when considered with other projects in the area, could have a cumulative impact on the amount of existing wetlands, this impact would be sufficiently mitigated below a level of significance. EA 2-130 to -131, JA 560-561.

Finally, regarding the cumulative impacts of habitat loss and fragmentation on vegetation and wildlife, the EA notes that the development of the Project,

coupled with other projects in the area, could result in habitat fragmentation. The Commission explains why the cumulative impact on vegetation and wildlife is minor. *See* Certificate Order P 196 (citing EA 2-131, JA 561), JA 821. The Commission affirmed the conclusion in the EA that, "due to the implementation of specialized construction techniques, the relatively short timeframe in any one location, and carefully developed resource protection and mitigation plans, only small cumulative impacts are anticipated when the impacts of the [] Project are added to identified, ongoing projects in the project area." Certificate Order P 198, JA 822.

The EA's level of discussion is enough. Although it is "always possible to explore a subject more deeply," the decision regarding the level of detail needed on each of these resources is vested with the Commission. *Coal. on Sensible Transp.*, 826 F.2d at 66. *See also Marsh*, 490 U.S. at 376-77 (holding that agencies retain substantial discretion as to the extent of the inquiry and level of explanation necessary for a cumulative impacts analysis); *Kleppe*, 427 U.S. at 412-14 (determination of cumulative impacts "is a task assigned to the special competency of the appropriate agenc[y]" and is not to be disturbed "[a]bsent a showing of arbitrary action"). The Commission exercised its judgment to determine the scope of information that it deemed necessary or useful, especially considering the scale of comments on the issues.

Moreover, the cumulative impacts analysis served NEPA's informational purpose. The "informational role" of a NEPA document is to give the public the assurance that the agency has indeed considered environmental concerns in its decision-making process, and serves to "provide a springboard for public comment in the agency decision-making process itself." *Public Citizen*, 541 U.S. at 768. Here, the cumulative impacts discussion served both roles. First, the information and discussion in the EA encouraged public comment on the issue, and the Commission's consideration of those comments enhanced its environmental review of the Project. *See* Certificate Order PP 194-198, JA 821-822; Rehearing Order PP 86-87, JA 987-988. Second, the EA's cumulative impacts analysis and the resulting public comments better informed the Commission's Natural Gas Act balance of public interests and benefits versus adverse effects in deciding whether to approve the Project. *See* Certificate Order P 203, JA 824; *see also* Rehearing Order P 102 (noting the "strong showing of public benefits"), JA 992.

C. The Commission's Finding Of No Significant Impact Is Supported By The Record

The remainder of Riverkeeper's brief challenges the Commission's finding that the Project, as mitigated, has no significant environmental impacts. *See* Br. 40-50. Riverkeeper's challenge is limited to two resources: wildlife (including migratory birds) and wetlands. Contrary to Riverkeeper's assertions, as detailed below, the Commission's environmental analysis in the EA, Certificate Order, and

Rehearing Order demonstrates that it: (1) accurately identified the relevant environmental concern, (2) took a hard look at the problem, (3) made a convincing case for its finding of no significant impact, and (4) where a significant impact was identified, showed that the mitigation measures sufficiently reduced the impact to a minimum. *See Sierra Club v. Van Antwerp*, 661 F.3d 1147, 1154 (D.C. Cir. 2011) (court's review of a "finding of no significant impact" is under the arbitrary and capricious standard, not a "convincing case" standard).

1. Riverkeeper's Challenge Regarding Wildlife And Migratory Bird Impacts Is Statutorily Barred

Riverkeeper failed to raise any objection on rehearing regarding wildlife and migratory birds. In its rehearing request, Riverkeeper generally claims that the Commission discounted project impacts "by claiming 'fragmentation will be minimal'" and "fail[ed] to take into account the multiplier-effect of doubling the right-of-way for the project." Rehearing Request at 28, JA 862; *see also id.* at 34, JA 868. Missing is any mention of wildlife or migratory birds. Instead, with regard to forest fragmentation, Riverkeeper raised concerns regarding invasion of non-native organisms, plant cover, contaminant filtration, and edge effect. *Id.* at 28, 34, JA 862, 868.

Now, before this Court, Riverkeeper belatedly argues that the Commission failed to assess adequately the Project's impacts on wildlife, including migratory birds. *See* Br. 40-44 (Part III.C of brief challenges the EA's discussion of Project

impacts of deforestation on wildlife, including migratory bird populations); and Br. 46 (Part III.D.1 of brief argues that collocation does not mitigate impacts to wildlife to an insignificant level). Riverkeeper's two references to "fragmentation" and "edge effect" in its rehearing request were insufficient to notify the Commission that it was seeking rehearing regarding wildlife and migratory bird impacts. *See N.J. Zinc Co. v. FERC*, 843 F.2d 1497, 1502-03 (D.C. Cir. 1988) (finding no jurisdiction where specific objection was not made in rehearing application, despite claim it was encompassed by "overarching objection"). Accordingly, these new arguments should be dismissed for lack of jurisdiction.

2. FERC Comprehensively Analyzed The Potential Impacts On Wildlife Associated With Habitat Loss

The EA contradicts Riverkeeper's assertion that the Commission "shirked" its obligation to meaningfully discuss impacts on wildlife related to habitat loss. Br. 40-44, 46. The EA identifies all existing wildlife in the various habitats traversed by the Project (EA 2-38 to -43, JA 468-473) and details baseline Project impacts on wildlife.[5] EA 2-43 to -44, JA 473-474. The EA recognizes that the Projects will cross 17.6 miles of forested land, permanently converting 77.7 acres

[5] Separate from the analysis of direct impacts on wildlife, the EA includes an in-depth analysis of impacts on sensitive, threatened, endangered, or otherwise protected species. EA 2-46 to -56, JA 476-486. Wildlife and "special status species" are separately analyzed resources. Riverkeeper does not challenge the Commission's review of special status species; rather, it focuses exclusively on wildlife and migratory birds.

of forest. EA 2-59, JA 489. Consulted federal, state, and local agencies only identified an 8.5-mile portion of the 40.3-mile Project route that would cross a sensitive wildlife habitat, an "Important Bird Area," part of which is forested. EA 2-45, JA 475. Further, contrary to Riverkeeper's assertion that the EA fails to assess the actual acreage of available alterative forested habitat (Br. 42), the EA notes that this Important Bird Area covers a 41,623-acre area comprised of largely intact forests (EA 2-45, JA 475) and that there is a total of 17 million acres of forest in Pennsylvania. *Id.* 2-131, JA 561.

The Commission recognized some permanent impacts from the creation of additional right-of-way that will remain cleared of trees. EA 2-59, JA 489; *see also* Certificate Order P 135, JA 798. However, the Commission reasonably concluded that the impact on wildlife from forest fragmentation will be minimal because the Project mostly expands the width of the existing right-of-way which already has edge habitat. *Id.* P 139, JA 799. This conclusion is supported by Pipeline's environmental report on wildlife, which found with respect to wildlife populations in the Project area that: (1) none of the species is specialized in such a way that construction of the Project will inhibit the overall fitness or reproductive output of the populations as a whole, (2) most species are not dependent on the right-of-way or transitional areas to provide all of their habitat requirements, and (3) many of the species are adaptive to changing habitat conditions and possess the

capability to expand or shift their home ranges to find alternative sources of food, water, and shelter. Certificate Application, Resource Report No. 3 at 3-21 (citing DeGraaf study "New England Wildlife: Management of Forested Habitats"), JA 254; *see also Swinomish Tribal Cmty v. FERC*, 627 F.2d 499, 511 (D.C. Cir. 1980) (FERC appropriately considered other parts of the record in addition to the EIS to analyze project impacts).

Regarding the "penetration distance of edge effects" (Br. 43), the EA cites to five studies that conclude that the distance an edge effect extends into a woodland generally is at least 300 feet. EA 2-43, JA 473. This issue is a "classic example of a factual dispute the resolution of which implicates substantial agency expertise." *Marsh*, 490 U.S. at 376. Although Riverkeeper may disagree with this finding, the Commission may rely on the reasonable opinions of its own experts. *Id.* at 378.

Riverkeeper asserts that the EA "lacks data" on impacts on migratory birds. Br. 43-44. The record shows the opposite. EA 2-44 to -46 (listing birds of conservation concern and identifying breeding habitats that will be crossed by the Project), JA 474-476. Riverkeeper's statement that the Commission failed to "address or evaluate" whether any migratory bird species may "suffer measurable reductions in populations due to habitat loss" (Br. 44) ignores record evidence that:

> Any migratory bird species that solely rely on large, un-fragmented tracts of forested habitat most likely do not utilize the habitat in the vicinity of the Project due to the presence of Tennessee's existing 300 Line easement and the periodic vegetation maintenance activities conducted thereon.

> Subsequently, no additional impacts to migratory bird populations or behaviors are anticipated as a result of the proposed Project.

Certificate Application, Resource Report No. 3 at 3-73, JA 306.

The Commission determined that the greatest potential impact to migratory birds would occur if Project activities such as tree clearing took place during nesting season. EA 2-44, JA 474. Accordingly, the Commission imposed tree clearing restrictions and other mitigation measures. Based on this analysis, the Commission reasonably concluded that, with the required mitigation, these impacts do not rise to the level of significance as to require a full-blown EIS. *See Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 200 (D.C. Cir. 1991) (rule of reason guides depth of agency's discussion of particular environmental impacts).

Moreover, the Project EA is distinguishable from the EAs at issue in the Ninth Circuit and district court cases on which Riverkeeper relies. Br. 40-41 (citing *Friends of the Earth v. U.S. Army Corps of Eng'rs*, 109 F. Supp. 2d 30, 38 (D.D.C. 2000), and *Found. for North Am. Wild Sheep v. U.S. Dep't of Agric.*, 681 F.2d 1172, 1181 (9th Cir. 1982)). Unlike the Project EA, in both of Riverkeeper's cited cases there was an absence of analysis regarding a sensitive habitat or a protected species about which the petitioner had raised pointed concerns. In *Friends of the Earth*, the court found, along with multiple other deficiencies, that the Army Corps failed to address concerns raised by nearly all the commenting federal agencies about the destruction of highly valued water bottom habitats. *See*

109 F.Supp.2d at 38. In *Foundation for Wild Sheep*, where the agency approved the reopening of a road that passes directly through the lambing area of one of the few remaining herds of a protected species of sheep, for whom "any disturbance of these (lambing) areas would be a catastrophe," the Court rejected the EA because the agency failed to include any estimate of the expected amount of traffic on the road. *See* 681 F.2d at 1175-76, 1178, 1180-81.

Unlike these two cases, here, Riverkeeper expresses a vague, non-specific concern regarding "wildlife." Although the Commission did not elaborate on impacts to common wildlife, including migratory birds, to the same degree it did on special status species (e.g., bald eagle, Indiana bat, bog turtle), the Commission clearly identified and considered the issue of habitat loss on wildlife.

Simply put, Riverkeeper's real dispute is not with the quantity or quality of the EA's analysis, but with the Commission's ultimate conclusion that these impacts do not rise to the level of significance required to justify an EIS. That Riverkeeper disagrees with the Commission's conclusion that the Project will not have significant adverse environmental effects, absent a clear error of judgment, is an insufficient basis upon which to overturn FERC's decision. *See Friends of the Ompompanoosuc v. FERC*, 968 F.2d 1549, 1553-54 (2d Cir. 1992).

3. The Mitigation Measures Reflect The Commission's Hard Look At Project Impacts

Here, the Commission acted to ensure that environmental issues were resolved. Consistent with NEPA procedures, Commission staff prepared a thorough, 200-page EA for the Project that addresses the effects of the Project and describes required mitigation measures, including site-specific measures for each special interest area as determined by the managing agency or permitting authority. Rehearing Order PP 65, 69, JA 979, 980. The development of mitigation measures designed to minimize specific impacts demonstrates that the Commission seriously considered those impacts. *See Swinomish*, 627 F.2d at 512 (FERC took hard look at an impact where it imposed conditions related to that impact).

a. Wildlife Impacts

Riverkeeper ignores the record by arguing that the Commission erroneously relied on the collocated nature of the Project as the sole basis for its finding that Project impacts on wildlife would be mitigated to an insignificant level. *See* Br. 46. Contrary to Riverkeeper's claim, the Commission, after analyzing the types of wildlife and impacts, concluded that the impacts will be *minor* because of: (1) the mobile nature of most wildlife in the area, (2) the availability of similar habitat adjacent and near the Project, and (3) the compatible nature of the restored right-of-way with species occurring in the area. EA 2-44, JA 474. Moreover, the Commission imposed specific mitigation measures to further minimize any

impacts on wildlife. *Id.*; *see also* Certificate Order P 90 (determining that Pipeline's Environmental Construction Plan minimizes impacts), JA 784. Further, to mitigate impacts on the identified sensitive wildlife species, the Pipeline will implement tree clearing restrictions, restore temporary workspaces, and implement any other mitigation measures required by other agencies. EA 2-45, JA 475. *See also LaFlamme v. FERC*, 945 F.2d 1124, 1130 (9th Cir. 1991) (FERC did not err in permitting post-order monitoring and studies of environmental impacts); *Pub. Utils. Comm'n of Cal.*, 900 F.2d at 282-83 (deferring development of specific mitigation steps until the start of construction when more details are known is "eminently reasonable"). The EA further identifies and imposes specific mitigation measures to protect threatened and endangered species. EA 2-46 to -52, JA 476-482; *see also* Certificate Order P 49, JA 771.

b. Wetland Impacts

Riverkeeper argues that the Commission's mitigation analysis regarding measures addressing wetland impacts is deficient because the efficacy of the measures is not analyzed and the Commission defers to the actions of other agencies. Br. 47-48. As the Commission explained, the Pipeline will implement a series of mitigation measures to reduce wetland impacts. *See* Certificate Order P 135, JA 798. Specifically, the mitigation measures are a combination of Pipeline-developed measures, measures to be developed in consultation with other

agencies with expertise and jurisdiction over wetlands, compensatory mitigation, and post-construction monitoring of all wetlands. EA 2-23 to -32 (detailing mitigation measures), JA 453-462.

The Commission need not prove the efficacy of a mitigation plan or otherwise demonstrate that the mitigation will "completely compensate" for Project impacts. *See Robertson*, 490 U.S. at 352 (mitigation only needs to be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated). Nevertheless, the Commission determined that Pipeline's mitigation plans for wetland crossings (its Environmental Construction Plans) are the best management practices that reduce impacts on streams and wetlands during construction. Certificate Order P 90, JA 784; EA 2-22, JA 452.

Next, contrary to Riverkeeper's claim (Br. 47), the Commission reasonably left the development of some wetland mitigation measures to relevant agencies. In particular, the Commission relies on the Army Corps of Engineers, a NEPA cooperating agency that regulates wetlands, to develop mitigation measures. EA 1-4, 2-28 to -32, JA 409, 458-462. This practice has been sanctioned by this Court, and other courts of appeal, where the mitigation measures are mandatory, enforceable, and subject to review to ensure their efficacy. *See Nat'l Comm. for the New River*, 373 F.3d at 1328 (EIS not deficient where FERC imposed mitigation measures to be developed and approved); *Friends of the*

Ompompanoosuc, 968 F.2d at 1555 (requirement that licensee consult with local agencies to develop measures to mitigate adverse project impact is a rational basis for finding of no significant impact); *LaFlamme*, 945 F.2d at 1130 (FERC did not err in permitting post-order monitoring and studies of environmental impacts); *Wetlands Action Network v. U.S. Army Corps of Eng'rs*, 222 F.3d 1105 (9th Cir. 2000) (upholding finding of no significant impact that relied on under-developed mitigation measures where license conditions ensured their enforcement). The Commission's approval of the Project is explicitly conditioned upon Pipeline submitting wetland surveys, reports, and mitigation plans for the Commission's review and approval. *See* Certificate Order, Appendix B, Environmental Conditions 6, 12, 16, JA 829, 831, 832-833. Further, the Commission monitors and enforces all mitigation measures. *See* Rehearing Order PP 65, 93-94, JA 979, 989-990.

Moreover, Riverkeeper's reliance on *Idaho v. ICC*, 35 F.3d 585 (D.C. Cir. 1994), is misplaced. Br. 48. In that case, the agency completely abdicated all responsibility for reviewing and evaluating the cumulative impacts of one part of the proposed action (salvaging of railroad materials), and instead tried to rely on other agencies' piecemeal enforcement of license conditions. 35 F.3d at 589, 595-96 (agency blatantly departed from NEPA by completely deferring all environmental analysis to other agencies and the project applicant). In this case,

the Commission, after conducting a wetlands impacts analysis, reasonably relied – as is its practice – on a draft mitigation plan Pipeline submitted to two other agencies with expertise and regulatory oversight over wetlands, the Army Corps of Engineers and the Pennsylvania Department of Environmental Protection. *See* EA 2-28, JA 458; *see also* Rehearing Order PP 66, 94 (FERC routinely relies on other agencies to conduct studies and develop mitigation measures subject to FERC's review and approval), JA 979, 990. *See also Mich. Gambling*, 525 F.3d at 30 (not arbitrary or capricious for lead NEPA agency to rely on a state agency's assessment regarding efficacy of mitigation measures).

Further, where wetland impacts cannot be sufficiently reduced, the Commission reasonably relies on compensatory mitigation implemented through agreements between Pipeline and the Army Corps of Engineers and state agencies. *See* Certificate Order PP 78, 135, JA 780, 798. This type of mitigation, which includes the creation of off-site enhancement/mitigation sites, is the type of mitigation measures this Court has found to "sufficiently reduce the impact to a minimum." *Sierra Club v. Van Antwerp*, 661 F.3d 1147, 1154 (D.C. Cir. 2011) (quoting *Mich. Gambling*, 525 F.3d at 29).

Where, as here, the Commission identified and detailed Project impacts, imposed enforceable mitigation measures (whether drafted or to be developed), and required future monitoring to ensure their success, the Commission's finding

of no significant impact is entirely consistent with reasoned decision-making. *See Cabinet Mountains Wilderness v. Peterson*, 685 F.2d 678, 684 (D.C. Cir. 1982) (dismissing claim that mitigation measures were not factually supported where agency evaluated project and consulted with the Fish and Wildlife Service). The extensive information set forth in the EA here, and the conditions imposed by the Commission, ensure that these important effects have not been overlooked or underestimated. *See Robertson*, 490 U.S. at 369; *see also* Rehearing Order P 64 (Project's environmental record supported development of mitigation measures and the finding of no significant impact), JA 979. The Commission gave these and all other environmental impacts the hard look that NEPA requires.

CONCLUSION

For the foregoing reasons, the petition for review should be denied and the Commission's orders should be affirmed in all respects.

Respectfully submitted,

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June 25, 2013
FINAL BRIEF: August 13, 2013

Delaware Riverkeeper Network, et al. v. FERC **Docket No. CP11-161**
D.C. Cir. No. 13-1015

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the final brief of Respondent Federal Energy Regulatory Commission contains 10,517 words, not including the tables of contents and authorities, the glossary, the certificates of counsel, and the addendum.

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August 13, 2013

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service for the sale of natural gas for resale for industrial use only.

ADVANCE RECOVERY OF EXPENSES INCURRED BY NATURAL GAS COMPANIES FOR NATURAL GAS RESEARCH, DEVELOPMENT, AND DEMONSTRATION PROJECTS

Pub. L. 102–104, title III, Aug. 17, 1991, 105 Stat. 531, authorized Federal Energy Regulatory Commission, pursuant to this section, to allow recovery, in advance, of expenses by natural-gas companies for research, development and demonstration activities by Gas Research Institute for projects on use of natural gas in motor vehicles and on use of natural gas to control emissions from combustion of other fuels, subject to Commission finding that benefits, including environmental benefits, to both existing and future ratepayers resulting from such activities exceed all direct costs to both existing and future ratepayers, prior to repeal by Pub. L. 102–486, title IV, § 408(c), Oct. 24, 1992, 106 Stat. 2882.

§ 717c–1. Prohibition on market manipulation

It shall be unlawful for any entity, directly or indirectly, to use or employ, in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance (as those terms are used in section 78j(b) of this title) in contravention of such rules and regulations as the Commission may prescribe as necessary in the public interest or for the protection of natural gas ratepayers. Nothing in this section shall be construed to create a private right of action.

(June 21, 1938, ch. 556, § 4A, as added Pub. L. 109–58, title III, § 315, Aug. 8, 2005, 119 Stat. 691.)

§ 717d. Fixing rates and charges; determination of cost of production or transportation

(a) Decreases in rates

Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided*, *however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) Costs of production and transportation

The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

(June 21, 1938, ch. 556, § 5, 52 Stat. 823.)

§ 717e. Ascertainment of cost of property

(a) Cost of property

The Commission may investigate and ascertain the actual legitimate cost of the property of every natural-gas company, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation and the fair value of such property.

(b) Inventory of property; statements of costs

Every natural-gas company upon request shall file with the Commission an inventory of all or any part of its property and a statement of the original cost thereof, and shall keep the Commission informed regarding the cost of all additions, betterments, extensions, and new construction.

(June 21, 1938, ch. 556, § 6, 52 Stat. 824.)

§ 717f. Construction, extension, or abandonment of facilities

(a) Extension or improvement of facilities on order of court; notice and hearing

Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) Abandonment of facilities or services; approval of Commission

No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) Certificate of public convenience and necessity

(1)(A) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

(B) In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however*, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(2) The Commission may issue a certificate of public convenience and necessity to a natural-gas company for the transportation in interstate commerce of natural gas used by any person for one or more high-priority uses, as defined, by rule, by the Commission, in the case of—

(A) natural gas sold by the producer to such person; and

(B) natural gas produced by such person.

(d) Application for certificate of public convenience and necessity

Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Granting of certificate of public convenience and necessity

Except in the cases governed by the provisos contained in subsection (c)(1) of this section, 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; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

(f) Determination of service area; jurisdiction of transportation to ultimate consumers

(1) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization; and

(2) If the Commission has determined a service area pursuant to this subsection, transportation to ultimate consumers in such service area by the holder of such service area determination, even if across State lines, shall be subject to the exclusive jurisdiction of the State commission in the State in which the gas is consumed. This section shall not apply to the transportation of natural gas to another natural gas company.

(g) Certificate of public convenience and necessity for service of area already being served

Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company.

(h) Right of eminent domain for construction of pipelines, etc.

When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the prac-

neys, examiners, and experts as may be necessary for carrying out its functions under this chapter ''without regard to the provisions of other laws applicable to the employment and compensation of officers and employees of the United States'' are omitted as obsolete and superseded.

As to the compensation of such personnel, sections 1202 and 1204 of the Classification Act of 1949, 63 Stat. 972, 973, repealed the Classification Act of 1923 and all other laws or parts of laws inconsistent with the 1949 Act. The Classification Act of 1949 was repealed by Pub. L. 89–554, Sept. 6, 1966, §8(a), 80 Stat. 632, and reenacted as chapter 51 and subchapter III of chapter 53 of Title 5, Government Organization and Employees. Section 5102 of Title 5 contains the applicability provisions of the 1949 Act, and section 5103 of Title 5 authorizes the Office of Personnel Management to determine the applicability to specific positions and employees.

Such appointments are now subject to the civil service laws unless specifically excepted by those laws or by laws enacted subsequent to Executive Order 8743, Apr. 23, 1941, issued by the President pursuant to the Act of Nov. 26, 1940, ch. 919, title I, §1, 54 Stat. 1211, which covered most excepted positions into the classified (competitive) civil service. The Order is set out as a note under section 3301 of Title 5.

''Chapter 51 and subchapter III of chapter 53 of title 5'' substituted in text for ''the Classification Act of 1949, as amended'' on authority of Pub. L. 89–554, §7(b), Sept. 6, 1966, 80 Stat. 631, the first section of which enacted Title 5.

AMENDMENTS

1949—Act Oct. 28, 1949, substituted ''Classification Act of 1949'' for ''Classification Act of 1923''.

REPEALS

Act Oct. 28, 1949, ch. 782, cited as a credit to this section, was repealed (subject to a savings clause) by Pub. L. 89–554, Sept. 6, 1966, §8, 80 Stat. 632, 655.

§ 717r. Rehearing and review

(a) Application for rehearing; time

Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Review of Commission order

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which is supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission order

The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(d) Judicial review

(1) In general

The United States Court of Appeals for the circuit in which a facility subject to section 717b of this title or section 717f of this title is proposed to be constructed, expanded, or operated shall have original and exclusive jurisdiction over any civil action for the review of an order or action of a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to

seeks authority to serve some or all of the markets sought in such pending application or is otherwise competitive with such pending application, the Commission will not schedule the new application for hearing until it has rendered its final decision on such pending application, except when, on its own motion, or on appropriate application, it finds that the public interest requires otherwise.

(b) *Shortened procedure.* If no protest or petition to intervene raises an issue of substance, the Commission may upon request of the applicant dispose of an application in accordance with the provisions of § 385.802 of this chapter.

[17 FR 7386, Aug. 14, 1952, as amended by Order 225, 47 FR 19057, May 3, 1982]

§ 157.12 Dismissal of application.

Except for good cause shown, failure of an applicant to go forward on the date set for hearing and present its full case in support of its application will constitute ground for the summary dismissal of the application and the termination of the proceedings.

[17 FR 7386, Aug. 14, 1952]

§ 157.13 Form of exhibits to be attached to applications.

Each exhibit attached to an application must conform to the following requirements:

(a) *General requirements.* Each exhibit must be submitted in the manner prescribed in §§ 157.6(a) and 385.2011 of this chapter and contain a title page showing applicant's name, docket number (to be left blank), title of the exhibit, the proper letter designation of the exhibit, and, if of 10 or more pages, a table of contents, citing by page, section number or subdivision, the component elements or matters therein contained.

(b) *Reference to annual reports and previous applications.* An application may refer to annual reports and previous applications filed with the Commission and shall specify the exact pages or exhibit numbers of the filing to which reference is made, including the page numbers in any exhibit to which reference is made. When reference is made to a previous application the docket number shall be stated. No part of a rejected application may be incorporated by reference.

(c) *Interdependent applications.* When an application considered alone is incomplete and depends vitally upon information in another application, it will not be accepted for filing until the supporting application has been filed. When applications are interdependent, they shall be filed concurrently.

(d) *Measurement base.* All gas volumes, including gas purchased from producers, shall be stated upon a uniform basis of measurement, and, in addition, if the uniform basis of measurement used in any application is other than 14.73 p.s.i.a., then any volume or volumes delivered to or received from any interstate natural-gas pipeline company shall also be stated upon a basis of 14.73 p.s.i.a.; similarly, total volumes on all summary sheets, as well as grand totals of volumes in any exhibit, shall also be stated upon a basis of 14.73 p.s.i.a. if the uniform basis of measurement used is other than 14.73 p.s.i.a.

[17 FR 7387, Aug. 14, 1952, as amended by Order 185, 21 FR 1486, Mar. 8, 1956; Order 280, 29 FR 4877, Apr. 7, 1964; Order 493, 53 FR 15029, Apr. 27, 1988]

§ 157.14 Exhibits.

(a) *To be attached to each application.* All exhibits specified must accompany each application when tendered for filing. Together with each exhibit applicant must provide a full and complete explanation of the data submitted, the manner in which it was obtained, and the reasons for the conclusions derived from the exhibits. If the Commission determines that a formal hearing upon the application is required or that testimony and hearing exhibits should be filed, the Secretary will promptly notify the applicant that submittal of all exhibits and testimony of all witnesses to be sponsored by the applicant in support of his case-in-chief is required. Submittal of these exhibits and testimony must be within 20 days from the date of the Secretary's notice, or any other time as the Secretary will specify. Exhibits, except exhibits F, F–1, G, G-I, and G-II, must be submitted to the Commission on electronic media as prescribed in § 385.2011 of this chapter. Interveners and persons becoming

interveners after the date of the Secretary's notice must be advised by the applicant of the afore-specified exhibits and testimony, and must be furnished with copies upon request. If this section requires an applicant to reveal Critical Energy Infrastructure Information (CEII), as defined by §388.113(c) of this chapter, to any person, the applicant shall follow the procedures set out in §157.10(d).

(1) *Exhibit A—Articles of incorporation and bylaws.* If applicant is not an individual, a conformed copy of its articles of incorporation and bylaws, or other similar documents.

(2) *Exhibit B—State authorization.* For each State where applicant is authorized to do business, a statement showing the date of authorization, the scope of the business applicant is authorized to carry on and all limitations, if any, including expiration dates and renewal obligations. A conformed copy of applicant's authorization to do business in each State affected shall be supplied upon request.

(3) *Exhibit C—Company officials.* A list of the names and business addresses of applicant's officers and directors, or similar officials if applicant is not a corporation.

(4) *Exhibit D—Subsidiaries and affiliation.* If applicant or any of its officers or directors, directly or indirectly, owns, controls, or holds with power to vote, 10 percent or more of the outstanding voting securities of any other person or organized group of persons engaged in production, transportation, distribution, or sale of natural gas, or of any person or organized group of persons engaged in the construction or financing of such enterprises or operations, a detailed explanation of each such relationship, including the percentage of voting strength represented by such ownership of securities. If any person or organized group of persons, directly or indirectly, owns, controls, or holds with power to vote, 10 percent or more of the outstanding voting securities of applicant—a detailed explanation of each such relationship.

(5) *Exhibit E—Other pending applications and filings.* A list of other applications and filings under sections 1, 3, 4 and 7 of the Natural Gas Act filed by the applicant which are pending before the Commission at the time of the filing of an application and which directly and significantly affect the application filed, including an explanation of any material effect the grant or denial of those other applications and filings will have on the application and of any material effect the grant or denial of the application will have on those other applications and filings.

(6) *Exhibit F—Location of facilities.* Unless shown on Exhibit G or elsewhere, a geographical map of suitable scale and detail showing, and appropriately differentiating between all of the facilities proposed to be constructed, acquired or abandoned and existing facilities of applicant, the operation or capacity of which will be directly affected by the proposed facilities or the facilities proposed to be abandoned. This map, or an additional map, shall clearly show the relationship of the new facilities to the applicant's overall system and shall include:

(i) Location, length, and size of pipelines.

(ii) Location and size (rated horsepower) of compressor stations.

(iii) Location and designation of each point of connection of existing and proposed facilities with (*a*) main-line industrial customers, gas pipeline or distribution systems, showing towns and communities served and to be served at wholesale and retail, and (*b*) gas-producing and storage fields, or other sources of gas supply.

(6-a) *Exhibit F-I—Environmental report.* An environmental report as specified in §§380.3 and 380.12 of this chapter. Applicant must submit all appropriate revisions to Exhibit F-I whenever route or site changes are filed. These revisions should identify the locations by mile post and describe all other specific differences resulting from the route or site changes, and should not simply provide revised totals for the resources affected.

(7) *Exhibit G—Flow diagrams showing daily design capacity and reflecting operation with and without proposed facilities added.* A flow diagram showing daily design capacity and reflecting operating conditions with only existing facilities in operation. A second flow diagram showing daily design capacity and reflecting operating conditions

with both proposed and existing facilities in operation. Both flow diagrams shall include the following for the portion of the system affected:

(i) Diameter, wall thickness, and length of pipe installed and proposed to be installed and the diameter and wall thickness of the installed pipe to which connection is proposed.

(ii) For each proposed new compressor station and existing station, the size, type and number of compressor units, horsepower required, horsepower installed and proposed to be installed, volume of gas to be used as fuel, suction and discharge pressures, and compression ratio.

(iii) Pressures and volumes of gas at the main line inlet and outlet connections at each compressor station.

(iv) Pressures and volumes of gas at each intake and take-off point and at the beginning and terminus of the existing and proposed facilities and at the intake or take-off point of the existing facilities to which the proposed facilities are to be connected.

(8) *Exhibit G-I—Flow diagrams reflecting maximum capabilities.* If Exhibit G does not reflect the maximum deliveries which applicant's existing and proposed facilities would be capable of achieving under most favorable operating conditions with utilization of all facilities, include an additional diagram or diagrams to depict such maximum capabilities. If the horsepower, pipelines, or other facilities on the segment of applicant's system under consideration are not being fully utilized due, e.g., to capacity limitation of connecting facilities or because of the need for standby or spare equipment, the reason for such nonutilization shall be stated.

(9) *Exhibit G-II—Flow diagram data.* Exhibits G and G-I shall be accompanied by a statement of engineering design data in explanation and support of the diagrams and the proposed project, setting forth:

(i) Assumptions, bases, formulae, and methods used in the development and preparation of such diagrams and accompanying data.

(ii) A description of the pipe and fittings to be installed, specifying the diameter, wall thickness, yield point, ultimate tensile strength, method of fabrication, and methods of testing proposed.

(iii) When lines are looped, the length and size of the pipe in each loop.

(iv) Type, capacity, and location of each natural gas storage field or facility, and of each dehydration, desulphurization, natural gas liquefaction, hydrocarbon extraction, or other similar plant or facility directly attached to the applicant's system, indicating which of such plants are owned or operated by applicant, and which by others, giving their names and addresses.

(v) If the daily design capacity shown in *Exhibit G* is predicated upon an ability to meet each customer's maximum contract quantity on the same day, explain the reason for such coincidental peak-day design. If the design day capacity shown in Exhibit G is predicated upon an assumed diversity factor, state that factor and explain its derivation.

(vi) The maximum allowable operating pressure of each proposed facility for which a certificate is requested, as permitted by the Department of Transportation's safety standards. The applicant shall certify that it will design, install, inspect, test, construct, operate, replace, and maintain the facilities for which a certificate is requested in accordance with Federal safety standards and plans for maintenance and inspection or shall certify that it has been granted a waiver of the requirements of the safety standards by the Department of Transportation in accordance with the provisions of section 3(e) of the Natural Gas Pipeline Safety Act of 1968. Pertinent details concerning the waiver shall be set forth.

(10) *Exhibit H—Total gas supply data.* A statement by applicant describing:

(i) Those production areas accessible to the proposed construction that contain sufficient existing or potential gas supplies for the proposed project; and

(ii) How those production areas are connected to the proposed construction.

(11) *Exhibit I—Market data.* A system-wide estimate of the volumes of gas to be delivered during each of the first 3 full years of operation of the proposed service, sale, or facilities and during the years when the proposed facilities

(a) Integrating the NEPA process into early planning (§ 1501.2).

(b) Emphasizing interagency cooperation before the environmental impact statement is prepared, rather than submission of adversary comments on a completed document (§ 1501.6).

(c) Insuring the swift and fair resolution of lead agency disputes (§ 1501.5).

(d) Using the scoping process for an early identification of what are and what are not the real issues (§ 1501.7).

(e) Establishing appropriate time limits for the environmental impact statement process (§§ 1501.7(b)(2) and 1501.8).

(f) Preparing environmental impact statements early in the process (§ 1502.5).

(g) Integrating NEPA requirements with other environmental review and consultation requirements (§ 1502.25).

(h) Eliminating duplication with State and local procedures by providing for joint preparation (§ 1506.2) and with other Federal procedures by providing that an agency may adopt appropriate environmental documents prepared by another agency (§ 1506.3).

(i) Combining environmental documents with other documents (§ 1506.4).

(j) Using accelerated procedures for proposals for legislation (§ 1506.8).

(k) Using categorical exclusions to define categories of actions which do not individually or cumulatively have a significant effect on the human environment (§ 1508.4) and which are therefore exempt from requirements to prepare an environmental impact statement.

(l) Using a finding of no significant impact when an action not otherwise excluded will not have a significant effect on the human environment (§ 1508.13) and is therefore exempt from requirements to prepare an environmental impact statement.

§ 1500.6 Agency authority.

Each agency shall interpret the provisions of the Act as a supplement to its existing authority and as a mandate to view traditional policies and missions in the light of the Act's national environmental objectives. Agencies shall review their policies, procedures, and regulations accordingly and revise them as necessary to insure full compliance with the purposes and provisions of the Act. The phrase ''to the fullest extent possible'' in section 102 means that each agency of the Federal Government shall comply with that section unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible.

PART 1501—NEPA AND AGENCY PLANNING

Sec.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609, and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 55992, Nov. 29, 1978, unless otherwise noted.

§ 1501.1 Purpose.

The purposes of this part include:

(a) Integrating the NEPA process into early planning to insure appropriate consideration of NEPA's policies and to eliminate delay.

(b) Emphasizing cooperative consultation among agencies before the environmental impact statement is prepared rather than submission of adversary comments on a completed document.

(c) Providing for the swift and fair resolution of lead agency disputes.

(d) Identifying at an early stage the significant environmental issues deserving of study and deemphasizing insignificant issues, narrowing the scope of the environmental impact statement accordingly.

(e) Providing a mechanism for putting appropriate time limits on the environmental impact statement process.

§ 1501.2 Apply NEPA early in the process.

Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts. Each agency shall:

(a) Comply with the mandate of section 102(2)(A) to ''utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment,'' as specified by § 1507.2.

(b) Identify environmental effects and values in adequate detail so they can be compared to economic and technical analyses. Environmental documents and appropriate analyses shall be circulated and reviewed at the same time as other planning documents.

(c) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources as provided by section 102(2)(E) of the Act.

(d) Provide for cases where actions are planned by private applicants or other non-Federal entities before Federal involvement so that:

(1) Policies or designated staff are available to advise potential applicants of studies or other information foreseeably required for later Federal action.

(2) The Federal agency consults early with appropriate State and local agencies and Indian tribes and with interested private persons and organizations when its own involvement is reasonably foreseeable.

(3) The Federal agency commences its NEPA process at the earliest possible time.

§ 1501.3 When to prepare an environmental assessment.

(a) Agencies shall prepare an environmental assessment (§ 1508.9) when necessary under the procedures adopted by individual agencies to supplement these regulations as described in § 1507.3. An assessment is not necessary if the agency has decided to prepare an environmental impact statement.

(b) Agencies may prepare an environmental assessment on any action at any time in order to assist agency planning and decisionmaking.

§ 1501.4 Whether to prepare an environmental impact statement.

In determining whether to prepare an environmental impact statement the Federal agency shall:

(a) Determine under its procedures supplementing these regulations (described in § 1507.3) whether the proposal is one which:

(1) Normally requires an environmental impact statement, or

(2) Normally does not require either an environmental impact statement or an environmental assessment (categorical exclusion).

(b) If the proposed action is not covered by paragraph (a) of this section, prepare an environmental assessment (§ 1508.9). The agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments required by § 1508.9(a)(1).

(c) Based on the environmental assessment make its determination whether to prepare an environmental impact statement.

(d) Commence the scoping process (§ 1501.7), if the agency will prepare an environmental impact statement.

(e) Prepare a finding of no significant impact (§ 1508.13), if the agency determines on the basis of the environmental assessment not to prepare a statement.

(1) The agency shall make the finding of no significant impact available to the affected public as specified in § 1506.6.

(2) In certain limited circumstances, which the agency may cover in its procedures under § 1507.3, the agency shall make the finding of no significant impact available for public review (including State and areawide clearinghouses) for 30 days before the agency makes its final determination whether to prepare an environmental impact statement and before the action may begin. The circumstances are:

(i) The proposed action is, or is closely similar to, one which normally requires the preparation of an environmental impact statement under the procedures adopted by the agency pursuant to § 1507.3, or

(ii) The nature of the proposed action is one without precedent.

§ 1501.5 Lead agencies.

(a) A lead agency shall supervise the preparation of an environmental impact statement if more than one Federal agency either:

(1) Proposes or is involved in the same action; or

(2) Is involved in a group of actions directly related to each other because of their functional interdependence or geographical proximity.

(b) Federal, State, or local agencies, including at least one Federal agency, may act as joint lead agencies to prepare an environmental impact statement (§ 1506.2).

(c) If an action falls within the provisions of paragraph (a) of this section the potential lead agencies shall determine by letter or memorandum which agency shall be the lead agency and which shall be cooperating agencies. The agencies shall resolve the lead agency question so as not to cause delay. If there is disagreement among the agencies, the following factors (which are listed in order of descending importance) shall determine lead agency designation:

(1) Magnitude of agency's involvement.

(2) Project approval/disapproval authority.

(3) Expertise concerning the action's environmental effects.

(4) Duration of agency's involvement.

(5) Sequence of agency's involvement.

(d) Any Federal agency, or any State or local agency or private person substantially affected by the absence of lead agency designation, may make a written request to the potential lead agencies that a lead agency be designated.

(e) If Federal agencies are unable to agree on which agency will be the lead agency or if the procedure described in paragraph (c) of this section has not resulted within 45 days in a lead agency designation, any of the agencies or persons concerned may file a request with the Council asking it to determine which Federal agency shall be the lead agency.

A copy of the request shall be transmitted to each potential lead agency. The request shall consist of:

(1) A precise description of the nature and extent of the proposed action.

(2) A detailed statement of why each potential lead agency should or should not be the lead agency under the criteria specified in paragraph (c) of this section.

(f) A response may be filed by any potential lead agency concerned within 20 days after a request is filed with the Council. The Council shall determine as soon as possible but not later than 20 days after receiving the request and all responses to it which Federal agency shall be the lead agency and which other Federal agencies shall be cooperating agencies.

[43 FR 55992, Nov. 29, 1978; 44 FR 873, Jan. 3, 1979]

§ 1501.6 Cooperating agencies.

The purpose of this section is to emphasize agency cooperation early in the NEPA process. Upon request of the lead agency, any other Federal agency which has jurisdiction by law shall be a cooperating agency. In addition any other Federal agency which has special expertise with respect to any environmental issue, which should be addressed in the statement may be a cooperating agency upon request of the lead agency. An agency may request the lead agency to designate it a cooperating agency.

(a) The lead agency shall:

(1) Request the participation of each cooperating agency in the NEPA process at the earliest possible time.

(2) Use the environmental analysis and proposals of cooperating agencies with jurisdiction by law or special expertise, to the maximum extent possible consistent with its responsibility as lead agency.

(3) Meet with a cooperating agency at the latter's request.

(b) Each cooperating agency shall:

(1) Participate in the NEPA process at the earliest possible time.

which address classified proposals may be safeguarded and restricted from public dissemination in accordance with agencies' own regulations applicable to classified information. These documents may be organized so that classified portions can be included as annexes, in order that the unclassified portions can be made available to the public.

(d) Agency procedures may provide for periods of time other than those presented in §1506.10 when necessary to comply with other specific statutory requirements.

(e) Agency procedures may provide that where there is a lengthy period between the agency's decision to prepare an environmental impact statement and the time of actual preparation, the notice of intent required by §1501.7 may be published at a reasonable time in advance of preparation of the draft statement.

PART 1508—TERMINOLOGY AND INDEX

Sec.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 56003, Nov. 29, 1978, unless otherwise noted.

§ 1508.1 Terminology.

The terminology of this part shall be uniform throughout the Federal Government.

§ 1508.2 Act.

Act means the National Environmental Policy Act, as amended (42 U.S.C. 4321, *et seq.*) which is also referred to as ''NEPA.''

§ 1508.3 Affecting.

Affecting means will or may have an effect on.

§ 1508.4 Categorical exclusion.

Categorical exclusion means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (§1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. An agency may decide in its procedures or otherwise, to prepare environmental assessments for the reasons stated in §1508.9 even though it is not required to do so. Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

§ 1508.5 Cooperating agency.

Cooperating agency means any Federal agency other than a lead agency which has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal (or a reasonable alternative) for legislation or other major Federal action significantly affecting the quality of the human environment. The selection and responsibilities of a cooperating agency are described in §1501.6. A State or local agency of similar qualifications or, when the effects are on a reservation, an Indian Tribe, may by agreement with the lead agency become a cooperating agency.

§ 1508.6 Council.

Council means the Council on Environmental Quality established by title II of the Act.

§ 1508.7 Cumulative impact.

Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

§ 1508.8 Effects.

Effects include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

§ 1508.9 Environmental assessment.

Environmental assessment:

(a) Means a concise public document for which a Federal agency is responsible that serves to:

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.

(2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.

(3) Facilitate preparation of a statement when one is necessary.

(b) Shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

§ 1508.10 Environmental document.

Environmental document includes the documents specified in § 1508.9 (environmental assessment), § 1508.11 (environmental impact statement), § 1508.13 (finding of no significant impact), and § 1508.22 (notice of intent).

§ 1508.11 Environmental impact statement.

Environmental impact statement means a detailed written statement as required by section 102(2)(C) of the Act.

§ 1508.12 Federal agency.

Federal agency means all agencies of the Federal Government. It does not mean the Congress, the Judiciary, or the President, including the performance of staff functions for the President in his Executive Office. It also includes for purposes of these regulations States and units of general local government and Indian tribes assuming NEPA responsibilities under section 104(h) of the Housing and Community Development Act of 1974.

§ 1508.13 Finding of no significant impact.

Finding of no significant impact means a document by a Federal agency briefly presenting the reasons why an action, not otherwise excluded (§ 1508.4), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it (§ 1501.7(a)(5)). If the assessment is included, the finding need not

repeat any of the discussion in the assessment but may incorporate it by reference.

§ 1508.14 Human environment.

Human environment shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. (See the definition of ''effects'' (§ 1508.8).) This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.

§ 1508.15 Jurisdiction by law.

Jurisdiction by law means agency authority to approve, veto, or finance all or part of the proposal.

§ 1508.16 Lead agency.

Lead agency means the agency or agencies preparing or having taken primary responsibility for preparing the environmental impact statement.

§ 1508.17 Legislation.

Legislation includes a bill or legislative proposal to Congress developed by or with the significant cooperation and support of a Federal agency, but does not include requests for appropriations. The test for significant cooperation is whether the proposal is in fact predominantly that of the agency rather than another source. Drafting does not by itself constitute significant cooperation. Proposals for legislation include requests for ratification of treaties. Only the agency which has primary responsibility for the subject matter involved will prepare a legislative environmental impact statement.

§ 1508.18 Major Federal action.

Major Federal action includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (§ 1508.27). Actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action.

(a) 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 (§§ 1506.8, 1508.17). Actions do not include funding assistance solely in the form of general revenue sharing funds, distributed under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1221 *et seq.*, with no Federal agency control over the subsequent use of such funds. Actions do not include bringing judicial or administrative civil or criminal enforcement actions.

(b) Federal actions tend to fall within one of the following categories:

(1) Adoption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act, 5 U.S.C. 551 *et seq.;* treaties and international conventions or agreements; formal documents establishing an agency's policies which will result in or substantially alter agency programs.

(2) Adoption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of Federal resources, upon which future agency actions will be based.

(3) Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.

(4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.

§ 1508.19 Matter.

Matter includes for purposes of part 1504:

(a) With respect to the Environmental Protection Agency, any proposed legislation, project, action or regulation as those terms are used in section 309(a) of the Clean Air Act (42 U.S.C. 7609).

(b) With respect to all other agencies, any proposed major federal action to which section 102(2)(C) of NEPA applies.

§ 1508.20 Mitigation.

Mitigation includes:

(a) Avoiding the impact altogether by not taking a certain action or parts of an action.

(b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.

(c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.

(d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.

(e) Compensating for the impact by replacing or providing substitute resources or environments.

§ 1508.21 NEPA process.

NEPA process means all measures necessary for compliance with the requirements of section 2 and title I of NEPA.

§ 1508.22 Notice of intent.

Notice of intent means a notice that an environmental impact statement will be prepared and considered. The notice shall briefly:

(a) Describe the proposed action and possible alternatives.

(b) Describe the agency's proposed scoping process including whether, when, and where any scoping meeting will be held.

(c) State the name and address of a person within the agency who can answer questions about the proposed action and the environmental impact statement.

§ 1508.23 Proposal.

Proposal exists at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated. Preparation of an environmental impact statement on a proposal should be timed (§ 1502.5) so that the final statement may be completed in time for the statement to be included in any recommendation or report on the proposal. A proposal may exist in fact as well as by agency declaration that one exists.

§ 1508.24 Referring agency.

Referring agency means the federal agency which has referred any matter to the Council after a determination that the matter is unsatisfactory from the standpoint of public health or welfare or environmental quality.

§ 1508.25 Scope.

Scope consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. The scope of an individual statement may depend on its relationships to other statements (§§ 1502.20 and 1508.28). To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:

(a) Actions (other than unconnected single actions) which may be:

(1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. 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.

(2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.

(3) Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental

485 Fed.Appx. 472
This case was not selected for publication in the Federal Reporter.
United States Court of Appeals,
Second Circuit.

COALITION FOR RESPONSIBLE GROWTH AND RESOURCE CONSERVATION, Damascus Citizens for Sustainability, and Sierra Club, Petitioners,
v.
UNITED STATES FEDERAL ENERGY REGULATORY COMMISSION, Respondent,
Central New York Oil and Gas Company, Intervenor.

No. 12–566–ag. | June 12, 2012.

Synopsis

Background: Environmental organizations petitioned for review of orders of the United States Federal Energy Regulatory Commission (FERC), granting Certificate of Public Convenience and Necessity (CPCN) for natural gas pipeline project under Natural Gas Act, 137 FERC P 61121, and denying organizations' request for rehearing of certificate order, 138 FERC P 61104.

Holdings: The Court of Appeals held that:

[1] FERC took "hard look" at possible effects of project, and

[2] FERC's cumulative impact analysis was adequate.

Petition denied.

***473** Petition for review of two orders of the United States Federal Energy Regulatory Commission ("FERC"). **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the petition is **DENIED.**

Attorneys and Law Firms

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PRESENT: RALPH K. WINTER, DENNY CHIN, CHRISTOPHER F. DRONEY, Circuit Judges.

Opinion

SUMMARY ORDER

We assume the parties' familiarity with the facts and procedural history, which we reference only as necessary to explain our decision to deny the petition.

Petitioners Coalition for Responsible Growth and Resource Conservation, Damascus Citizens for Sustainability, and Sierra Club (collectively, the "Coalition") seek review of: (1) a Certificate of Public Convenience and Necessity (the "Certificate Order") granted by FERC pursuant to Section 7(c) of the Natural Gas Act, ***474** 15 U.S.C. § 717f(c), to the Central New York Oil and Gas Company ("Central NY Oil") and (2) an order denying the Coalition's Request for Rehearing of the Certificate Order (the "Rehearing Order").

The Certificate Order authorizes Central NY Oil to build and operate the MARC I Hub Line Project natural gas pipeline—39 miles long and 30 inches in diameter—to run through Bradford, Sullivan, and Lycoming Counties, Pennsylvania, and to build and operate related facilities.

Under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321–4347, a federal agency proposing a "major Federal action[ ] significantly affecting the quality of the human environment" must prepare a detailed statement about the environmental impact of the proposed action—an environmental impact statement ("EIS"). 42 U.S.C. § 4332(2)(C)(i); *Nat'l Audubon Soc'y v. Hoffman*, 132 F.3d 7, 12 (2d Cir.1997). If an agency is uncertain as to whether the action requires an EIS, it must prepare an environmental assessment ("EA") that ["b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an [EIS]." 40 C.F.R. §§ 1501.3, 1508.9(a)(1). If the agency finds that an EIS is not necessary, the agency will issue a finding of no significant impact ("FONSI"). 40 C.F.R. § 1508.9(a)(1).

In reviewing a decision whether to issue an EIS, this Court must consider: (1) "whether the agency took a 'hard look' at the possible effects of the proposed action" and (2) if the agency has taken a "hard look," whether "the agency's decision was arbitrary or capricious." *Nat'l Audubon Soc'y*, 132 F.3d at 14; *see also* 5 U.S.C. § 706(2)(A) (court may set aside an agency's decision not to require an EIS only upon a showing that it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"). Under NEPA, this Court's role is to "insure that the agency considered the environmental consequences" of the federal action at issue. *Town of Orangetown v. Gorsuch*, 718 F.2d 29, 35 (2d Cir.1983) (citation omitted); *see also Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989) ("NEPA merely prohibits uninformed—rather than unwise—agency action").

[1] Here, in considering Central NY Oil's application, FERC prepared an EA, issued a FONSI, and concluded that an EIS was not required. We conclude, based on our review of the administrative record, that FERC took a "hard look" at the possible effects of the Project and that its decision that an EIS was not required was not arbitrary or capricious. Its 296–page EA thoroughly considered the issues. The Certificate Order carefully reviewed the concerns raised by the comments. The Rehearing Order addressed petitioners' concerns and further explained FERC's basis for issuing the FONSI.

[2] The Coalition argues that FERC's cumulative impact analysis was inadequate. We disagree. FERC's analysis of the development of the Marcellus Shale natural gas reserves was sufficient. FERC included a short discussion of Marcellus Shale development in the EA, and FERC reasonably concluded that the impacts of that development are not sufficiently causally-related to the project to warrant a more in-depth analysis. In addition, FERC's discussion of the incremental effects of the project on forests and migratory birds was sufficient. FERC addressed both issues in the EA and has required Central NY Oil to take concrete steps to address environmental concerns raised by petitioners and others. For example, in the Certificate Order, FERC required Central NY Oil to comply with its Riparian Forested Buffer Enhancement Plan to address forest fragmentation. In ***475** Environmental Condition 17 of the EA, FERC required Central NY Oil to prepare and execute a Migratory Bird Impact Assessment and Habitat Restoration Plan. The environmental concerns identified by commenting parties, including the Environmental Protection Agency, were considered and addressed by FERC in the EA and the Rehearing Order.

Accordingly, we hold that FERC properly discharged its responsibilities under NEPA. We have considered all of petitioners' remaining arguments and conclude that they are without merit. The petition for review is **DENIED.**

Parallel Citations

2012 WL 2097249 (C.A.2)

Timeline of Tennessee Gas Pipeline's Upgrade Projects

11/4/2008	300 Line Upgrade pre-filing environmental review initiated
07/17/2009	300 Line Upgrade application filed
02/25/2010	300 Line Upgrade Environmental Assessment issued
05/14/2010	300 Line Upgrade approved – FERC issues Certificate Order
07/6/2010	**Northeast Upgrade pre-filing environmental review initiated**
08/11/2010	**MPP project** non-binding open season conducted to solicit interest
11/12/2010	NSD project application filed (no pre-filing review)
12/30/2010	NSD project – FERC issues notice of intent to prepare an Environmental Assessment
03/31/2011	**Northeast Upgrade application filed**
06/30/2011	NSD project Environmental Assessment issued
08/05/2011	**MPP project** binding open season conducted to solicit contracts
09/15/2011	NSD project approved – FERC issues Certificate Order
11/01/2011	300 Line Upgrade placed into service
11/21/2011	**Northeast Upgrade Environmental Assessment issued**
12/09/2011	**MPP project** application filed (no pre-filing review)
01/04/2012	**MPP project** – FERC issues notice of intent to prepare an Environmental Assessment
05/18/2012	**MPP project** Environmental Assessment issued
05/29/2012	**Northeast Upgrade approved – FERC issues Certificate Order**
08/09/2012	**MPP project** approved – FERC issues Certificate Order
11/1/2012	NSD project placed into service
12/11/2012	**MPP project** construction commences

Delaware Riverkeeper Network, et al. v. FERC **Docket No. CP11-161**
D.C. Cir. No. 13-1015

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 13th day of August, 2013, filed the foregoing with the Court via the Court's CM/ECF system and served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system.

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