

136 FERC ¶ 61,175
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

El Paso Natural Gas Company

Docket No. CP10-470-001

ORDER DENYING REHEARING AND DISMISSING STAY REQUEST

(Issued September 13, 2011)

1. On September 16, 2010, the Commission issued an order granting El Paso Natural Gas Company's (El Paso) request under section 7(c) of the Natural Gas Act (NGA) to replace pipeline segments across the San Francisco River in Greenlee County, Arizona.¹ On September 21, 2010, the Center for Biological Diversity (Center) filed a request for rehearing and stay of the order. For the reasons explained below, we will deny the request for rehearing and dismiss Center's stay request.

I. Background

2. The September 16, 2010 Order authorized El Paso to replace segments of three lines where they cross the San Francisco River. As discussed in the order, due to erosion of the river bank, 700 feet of El Paso's 8-inch diameter Station No. 7 to Morenci 2nd Loop Line (Line No. 2083) was exposed where it crossed the river and had to be replaced to ensure continued safe operation of El Paso's pipeline system. The order also authorized El Paso to replace the remaining, unexposed two lines to mitigate safety and service concerns related to the possibility of exposure in the future.²

3. Although El Paso originally planned to build the project pursuant to section 157.208 of the Commission's automatic blanket regulations, because the installation of

¹ *El Paso Natural Gas Co.*, 132 FERC ¶ 61,228 (2010) (September 16, 2010 Order).

² A more detailed procedural history appears in the September 16, 2010 Order, and need not be repeated here.

the permanent bank stabilization structure would be located within designated critical habitat for the federally listed threatened loach minnow, El Paso was unable to secure a “not likely to adversely affect” determination from the U.S. Fish and Wildlife Service (FWS).³ Accordingly, the project could not be built under El Paso’s blanket authority.

4. On July 31, 2010, FWS issued its Biological Opinion (BO), concluding that the action as proposed was neither likely to jeopardize the continued existence of the loach minnow, nor likely to destroy or adversely modify designated critical habitat for the species. This conclusion was based on several findings, including: the loach minnow is likely to be “immeasurably rare in the project area;” the short (58 days) construction period during the species’ non-breeding season would minimize impacts; and the project’s permanent impacts on the affected critical habitat (0.3 acres) and the temporary effects to another 10.15 acres were unlikely to affect recovery of the loach minnow given the overall vast amount of critical habitat for the species (126.5 river miles in the San Francisco River Unit scale and 522.2 river miles rangewide).⁴

5. Commission staff prepared an Environmental Assessment (EA) for El Paso’s proposal pursuant to the National Environmental Policy Act (NEPA).⁵ The EA, which was placed in the public record on August 16, 2010, considered, *inter alia*, the impacts of the project on the loach minnow and its critical habitat as identified in the BO, as well as alternatives to the proposed action, which were addressed in El Paso’s filed Resource Reports and alignment sheet and maps. The EA concurred with FWS’s “no jeopardy or adverse modification” finding. Staff concluded that based on the EA and information contained in El Paso’s application and supplemental filings, El Paso’s proposal would not significantly affect the quality of the human environment, hence no Environmental Impact Statement (EIS) was required.⁶

³ Under the Endangered Species Act (ESA), 16 U.S.C. § 1536 (2000), when an agency determines that a proposed action may affect a threatened or endangered species and its critical habitat, the agency must consult, informally or formally, with (as relevant here) FWS and obtain a Biological Opinion on whether its proposed action is likely to result in a taking. *See* 50 C.F.R. § 402.01(b).

⁴ Biological Opinion at 9-10.

⁵ 42 U.S.C. § 4332 *et seq.* (2006).

⁶ Staff’s findings also relied on several mitigation measures proposed by El Paso, including: constructing the project during the historic low flows and outside the breeding season for loach minnow; conducting preconstruction fish depletion surveys using electrofishing techniques 30 days prior to construction (if loach minnows are captured, immediately re-initiating consultation with the FWS); installing and maintaining block

(continued...)

6. On September 16, 2010, the Commission issued an order authorizing El Paso's project. The Commission concluded in the order that the project would not significantly affect the environment. On September 22, 2010, Center filed a request for rehearing, alleging: (1) the EA failed to consider alternatives to the proposed action, including the "no action alternative"; (2) the EA failed to sufficiently consider cumulative impacts; (3) an EIS was required; and (4) the Biological Opinion was inadequate.

7. On October 14, 2010, El Paso filed a motion for leave to answer, and answer to, Center's rehearing request. Although the Commission's Rules of Practice and Procedures do not permit answers to requests for rehearing,⁷ our rules provide that we may, for good cause, waive this provision.⁸ We find good cause to do so in this instance because El Paso's answer provides information that will assist us in our decision-making process.

II. Center's Rehearing Request

A. Alternatives Analysis

8. Center alleges that the EA failed to adequately consider a reasonable and viable range of alternatives, including the "no action" alternative. Indeed, Center asserts, the EA did not consider *any* alternative to the proposed action, or even a no action alternative "that would afford reviewers an opportunity to compare the relative merits of the proposed action with the merits of not undertaking it."⁹ Center states that the "EA merely rubber-stamps El-Paso's application...contrary to the purpose of NEPA to foster informed decision making."¹⁰

9. We find that Center's claims lack merit. The Commission is required by NEPA to take a "hard look" at the potential environmental consequence of its proposed action.¹¹ However, in carrying out their NEPA responsibilities, agencies are governed by the rule

nets upstream of the stream diversion point to exclude fishes from the diverted stream reach during the entire time the stream is diverted). *See* EA at 4.

⁷ 18 C.F.R. § 385.213(a)(2) (2011).

⁸ 18 C.F.R. § 385.101(e) (2011).

⁹ Rehearing Request at 6.

¹⁰ *Id.*

¹¹ *Committee for Auto Responsibility v. Solomon*, 603 F.2d 992, 1002 (D.C. Cir. 1979), *cert denied*, 445 U.S. 915 (1980).

of reason.¹² The range of alternatives that must be considered is a matter within an agency's discretion, but must be sufficient to permit a reasoned choice of alternatives, i.e., "reasonable alternatives."¹³

10. The EA here satisfies these requirements by considering the alternatives to the proposed action as presented in El Paso's Resource Reports and alignment sheet and maps.¹⁴ These alternatives were briefly considered, but rejected by staff as not reasonable because they were: inapplicable; involved a horizontal directional drill crossing method that proved to be infeasible; and involved other crossing locations which would result in new disturbances, could result in impacts to other landowners, and would still require crossing of the river in critical habitat.¹⁵ For these reason, staff concluded that there was no preferred alternative to replacing the exposed pipeline. As noted in the September 16, 2010 Order, if an alternative is not reasonable, it may be eliminated from further study,¹⁶ which, although not discussed in the EA, is what occurred here.¹⁷

11. Similarly, the EA considered the no-action alternative. Resource Report 10 states:

Under the No Action Alternative, the activities associated with the proposed Project would not take place and the environmental impacts associated with the Proposed Action would not occur. Not constructing the Project Facilities would remove an impact on the Loach minnow and its

¹² *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 837 (D.C. Cir. 1972).

¹³ *See* 42 U.S.C. § 4332(2)(C)(iii); *see also North Carolina v. FPC*, 533 F.2d 702, 707 (D.C. Cir. 1976) (citing *NRDC V. Morton*, 458 F.2d 827).

¹⁴ Resource Report No. 10, submitted with El Paso's application, addressed alternatives regarding other companies, designs, and locations. *See* El Paso's Application, Exhibit F-1 at 10-1.

¹⁵ *Id.*

¹⁶ *See Rochester Gas and Electric Corp.*, 100 FERC ¶ 61,113 (2002).

¹⁷ The EA incorporates by reference El Paso's application and associated resource reports (*See* EA at 4, noting that staff's assessment of the proposed project was based in part on El Paso's application and supplemental filings). The Council on Environmental Quality regulations implementing NEPA encourage agencies to incorporate material into a NEPA document by reference "when the effect will be to cut down on bulk without impeding agency and public review of the action." 40 C.F.R. § 1502.21 (2011).

critical habitat. However, under the No Action alternative, [El Paso] would be unable to address its operational and safety concerns with the exposed segment of Line 2083.

12. We believe this language succinctly provides a sufficient baseline for comparison of the impacts of the proposed action. Indeed, courts have upheld similarly brief descriptions of no action alternatives, noting that “merely because a ‘no action’ proposal is given a brief discussion does not suggest that it has been insufficiently addressed.”¹⁸

B. Cumulative Impact Analysis

13. Center argues that the EA failed to adequately disclose the cumulative impacts of the project, including omitting any analysis of a number of cumulative impacts identified in FWS’s July 31, 2010 BO.¹⁹

14. We reject Center’s argument that the EA did not adequately disclose cumulative impacts for the same reason we reject its alternatives arguments: the EA incorporates by reference the July 31, 2010 BO prepared by FWS for the proposed project.²⁰

15. Moreover, in its memorandum providing guidance on cumulative impact assessment, the Council on Environmental Quality (CEQ) advises that agencies have substantial discretion in determining the appropriate level of their cumulative impact assessments.²¹ The CEQ Memorandum states that an agency should relate the scope of its analysis to the magnitude of the environmental impacts of the proposed action.²² Accordingly, proposed actions that result in a finding of no significant impact usually involve only a limited cumulative impact analysis to confirm that the proposed action would not, in fact, have a significant impact on the environment.²³

¹⁸ See *Friends of Southeast’s Future v. Morrison*, 153 F.3d 1059, 1065 (9th Cir. 1998) (citing *Headwaters, Inc. v. Bureau of Land Mgmt.*, 914 F.2d 1174, 1181 (9th Cir. 1990)).

¹⁹ Rehearing Request at 8.

²⁰ See EA at 4, which describes the Biological Opinion and its conservation measures, and concurs with the no-jeopardy opinion.

²¹ CEQ, *Memorandum on Guidance on Consideration of Past Actions in Cumulative Effects Analysis* at 2 (June 24, 2005).

²² *Id.* at 3.

²³ *Id.*

16. Although brief, the cumulative impact analysis in the BO for the project identifies past cumulative impacts of the project and other actions in the project area on the loach minnow and its habitat, including road crossing construction and maintenance, livestock grazing, water withdrawals, contaminants, recreational activities, and nonnative aquatic species.²⁴ It also identifies potential future cumulative impacts on the loach minnow, including runoff from the impervious areas of an adjacent wastewater treatment plant, Highway 191, and buildings and associated structures and parking areas.²⁵

17. Given both the limited scope of the project and the minimal impacts to the loach minnow, we find that the cumulative impact analysis incorporated by reference in the EA is sufficient to meet the Commission's obligations under NEPA.

C. EA vs. EIS

18. Center also challenges the Commission's decision to prepare an EA, rather than an EIS, for El Paso's project. Center notes that the CEQ regulations set forth criteria that may be relevant in determining whether a proposed action will have significant impacts (thus requiring an EIS), including the "degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical" under the Endangered Species Act (ESA).²⁶ Center asserts that because the July 31, 2010 BO found that the proposed action will adversely affect the threatened loach minnow and its critical habitat, an EIS should have been prepared. Center adds that in determining that the project will not have significant impacts on the environment, the Commission inappropriately focused on the BO's finding that the project will not *jeopardize* the continued existence of the loach minnow or *adversely modify* its critical habitat. Center asserts that such a focus results in an "unreasonably high standard to dismiss potentially significant impacts."²⁷

19. We disagree. Center seems to suggest that the CEQ regulations require agencies to prepare an EIS whenever a proposed action "may adversely affect" listed species under the ESA. At most, the CEQ regulations indicate that an adverse effect on listed species is a factor to be considered in determining whether a proposed action will have a significant impact on the environment.

²⁴ Biological Opinion at 6.

²⁵ *Id.* at 9.

²⁶ *See* Rehearing Request at 11 (citing 40 C.F.R. § 1508.27 (2011)).

²⁷ Rehearing Request at 12.

20. The CEQ regulations provide that, in determining whether a proposed action will have a significant impact on the environment, agencies should consider both context and intensity.²⁸ In evaluating intensity, or severity of impact, one factor that agencies should consider is the degree to which a proposed action may adversely affect an endangered or listed species.²⁹ Thus, the regulations require an agency to consider whether adverse effects on listed species are sufficiently severe to require preparation of an EIS.³⁰

21. In this case staff appropriately considered the adverse effects on the loach minnow by reviewing FWS's BO, and rightly concluded that, among other things, the small amount of affected critical habitat, compared with the overall acreage comprising critical habitat, as well as the rarity of the loach minnow in the project area, resulted in a finding that the impacts to the loach minnow were not significant.³¹ In these circumstances, we find no basis for concluding that an EIS is required merely because of adverse effects on the loach minnow, nor do we find anything in the ESA or NEPA to support such a result.³²

D. Biological Opinion

22. Finally, Center takes issue with FWS's BO, arguing that the discussion of the environmental baseline is incomplete and omits "relevant facts including cumulative impacts resulting from historic degradation of the aquatic environment."³³ Accordingly, Center argues, the BO violates the ESA.

²⁸ 40 C.F.R. § 1508.27 (2011).

²⁹ 40 C.F.R. § 1508.27(b)(9) (2011).

³⁰ See *Atlanta Power Co.*, 100 FERC ¶ 61,215 (2002), note 5.

³¹ In addition, as noted earlier, staff based its conclusion on a number of El Paso's proposed mitigation measures.

³² Center, in requesting rehearing, also sought a stay of the certificate authorization in the September 16, 2010 Order so that the Commission can prepare an EIS for the project "to maintain the ability to choose less-impactful alternatives and/or adequate mitigation measures" (Rehearing Request at 16). Given our action on rehearing, Center's request for stay is dismissed as moot.

³³ Rehearing Request at 13.

23. The Commission is not the appropriate venue to address Center's assertion that the BO violates the ESA. The FWS authored the BO, and implements the ESA; as such, any challenge to the BO should have been addressed to the FWS.³⁴

The Commission orders:

(A) Center's request for rehearing is denied.

(B) Center's request for stay is dismissed as moot.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

³⁴ While Center did not argue that the Commission inappropriately relied on the BO, even if it had raised such a challenge, we would have rejected it. It is undisputed that those agencies (including FWS) charged with implementing the ESA are the recognized experts with regard to matters of listed species and their habitat. Thus, it is appropriate for the Commission to rely on the judgment of FWS, the agency that Congress has determined in the ESA should be responsible for providing its expert opinion regarding whether authorizing El Paso's project is likely to jeopardize the continued existence of the loach minnow, or to destroy or adversely modify its critical habitat.