

131 FERC ¶ 61,164
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Texas Eastern Transmission, LP

Docket No. CP09-68-001

ORDER GRANTING AND DENYING REHEARING

(Issued May 20, 2010)

1. In an order issued on November 19, 2009,¹ the Commission authorized Texas Eastern Transmission, LP (Texas Eastern) to construct and operate the Texas Eastern Market Area Crossing Project (TEMAX) and Texas Eastern Incremental Market Area Expansion III Project (TIME III) (collectively referred to as the projects) and to abandon certain facilities located in various counties in Pennsylvania.² Requests for rehearing of the November 19 Order were filed by Texas Eastern and by Emerald Coal Resources, L.P., Freeport Resources Corp., and Freeport Mining, LLC (collectively, Emerald/Freeport), which are affiliated coal mining operators that own coal reserves in Pennsylvania.³
2. For the reasons discussed below we will grant, in part, and deny, in part, the requests for rehearing.

¹*Texas Eastern Transmission, LP*, 129 FERC ¶ 61,151 (2009) (November 19 Order).

²The TEMAX and TIME III projects were evaluated together in a single environmental assessment document for National Environmental Policy Act purposes since the projects' proposed facilities are in the same path and are expected to be placed into service on the same November 1, 2010 date.

³Texas Eastern also filed a motion for leave to answer and answer to Emerald/Freeport's rehearing request on January 7, 2010. Although the Commission's rules do not allow answers to rehearing requests (*see* 18 C.F.R. § 385.213(a)(2)(2009)), we will grant Texas Eastern's motion and accept its answer because it provides information that assists us in our decision making.

I. The November 19 Order

3. In addition to authorizing the projects, the November 19 Order denied Texas Eastern's request for authority to begin accruing an allowance for funds used during construction (AFUDC) prior to February 27, 2009, the date Texas Eastern filed its certificate application.⁴ The Commission based its denial on Accounting Release No. 5 (Revised) (AR-5)⁵ under which a company may begin accruing AFUDC on construction costs when the costs are continuously incurred on a planned progressive basis, but for a company constructing a natural gas pipeline, AFUDC should not be accrued for the period of time prior to the date of the application to the Commission for a certificate to construct facilities unless specifically justified. The November 19 Order found that Texas Eastern did not provide any support to justify the accrual of AFUDC prior to filing its certificate application.

4. The November 19 Order also addressed Emerald/Freeport's protest and comments to the application and comments to the environmental assessment (EA) prepared for the projects. Emerald/Freeport argued that the EA was inadequate in its alternatives and cumulative impacts analysis, failed to adequately address the mining-related safety issues raised by Emerald/Freeport, and failed to follow the approach to mining-related issues adopted in two recent Commission proceedings, *REX* and *Hub III*.⁶ The parties seek rehearing on their respective issues.

II. Rehearing Requests

A. Texas Eastern/AFUDC

5. On rehearing, Texas Eastern argues (A) the Commission's denial of Texas Eastern's proposal to accrue AFUDC prior to the filing of its certificate application in this proceeding precludes Texas Eastern from its right to a reasonable opportunity to recover its costs and earn an adequate return,⁷ (B) the Commission incorrectly used AR-5 in according near-statutory authority and by using it to determine ratemaking principles,

⁴November 19 Order at P 55-56.

⁵*Accounting Release No. 5 (Revised), Capitalization of Interest During Construction*, Effective January 1, 1968, FERC Stats. & Regs. ¶ 40,005.

⁶*Rockies Express Pipeline LLC*, 123 FERC ¶ 61,234, *reh'g denied*, 125 FERC ¶ 61,160 (2008), *reh'g granted and denied*, 128 FERC ¶ 61,045 (2009) (*REX*); *Dominion Transmission, Inc.*, 129 FERC ¶ 61,012 (2009) (*Hub III*).

⁷*Citing Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944); *Mid-Tex Electric Cooperative, Inc. v. FERC*, 773 F.2d 327 (D.C. Cir. 1985).

rather than as an informal interpretation of the accounting regulations, (C) the November 19 Order fails to consider reliance on AR-5 in the context of significant changes to the natural gas pipeline industry since the issuance of AR-5 in 1968, (D) the November 19 Order should have relied on the development of criteria regarding commencement of AFUDC by the Financial Accounting Standards Board (FASB) in the form of FAS 34, and (E) that Texas Eastern provided ample record justification in support of accruing AFUDC prior to the filing of its certificate application.

Discussion

6. Texas Eastern was one of several pipelines that had been denied early accrual of AFUDC after it had proposed to accrue AFUDC on expenditures made prior to the filing of the certificate application.⁸ Like Texas Eastern, the other pipeline applicants argued that the Commission should allow the accrual of AFUDC on expenditures made prior to the filing of a certification application, particularly for those costs incurred during the pre-filing period. In response, on December 15, 2009, the Commission convened a technical conference seeking input and comments on the continuing propriety of the Commission's current policy of limiting the AFUDC accruals, absent specific justification, to expenditures incurred after the filing of an application.⁹ The Commission received extensive comments from numerous natural gas pipelines through pre- and post-technical conference filings, and conference presentations and discussions.

7. Based on the comments received in the technical conference proceeding and in the requests for rehearing, the Commission revised its AFUDC policy in *Southern Natural Gas Co.* and *Florida Gas Transmission LLC*.¹⁰ In these orders, we acknowledged that the natural gas industry has undergone significant changes since the

⁸*Fayetteville Express Pipeline LLC*, 129 FERC ¶ 61,235 (2009); *Pacific Connector Gas Pipeline, LP*, 129 FERC ¶ 61,234 (2009); *Texas Eastern Transmission, LP*, 129 FERC ¶ 61,151 (2009); *Florida Gas Transmission Co. LLC*, 129 FERC ¶ 61,150 (2009); *Midcontinent Express Pipeline LLC*, 128 FERC ¶ 61,253 (2009); *Southern Natural Gas Co.*, 128 FERC ¶ 61,198 (2009).

⁹*Notice of Technical Conference on Commission Policy on Commencement of Accrual of Allowance for Funds Used During Construction*, 74 Fed. Reg. 65,117 (December 2, 2009). Pre-technical conference comments were due December 11, 2009. Post-technical conference comments were due December 29, 2009.

¹⁰130 FERC ¶ 61,193 (2010) and 130 FERC ¶ 61,194 (2010), respectively. A full discussion of the comments received in the technical conference proceeding and the Commission's rationale for adopting the new policy can be found in *Southern Natural Gas Co.*, 130 FERC ¶ 61,193 at P 24-40.

issuance of AR-5 in 1968. We also noted that since many natural gas pipelines take advantage of the pre-filing process and incur significant project-related costs during this time, they may be at risk of not being able to capture all the cost of financing their construction projects if they cannot accrue AFUDC on expenditures made prior to the filing of a certificate application. Therefore, in light of the current regulatory landscape in the natural gas industry, the certificate application date is no longer an appropriate milestone for determining when construction project-related expenditures begin, and thus when to begin accruing AFUDC.¹¹

8. Under the Commission's revised AFUDC policy, natural gas pipelines may begin accruing AFUDC on construction projects when the following two conditions are met: (1) capital expenditures for the project have been incurred, and (2) activities that are necessary to get the construction project ready for its intended use are in progress.¹² The term "activities" includes all actions required to prepare the construction project for its intended use, including actions prior to physical construction, such as the development of plans or the process of obtaining permits from governmental authorities, and costs pursuant to Gas Plant Instruction No. 3.¹³ "Activities" does not include preliminary survey and investigation activities.¹⁴ Although the Commission's revised policy does not identify a bright line for establishing when natural gas pipelines may begin to accrue AFUDC, the date that the Commission approves the request to initiate the pre-filing process is a strong indicator of the initiation of construction project-related activities.¹⁵

9. Based on our revised AFUDC policy, we grant Texas Eastern's request for rehearing on this issue, and we will allow Texas Eastern to include its proposed AFUDC in its initial rates, subject to Texas Eastern filing a representation that the proposed AFUDC accruals comply with the requirements set forth above and in our recent orders describing the revised AFUDC policy.¹⁶ Furthermore, if Texas Eastern determines that

¹¹130 FERC ¶ 61,193 at P 34. We believe that our revised policy is directly responsive to each of the arguments Texas Eastern has raised on rehearing in this proceeding.

¹²*Id.* at P 36.

¹³*Id.*

¹⁴*Id.* at P 37.

¹⁵*Id.* at P 39.

¹⁶*See Florida Gas*, 130 FERC ¶ 61,194 at P 24-29; *Southern*, 130 FERC ¶ 61,193 at P 36-40.

its proposed AFUDC accruals should be revised in light of our revised AFUDC policy conditions, it must revise all cost-of-service items dependant on Gas Plant in Service such as Income Taxes, Depreciation Expense, Return, and Interest Expense. Texas Eastern must then file its revised rates and work papers in sufficient time for the Commission to act on the revised rates prior to filing the tariff sheets to implement those rates.

B. Emerald/Freeport/Natural Gas Act

10. Emerald/Freeport seeks rehearing on a number of issues, which generally involve 1) the Commission's responsibilities under the NGA, and 2) the Commission's responsibilities under NEPA. The specific arguments overlap substantially. Therefore, this order's structure is directed at the substance of the arguments presented, and does not follow the outline used by Emerald/Freeport in its request for rehearing. Where information contained in Texas Eastern's answer is helpful regarding a particular issue, it is utilized below.

11. The pipeline facilities at issue here are located in the far western part of Pennsylvania,¹⁷ specifically between the Holbrook and Uniontown compressor stations. Numbers 5 and 6 on Exhibit F represent two portions of Texas Eastern's existing system where replacement and construction is to occur. Number 5 involves installation of .5 miles of 36-inch diameter pipeline and the replacement (pick-up and relay) of 9.2 miles of existing 20 and 24-inch diameter pipeline being replaced with 36-inch pipeline. Number 6 represents the installation of 9.1 miles of 36-inch diameter loop.

12. The gap between Numbers 5 and 6 and an area under a part of Number 6 are the areas discussed by Emerald/Freeport. No change in existing pipeline facilities is proposed in the gap between Numbers 5 and 6. Emerald states that it has active mining elsewhere within its coal reserve rights, which underlie both the gap between Numbers 5 and 6 and adjacent areas apart from that gap. Freeport's coal reserve rights are located near to and possibly under a portion of the Number 6 looping facilities. Neither Emerald nor Freeport claim that active mining is currently occurring, or would occur during construction, under the gap or under the Number 6 looping facilities.

1. Reasoned Decision-making

13. Emerald/Freeport state that the November 19 Order failed to give a satisfactory explanation for its action¹⁸ and is arbitrary and capricious.¹⁹ Emerald/Freeport claims

¹⁷ See Exhibit F to Texas Eastern's section 7 application filed in this proceeding, a Facilities Map (Exhibit F).

¹⁸ Citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 156, 168 (1962)).

that in failing to impose conditions relating to Texas Eastern's construction over areas with coal reserves, because Emerald/Freeport has not provided "a reasonably-foreseeable timeframe in which it plans to mine coal reserves" in that area,²⁰ the Commission departed from its own precedent in *REX* and *Hub III*, where the Commission imposed certificate conditions requiring pipelines to develop mine subsidence mitigation plans.

14. Texas Eastern states that the Commission based its determination in the November 19 Order on the discussions in the EA that thoroughly explained why subsidence safety conditions are unnecessary for the projects considered here.²¹ Texas Eastern states that it will fully comply with all Department of Transportation's (DOT) Pipeline and Hazardous Materials Safety Administration (PHMSA) safety regulations²² intended to maintain the pipelines' integrity. Furthermore, when and if a subsidence issue arises in the future due to potential coal mining beneath Texas Eastern's older vintage pipeline, Texas Eastern states that it will address the issues as it has always done in the past—through discussions with the owners of the coal interests and before the Pennsylvania Department of Environmental Protection (PADEP), or the courts if necessary, in accordance with applicable federal and state law.

15. Texas Eastern notes substantial differences between its projects here and the REX project, specifically in that active mining was occurring in the vicinity of the REX project, i.e., the REX project involves construction of new pipeline facilities in the vicinity of the Murray Coal Companies' active coal mining operations in Ohio.²³ Indeed, the REX project is being constructed within 500 feet of a longwall mining panel,²⁴ and construction activities for the REX project had the potential to directly interfere with active mining operations. As Emerald/Freeport itself quoted from the Commission's

¹⁹*Citing Tesoro Alaska Petroleum Co. v. FERC*, 234 F.3d 1286, 1294 (D.C. Cir. 2000); *Pub. Serv. Comm'n of Ky. v. FERC*, 397 F.3d 1004, 1008 (D.C. Cir. 2005).

²⁰November 19 Order at P 71.

²¹*Citing* November 19 Order at P 76. *See also* EA at 27-30.

²²49 C.F.R. Pt. 190-199 (2009).

²³Texas Eastern states that the only portion of the TEMAX and TIME III projects involving construction of greenfield pipeline facilities (as opposed to lines looping adjacent existing facilities) is the Marietta Extension, which generally parallels an existing electric transmission corridor in an area significantly distant from any known mining area and coal holdings.

²⁴*Rockies Express Pipeline LLC*, 123 FERC ¶ 61,234, at P 87 (2008).

order in *REX*, “the [REX] pipeline will directly cross the underground entrance to the [Murray] mining operations.”²⁵

16. Texas Eastern also distinguishes the Hub III proceeding as one where pipeline construction activities would occur while coal mining activities were underway and might continue after the pipeline is placed in service.²⁶ Thus, the active mining near the Hub III project facilities was expected to affect the construction and restoration procedures for the Hub III project.²⁷ Consequently, as noted in the EA prepared for the instant proceeding, the pipeline-applicant “developed a plan as they would be constructing as mining occurs under the new pipeline.”²⁸

Discussion

17. The over-arching theme of Emerald/Freeport’s extensive pleadings in this proceeding is that Texas Eastern’s application in this proceeding is insufficient because it does not provide specific mitigation measures for as-yet potential subsidence issues that could emerge in the future if active mining were to take place beneath the facilities authorized herein. Indeed, Emerald/Freeport states that the public convenience and necessity standard of the NGA²⁹ is not met in this case unless the Commission requires the immediate development of subsidence plans.³⁰

18. The issue before us is a question of timing, i.e., when is it appropriate for the Commission to require a pipeline applicant to establish a specific plan addressing specific

²⁵See Motion for Leave to Answer and Answer of Emerald/Freeport to Answer of Texas Eastern to Motions to Lodge, Docket No. CP09-68-000 at 5 (Aug. 28, 2009).

²⁶Dominion Hub III Project Environmental Assessment, Docket No. CP09-18-000, at 6-7 (Jul. 31, 2009).

²⁷*Id.* at 7.

²⁸EA at 29.

²⁹ 15 U.S.C. § 717f (2006).

³⁰See Motion to Intervene, Protest and Comments of Emerald/Freeport, April 1, 2009 at 8-9; also citing *At. Ref. Co. v. Pub. Serv. Comm’n of N.Y.*, 360 U.S. 378, 391 (1959) (“section 7(e) requires the Commission to evaluate all factors bearing on the public interest.”); *Cascade Natural Gas Corp. v. FERC*, 955 F.2d 1412, 1421 (10th Cir. 1992) (“the Commission must determine that the construction or extension ‘is or will be required by the present or future public convenience and necessity.’”); *Transwestern Pipeline Co., LLC*, 122 FERC ¶ 61,165, at P 57 (2008).

mining subsidence problems. Emerald/Freeport misreads the import of the two cases where such plans have been required as conditions attached to certificates, *REX* and *Hub III*. In both of those proceedings, ongoing and imminent coal mining activities were of acute concern prompting the Commission to require the applicant pipeline to develop a construction and operations plan, in collaboration with the mining company, addressing the maintenance of pipeline integrity and operation without impeding such mining operations.³¹ We have made clear the limits of our holdings in these two cases. For example, in distinguishing the *REX* proceeding from another recent Texas Eastern project (the Northern Bridge Project),³² we noted that the *REX* proceeding involved the construction of “new pipeline facilities through active and proposed coal mining areas with known areas of present or potential ground instability resulting from mining operations.”³³

19. Circumstances are substantially different in this proceeding. The route proposed by Texas Eastern within its existing right-of-way does not cross land under which active coal mines owned by Emerald/Freeport are being operated as construction begins. Emerald/Freeport has shown neither how they will be affected by the construction activities we are authorizing, nor what a construction and operation subsidence mitigation plan could or should contain. In the absence of specific information about the details of how potential mining activities would go forward, and what they would involve, and how they would likely be affected by the construction of the projects, the pipeline mitigation plans Emerald/Freeport would have us require would be based only on vague speculation.³⁴

20. Should Emerald/Freeport at some point in the future engage in long-wall mining beneath the facilities Texas Eastern will construct,³⁵ Texas Eastern remains under an

³¹See 128 FERC ¶ 61,045 at P 5-6 (2009) (daily mining of coal in the immediate vicinity of proposed pipeline and, further, longwall mining and subsidence to begin imminently).

³²See *Texas Eastern, LP*, 127 FERC ¶ 61,162 (2009).

³³*Id.* at P 13 (2009).

³⁴On October 13, 2009, Emerald/Freeport stated, “Freeport submitted its permit application to the PADEP on September 4, 2009. See Comments of Emerald/Freeport Concerning Environmental Assessment, at n. 62. What that permit application specifically involves with regard to mining techniques is not described.

³⁵Emerald/Freeport admits that its “mining schedules may change based on geological or engineering factors which cannot be foreseen with certainty.” Request for rehearing at 48.

obligation to comply with all relevant PHMSA safety requirements for existing pipelines. Texas Eastern would also be required to resolve any subsidence mitigation issues within the purview of the PADEP.³⁶

21. We note that Emerald/Freeport's consistent attempts to construe the holdings in *REX* and *Hub III* as being predicated merely on future mining activities permeate virtually all its arguments on rehearing. However, none of its many citations and quotations drawn from the two cases is inconsistent with our explanation, and that of the EA, of the circumstances supporting the need for the immediate development of a subsidence mitigation plan, i.e., active mining as new construction began. Indeed, the thrust of Emerald/Freeport's concerns as stated earlier in this proceeding was specifically that Texas Eastern's responsibilities to comply with applicable safety requirements remain clear, that Texas Eastern "will communicate and cooperate with affected mining operators whenever the mining occurs,"³⁷ and that "Texas Eastern undertakes subsidence mitigation *when the need arises*."³⁸

22. There is no need to add a certificate condition in order to make it clear that Texas Eastern is obligated to comply with all applicable safety requirements. As indicated above, Texas Eastern must comply with all applicable safety requirements, including those that might come into play at such time as active mining is authorized to proceed under any of its facilities.

2. Deferral of Issues to State Agencies

23. Emerald/Freeport states that the November 19 Order, holding that mining subsidence concerns "would be more properly addressed through the PADEP's administrative process for pending mining permit applications,"³⁹ abdicates the

³⁶The November 19 Order did include environmental conditions requiring that Texas Eastern follow mitigation measures described in its application and supplements and as identified in the EA (Appendix B, No. 1). As discussed in this order, Texas Eastern commits to following all applicable law and agency directives.

³⁷See Comments of Emerald/Freeport, October 13 at 13 and 15.

³⁸*Id.* at 19 (emphasis supplied).

³⁹November 19 Order at P 71.

Commission's statutory duties under the NGA and NEPA, and fails to follow *REX* or *Hub III*.⁴⁰

Discussion

24. We have fulfilled our statutory duties and responsibility under the NGA and NEPA by resolving all relevant issues in the TEMAX and TIME III proceeding, and we have not deferred responsibility to PADEP regarding issues that are properly before us here. Rather, we properly concluded that, given the lack of evidence supporting a Commission directive requiring an immediate subsidence mitigation plan, the PADEP was the appropriate forum with jurisdiction over the potential subsidence mitigation issues that may evolve at some time in the future.⁴¹

25. The record shows that the parties are actively engaged in at least one proceeding before the PADEP and are familiar with the requirements of and practice before that agency, including the general requirements of an application for a mine permit, description of property interests, descriptions of measures to protect pipelines, also including subsidence control plans specifying the measures to be taken to control subsidence effects, performance standards for the protection of utilities, and other responsibilities of mine operators.⁴² The EA also noted the various specific issues the parties had raised before that agency, including mine subsidence rights, liability for damage to landowners' surface facilities, and the responsibility for subsidence mitigation costs.

26. We note that Emerald/Freeport argues that mitigation costs for mine subsidence should be Texas Eastern's responsibility.⁴³ Texas Eastern states that Emerald/Freeport's numerous submissions in this and other Commission proceedings⁴⁴ are designed to gain

⁴⁰Citing *Transwestern* at P 50, P 57 & n.66 ("Our regulatory role requires us to determine which practices and procedures are necessary to ensure an acceptable margin of safety."); *E. Tenn. Natural Gas Co.*, 41 FERC ¶ 61,176, at 61,444 (1987).

⁴¹The Commission routinely relies on work accomplished by the PADEP regarding other substantive issues, which may involve, as examples, water-related issues (*See* EA at 22), soil (*See* EA at 34), and air-quality (*See* EA at 79). We also note that PADEP offered no suggestion here that a Commission-required mitigation plan should be developed.

⁴²*See* EA at 29, n. 7.

⁴³*Id.* at 29.

⁴⁴Citing Docket Nos. PF07-9, CP08-15, CP08-100, and PF08-27.

leverage in the ongoing PADEP proceeding regarding Emerald's application for a mining permit in the area the TEMAX and TIME III projects were designed to avoid. Such issues properly await resolution within the PADEP proceeding.

27. Further, we note Texas Eastern's statement that its pipelines have coexisted with mining operations for many decades, and that Texas Eastern has and will continue to fully comply with all DOT safety regulations necessary to maintain the integrity of its pipelines. Texas Eastern also avers that when and if a subsidence issue arises in the future due to potential coal mining, Texas Eastern will address the issues through discussions with the owners of the coal interests and before the PADEP,⁴⁵ or the courts if necessary, in accordance with applicable federal and state law.

3. Subsidence Conditions and Freeport's Mine

28. Emerald/Freeport states that the subsidence mitigation safety conditions in *REX* and *Hub III* should have been applied here, since Freeport holds mining rights and may decide to mine certain parts of the area in the future beneath the new TEMAX/TIME III pipeline loop.⁴⁶ Emerald/Freeport states also that the EA improperly adopted Texas Eastern's reliance on field surveys and data searches of limited scope, revealing only currently active or abandoned mines, not mines planned for future mining operations, such as Freeport's.

29. Emerald/Freeport states that the Commission's regulations for Resource Report 6, upon which the EA's minerals analysis is based, require a far broader evaluation.⁴⁷ In Resource Report 6, Texas Eastern was to "[d]escribe, by milepost, mineral resources that are currently or potentially exploitable." Texas Eastern also was to "[d]escribe, by milepost, existing and potential geological hazards and areas of nonroutine geotechnical concern, such as . . . planned, active, and abandoned mines . . . and areas of potential ground failure, such as subsidence" and "[d]iscuss the hazards posed to the facility from each one."

⁴⁵Compare REX Rehearing Order at P 11-12, 41.

⁴⁶Emerald/Freeport states that Freeport has an application pending (re-filed September 4, 2009) before the PADEP for its mine. Request for rehearing at 26. Texas Eastern states that the mine is located in Jefferson and Morgan Townships in Greene County, "approximately 1.5 miles northwest of Texas Eastern's pipelines and does not underlie any portion of the Projects." Answer of Texas Eastern at 10, n. 33.

⁴⁷Citing section 380.12.

Discussion

30. Emerald/Freeport's attempt to rely on the *REX* and *Hub III* cases must fail, for the reasons discussed above. The mere possibility that a company may at some future point begin mining activities does not reasonably require the Commission to require mitigation plans that would be unguided by currently available specifics regarding the engineering elements of such a mining plan. The record in this case does not provide such specifics, and it remains impossible to design a coherent mitigation plan in their absence.

31. Further, the same difficulties are inherent for an applicant attempting to be completely responsive to the requirements of section 380.12 of the Commission's regulations regarding Resource Report No. 6. We note that the basic instructions provided to applicants by section 380.12 state, as pertinent here, that the resource report shall "identify significant environmental effects expected to occur as a result of the project."⁴⁸ Further, the applicant is to identify effects of construction and "cumulative effects resulting from existing or reasonably foreseeable projects."⁴⁹

32. We think it reasonable that there be more evidence than that available in this proceeding that a coal mine will actually be operated close to a proposed pipeline in order to conclude that a significant effect will occur. To discuss "planned" coal mines with any meaning, the basic elements of such a planned mining endeavor must have been made available. The record here is devoid of any attempt to provide such information by Emerald/Freeport. The evidence submitted here does not establish that either the Emerald mine near Texas Eastern's pipeline or Freeport's potential mine are reasonably foreseeable within the intent and meaning of our regulations.

33. Nonetheless, our staff's EA considered active and planned mines within 0.25 mile on either side of the existing right-of-way, with permitted projects not under construction considered reasonably foreseeable mining activities within this area. While Emerald/Freeport states that it has "pending" projects, not yet constituting permitted mining operations, the TEMAX/TIME III facilities do not cross these pending mining operations.⁵⁰ The EA, therefore, rightfully concludes that the Texas Eastern's projects will not involve construction activities in the same timeframe or vicinity of any active

⁴⁸See section 380.12(b)(2).

⁴⁹*Id.* at (b)(3).

⁵⁰Information regarding mining activities and locations in the project area was obtained from the most recent available PADEP 2006 Annual Report on Mining Activities in PA. See EA at 30.

coal mining operations and there are no permitted coal mines that would be impacted by TEMAX/TIME III pipeline alignments.

4. Safety Issues in a “Gap” Over a Mining Area

34. Texas Eastern has an existing 18.8-mile pipeline the middle of which crosses the Emerald mine for which Emerald has filed a mining permit application with the PADEP. We approved Texas Eastern’s proposal to loop the 18.8-mile pipeline, which excluded the portion over the proposed Emerald mining activity. Emerald/Freeport claims that the November 19 order improperly rejects its request for subsidence safety conditions even though Texas Eastern designed its new pipeline facilities to avoid construction in the area directly over the Emerald mine for which a mining permit application is pending. Moreover, Emerald/Freeport criticizes Texas Eastern’s decision not to construct new pipeline facilities in this area. Emerald/Freeport states that the November 19 Order and EA failed to take a “hard look” at the merits of an alternative approach, a continuous 18.8-mile loop the middle of which would be located over the area where Emerald/Freeport states would be located the mine for which PADEP approval is being sought.⁵¹ Emerald/Freeport argues that NEPA is thus violated.⁵²

35. Emerald/Freeport states that Texas Eastern’s decision to forego upgrades over Emerald’s proposed mine increases safety risks and that Texas Eastern’s “normally preferred” alternative of continued straight-line construction is superior because it would require the upgrading of the existing pipe located over Emerald’s proposed mining area.⁵³ Emerald/Freeport states that its experts demonstrated that this “gap” in the pipeline loop would leave old, 1950s-vintage pipe precisely where a pipeline upgrade is needed to withstand mining subsidence.⁵⁴ Emerald/Freeport states that the safety concerns in this

⁵¹EA at 108 (“An alternative was considered that entailed a single continuous 18.8 mile 36-inch-diameter loop and replacement segment. . . . While a single segment would normally be preferred, the proposed two segments are designed to avoid the area of the proposed longwall mine activity.”).

⁵²42 U.S.C. § 4332; *citing Nat’l Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323, 1327 (D.C. Cir. 2004) (NEPA “ensure[s] that the agency [takes] a ‘hard look’ at the environmental consequences of its decision to go forward with the project.”).

⁵³Emerald/Freeport states that section 102(C)(iii) of NEPA requires a “detailed statement” discussing the “alternatives to the proposed action.” 42 U.S.C. § 4332(C)(iii).

⁵⁴Emerald/Freeport states that the Council on Environmental Quality (“CEQ”) regulations are even more emphatic, stating that the alternatives analysis is the “heart” of an environmental review, citing 40 C.F.R. § 1502.14; *Lee v. U.S. Air Force*, 354 F.3d

(continued)

case are the same safety issues as those presented in *REX* and *Hub III*, and the November 19 Order's failure to adopt subsidence safety conditions improperly departs from Commission precedent, in spite of the expert testimony of mining engineers submitted by Emerald/Freeport.⁵⁵

36. Emerald/Freeport notes that Texas Eastern has elsewhere replaced some of its World War II vintage pipe, but some remain in service.⁵⁶ Emerald/Freeport states also that, just a few miles from Emerald's mine, Texas Eastern proposed to upgrade portions of 1950s-era pipelines over CONSOL Energy Inc.'s Bailey mine as part of safety mitigation in advance of longwall mining,⁵⁷ "[b]ecause of the age of the mainlines."⁵⁸

37. Emerald/Freeport also relies on a recent pre-filing Request submitted to this Commission by National Fuel Gas Supply Corporation (National Fuel) as underscoring

1229, 1238 (10th Cir. 2004) (*quoting* 40 C.F.R. § 1502.14); *Fuel Safe Wash. v. FERC*, 389 F.3d 1313, (10th Cir. 2004); 42 U.S.C. § 4332(2)(C)(iii); *also* 40 C.F.R. § 1502.14(a) (requiring agencies to "rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated"); *Utahns for Better Transp. v. DOT*, 305 F.3d 1152, 1166 (10th Cir. 2002).

⁵⁵Citing Weir Report at 7-8 ("The environmental assessment by the FERC should include development of a mitigation plan for the length of Texas Eastern's pipeline system encompassed by the Projects, including the pipeline segments between upgraded sections. Language similar to that applied by the FERC in the Rockies Express Certificate Order, Environmental Condition Nos. 50 and 147 for the REX pipeline in Docket No. CP07-208 is recommended to ensure the coordination of the mitigation work and overall public safety."); Pasini ¶¶ 16, 17 ("If FERC approves Texas Eastern's proposals, it should require Texas Eastern to develop . . . a pipeline protection and mitigation plan to address the foreseeable risks posed by coal mining subsidence in this area."). The specifics of such foreseeable risks are not cited.

⁵⁶The Weir Report raises concerns, stating: "[t]he consequence of Texas Eastern's rejection of this preferred alternative is leaving 1950s-vintage pipe in place over a known mining area. . . . The Commission should carefully consider the merits of this preferred alternative." Weir Report at 7.

⁵⁷Petition for Waiver of Blanket Certificate Automatic Project Cost Limit and Request for Expedited Action, Docket No. CP08-384-000 (July 25, 2008) ("Texas Eastern Waiver Petition").

⁵⁸*Id.* at 2.

the dangers of leaving vintage pipe over longwall mining areas.⁵⁹ To avoid service interruptions, National Fuel proposes to relocate the line from its existing alignment.⁶⁰ Emerald/Freeport states that Texas Eastern will need to perform mitigation on the pipelines crossing Emerald's mining area regardless of whether the "gap" alternative or the 18.8-mile continuous loop alternative is constructed.

Discussion

38. Emerald/Freeport's claim that Texas Eastern's "preferred" route would be a continuous line over the area in question is misleading. The EA stated that "we believe the proposed 2 segments of loop are the environmentally preferred alternative as these avoid constructing new pipeline across an area of proposed longwall mine activity."⁶¹ The loops as proposed would avoid adding additional pipeline in a limited area where subsidence may result should longwall mining ever occur.

39. Texas Eastern states no current safety risks are associated with its older vintage pipe as claimed by Emerald/Freeport, since Texas Eastern maintains all of its pipelines in compliance with DOT safety regulations⁶² and will address subsidence issues on any of its pipelines when and if subsidence is expected to occur. Nothing in the record can reasonably support the contrary. The expert witness testimony submitted by Emerald/Freeport stands clearly for the unremarkable proposition that new pipe is better able to withstand pressure than older pipe. It is a leap unsupported by this record to conclude that immediate replacement is required, especially where the urgency indicated in the *REX* and *Hub III* cases is not shown.

40. Emerald/Freeport's request that the Commission select the 18.8-mile continuous route traversing Emerald/Freeport's property rights and use that route to require mitigation and safety plans is both counter-intuitive and without any common sense support. Texas Eastern explained in Resource Report No. 10 that its proposed route will not involve construction traversing an active coal mining area. We agree that it would be contrary to the requirements of NEPA for the Commission to require, for no reasonably

⁵⁹National Fuel's Line N relocation project, among other things, will relocate approximately 17.5 miles of 20-inch natural gas pipeline in Greene and Washington Counties, Pennsylvania to avoid longwall mining.

⁶⁰National Fuel Gas Supply Corporation's Line N Pre-Filing Request, Docket No. PF10-1, at 3-4 (Oct. 13, 2009)

⁶¹EA at 29.

⁶²49 C.F.R. Pt. 190-199 (2009).

foreseeable reason, the evaluation of an alternative which would require the construction of additional facilities solely in order to impose mitigation where there would be no need for mitigation but for the additional construction.

41. Further, we agree with Texas Eastern that National Fuel's decision to replace older vintage pipe confirms nothing with respect to the safety of existing pipeline facilities operated by Texas Eastern. National Fuel's construction decisions with respect to its Line N project simply have no supported bearing on, and serve as no precedent for, Texas Eastern's operation of its pipeline system within existing DOT safety regulations.

5. Pending MAOP Waiver From PHMSA

42. Emerald/Freeport notes that Texas Eastern applied to the DOT's PHMSA for an increase of the Maximum Allowed Operating Pressure (MAOP) of certain of the projects' pipelines on September 11, 2008, and that, while Texas Eastern's petition was pending, PHMSA issued a final rule setting forth standards governing MAOP increases.⁶³ Emerald/Freeport states that Texas Eastern's pipeline does not meet the requirements for an MAOP uprate under the final rule, and that on December 22, 2008, Texas Eastern filed a further request for a special permit, asking the PHMSA to waive eight sections of the final rule and provide interpretations of a further eight sections. Emerald/Freeport states that this request remains pending before PHMSA, and thus the November 19 Order's certification of TEMAX/TIME III is premature.

Discussion

43. The Commission routinely reviews and approves natural gas pipeline projects that have authorizations pending in other federal and state agencies. Texas Eastern correctly notes that, in a recent final rule, the Commission acknowledged that during the certificate process, applicants will concurrently pursue other required authorizations.⁶⁴ Natural gas projects require numerous approvals and permits from a variety of federal, state, and local agencies that must be concurrently pursued. In such cases, agencies work together

⁶³*Pipeline Safety: Standards for Increasing the Maximum Allowable Operating Pressure for Gas Transmission Pipelines*, 73 Fed. Reg. 62,148 (Oct. 17, 2008).

⁶⁴Regulations Implementing the Energy Policy Act of 2005; Coordinating the Processing of Federal Authorizations for Applications under Sections 3 and 7 of the Natural Gas Act and Maintaining a Complete Consolidated Record, 117 FERC ¶ 61,076 (2006) (acknowledging that "the Commission does not have jurisdiction over every aspect of each natural gas project" and that "several different agencies must typically reach favorable findings regarding other aspects of the project" in order for natural gas projects to move forward).

to determine project facilities and siting that will be efficient and safe and produce the least environmental impacts. The end result is that each agency's requirements are met as appropriate. If not, contingent Commission certification conditioned upon such satisfaction of other agencies' necessary requirements is without legal effect. Thus, Emerald/Freeport's argument is rejected.

C. Emerald/Freeport/NEPA

1. Connected Projects

44. Emerald/Freeport states that it is well-established that an agency cannot "isolate a proposed project, viewing it in a vacuum."⁶⁵ Such "piecemealing" or project segmentation is the "forbidden practice of dividing a major federal action into smaller component parts, each with less significant environmental effects, in order to enable an agency to reach a finding of no significant impact."⁶⁶ Emerald/Freeport concludes that it was error for the November 19 Order to consider separately what Emerald/Freeport states is actually a smaller part of a larger overall project to avoid confronting the cumulative impact of Texas Eastern's projects in the Ohio/Pennsylvania mining region.

45. Emerald/Freeport states further that Texas Eastern itself considers TEMAX/TIME III to be, not the stand-alone projects claimed, but another in a line of pipeline development projects across Ohio/Pennsylvania mining areas which will cause environmental and socioeconomic impacts and other impacts to the human environment.⁶⁷ Emerald/Freeport claims that Texas Eastern has touted itself as "well positioned to develop a multi-year connection and capacity expansion program."⁶⁸

⁶⁵Citing *Grand Canyon Trust v. Fed. Aviation Admin.*, 290 F.3d 339, 342 (D.C. Cir. 2002); *Grand Canyon Trust v. Fed. Aviation Admin.*, 351 U.S. App. D.C. 253 (2002).

⁶⁶Citing *Knowles v. U.S. Coast Guard*, 1997 U.S. Dist. LEXIS 3820, *11 (S.D.N.Y. 1997).

⁶⁷Citing Jim Magill, *Texas Eastern expansion targets Ohio-Pa. route*, Gas Daily, May 20, 2008, at 6. Emerald/Freeport cites Bill Yardley, Vice President of Northeast Transmission for Texas Eastern's corporate parent, Spectra, as stating: "If you combine . . . [TIME II, Northern Bridge, and TEMAX] you've got nearly half of what we expect to show up in Ohio moving along the Texas Eastern Pipeline and *we don't feel like we're done yet.*"

⁶⁸Texas Eastern Appalachia to Market Expansion Program (TEAM), *available at* http://www.spectraenergy.com/what_we_do/projects/team/.

46. Emerald/Freeport states that Texas Eastern's Ohio/Pennsylvania region projects are related to each other due to: (1) the new gas supply at Clarington, Ohio; (2) geography in the Ohio/Pennsylvania region and more specifically the common coal seams; and (3) common impacts of these projects on the environment.⁶⁹

Emerald/Freeport states that other projects should have been analyzed, including Texas Eastern's Northern Bridge project, TEAM and TIME II, and project(s) from other entities including the Northeast Supply project, the REX Northeast Express project, and Dominion's TL-492 expansion.

47. Emerald/Freeport states that Texas Eastern's projects do not have independent utility because TEMAX/TIME III relies upon upgrades in Northern Bridge, and that Texas Eastern's projects are therefore interdependent parts of a larger action,⁷⁰ cannot or will not proceed unless other actions are taken previously or simultaneously, and that Texas Eastern's open seasons themselves shed doubt on claims that the projects are independent.

48. Emerald/Freeport states that Texas Eastern cites separate open seasons, but Emerald/Freeport states that the Northern Bridge Project and the TIME II Project were products of the original TEMAX open season. Emerald/Freeport also states that on August 4, 2008, Texas Eastern announced a non-binding open season for its Texas Eastern Appalachia to Market (TEAM) Project, which will further upgrade the same pipeline segment at issue in the Northern Bridge, TIME III, and TEMAX projects to accommodate an additional 300 million cubic feet of gas per day.

Discussion

49. We believe our order complied with our obligations to objectively evaluate information, and we note that Emerald/Freeport points to no specific information or data left unconsidered. Rather, Emerald/Freeport argues that the Commission did not address "evidence" in the form of general public statements by Texas Eastern executives about the potential size of demand markets in the same general geographic region. Emerald/Freeport complains that the Commission should have thus distrusted

⁶⁹Citing 40 C.F.R. § 1508.25(a)(1)(i)-(iii). Emerald/Freeport state that connected actions are closely related and should be discussed in the same impact statement, if they: (1) automatically trigger other actions which may require environmental impact statements; (2) cannot or will not proceed unless other actions are taken previously or simultaneously; or (3) are interdependent parts of a larger action and depend on the larger action for their justification; *Hammond v. Norton*, 370 F. Supp. 2d 226 (D.D.C. 2005).

⁷⁰Citing 40 C.F.R. § 1508.25(a)(1)(iii).

information submitted by Texas Eastern and issued further data requests proposed by Emerald/Freeport.

50. The Commission has discretion to determine what information it finds credible and whether it has sufficient data to address an issue.⁷¹ Here, the EA conducted independent investigation and evaluation of future actions in its cumulative impacts analysis, in addition to using information provided by Texas Eastern.⁷² Emerald/Freeport's request for additional data requests was unsupported. Further, the Commission properly addressed Emerald/Freeport's comments and indeed, gave them extensive attention in the EA.

51. The November 19 Order also properly delineated the scope of its review of other actions and reasonably concluded that the Northern Bridge, TIME II, and TEAM projects cited by Emerald/Freeport were not connected actions within the meaning of relevant regulations to the TEMAX and TIME III projects, because the TEMAX and TIME III projects have independent utility from these other projects.⁷³ Texas Eastern submitted evidence showing that all of the referenced projects are distinct and independent in nearly every respect possible, with different open seasons, different in-service dates, different shippers, different facilities, different methods of expansion of capacity, and different degrees of pipeline construction and/or replacement in different areas. The fact that the projects are proposed by the same natural gas pipeline company in the same general geographic region is not sufficient to make them "connected" actions. Rather, the

⁷¹*Sierra Club v. Van Antwerp*, 526 F.3d 1353, 1361 (11th Cir. 2008) (finding that the deferential standard of review of agency action under NEPA "requires substantial deference to the agency, not only when reviewing decisions like what evidence to find credible and whether to issue a FONSI or EIS, but also when reviewing drafting decisions like how much discussion to include on each topic, and how much data is necessary to fully address each issue").

⁷²See EA at p. 90 ("We identified these projects through scoping and independent research, as well as information provided by Texas Eastern.").

⁷³See November 19 Order at P 74; see also 40 C.F.R. § 1508.25(a)(1); *Wilderness Workshop v. U.S. Bureau of Land Management*, 531 F.3d 1220, 1228-29 (10th Cir. 2008); *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 969 (9th Cir. 2006); *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1183 (10th Cir. 2002); see also *Maryland Conservation Council, Inc. v. Gilchrist*, 808 F.2d 1039 (4th Cir. 1986).

evidence here shows that each project serves a “significant purpose” separate and apart from the other project.⁷⁴

52. In our order on Northern Bridge, the Commission found that the TEMAX and TIME III projects and the Northern Bridge project are “stand-alone, distinct projects that propose different facilities to create capacity for specific transportation services, shippers, and gas volumes.”⁷⁵ Here, we also found that Northern Bridge “is a stand-alone project designed to provide a contracted volume of gas to a certain customer within a certain timeframe. The instant project is designed to provide another contracted volume of gas within a different timeframe.”⁷⁶ Texas Eastern notes that the TIME II project was approved⁷⁷ for construction and operation of facilities to provide 150,000 Dth/d for the anchor customers New Jersey Resources and PSE&G Power, LLC.⁷⁸

53. Actions are not connected for relevant purposes merely because they may be constructed in the same area. In *Utahns for Better Transportation v. United States Department of Transportation*,⁷⁹ the court held that components of a regional transportation plan were not “connected” because each component could serve an independent transportation purpose whether or not the other components were constructed.⁸⁰

⁷⁴Citing *Coalition on Sensible Transportation v. Dole*, 826 F.2d 60, 69 (D.C. Cir. 1987).

⁷⁵*Texas Eastern Transmission, LP*, 125 FERC ¶ 61,342, at P 22 (2008).

⁷⁶November 19 Order at P 74.

⁷⁷*Texas Eastern Transmission, LP*, 119 FERC ¶ 61,258 (2007) (approving compression and pipeline facilities in Ohio and Pennsylvania including looping and replacement pipelines and new compression).

⁷⁸Texas Eastern’s TEAM project has advanced only to the point of reviewing open season requests for service; no facilities have been proposed. We believe appropriate review was accorded. See EA at 90; *Gulf Restoration Network v. United States Dep’t of Transp.*, 452 F.3d 362, 371 (5th Cir. 2006).

⁷⁹305 F.3d 1152, 1184 (10th Cir. 2002).

⁸⁰We note that the court stated: “The components, although interrelated as part of an overall transportation plan, should individually contribute to alleviation of the traffic problems in the Northern Corridor.”

54. Here, each of the Texas Eastern projects serves an independent gas transportation purpose even if the other projects are not constructed. Each project will contribute to serve the growing demand for natural gas identified by Texas Eastern as exhibited by its Northeast customers. The fact that they were developed as part of broader efforts by Texas Eastern to develop projects to meet Northeast market demands does not diminish their independent utility.

55. We note also that the November 19 order did consider the evaluation of the potential cumulative impacts of the other natural gas projects in the EA.⁸¹ The EA specifically discussed the Northern Bridge and TIME II projects, along with other natural gas projects in the project area, in its cumulative impacts section.⁸²

56. Further, we find Emerald/Freeport's reliance on *Hammond v. Norton* unsupported.⁸³ *Hammond* does not require the Commission to consider the referenced natural gas projects in a single EIS. There the court reviewed a challenge to the decision of the Bureau of Land Management (BLM) to consider two proposed pipeline projects as independent for EIS purposes. The record there showed that applicants sought to segment the environmental analysis by dividing a once jointly-proposed project into two smaller projects.⁸⁴ No such segmentation has occurred here.

2. Cumulative Impacts

57. Emerald/Freeport states that the November 19 order erred by finding that the EA's discussion of various projects in the alternatives section was sufficient for cumulative impacts analysis.⁸⁵ Emerald/Freeport complains that the EA adopts Texas Eastern's

⁸¹See EA at 96-98.

⁸²*City of Shoreacres v. Waterworth*, 420 F.2d 440, 451 (5th Cir. 2005) (upholding agency discretion not to include a recently permitted project in its NEPA "no action" alternative because the project was otherwise addressed as part of the cumulative impacts analysis).

⁸³*Hammond v. Norton*, 370 F. Supp. 2d 226, 243-44 (D.D.C. 2005).

⁸⁴*Id.* at 244. The project was filed as a joint venture with the BLM for two pipelines, but after the BLM decided to examine the entire pipeline as a single project for NEPA purposes, separate applications were filed for the two pipeline segments.

⁸⁵November 19 Order at P 73.

conclusory cumulative impacts analysis, which merely gives the illusion of a thorough analysis while providing in fact no cumulative impacts analysis at all.⁸⁶

Emerald/Freeport states that the CEQ has advised agencies that “[c]umulative effects analysis should . . . not produce superficial analyses of a long laundry list of issues that have little relevance to the effects of the proposed action or the eventual decisions.”⁸⁷

Emerald/Freeport concludes that the Commission improperly elected to sacrifice the Ohio/Pennsylvania region’s environmental condition and the health and safety of its citizens by approving Texas Eastern’s project as proposed without considering the full range of incremental impacts.

Discussion

58. We believe that the geographic and temporal scope of the cumulative impacts analysis of the EA is appropriate given the nature of the projects at issue. Emerald/Freeport alleges that the Commission’s cumulative impacts assessment should have been broader in geographic and temporal scope, but fails to identify specific impacts or types of impacts that were not considered. We note that agencies are given substantial discretion in determining the scope of their cumulative impacts analysis, which determinations are made on a project-by-project basis.⁸⁸

⁸⁶Specifically, Emerald/Freeport states that the EA provides only a list of regional projects that on the surface “appears impressive by its sheer (sic) length and apparent completeness, but which listing lacks substantive discussions of impacts.” *See* Request for rehearing of Emerald/Freeport at 65, *citing* EA at 102-106 (listing a series of projects by county along with only a description and anticipated construction date).

⁸⁷Citing CEQ, *Considering Cumulative Effects Under the National Environmental Policy Act*, at 12 (1997), *available at* <http://www.nepa.gov/nepa/ccenepa/sec2.pdf> (“CEQ’s Cumulative Effects Under NEPA”). Emerald/Freeport argues that the D.C. Circuit has held that a “‘meaningful cumulative impact analysis must identify’ five things: ‘(1) the area in which the effects of the proposed project will be felt; (2) the impacts that are expected in that area from the proposed project; (3) other actions -- past, present, and proposed, and reasonably foreseeable -- that have had or are expected to have impacts in the same area; (4) the impacts or expected impacts from these other actions; and (5) the overall impact that can be expected if the individual impacts are allowed to accumulate.’” *Tomac v. Norton*, 433 F.3d 852, 864 (D.C. Cir. 2006).

⁸⁸*Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944 (9th Cir. 2003) (“The selection of the scope of an EIS is a delicate choice and one that should be entrusted to the experience of the deciding agency.”).

59. Particular guidance is provided by relevant regulation, which defines a “cumulative impact” as 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.”⁸⁹ Emerald/Freeport offers no evidence that the areas considered in the EA should have been extended beyond 0.25 miles on either side of the right-of-way, for impacts to geologic resources, including active and planned mines.⁹⁰ A cumulative impacts analysis requires the assessment of the area in which the effects from the projects will be felt and impacts from other actions the nature of which are reasonably foreseeable in that same area.⁹¹

60. Further, the Commission’s cumulative impacts analysis identified relevant projects in a tabular format, and discussed them in further detail, including potential cumulative impacts of all the projects on various resources, including geologic resources, socioeconomics, and cultural resources, among others.⁹² Emerald/Freeport’s claim that such analysis was insufficient is unpersuasive, given the nature of the projects before us and those reasonably foreseeable.

61. The proposed projects are constrained in time, geography, range and severity of impacts. Given that the projects involve construction in existing rights-of-way and minimal greenfield construction in a fairly limited geographic area, with a limited period of impact from the construction activities,⁹³ and minimal impacts after construction, we confirm that the scope of the cumulative impacts discussed in the EA is appropriate.

⁸⁹40 C.F.R. § 1508.7 (emphasis supplied); *see also Gulf Restoration Network*, 452 F.3d at 370-371.

⁹⁰EA at 27-29.

⁹¹*See Gulf Restoration Network*, 452 F.3d at 368.

⁹²*See* EA at 94-105.

⁹³The Council on Environmental Quality’s guidance on cumulative effects confirms that the timeframe for a proposed project’s effects also “may be the most appropriate for the cumulative effects analysis.” Council on Environmental Quality, **CONSIDERING CUMULATIVE EFFECTS UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT** (Jan. 1997), *available at* <http://ceq.hss.doe.gov/NEPA/ccenepa/ccenepa.htm>.

3. Precedential Effect of Collective Policies and Decisions

62. Emerald/Freeport states that CEQ regulations require agencies to consider whether a proposed action is related to other actions “with individually insignificant but cumulatively significant impacts,”⁹⁴ and that the Commission itself has encouraged the development of gas infrastructure to serve growing demand in the Northeastern United States.⁹⁵ Thus, argues Emerald/Freeport, the Commission runs afoul of courts’ admonitions against the “thoughtless setting in motion of a ‘chain of bureaucratic commitment that will become progressively harder to undo the longer it continues.’”⁹⁶

63. Emerald/Freeport claims that while new pipeline infrastructure may be needed to bring natural gas from the Marcellus Shale, Rocky Mountains and other sources to markets in the Northeast, the desire of pipelines to capitalize on these new sources of gas appears to be fostering a “gold rush” mentality that thrusts pipeline expansion to the forefront at the expense of ongoing coal mining and the vital role that coal plays in electric power generation, and many thousands of jobs in this region.⁹⁷

64. Further, states Emerald/Freeport, the Commission has a general preference for utilizing “routing along existing road or utility rights-of-way, whenever possible, over creating a new greenfield pipeline right-of-way.”⁹⁸ Thus the existing rights-of-way over

⁹⁴Citing 40 C.F.R. § 1508.27(b)(7) (“Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.”).

⁹⁵Citing the Commission’s 2007 State of the Markets Report, at 7, issued March 20, 2008, which concluded: “It appears that the market is signaling that the next major need for expanded infrastructure would be to deliver natural gas to the Northeast.”

⁹⁶Citing *Presidio Golf Club v. Nat’l Park Serv.*, 155 F.3d 1153, 1162-63 (9th Cir. 1998) (quoting *Sierra Club v. Marsh*, 769 F.2d 868, 879 (1st Cir. 1985)); *Sierra Club v. Marsh*, 769 F.2d at 879 (“The purpose of that section is to avoid the thoughtless setting in motion of a ‘chain of bureaucratic commitment that will become progressively harder to undo the longer it continues.’”); *Anglers of the Au Sable v. U.S. Forest Serv.*, 565 F. Supp. 2d 812, 832 (E.D. Mich. 2008). See also *Sierra Club v. Bosworth*, 510 F.3d 1016, 1027 (9th Cir. 2007).

⁹⁷Rehearing request of Emerald/Freeport at 68.

⁹⁸Citing, e.g., *Islander East Pipeline Co.*, 102 FERC ¶ 61,054, at P 133 (2003); 18 C.F.R. Parts 153, 157, 380 *Landowner Notification, Expanded Categorical*

active and future mining areas are likely to be selected by project applicants time and again pursuant to this Commission policy.

65. Emerald/Freeport states that the November 19 order failed to balance Commission policy with appropriate safeguards to ensure that mining in those areas can be conducted in a safe and viable manner. Emerald/Freeport concludes that, under *Kleppe v. Sierra Club*,⁹⁹ the Commission was required to complete a full Environmental Impact Statement (EIS). Emerald/Freeport states that the problems of practical considerations in assessing the environmental impacts of an exceedingly large geographic area covering portions of Wyoming, Montana, North Dakota, and South Dakota, as were involved in *Kleppe*, do not face the Commission here.

Discussion

66. Simply positing that pipelines may be constructed in existing rights-of-way in the future does not establish that significant impacts within the meaning of the relevant regulation would result.¹⁰⁰ Significance exists “if it is reasonable to anticipate” a cumulatively significant impact on the environment. The Commission encourages construction in existing rights-of-way on the basic theory that impacts, small and large, would be minimized. The validity of that theory has not been undercut by Emerald/Freeport here; nor has any evidence been submitted to show any frailties thereof. Rather, the November 19 order is attacked on the basis of Emerald/Freeport’s assumption that a larger focus of inquiry would surely identify some significant impact not shown by the existing record.

Exclusions, and Other Environmental Filing Requirements, Order No. 609, FERC Stats. & Regs., Regulations Preambles July 1996 - December 2000 ¶ 31,082 (1999) (“The Commission’s long-standing preference for such collocation will still encourage pipelines to propose using existing rights-of-way.”); *Transcontinental Gas Pipe Line Corp.*, 115 FERC ¶ 61,200 (2006); *Entrega Gas Pipeline, Inc.*, 112 FERC ¶ 61,177, at P 19, *order on reh’g*, 113 FERC ¶ 61,327 (2005) (“[c]onsistent with the Commission’s preference that pipelines use existing utility corridors rather than creating new ones.”).

⁹⁹*Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976) (“when several proposals for coal-related actions . . . will have cumulative or synergistic environmental impact upon a region . . ., their environmental consequences must be considered together.”).

¹⁰⁰40 C.F.R. § 1508.27(b)(7) (“Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.”).

67. The Commission evaluates each certificate application on a case-by-case basis based on the record evidence before it. We make our best effort to do so in such fashion as to preclude any thoughtless setting in motion of a “chain of bureaucratic commitment that becomes progressively harder to undo the longer it continues.” It is unsupported overstatement, at best, to claim that, because the Commission staff has issued annual State of the Markets reports attempting to identify accurately for the public good current notable trends, including levels of supply and demand in various natural gas markets, both regional and national, the Commission is thereby prejudging the merits of any and all projects that may be submitted by applicants seeking to provide service to such markets.

68. State of the Markets reports, which are prepared by the Commission’s staff, always include a disclaimer making clear that the opinions and conclusions articulated in the reports are not necessarily those of the Commission, its Chairman, or individual Commissioners. These reports provide Commission staff’s analysis of trends in the market but do not provide recommendations for Commission actions. For example, State of the Markets reports have spoken to countless other specific issues, including the devastating effects on natural gas supplies of Hurricanes Katrina and Rita with resulting higher prices,¹⁰¹ and the restricted access to capital markets caused by the world-wide financial distress suffered in the fall of 2008.¹⁰² In the case of the report at issue here, the 2007 State of the Markets report was attempting to explain why the price of gas exceeded the price of residual fuel oil, and occasionally that of distillate fuel oil, during that year and the effects of uncertainty in supply from the Canadian Maritimes. Particularly in this context, the language that Emerald/Freeport cites was clearly descriptive, and not directive. The strategic natural gas industry decisions made in reliance on any industry analytical reports publicly available remain functions of natural gas pipeline company leadership.

69. Nor do we see good reason to conduct a full EIS analysis to evaluate all possible natural gas projects in the regional area of the proposed TEMAX and TIME III Projects. *Kleppe* acknowledges wide agency discretion in determining the scope of its environmental review necessary under NEPA, and particularly any decision to prepare a regional EIS.¹⁰³ Indeed, we read *Kleppe* as indicating that a regional EIS is not feasible,

¹⁰¹2006 State of the Markets, at 2.

¹⁰²2008 State of the Markets, at 12.

¹⁰³*Kleppe v. Sierra Club*, 427 U.S. 390, 412-413 (1976).

when a proposal for a regional plan of development is not before the Commission.¹⁰⁴ The various, discrete projects proposed by Texas Eastern do not constitute a “regional plan of development.”

70. Further, *Kleppe* did not find a single EIS unnecessary simply because of the large geographic area. Rather, the decision properly involves several factors the resolution of which “requires a high level of technical expertise and is properly left to the informed discretion of the responsible federal agencies.”¹⁰⁵ We believe we have performed our duties consistent with *Kleppe*.

71. Emerald/Freeport offers no compelling reasons to show that preparation of a single document to review cumulative actions or improper segmentation was appropriate, given the evidence of independent purposes and utility for the various Texas Eastern projects.¹⁰⁶ Each of the other Texas Eastern pipeline projects have independent utility, being designed to serve separate purposes, as is true also of the other pipeline projects in the general area alluded to by Emerald/Freeport, which involve entirely different pipeline facilities, will serve different customers, and have different in-service dates.

72. We concluded that the Northern Bridge project would not have significant impacts on the environment or more specifically on subsidence.¹⁰⁷ We have also concluded that the TEMAX and TIME III projects would not have significant environmental impacts.¹⁰⁸ Moreover, given the timing and status of development of the projects involved, Emerald/Freeport’s recommended approach is less than timely. Given that the Northern Bridge and TIME II projects have been constructed and placed in service, the TEMAX and TIME III projects have undergone their NEPA review, and the TEAM project is in a preliminary planning stage, single review of the projects together as cumulative actions makes little practical sense.¹⁰⁹ Emerald/Freeport suggests that the

¹⁰⁴*Id.* at 401 (“In the absence of a proposal for a regional plan of development, there is nothing that could be the subject of the analysis envisioned by the statute for an impact statement.”); *see also Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 356 (1989) (no requirement to evaluate “highly speculative harms.”).

¹⁰⁵*Id.* at 412.

¹⁰⁶*Wetlands Action Network*, 222 F.3d at 1118.

¹⁰⁷*Texas Eastern Transmission, LP*, 125 FERC ¶ 61,342 at P 21, 32.

¹⁰⁸*See* EA at p. 128.

¹⁰⁹*See Wetlands Action Network v. U.S. Army Corps of Eng’rs*, 225 F.3d 1105, 1119 (9th Cir. 2000) (noting that many of the details and planning decisions of the second
(continued)

projects should be considered in a single NEPA review document simply because they will be located, assuming completion, in the same regional area. This record does not show cumulatively significant impacts and thus no basis exists for the Commission to review the projects in a single document.¹¹⁰

The Commission orders:

(A) Requests for rehearing are granted and denied as discussed in the text of this order.

(B) The November 19 Order is amended by insertion of a new Ordering Paragraph (K), which provides as follows: Texas Eastern shall file a representation that its proposed AFUDC accruals for the project comply with the revised policy conditions. In the alternative, if Texas Eastern determines that its proposed AFUDC accruals should be revised in light of the revised policy conditions, it shall revise all cost-of-service items dependent upon Gas Plant in Service such as Income Taxes, Depreciation Expense, Return, and Interest Expense, and file its revised rates and work papers in sufficient time for the Commission to act on the revised rates prior to filing the tariff sheets to implement those rates.

(C) The November 19 Order is amended by the insertion of a new Ordering Paragraph (L), which provides as follows: Texas Eastern and its representations made

and third phase of a project were not completed at the time of the first phase and thus that the agency was not required to consider the three phases together as cumulative actions). Further, as noted above, the TEMAX and TIME III cumulative impacts analysis addressed potential cumulative impacts associated with other natural gas projects, including the Northern Bridge and TIME II projects. This analysis correctly concluded that the impacts would be minimal and thus that a full EIS was not required.

¹¹⁰See *Klamath-Siskiyou Wildlands Center v. Bureau of Land Management*, 387 F.3d 989, 999 (9th Cir. 2004) (requiring that projects be analyzed in a single EA as cumulative actions only “when the record raises substantial questions about whether there will be significant environmental impacts from the collection of anticipated projects”).

with respect to AFUDC accruals are subject to audit to determine whether it is in compliance with the revised policy and related Commission rules and regulations.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.