

141 FERC ¶ 61,043
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony T. Clark.

Texas Eastern Transmission, LP
and Algonquin Gas Transmission, LLC

Docket No. CP11-56-001

ORDER DENYING REQUESTS FOR REHEARING,
RECONSIDERATION, STAY, AND LATE INTERVENTION

(Issued October 18, 2012)

1. On May 21, 2012, the Commission issued an order granting Texas Eastern Transmission, LP (Texas Eastern) and Algonquin Gas Transmission, LLC (Algonquin) Natural Gas Act (NGA) section 7(b) abandonment approval and section 7(c) certificate authorization for their New Jersey-New York Expansion Project (NJ-NY Project).¹ The NJ-NY Project is designed to provide up to 800,000 dekatherms per day (Dth/d) of firm transportation service to the Borough of Manhattan by abandoning, replacing, and constructing pipeline facilities in Connecticut, New Jersey, and New York. The requests for rehearing, reconsideration, and a stay of the May 2012 Order are denied, for the reasons discussed below.

I. Background

2. The NJ-NY Project is designed to provide a path for gas from multiple upstream production areas² to reach the New Jersey and New York metropolitan

¹ Texas Eastern Transmission, LP and Algonquin Gas Transmission, LLC, 139 FERC ¶ 61,138 (2012) (May 2012 Order). Both Texas Eastern and Algonquin are wholly-owned subsidiaries of Spectra Energy Corporation (Spectra); thus, this project is also identified as the Spectra Project.

² Gas from producing fields in the Gulf Coast, Midcontinent, and Rocky Mountain regions may be transported via Texas Eastern's system; gas from Canada, as well as liquefied natural gas (LNG) from other foreign sources, may be transported

market area by establishing new points of interconnection with the Public Service Electric and Gas Company (PSE&G) in Bayonne and Jersey City, New Jersey, and with Consolidated Edison Company of New York, Inc. (ConEd) on the lower west side of Manhattan. The project is expected to eliminate existing operational constraints, mitigate the risk of severe disruption to ConEd's system, provide new and existing gas consumers (e.g., utilities and electric generators) with greater sources of gas supplies, meet escalating residential and commercial demands for energy, and improve regional air quality.

3. Texas Eastern and Algonquin will construct new facilities and modify existing facilities, and Texas Eastern will lease 730,000 Dth/d of firm transportation capacity on Algonquin's system. Texas Eastern estimates the cost of its portion of the NJ-NY Project will be \$789,493,884, and Algonquin estimates the cost of its portion of the project will be \$67,524,524.

II. Request for Late Intervention

4. On June 20, 2012, Consolidated Rail Corporation (Conrail) filed a motion to intervene out-of-time, claiming the NJ-NY Project could compromise railroad safety. Conrail seeks to become a party to this proceeding to request rehearing to urge the Commission to condition the project's construction on the applicants' commitment to adhere to safety procedures that comply with Federal Railroad Administration regulations.

5. Conrail states it did not seek to intervene earlier because it expected ongoing negotiations with the applicants to reach accord on certain matters in a Right of Entry Agreement and License, but that has yet to happen. As a result, Conrail maintains the applicants have yet to make commitments which Conrail contends are necessary to ensure railroad safety. Conrail explains that because it has "worked previously with a number of gas pipelines constructing facilities on Conrail property, and such commitments have been routinely made by pipelines as a matter of course," it "had no reason to believe negotiations with the Applicants would be any different."³

via Algonquin's system; and Appalachian supplies (in particular, gas imbedded in shale rock) may be transported via either Texas Eastern's or Algonquin's system.

³ Conrail's *Motion for Late Intervention, Request for Rehearing, and Request for Stay*, p. 15 (June 20, 2012).

6. Texas Eastern and Algonquin argue against allowing Conrail to intervene.⁴
7. To determine whether good cause exists to grant a motion to intervene out-of-time, we apply the criteria set forth in Rule 214(d)⁵ and consider, among other things: (1) whether the movant's interest is adequately represented by other parties to the proceeding; (2) whether the movant had good cause for failing to file a timely motion to intervene; (3) whether any disruption of the proceeding might result from permitting the late intervention; and (4) whether late intervention would be prejudicial to any of the existing parties. Late intervention at the early stages of a proceeding generally does not disrupt the proceeding or prejudice the interests of any party. However, a movant seeking to intervene after issuance of an order on the merits of a certificate application bears a higher burden to show good cause, and the Commission's general practice is to deny late intervention at the rehearing stage.⁶ For the reasons discussed below, we conclude Conrail's request fails to satisfy these criteria, and so deny its request for late intervention. As a consequence, because Conrail is not a party to this proceeding, it may not seek rehearing of the May 2012 Order.
8. Conrail, by its own description, is not facing the prospect of a Commission-jurisdictional pipeline crossing its property for the first time. Because this project's initially proposed route would have crossed Conrail property at approximately a dozen points, Conrail, as an affected landowner, received notice of the proposed project, and thus was aware of the proposal well in advance of the deadline to intervene. The draft and final environmental impact statements (EIS) on the applicants' NJ-NY Project devote considerable attention to the impacts of the project's route and its construction on railroads. In part in response to concerns expressed by Conrail, modifications were made to the route and to the project's mitigation measures. The EIS describes, and the final order incorporates, specific

⁴ Under our Rules of Practice and Procedure, answers to requests to intervene out-of-time are permitted, whereas answers to requests for rehearing are not. 18 C.F.R. § 385.213 (2012). We will waive this restriction and admit the applicants' July 6, 2012 answer to parties' rehearing requests, since doing so will not cause undue delay and the responsive pleadings may provide information that assists in our decision making.

⁵ 18 C.F.R. § 385.214(d) (2012).

⁶ See, e.g., *Cameron LNG, LLC*, 112 FERC ¶ 61,146, at P 6 (2005) (citations omitted).

construction methods the applicants are to follow to minimize adverse impacts on railroads.⁷

9. By its own description, the reason Conrail seeks to intervene now, after a final order on the merits has been issued, is because negotiations with the applicants have not gone as it anticipated, prompting Conrail to request that the Commission impose as conditions certain concessions it hopes, but has yet, to obtain from the applicants and incorporate into a Right of Entry Agreement and License. We have previously explained that entities that decline to submit a timely motion to intervene based on an expectation that a particular outcome will be realized from negotiations do so at their own risk,⁸ since it is our policy that latecomers not be admitted if doing so will unfairly prejudice other parties.⁹

10. In any event, we have already provided the relief that Conrail seeks. As Conrail acknowledges, our May 2012 Order is conditioned on the applicants' compliance with Department of Transportation (DOT) Federal Safety Standards as well as all other applicable federal and state regulations. We clarify that this requires the applicants to act in conformity with all applicable Federal Railroad Administration regulations. We believe that the project constraints specified in our May 2012 Order and the environmental conditions in Appendix B of that Order, in

⁷ See, e.g., the Bore/Cased Bore Method on page 2-35 of the final EIS, which describes procedures the applicants will employ to cross under railroad tracks.

⁸ See *Gulf Crossing Pipeline Company, LLC*, 123 FERC ¶ 61,100 (2008), in which an affected landowner, expecting to negotiate an easement with the applicant, only sought to intervene – like Conrail – after negotiations stalled and the applicant initiated a court action to acquire property rights. We denied the intervention request, noting the landowner was aware of the project and its potential impacts, yet rather than intervene on time, elected to rely on negotiations as “the exclusive means for addressing its interests in the project.” See also *Bradwood Landing LLC*, 126 FERC ¶ 61,035, at P 15 and 128 FERC ¶ 61,216, at P 22 (2009), denying a motion to intervene out-of-time, stating the Commission’s position that interested persons “are not entitled to hold back awaiting the outcome of the proceeding, or to intervene when events take a turn not to their liking.” (Citing *Summit Hydropower*, 58 FERC ¶ 61,360, at 62,199-200 (1992)).

⁹ See, e.g., *Williston Basin Interstate Pipeline Co.*, 31 FERC ¶ 61,045, at 61,076 (1985).

conjunction with the requirement that Texas Eastern and Algonquin comply with all applicable federal and state regulations, are sufficient to ensure that the project will not compromise railroad safety.¹⁰

III. Requests for Stay

11. Jersey City requests a stay.¹¹ We review such requests under the standard established by the Administrative Procedure Act,¹² and grant a stay when "justice so

¹⁰ In addition, the applicants point out that Spectra affiliated companies have previously constructed and operated projects that cross Conrail property, and have done so in accordance with Conrail's safety policies, and affirm they will do so in this case. We note that in a recent eminent domain proceeding for this project, the court conditioned its decision granting the applicants an easement over a Conrail property on the applicants' compliance with several of Conrail's safety policies. *See Texas Eastern v. .01 Acres of Land*, Civil Action No. 12-3680-SCRMAS, *Order for Preliminary Injunction* (D.N.J. June 28, 2012), which is attached as Exhibit B to Conrail's July 3, 2012 answer to the applicants' answer to Conrail's *Motion for Late Intervention, Request for Rehearing, and Request for Stay*. Conrail contends "[t]hese conditions were imposed because the court understood Conrail's serious concerns about rail safety and included explicit safety provisions in its order." *Id.*, p. 5. Thus, Conrail's safety concerns are addressed in two ways, in that it now has the safety measures it seeks embedded in both our May 2012 Order and the applicants' easement authorization.

¹¹ Conrail requests a stay as well. However, Conrail is precluded from doing so in view of our denial of its motion to intervene out-of-time. *See* 18 C.F.R. § 385.212(a)(2) (2012). Were Conrail a party to this proceeding, we would nevertheless deny its request for stay, because its request is based on its assertion that the easements the applicants obtain by exercise of eminent domain do not provide construction and operation constraints sufficient to ensure rail safety. As discussed above, we reject this contention that the applicants' certificate authorization, as currently conditioned, does not require the applicants to adhere to adequate railroad safety measures. Thus, because we believe the currently effective conditions provide sufficient safety protections, we do not believe a stay is merited. In response to Conrail's request that the Commission's Dispute Resolution Service be directed to oversee negotiations between Conrail and the applicants over a Right of Entry Agreement and License to govern project activities on its property, with the proceeding stayed until an agreement is reached, we clarify that while we invite Conrail and the applicants to make use of this service, the use of this service is voluntary; under no circumstances do we mandate its use.

¹² 5 U.S.C. § 705 (2006).

requires."¹³ In assessing a stay request, we consider several factors, which typically include: (1) whether the party requesting the stay will suffer irreparable injury without a stay; (2) whether issuing the stay may substantially harm other parties; and (3) whether a stay is in the public interest. Our general policy is to refrain from granting stays to assure definiteness and finality in our proceedings.¹⁴ In this case, for the reasons discussed below, we deny the stay requests.

12. Jersey City contends the Commission permitted Texas Eastern to commence construction in violation of Environmental Condition No. 15 of the May 2012 Order, which states that the applicants must submit the results of the soil and groundwater sampling program prior to construction, and requests a stay to resolve this matter. We find the applicants are in full compliance with this condition of their certificate authorization, as they have not commenced construction on any portion of the project in advance of having (1) submitted required sampling results to the Commission and (2) received a subsequent notice to proceed with construction from the Commission.¹⁵

13. Jersey City states a stay is needed to allocate liability in the event previously unknown contamination is found and released within the city's rights-of-way or on municipal property. First, liability – as a consequence of contamination or as a result of any other damage attributable to the project – is a matter appropriately addressed in a court proceeding, as the Commission has no authority to award damages, and is thus unrelated to a stay. Second, we have already considered the potential risks of construction-induced contamination, and find no likelihood of irreparable injury that would merit a stay to reconsider the matter. The EIS established that the project will pass through contaminated areas; consequently, our authorization is conditioned on the applicants taking specific measures to suppress, contain, and dispose of

¹³ See, e.g., *Ruby Pipeline, L.L.C.*, 134 FERC ¶ 61,020, at P 15 (2011); *AES Sparrows Point LNG, LLC*, 129 FERC ¶ 61,245, at P 18 (2009); and *Columbia Gas Transmission LLC*, 129 FERC ¶ 61,021, at P 6 (2009).

¹⁴ See, e.g., *Sea Robin Pipeline Company*, 92 FERC ¶ 61,217, at 61,710 (2000).

¹⁵ See, e.g., Commission staff's *Partial Notice to Proceed* letters, dated June 29, July 19, July 25, and August 2, and September 25, 2012 finding that for specific segments of the project, the applicants have met the pre-construction conditions of the Commission's May 2012 Order relevant to these segments and consequently have been permitted to commence construction within these segments.

contaminates exposed in the course of construction.¹⁶ If previously unknown contamination is uncovered for which our existing mitigation measures are insufficient, we will impose additional measures as needed to ensure public safety.¹⁷

IV. Requests for Rehearing

14. Requests for rehearing were submitted within the statutorily prescribed 30-day time frame by Evelyn Preuss; Jersey City; and by the Sierra Club (New Jersey and Atlantic Chapters) jointly with Food & Water Watch and No Gas Pipeline.¹⁸ We discuss below the allegations of error raised in these requests for rehearing.

¹⁶ See the Soil Management Plan component of the Excavation Management Plan in Appendix I of the final EIS. This matter is addressed in more detail in the Contaminated Soil section below.

¹⁷ Environmental Condition No. 2 in Appendix B of the May 2012 Order states:

The Director of OEP has delegated authority to take whatever steps are necessary to ensure the protection of all environmental resources during construction and operation of the NJ-NY Project and activities associated with abandonment of the NJ-NY Project. This authority shall allow:

- a. the modification of conditions of the Order; and
- b. the design and implementation of any additional measures deemed necessary (including stop-work authority) to ensure continued compliance with the intent of the environmental conditions as well as the avoidance or mitigation of adverse environmental impact resulting from NJ-NY Project construction, operation, and abandonment activities.

¹⁸ In addition to these specific requests for rehearing, following the May 2012 Order we received comments by Steven Kostis and petitions signed by Laura Monloya, Anne Bassen, Charles Rector, Bruce Weiskopf, Judith Vogelsang, Marlene Glasser, Ermal Camcai, Jennifer Oramas, and Jared Williams, expressing opposition to the NJ-NY Project based on concerns over environmental, safety, and security matters similar to those raised by parties to the proceeding and addressed in the EIS and May 2012 Order. The petitions are identical to petitions filed by other persons prior to issuance of the May 2012 Order (*see* the final EIS, Volume II, under IND171, Form Letter 2 at p. II-1048). Since none of those submitting these most recently-presented comments or petitions request rehearing, we will treat these post-Order submissions as late-filed comments in opposition to the project.

15. Sane Energy submitted a request for rehearing one day after the deadline for doing so.¹⁹ Sane Energy attributes the delay to the Commission's electronic filing system not recognizing its counsel's eFiling password. We have accepted submissions that we initially deemed to be late only when we subsequently found the documents were in fact presented on time, but due to error or oversight on the part of the Commission were not recognized as having been filed on time.²⁰ In this instance, there is no evidence of any error or oversight on our part.²¹ Consequently, we find Sane Energy submitted its pleading after the 30-day deadline prescribed in NGA section 19(a). As we have no discretion to waive or extend this statutory deadline,²² we dismiss Sane Energy's request for rehearing.

16. Sane Energy alternatively asks that we treat its request for rehearing as a request for reconsideration. On occasion, we have found good cause to treat a late request for rehearing as a request for reconsideration, particularly where the

¹⁹ In accordance with section 19(a) of the NGA, Rule 713(b) of our Rules of Practice and Procedure states that a request for rehearing "must be filed not later than 30 days after issuance of any final decision or other final order." 18 C.F.R. § 385.713(b) (2012). Sane Energy's submitted its request for rehearing on June 21, 2012 – 31 days after issuance of our May 21, 2012 Order.

²⁰ For example, we accepted requests for rehearing in *Westar Energy, Inc.*, 137 FERC ¶ 61,142 (2011), when the request was submitted within the 30-day limit, but was incorrectly time stamped due to an error in the Commission's eFiling system; in *Dayton Power & Light Company v. FPC*, 251 F.2d 875,877 (D.C. Cir. 1957), when one paper copy was received on time, but other copies arrived late; in *New York State Energy Research & Development Authority v. FERC*, 746 F.2d 64, 67 (D.C. Cir. 1984), when requests were submitted to the wrong office within the Commission following a change in filing instructions; and in *Village of Saranac Lake, New York*, 67 FERC ¶ 61,077 (1994), when the request was received in the Commission's mailroom on time, but was date-stamped three days later. Absent such extraordinary circumstances, we routinely reject submissions that fail to meet our filing requirements. See, e.g., *El Paso Natural Gas Company*, 115 FERC ¶ 61,370 (2006).

²¹ To the extent that counsel erred in attempting to access our electronic filing system, counsel bears the responsibility for filing out-of-time.

²² NGA section 19(a) states that "a party may apply for a rehearing within thirty days after the issuance of [an] order," and does not provide for any exemption or waiver of this provision.

submission contains new information that we believe should be addressed.²³ This is not the case with Sane Energy, as its submission repeats information and arguments that have been raised before or that appear in the other parties' timely-filed requests for rehearing.²⁴

17. In requesting rehearing, the Sierra Club, Food & Water Watch, and No Gas Pipeline ask for a trial-type evidentiary hearing before an administrative law judge to address and assess risks associated with radon and polychlorinated biphenyls (PCBs). Such a hearing would be appropriate were material issues of fact in dispute that cannot be resolved on the basis of the written record.²⁵ We believe the written record in this proceeding provides an adequate basis for reviewing and resolving these matters, and thus find no need for the requested hearing.²⁶ We respond below to the concerns raised regarding radon and PCBs.

A. Allegations of Error Presented on Rehearing

1. Constitutional Due Process

18. Jersey City, the Sierra Club, Food & Water Watch, and No Gas Pipeline argue – for the first time in this proceeding – that the Commission's actions conflict with the U.S. Constitution's Fifth Amendment guarantee of due process, which includes a fair hearing before a neutral arbiter. These parties declare the Commission is incapable of functioning as a neutral arbiter because it is "a self-financing agency

²³ See, e.g., *Southern Star Central Gas Pipeline, Inc.*, 104 FERC ¶ 61,080 (2003), in which we denied motions to intervene out-of-time and for leave to request rehearing, but then treated requests for rehearing as requests for reconsideration, since they raised issues about the pipeline route that were not previously considered.

²⁴ Sane Energy's submission does include new information in the form of a declaration by Clare Donohue, which describes an effort to sample background radon levels in apartments in New York City to establish a statistical baseline. While we accept the potential utility of this effort in identifying any future changes in radon levels in residences, this information provides no basis for a reassessment of the impacts of the NJ-NY Project.

²⁵ See, e.g., *Southern Union Gas Co. v. FERC*, 840 F.2d 964, 970 (D.C. Cir. 1988); *Cerro Wire & Cable Co. v. FERC*, 677 F.2d 124 (D.C. Cir. 1982); and *Citizens for Allegan County, Inc. v. FPC*, 414 F.2d 1125, 1128 (D.C. Cir. 1969).

²⁶ See, e.g., *Transwestern Pipeline Company, LLC*, 121 FERC ¶ 61,175, at P 17 (2007) and 122 FERC ¶ 61,165, at P 16 (2008).

entirely reliant upon the energy industry for [its full] funding,” and as such, is predisposed to favor the energy industry’s requested authorizations.²⁷

Commission Response

19. As an initial matter, we find no reason that this argument could not have been raised prior to our issuance of our May 2012 Order on the merits.²⁸ None of the parties challenging the Commission’s decision on Constitutional grounds, all of which have long been active participants in this proceeding, explain why this claim could not have been made earlier. As a rule, we reject requests for rehearing that raise a novel issue, unless we find that the issue could not have been previously presented, e.g., claims based on information that only recently became available or concerns prompted by a change in material circumstances.²⁹ We do so because (1) our regulations preclude other parties from responding to a request for rehearing³⁰ and (2) “such behavior is disruptive to the administrative process because it has the effect of moving the target for parties seeking a final administrative decision.”³¹ We therefore will not entertain this new argument on rehearing.

²⁷ The Sierra Club, Food & Water Watch, and No Gas Pipeline *Request for Rehearing* at 24. The Commission is directed, by 42 U.S.C. § 7178(a)(1) (2006), to “assess and collect fees and annual charges in any fiscal year in amounts equal to all of the costs incurred by the Commission in that fiscal year.”

²⁸ Congress established the Commission’s self-funding mechanism in 1986. Pub. L. 99–509, Title III, § 3401, 100 Stat. 1890 (Oct. 21, 1986), codified at 42 U.S.C. § 7178(e) (2006) and 52 FR 36022 (Sept. 25, 1987), codified at 18 C.F.R. § 382.202 (2012). To present this argument now is, in effect, an improper collateral attack on longstanding statutory funding provisions. Regardless of when this matter might have been raised, we note that “adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies.” *Elgin v. Dep’t of the Treasury*, 132 S. Ct. 2126, 2136 (2012) (*citations omitted*).

²⁹ See Rule 713(c)(3) of our Rules of Practice and Procedure, which states that any request for rehearing must “[s]et forth the matters relied upon by the party requesting rehearing, if rehearing is sought, based on matters not available for consideration by the Commission at the time of the final decision or final order.” 18 C.F.R. § 385.713(c)(3) (2012).

³⁰ 18 C.F.R. § 385.713(d) (2012).

³¹ *Westar Energy, Inc.*, 134 FERC ¶ 61,176 (2011).

20. If we did not dismiss this argument on procedural grounds, we would nevertheless deny it. We reject the assertion that the manner in which the Commission is funded influences the outcome of any of our decisions. Permitting a federal or state agency to levy fees and fines on persons subject to its jurisdiction, or to charge for regulatory actions, is neither a novel nor nefarious means of sustaining the work of an agency. At least two dozen federal agencies derive some or all of their funding, directly or indirectly, from such collections.³²

21. The parties objecting to this means of funding imply the Commission is motivated to approve more projects because it could then derive more revenue. This is not the case. The Commission is not self-funding in the sense of keeping what it collects. Instead, each year Congress appropriates funds for the Commission's operations, with the stipulation that the Commission reimburse the Treasury the same amount by collecting fees and charges from the entities it regulates.³³ For jurisdictional natural gas companies, the Commission annually compares the amount of gas each company transports to the total amount transported by all jurisdictional gas companies, then calculates and imposes a proportional volumetric charge on each company.³⁴ "All moneys received" by the Commission from fees and charges are "credited to the general fund of the Treasury."³⁵ At the end of each year the Commission trues up its collection by making "such adjustments in the assessments for such fiscal year as may be necessary to eliminate any overrecovery or underrecovery of its total costs, and any overcharging or undercharging of any person."³⁶

³² See *Federal User Fees: Budgetary Treatment, Status, and Emerging Management Issues*, U.S. Government Accountability Office (GAO) Report to the Chairman, Committee on the Budget, House of Representatives, dated December 19, 1997, GAO/AIMD-98-11, identifying 27 agencies that rely on federal user fees for a significant portion of their budget. "The mere fact that an administrative or adjudicative body derives a financial benefit from fines or penalties that it imposes is not in general a violation of due process." *Van Harken v. City of Chicago*, 103 F.3d 1346, 1353 (7th Cir. 1997) (*citations omitted*).

³³ 42 U.S.C. § 7178 (2006).

³⁴ 18 C.F.R. § 382.202 (2011).

³⁵ 42 U.S.C. § 7178(f) (2006).

³⁶ *Id.* at 7178(e). Although the Commission calculates the annual charge due from each regulated entity, we do not take receipt of this charge; rather, under section 382.103(b) of our regulations, each regulated entity makes out a "check, draft,

22. Therefore, there is no financial incentive for the Commission to grant or deny an application for a gas project, as the outcome will have no more than a *de minimis* impact on total cost of carrying out the Commission's regulatory responsibilities. Further, whether this total cost rises or falls is immaterial to the Commission, since it will reimburse the Treasury no more and no less than what it actually expends to meet its statutory mandates.³⁷ This distinguishes the sources of the Commission's funding from those in cases cited by the complaining parties, such as *Ward v. Village of Monroeville*.³⁸ In that case, the mayor of a village sat as a judge in cases where any assessed charges would devolve back to the village. Given that a "major part of village income is derived from the fines, forfeitures, costs, and fees imposed by him in his mayor's court,"³⁹ the Court found "the pecuniary interest of the Mayor in the result of his judgment" offered "a possible temptation" for him to act as other than a neutral and detached judge.⁴⁰ The Commission has no financial stake in the outcome of this application or any other decision it makes, since all charges assessed to regulated entities for the amount of jurisdictional service they provide are paid to the U.S. Treasury, not the Commission.

23. We acknowledge the claim of the parties seeking rehearing that we approve most of the construction projects presented to us. However, we attribute this largely to Commission procedures and requirements that prevent project sponsors from filing incomplete or insufficiently vetted applications. In particular, we strongly encourage – and in some instances require – would-be applicants to engage in our prefiling process before filing applications. During the prefiling process, the prospective

or money order" in the amount of its annual charge "payable to the United States Treasury."

³⁷ For this same reason, the same monetary indifference applies to the outcome of Commission decisions on hydroelectric licensing, fines and penalties, and the rates regulated entities are permitted to charge for their services.

³⁸ 409 U.S. 57 (1972).

³⁹ *Id.* at 58, with the Court observing that "[t]his revenue was of such importance to the village that when legislation threatened its loss, the village retained a management consultant for advice upon the problem."

⁴⁰ *Id.* at 60. The Court quotes *Tumey v. Ohio*, 273 U.S. 510, 523 (1927), in which the Court found that "it certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case."

sponsor presents a planned project to all potentially interested persons, including Commission staff. Prefiling is designed to identify issues and highlight possible difficulties with a contemplated project as far in advance as is feasible. Written comments, open houses in areas where the project will be located, and staff input frequently lead to a project sponsor making significant modifications to its originally planned project before it files its application.

24. The evidence that the prefiling process is functioning as intended is that the applications we receive are almost always complete, with a detailed description of a financially and environmentally viable project. Project sponsors make significant investments to prepare their applications, and the Commission's review of applications requires a significant commitment of administrative resources on its part. The criteria by which we evaluate an application are explicit and well understood by the industry, and because we apply the same criteria in the same manner in each gas proceeding, there is no incentive for a project sponsor to present an application that cannot meet our standards for approval. Further, virtually every project that comes before the Commission is modified by either the applicant or by Commission staff through the review process to address environmental and other concerns. Thus, we do not believe that what appears to be an inordinately high percentage of project approvals indicates bias in favor of the industry. Instead, we believe it demonstrates prudence on the part of the industry and consistency on the part of the Commission, resulting in a process which weeds out marginal projects and leaves us to consider only those that merit serious consideration.

25. Jersey City alleges "the Commission predetermines (1) natural gas pipelines will follow routes energy companies propose, and (2) it will consequently reject viable – even preferable – alternatives pipeline companies do not want to build."⁴¹ In fact, the Commission does not direct the development of the gas industry's infrastructure, neither on a broad regional basis nor in the design of specific projects. Instead, we respond when an application is presented to us, and in each application the parameters of the project are predetermined by the applicant. The route presented represents a way to get certain supplies to certain markets, and following scrutiny of the proposed project will also come to reflect public and government input on safety and security, cultural and environmental resources, and engineering and design.⁴²

⁴¹ Jersey City *Request for Rehearing* at 17.

⁴² The applicants state that in "response to comments from agencies, officials, landowners and the Commission Staff," they "considered 85 route variations and ultimately adopted 45 variations from the original design of the Project proposed in the Pre-filing process, affecting 45% of the Project," as well as making modifications

26. Under the NGA, we consider alternatives to a proposed project in determining whether a proposal is in the public interest. Under NEPA, we take a hard look at alternative means to fulfill the purpose and meet the need described in the application and assess the environmental impacts of each alternative. If we were to find the proposed project to be environmentally unacceptable, we would reject the application. However, if we find the project to be environmentally acceptable, we will approve it, provided we find it to be otherwise required by the public convenience and necessity.

27. During the NEPA process we frequently identify environmentally preferable alternatives, and may condition our authorization on the applicant's implementation of certain alternatives. However as we have previously explained:

[I]t is well settled that NEPA does not mandate that agencies reach particular substantive results. Instead, NEPA simply sets forth procedures that agencies must follow to determine what the environmental impacts of a proposed action are likely to be. If an agency adequately identifies and evaluates the adverse environmental effects of a proposed action, "the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs."⁴³

28. With limited exceptions, the Commission has no authority to compel companies to construct gas facilities.⁴⁴ However, the Commission frequently attaches conditions to its authorization to address environmental concerns, including requiring route modifications. A project sponsor can decline to proceed with a planned project if it determines that the route and other modifications required by the Commission are unacceptable.

specifically to accommodate Jersey City. Texas Eastern's and Algonquin's *Answer to Requests for Rehearing* at 20-21.

⁴³ *KN Wattenberg Transmission Limited Liability Company*, 90 FERC ¶ 61,322, at 62,083 (2000), *citing and quoting Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

⁴⁴ Minor exceptions to the Commission's lack of authority to compel construction include NGA section 5's provision for the Commission to compel companies to construct interconnections to remedy undue discrimination; NGA section 7(a)'s provision for the Commission to direct a company to extend facilities to serve a municipality or local distribution company where the extension will not unduly burden the natural gas company; and the dormant exception of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1334(f)(B), which conditionally permits the Commission to order the expansion of capacity on an existing pipeline.

2. Ramapo Metering Station -- Notice and Alternative Access

29. Evelyn Preuss claims that she and her neighbors, as affected landowners, did not receive proper notice of the proposed project and were thereby deprived of the opportunity to present timely objections. She states that the road Algonquin currently uses to access its Ramapo Metering and Regulatory (M&R) Station is subject to flooding, and that using this road to access the station is a violation of DOT safety standards.⁴⁵

Commission Response

30. We considered the allegation that landowners were not informed of, or did not have adequate opportunity to comment on, the proposed project, and we affirm our finding in the May 2012 Order that (1) Ms. Preuss and her husband have been on the project mailing list since staff's first environmental correspondence was sent out in July 2010, and (2) we have accepted all of Ms. Preuss' submissions, whether presented on time or out-of-time, and have taken into account, and responded to, and reached a decision upon, all of the issues she has raised.⁴⁶ Therefore, we find no indication that Ms. Preuss or any affected landowner was deprived of access to information about the proposed project or was disadvantaged in stating concerns about the project.

31. The proposed project anticipates adding a new M&R station at the existing Ramapo station site. We determined that the road now used to access the site would not be suitable for the more frequent and heavier vehicle traffic necessary to haul equipment and materials to the site. After reviewing alternative means of accessing the site, we decided in favor of the option of building a temporary new road along an existing pipeline right-of-way for use by construction-related vehicles. The temporary new road will necessitate building a temporary new bridge across the Mahwah River. We found, and the U.S. Army Corps of Engineers (COE) found, that this new road would not impose unacceptable environmental impacts if, after the new station was in place, the bridge is removed and the riverbanks are restored to their former condition. In response to Ms. Preuss' plea to make this provisional road and bridge the permanent means of access to the M&R station,⁴⁷ we confirm that

⁴⁵ *Citing* 49 U.S.C. § 60112 (2006).

⁴⁶ *See* May 2012 Order, 139 FERC ¶ 61,138, at P 95 and n.66.

⁴⁷ This approach was recently endorsed by the Rockland County Legislature in New York, as reported in a June 7, 2012 letter to the Commission from U.S. Congressional Representative Nita M. Lowey.

permitting the bridge to remain in place would be inconsistent with the determination that the river banks must be restored.⁴⁸

32. Because our certificate conditions require the applicants to adhere to DOT's safety standards, Algonquin will be compelled to establish alternate access to the Ramapo station if the road now in use does not comply with these standards. The applicants insist their operations comply with DOT standards,⁴⁹ and aver that flooding has never precluded them from reaching the Ramapo station as needed. In view of this, we affirm our finding favoring the use of a temporary road for access during construction, and the continued use of the current road for access thereafter.

3. Scope of Review

33. The Sierra Club, Food & Water Watch, and No Gas Pipeline argue that the Commission erred by limiting the scope of its environmental review to exclude a nonjurisdictional 1500-foot long, 30-inch diameter pipeline that ConEd will construct to connect to the Manhattan terminus of the NJ-NY Project. The parties insist the Commission "must give *some* environmental consideration to non-jurisdictional facilities built in conjunction with the Project." (Emphasis in the original).⁵⁰

Commission Response

34. The parties seeking rehearing note that in our initial appraisal of the ConEd pipeline, we did not find cause to include it in the scope of our environmental review for the NJ-NY Project.⁵¹ However, we did find cause to consider the environmental

⁴⁸ We note that the temporary access route comes within 100 feet of a house. Were the temporary route to be made permanent, it would not eliminate adverse impacts imposed by the access road, but merely shift them from one residence to another. Therefore, even if there were no need for restoration of the banks of the Mahwah River, we could not find an environmental advantage in altering the existing route that has been used to access the Ramapo M&R Station since its construction in 1967.

⁴⁹ In particular, they state their compliance with 49 C.F.R. § 192.615 (2012), which requires that an "operator shall establish written procedures to minimize the hazard resulting from a gas pipeline emergency."

⁵⁰ The Sierra Club, Food & Water Watch, and No Gas Pipeline *Request for Rehearing* at 16, citing *Henry v. FPC*, 513 F.2d 395, 406 (D.C. Cir. 1975).

⁵¹ See final EIS at p. 1-14.

impacts of ConEd's nonjurisdictional pipeline in our review of the cumulative impacts of the NJ-NY Project.⁵²

35. Based on the information available to us,⁵³ the cumulative impact review found that ConEd's nonjurisdictional pipeline would have the environmental impacts typical of a project in an urban setting, i.e., impacts similar to those we studied for the Jersey City portion of Texas Eastern's jurisdictional pipeline. Given the urban setting, impacts on vegetation, wildlife, and aquatic resources are not expected to be significant. We found the anticipated urban impacts – e.g., noise, dust, transportation and traffic disruption, and effects on the economy and employment – would be of short duration, with minimal permanent effects, since areas adversely affected by construction activities would revert to prior uses after the pipeline was put in place. Therefore, we conclude that our consideration of the environmental impacts of the ConEd pipeline in our cumulative impacts review satisfies the request on rehearing that we include this nonjurisdictional pipeline within the scope of our environmental review of the NJ-NY Project.

4. Cumulative Impacts

36. The Sierra Club, Food & Water Watch, and No Gas Pipeline fault the cumulative impacts analysis of the EIS. They argue the Commission “misstates” the NEPA requirement⁵⁴ by suggesting that the consideration of cumulative impacts need only to take into account environmental effects “causally related” to the NJ-NY Project. They argue that the scope of cumulative impacts that need to be considered “is not delimited by a requirement of causality.”⁵⁵ In this regard, the parties fault the

⁵² *Id.* at p. 4-252; Table 4.13-1 lists the ConEd pipeline among the present or reasonable foreseeable future projects or activities that may cumulatively or additively impact resources that would be affected by construction and operation of the NJ-NY Project.

⁵³ *See, e.g.*, information on the ConEd pipeline contained in the applicants' Data Responses dated July 15, August 9, October 26, and December 20, 2010 and the application's Resource Reports 1 and 10.

⁵⁴ *Citing* 40 C.F.R. § 1508.7 (2012), which defines 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 actions.”

⁵⁵ Sierra Club, Food & Water Watch, and No Gas Pipeline *Request for Rehearing* at p. 6, *citing* *Natural Resources Defense Council v. Hodel*, 865 F.2d 288, 298 (1988).

EIS for failing to consider “foreseeable indirect impacts of Marcellus Shale development”⁵⁶ stemming from, but not necessarily caused by, the NJ-NY Project.

Commission Response

37. To assess cumulative effects, we consider (1) the direct and indirect effects on the environment expected to result from the proposed project and its alternatives and (2) present effects of past actions we find relevant and useful because of a significant cause-and-effect relationship with the direct and indirect environmental impacts of the project and its alternatives.⁵⁷ Here, we took into account comments on the draft and final EIS urging us to include certain additional past or future projects or activities in our cumulative impacts consideration. We excluded projects and activities we found to be speculative, no more than tangentially related to the proposed project, or not subject to meaningful review.⁵⁸ On this basis, we considered including the development of Marcellus Shale gas reserves in our cumulative impacts analysis, but decided not to because such development was neither causally-related nor reasonably foreseeable, a decision we affirm.

38. We found no more than an attenuated relationship between the NJ-NY Project and activities in the geographically removed Marcellus Shale region. As the final EIS observed, “the local resources that may be affected by Marcellus Shale development are not affected by the Project and local resources affected by the Project would not be affected by Marcellus Shale development.”⁵⁹ We also found that the future

⁵⁶ *Id.* at p. 7. The parties point out that 40 C.F.R. § 1508.8 (2012) defines indirect effects as those that are “caused by the action and are later in time or further removed in distance, but are still reasonably foreseeable.” They cite *Sierra Club v. March*, 769 F.2d 868, 877 (1st Cir. 1985), for the proposition that when a project may lead to future development, and the future development will significantly impact the environment, the agency should take into account such reasonably foreseeable impacts.

⁵⁷ See EIS section 4.13. See also the Council on Environmental Quality’s (CEQ’s) *Guidance on Consideration of Past Actions in Cumulative Effects Analysis*, at pp. 2-3 (June 24, 2005).

⁵⁸ Agencies may limit the scope of their cumulative effects analysis based on practical considerations. See, e.g., *Kleppe v. Sierra Club (Kleppe)*, 427 U.S. 390, 414 (1976), stating that “[e]ven if environmental interrelationships could be shown conclusively to extend across basins and drainage areas, practical considerations of feasibility might well necessitate restricting the scope of comprehensive statements.”

⁵⁹ Final EIS at 4-251. See also *Central New York Oil and Gas Company, LLC*,

development of the Marcellus Shale was not predictable because the scope and timing of Marcellus drilling and production (which encompasses the acquisition of mineral rights, well permits, and approvals for associated processing, gathering, and NGA-exempt transportation facilities) is dependent on state authorizations.⁶⁰ Since we reached this finding, predictions about the development of shale reserves have become even more uncertain as state legislatures have reviewed and revised regulations governing further development, while the market, in response to the production of unexpectedly large volumes of domestic gas, has driven down the price of gas and, consequently, the incentive to drill for more gas. Accordingly, we affirm our determination that the Marcellus' development is not "reasonably foreseeable" as a result of the NJ-NY Project and thus does not meet the criterion for consideration in a cumulative or indirect impacts analysis.⁶¹

39. In the May 2012 Order's discussion of our decision not to include the Marcellus' development in our cumulative impacts analysis, we stated that "because there is no causal relation between the proposed project and past, present, and future shale development, there is no cause to consider the impact of the project on shale development." We cited to a decision by the U.S. District Court for the District of

137 FERC ¶ 61,121 (2011), *order on reh'g*, 138 FERC ¶ 61,104 (2012), *aff'd*, *Coalition for Responsible Growth and Resource Conservation et al. v. FERC*, No. 12-566, Slip Copy, 2012 WL 2097249 or 2012 U.S. App. LEXIS 11847 (2nd Cir. June 12, 2012). In that case, in which a proposed pipeline was to be routed through active Marcellus production fields for the stated purpose of transporting Marcellus-derived gas – unlike the NJ-NY Project facilities, which are over a hundred miles from the Marcellus reserves – we elected to consider "readily available information about natural gas production and development in the project area as part of the cumulative impact analysis, including consideration of the impacts of Marcellus Shale drilling activities" in the environmental review of cumulative impacts. 137 FERC ¶ 61,121 at P 84.

⁶⁰ See May 2012 Order, 139 FERC ¶ 61,138 at P 73 and the final EIS at 1-11 and 4-251.

⁶¹ See 40 C.F.R. §§ 1508.7 and 1508.8(b) (2012). Because we expect the NJ-NY Project to go forward independent of shale gas production, we do not believe there will be Marcellus-related indirect effects – i.e., effects which are caused by the action of approving construction and operation of the project facilities and are later in time or farther removed in distance, but are still reasonably foreseeable – attributable to the NJ-NY Project. Due to the NJ-NY Project's distance from the Marcellus, and its access to even more distant supply basins, the project will have no reasonably foreseeable impact on activities in the Marcellus.

Minnesota in which the Sierra Club, among others, challenged the decisions by the U.S. Department of State and other federal agencies to approve a domestic oil pipeline intended to carry Canadian oil, because the environmental review did not include an assessment of the impacts of the oil's extraction.⁶² The court concluded that:

the Defendants' decision not to assess the trans-boundary impacts associated with the oil sands production is supported and consistent with their NEPA obligations. In particular, the administrative record supports Defendants' conclusion that there is not a sufficient causal relationship between the [crude oil pipeline] and the development of the oil sands.⁶³

40. The Sierra Club, Food & Water Watch, and No Gas Pipeline insist the scope of a cumulative impact analysis is not delimited by a requirement of causality. They consequently object to our reference to a causal relation and insist the U. S. District Court's decision in the *Sierra Club* case we cited "confusingly combines discussion of direct, indirect, and cumulative impacts and arrives at a vague conclusion that there is not a sufficient causal relationship between the proposed project and the development of the Canadian oil sands to require consideration of impacts associated with the oil sands production."⁶⁴

41. We do not view our determination that there is no causal relation between the NJ-NY Project and the development of shale reserves, or the District Court's holding in *Sierra Club*, as incompatible with the Council on Environmental Quality (CEQ) directive to federal agencies to consider the incremental impact a proposed action will have when added to other past, present, and reasonably foreseeable future actions.⁶⁵

⁶² *Sierra Club v. Clinton (Sierra Club)*, 746 F. Supp. 2d 1025 (D. Minn. 2010). The State Department had made a determination supporting issuance of a Presidential Permit for the construction, operation, and interconnection of a crude oil pipeline in the U.S. at the international border with the Canadian oil pipeline. The COE and the U.S. Forest Service had issued necessary permits.

⁶³ *Id.* at 1043.

⁶⁴ The Sierra Club, Food & Water Watch, and No Gas Pipeline *Request for Rehearing* at p. 6.

⁶⁵ 40 C.F.R. § 1508.7 (2012). We interpret the 40 C.F.R. § 1508.8 definition of direct and indirect impacts as those "which are caused by the action" to mean impacts caused by our authorization of the project's construction and operation.

In the *Sierra Club* case and this case, the new pipeline was found to be separated both physically (with hundreds of miles between the project site and production fields) and in terms of the pipeline's influence on production activities.⁶⁶ Accordingly, finding no cause and effect is a shorthand way of saying that the pipeline and production are not related "actions that will have cumulative or synergistic environmental impact upon a region."⁶⁷ If two separate actions may proceed independently, the impacts of

⁶⁶ We note that in *Sierra Club*, 746 F. Supp. 2d 1025, 1044, before the court makes the cause-and-effect statement to which the parties seeking rehearing object, the court favorably references comments submitted by the defendants in response to criticism of the final EIS that show why a cumulative impacts analysis should not add the impacts of the pipeline project to the impacts associated with production. The court's reasoning regarding Alberta oil sands and the Alberta Clipper pipeline is equally applicable to Marcellus Shale gas and the NJ-NY Project:

[O]il sands will be extracted and utilized regardless of the Alberta Clipper pipeline. The clearest evidence of this is that Alberta oil sands production has been increasing for years even though the Alberta Clipper pipeline has not been constructed. Production of oil from the oil sands is driven by global market demand for oil and the price of oil, not by whether one more or one less pipeline exists to transport that oil to the United States. Were the Alberta Clipper pipeline not built, the oil produced in Alberta would simply find another outlet through which to meet the global demand for that oil ... the extraction impacts need not be addressed in the EIS because there is neither evidence that those activities have an impact in the United States, or even if they did, that the impact is a consequence of, or connected to, the proposed construction of the pipelines ... Since the oil extraction has been occurring, and will continue to occur, regardless of whether the pipeline is built, the environmental implications of the oil sands projects [are] outside the scope of the Alberta Clipper EIS.

⁶⁷ *Kleppe*, 427 U.S. 390, 410. Further, even if the project and remote gas production could be linked, *DOT v. Public Citizen*, 541 U.S. 752, 767 (2004), states that "NEPA requires 'a reasonably close causal relationship'" such as that established by the "familiar doctrine of proximate cause." (Quoting *Metropolitan Edison Company v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983).) Thus, "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect, and need not consider the effect under NEPA." *Id.* at 770. Here, as explained above, the Commission lacks any meaningful authority over the

these separate actions should not be conjoined in a cumulative impacts analysis.⁶⁸ The NJ-NY Project should operate for decades, and due to the diverse sources of gas it can draw upon,⁶⁹ it need never transport Marcellus supplies; the development and production of the Marcellus reserves should similarly extend over decades, and can be expected to do so with or without the proposed project.

5. Socioeconomic Impacts

42. The Sierra Club, Food & Water Watch, and No Gas Pipeline argue the Commission did not properly evaluate the project's potential impact on minority and/or low-income populations with disproportionately high and adverse health and environmental effects. They urge the Commission to identify such populations in the project area, and then determine if these populations have asthma-related problems, cancer rates, other ailments, or occupational-related exposures to environmental stresses that exceed those experienced in the general population.

43. The parties seeking rehearing urge the Commission to assess facilities emitting criteria air pollutants and hazardous air pollutants affecting minority and/or low-income populations to determine whether these air emissions may combine with those produced by the project to create a disproportionate impact. The parties add that the Commission should "also assess other large projects proposed in close proximity to the project area, including but not limited to the Port Authority of New York and New Jersey's raising of the Bayonne Bridge, the redevelopment of the Greenville Yards rail site along the Hudson River, the expansion of Global Terminal, the construction of the Bayonne Energy Center, the cleanup of the PPG chromium contaminated sites in Jersey City, etc."⁷⁰ The parties maintain that the Commission, by "[m]erely cataloging these facilities and projects," has not met its "obligation to take a hard look

development of shale reserves; it is the various states that hold "proximate cause" authority over exploration and production.

⁶⁸ May 2012 Order, 139 FERC ¶ 61,138 at P 73. *See, e.g., Sylvester v. U.S. Army Corps of Engineers*, 884 F.2d 394, 400 (9th Cir. 1989), finding that the environmental review for a golf course, which did not consider other planned resort facilities as indirect impacts of the golf course, did not violate NEPA, because "each could exist without the other, although each would benefit from the other's presence."

⁶⁹ *See supra* n. 2, itemizing the diverse array of potential sources of gas that will be able to feed and fill the NJ-NY Project.

⁷⁰ The Sierra Club, Food & Water Watch, and No Gas Pipeline *Request for Rehearing* at pp. 10-11 (*citation omitted*).

at and assess the cumulative impacts of the Project and other projects and facilities on overburdened communities.”⁷¹

Commission Response

44. As an initial matter, we note that neither Executive Order 12898⁷² nor guidance provided by the U.S. Environmental Protection Agency (EPA),⁷³ both of which the parties seeking rehearing urge us to adhere to, are binding on the Commission.⁷⁴ That said, we believe our consideration of environmental justice matters is in accord with the provisions of the Executive Order and EPA guidance and does not require any harder look at the project’s socioeconomic impacts to meet NEPA standards.

45. The EIS indentified minority and low-income populations along the proposed pipeline route. We found that the NJ-NY Project’s construction would result in temporary increases in local emissions of some pollutants, which would be short-term

⁷¹ *Id.*, p. 10.

⁷² *Federal Actions to Address Environmental Justice in Minority and Low-Income Populations*, 60 FR 6381 (February 1, 1995).

⁷³ Specifically, EPA’s *Final Guidance for Incorporating Environmental Justice Concerns into EPA’s NEPA Analyses*, at 2.2.1 (April 1998). EPA acted as a cooperating agency in the preparation of our NEPA review and filed initial comments in the pre-filing and comments on the draft and final EIS. EPA’s comments raise no objections to our treatment of environmental justice concerns.

⁷⁴ While the Sierra Club, Food & Water Watch, and No Gas Pipeline acknowledge that for the Commission the EPA’s guidance on how to incorporate environmental justice concerns into a NEPA review is not binding, they imply the Executive Order imposes more stringent requirements. It does so, but not as it applies to the Commission. Executive Order 12898 applies only to the federal agencies named in section 1-102 of that order, and the Commission is not among those named agencies. Independent agencies, such as this Commission, are requested to but not compelled to comply with the provisions of the order. While the Commission makes substantial efforts to address environmental justice issues, as reflected in the Environmental Justice section 4.9.8 of the EIS, the Executive Order does not create any legally enforceable rights, and any failure on our part to satisfy the non-binding provisions does not offer a basis for challenging the legitimacy and validity of our NEPA review. *See, e.g., City of Tacoma, Washington*, 86 FERC ¶ 61,311, at 62,073 (1999).

and widely distributed, and thus not disproportionately concentrated in minority and low-income areas.⁷⁵

46. EIS section 4.11.1, Air Quality, considered existing air emissions in the project area (including emissions associated with Clean Air Act Title V facilities), along with the project's potential emissions, and determined that (1) the project's construction-related emissions would be temporary, and taking into account the impact of the mitigation measures we imposed, would not have a significant impact on regional air, and (2) the project's operation-related emissions would meet all applicable regulatory requirements. We concluded that the cumulative impact resulting from project-related emissions would not be significant, and by making additional supplies of cleaner burning natural gas available to substitute for heavy heating oil to fuel existing and future residential, commercial, and industrial facilities, could result in an improvement in regional air quality.

47. We believe the assessment in the EIS of the project's potential health impacts on minority and low-income populations provides a sufficiently hard look at this issue. In addition, we took into consideration comments on the conclusions in the EIS concerning the project's potential health impacts. Based on our review, we directed the applicants to make changes to the proposed route and to adopt construction measures that will reduce all adverse environmental impacts to acceptable levels. In view of this, we find no cause to undertake the more extensive and detailed examination of health impacts as requested on rehearing.

6. Radon

48. The Sierra Club, Food & Water Watch, and No Gas Pipeline renew their claim that gas extracted from the Marcellus Shale entrains radon which will not decay to safe levels during the journey from wellhead to burnertip, and assert the Commission has given only cursory consideration to this issue. They contend the Commission relied on outdated and inapposite studies, in contrast to a more recent study submitted by the parties,⁷⁶ and failed to quantify or qualitatively assess the potential for radon exposure. As examples of the Commission's shortcomings in quantification, the

⁷⁵ See EIS section 4.9.8, Environmental Justice; *see also* section 4.11.1.3, Air Emission Impacts and Mitigation, which describes measures imposed to minimize exposure to air emissions.

⁷⁶ *Radon in Natural Gas from Marcellus Shale*, study by Dr. Marvin Resnikoff, Ph.D., submitted by the Sierra Club, Food & Water Watch, and No Gas Pipeline in a May 10, 2012 *Motion to Supplement the Record* and also included with the parties' *Request for Rehearing*.

parties point to the Commission's observations that (1) improvements in ventilation and appliance efficiency have reduced indoor exposure to the byproducts of gas consumption, (2) radon levels in gas at the wellhead are reduced when that gas is processed to remove impurities, (3) radon will decay as the gas is being transported, and (4) the new pipeline is designed to access gas from diverse supply sources.

Commission Response

49. In addressing radon we did not, as is alleged, overlook the results of relevant and recent research in the field.⁷⁷ The Sierra Club, Food & Water Watch, and No Gas Pipeline do not identify allegedly neglected materials, other than the study by Dr. Marvin Resnikoff. While we expressed our disagreement with the conclusions of the Resnikoff study in the May 2012 Order, the study was not entered into the record until 11 days before the Order was issued, an interval that did not allow us time to fully describe our assessment and response. We do so below.

50. Resnikoff references studies by Gogolak and Johnson that we relied on in considering radon, both of which concluded that indoor radon concentrations resulting from the use of natural gas in the home are unlikely to pose a radiological hazard to domestic users.⁷⁸ Resnikoff states that Gogolak and Johnson make

⁷⁷ See EIS section 4.11.1.5, Radon Exposure. The Sierra Club, Food & Water Watch, and No Gas Pipeline urge that we quantify improvements in ventilation, appliance efficiency, and building codes, or changes in radon concentrations attributable to gas processing. While we are comfortable relying on observable trends, we did not find requisite data readily available to permit us to specify numerical values. These parties also fault our failure to quantify the composition of the gas in the new pipeline by its origin. As we observed in our May 2012 Order, the applicants will be capable of drawing on gas supplied from numerous domestic and foreign producing fields; consequently, it is not possible to anticipate the components of the comingled gas stream. As we observed, the applicants could operate the NJ-NY Project at full capacity without a molecule of Marcellus gas. While it is likely that some of the gas flowing in the new pipeline will come from the Marcellus formation, there is no reliable way to predict what portion that might be.

⁷⁸ Gogolak, C., *Review of ²²²Rn in Natural Gas Produced from Unconventional Sources*. Prepared for the U.S. Department of Energy, Environmental Measurements Laboratory as DOE/EML-385, New York, New York (1980), and Johnson, R., D. Bernhardt, N. Nelson, and H. Calley, *Assessment of Potential Radiological Health Effects from Radon in Natural Gas*, Prepared for the U.S. Environmental Protection Agency, Office of Radiation Programs as EPA-520/1-83-004, Washington, D.C. (1973).

assumptions about the average volume of a home and the number of air interchanges per hour “which are not necessarily appropriate to apartments in major urban areas, such as New York City,”⁷⁹ and in response Resnikoff applies his own apartment-specific volume and air interchange assumptions. Resnikoff concludes that exposure to Marcellus-derived gas has the potential to produce between 1,182 and 30,448 excess lung cancer deaths in New York.⁸⁰

51. Resnikoff relies on three well logs to estimate a radon concentration of 2576 PicoCuries per liter (pCi/L) in Marcellus-sourced gas. In contrast, Gogolak reviews the radon concentration at over 1300 wells – derived variously from well logs, core samples, and direct measurement at the wellhead – to determine a value of 151 pCi/L in Devonian-sourced gas (of which the Marcellus is a subset).⁸¹ Given Resnikoff’s limited sample, we see no reason to reject the far more extensive Gogolak estimates of radon concentration. Further, Resnikoff’s results have not gone uncontested.

52. The applicants present a rebuttal that includes a report by Dr. Lynn R. Anspaugh, concluding that Resnikoff erred in estimating radon concentration and cancer deaths.⁸² Whereas Resnikoff predicts the radon concentration in gas delivered to end users in New York City will be 1953.97 pCi/L, Anspaugh finds that gas samples recently taken from Texas Eastern’s pipeline at Lambertsville, New Jersey, about 70 miles away from New York City, have a radon concentration of approximately 17 pCi/L. Anspaugh states the Lambertsville point reflects the character of the gas delivered to customers in New Jersey and New York.⁸³

⁷⁹ Resnikoff study at 3.

⁸⁰ *Id.* at 2.

⁸¹ Johnson reports a lower figure of 37 pCi/L, but this is for gas from shale formations in the Southeast and Southwest, which generally has a lower radon content than gas from Devonian deposits. We note in passing that Gogolak concluded that massive fracturing techniques do not appear to raise the relative concentration of radon in natural gas. However, the applicability of this conclusion to contemporary hydraulic fracturing is open to question, given that the Gogolak study relied on data accumulated from the Plowshare program, in which fracturing was induced by nuclear explosions.

⁸² Texas Eastern and Algonquin *Answer to Rehearing*, Exhibit A, Lynn R. Anspaugh, *Scientific Issues Concerning Radon in Natural Gas* at 8, n.2 (July 5, 2012).

⁸³ Tests at points further west on the applicants’ systems, i.e., closer to the Marcellus production areas, measure, as would be expected, increasing concentrations

Anspaugh maintains that knowing the radon concentration at this downstream point makes it unnecessary to measure radon at the wellhead and then extrapolate theoretical values for radon decay over time and dilution due to processing, storage, and comingling.⁸⁴ Anspaugh states that applying Resnikoff's apartment-specific volume and air interchange assumptions to the radon concentration measured in the gas stream at Lambertsville results in an insignificant health risk for gas consumers.⁸⁵

53. The applicants also submit a report by Risk Sciences International (RSI)⁸⁶ which assesses the radon-induced cancer risk from gas cooking, using the 17 pCi/L radon concentration measured in the Texas Eastern's gas stream at Lambertsville and Resnikoff's volume and air interchange assumptions.⁸⁷ RSI finds that under these conditions, as well as others using slightly different underlying assumptions, radon exposure would lead to lifetime cancer risk range of less than one chance in one

of radon. The test point closest to New York City was the Mahwah, Jew Jersey interconnect, about 50 miles away, where the measured radon content of 16.9 pCi/L nearly matches that at Lambertsville.

⁸⁴ In addition to arguing for the methodological advantage of measuring radon at points closer to end users, Anspaugh challenges Resnikoff's wellhead concentration results, questioning a conversion calculation and the reliability of his data.

⁸⁵ Anspaugh considers an average annual dose over a 30-year period, and calculates the risk of lung cancer associated with radon in gas used in unvented ovens, using Resnikoff's volume and air interchange assumptions, to be one in 100,000 – well below the one in 10,000 risk deemed acceptable by the EPA (*see* Fields TJ, Jr. *Clarification of the Role of Applicable, or Relevant and Appropriate Requirements in Establishing Preliminary Remediation Goals under CERCLA*, Washington, D.C., EPA, OSWER No. 9200.4-23; Luftig SD and Weinstock L., *Establishment of Cleanup Levels for CERCLA Sites with Radioactive Contamination*, Washington, D.C., EPA, OSWER No. 9200.418; 1997; and the EPA regulatory standards at 40 C.F.R. § 300.430(e)(2)(i)(A)(2) (2012)).

⁸⁶ Texas Eastern and Algonquin *Answer to Rehearing*, Exhibit B, RSI, *An Assessment of the Lung Cancer Risk Associated with the Presence of Radon in Natural Gas Used for Cooking in Homes in New York State* (July 4, 2012).

⁸⁷ Resnikoff assumes a dwelling volume of 183 cubic meters and 0.71 air exchanges per hour; RSI uses virtually the same figures of 181 and 0.7, respectively.

million to one chance in 10,000. This is within the risk range that the EPA considers “negligible.”⁸⁸

54. The Sierra Club, Food & Water Watch, and No Gas Pipeline refer to their October 31, 2011 comments on the draft EIS, in which questions are raised by Dr. James W. Ring about radon exposure and about the potential for radon decay to deposit lead in pipelines, and complain we did not respond adequately to these concerns. Dr. Ring’s comments on the potential danger of radon decay producing lead deposits in gas pipelines are speculative, and he offers no documentation that this did or will present an actual health hazard.

55. In response, the applicants present a report which concludes that “[i]nsignificantly small amounts of stable lead, which is the ultimate decay product of radon, will accumulate on the inside wall of the pipeline, but only long before the pipeline reaches any customer’s residence. Accordingly, lead does not create any health risk to the natural gas customer.”⁸⁹ Dr. Ring does not identify any evidence of any danger, and we are not aware of, and know of no research that has detected, any danger associated with radon-to-lead decay in gas pipelines producing health hazards for gas users.

56. In view of the above, we believe our review incorporated representative available and adequate quantitative and qualitative data that allowed us to reach an informed conclusion. We see no need to sponsor additional studies,⁹⁰ and

⁸⁸ See *Evaluation of Guidelines for Exposures to Technologically Enhanced Naturally Occurring Radioactive Materials*, National Research Council, at p. 131, National Academy Press, Washington D.C., 1999.

⁸⁹ Texas Eastern and Algonquin *Answer to Rehearing*, Exhibit A, Lynn R. Anspaugh, *Scientific Issues Concerning Radon in Natural Gas* at 8, n.2 (July 5, 2012.)

⁹⁰ See, e.g., *Sierra Club v. Froehlke*, 486 F.2d 946, 951 (7th Cir. 1973), in which the court observes that NEPA “does not require that every conceivable study be performed and that each problem be documented from every angle to explore its every potential for good or ill. Rather, what is required is that officials and agencies take a ‘hard look’ at environmental consequences.” (*Quoting Sierra Club v. Froehlke*, 345 F. Supp. 440, 444 (1972)). The court adds that “[i]t is doubtful that any agency, however objective, however sincere, however well-staffed, and however well-financed, could come up with a perfect environmental impact statement in connection with any major project.” (*Quoting Environmental Defense Fund v. U.S. Army Corps of Engineers*, 342 F. Supp. 1211, 1217 (E.D. Ark. 1972), *aff’d* 470 F.2d 289 (8th Cir. 1972)).

accordingly affirm our finding that the project's potential transportation of Marcellus-sourced gas will not pose a health hazard to end users.

7. Polychlorinated Biphenyls

57. The May 2012 Order approved the abandonment of approximately 8.95 miles of pipeline between Linden, New Jersey, and the Borough of Staten Island, New York, with 4.14 miles of this pipe to be abandoned in place. EIS section 2.3.2.4, Abandonment Construction Methods, states that all of the abandoned sections of pipe, including those abandoned in place, will be emptied of all gas, then cleaned and inspected for liquids, with any remaining liquids removed and managed in accordance with applicable federal and state laws. The pipe that is left in place will also be filled with grout, or with air or nitrogen, then sealed and capped.⁹¹ In addition, EIS section 4.8.6, Hazardous Waste Sites, directs that wipe sampling for PCBs be conducted and that any free-flowing liquids from the abandoned sections be removed and managed in accordance with applicable federal and state laws.⁹²

58. The Sierra Club, Food & Water Watch, and No Gas Pipeline state that because portions of the pipe left in place may be contaminated with PCBs, the Commission should direct that any PCB-contaminated segments be properly removed and disposed of. The parties complain the EIS does not describe the wipe sampling procedure for sections of pipeline that are abandoned in place. The parties contend the requirements in the final EIS and May 2012 Order for PCBs are inadequate to ensure the safety of ecosystems, wetlands, and the public.

Commission Response

59. We believe our discussion and decision concerning abandoning segments of pipeline by leaving it in place was sufficient to identify, evaluate, and respond to the risks associated with PCB-contaminated pipe. We clarify that, as directed in the EIS, the applicants will adhere to the EPA's PCB regulations in 40 C.F.R. Part 761 (which include a description of the wipe sample procedures for pipe that is abandoned in place), the Spectra Energy Companies' Standard Operating Procedure, and any applicable state and federal laws. The applicants' adherence to these regulations and procedures will ensure that the abandonment in place of any PCB-contaminated pipe is done in a manner that protects the safety of ecosystems, wetlands, and the public. We therefore find no need for further review and no need to develop additional plans and procedures specific to the segments of pipeline that the applicants will abandon.

⁹¹ Final EIS at pp. 4-163 to 4-164.

⁹² *Id.* at p. 4-164.

8. Cyber Security

60. Jersey City asserts there is “a significant, real risk of the pipeline being targeted” for a physical or cyber attack⁹³ and accuses the Commission of “refusing to address the environmental effects of a terrorist attack on the proposed pipeline.”⁹⁴ The Sierra Club, Food & Water Watch, and No Gas Pipeline stress gas pipelines’ supervisory control and data acquisition (SCADA) and distributed control system operations’ vulnerability to cyber attack, and fault the May 2012 Order for having “failed to address the issue at all.”⁹⁵

Commission Response

61. In considering the threat of deliberate damage to the project, we observed that the applicants participate in various activities to enhance security in close collaboration with the U.S. Department of Homeland Security’s (DHS) Transportation Safety Administration (TSA) and industry groups, including the applicants’ Information Technology and Corporate Security groups being certified and trained through the DHS and working closely with local, state, and federal agencies reviewing and developing safeguards against cyber threats.⁹⁶ Our review of and response to this case is consistent with our approach in prior cases.

⁹³ The Jersey City *Request for Rehearing* at p. 26. To back up this claim, Jersey City points to the U.S. Department of Homeland Security (DHS) *Homeland Security Grant Program, Guidance and Application Kit* (May 2011), http://www.fema.gov/pdf/government/grant/2011/fy11_hsgp_kit.pdf. In this document, DHS explains that funding to protect against risks associated with terrorist attacks is allocated according to a risk analysis of the 100 most populous metropolitan areas in the U.S., with the Jersey City and Newark area ranked among the 11 highest risk areas.

⁹⁴ *Id.* at p. 24

⁹⁵ The Sierra Club, Food & Water Watch, and No Gas Pipeline *Request for Rehearing* at p. 23.

⁹⁶ See EIS section 4.12.4 and p. 4-242. See generally EIS section 4.12, Reliability and Safety, since as we have observed, the environmental impacts from any facilities’ failure would be the same whether damage was caused intentionally or accidentally, therefore the “safety and environmental compliance requirements we impose on energy facilities are to ensure the facilities’ physical and operational integrity, and thereby protect the facilities against all sources of harm, whether natural

62. We recognize that Jersey City, in comparison to most other urban areas, is classified as being at higher risk of a terrorist attack. We nevertheless found that for the NJ-NY Project, as for other natural gas projects, the risk of a terrorist attack was unpredictable, and that such unpredictability was not a reason to reject the project.⁹⁷ We note the TSA's most recent threat assessment concludes "with high confidence that the terrorist threat to the U.S. pipeline industry is low" and finds "no specific or credible threat information indicating that violent transnational extremist groups or domestic extremists are actively plotting to conduct attacks on the U.S. pipeline industry."⁹⁸

63. The parties requesting rehearing recount damage to the Trans-Siberian pipeline due to a 1982 cyber attack on its SCADA system software that caused compressors to overrun and over-pressure the pipeline. The applicants point out that SCADA system security has improved markedly since 1982, and state that the upstream compressors on the Texas Eastern system, unlike those on the Trans-Siberian system in 1982, are equipped with overpressure protection devices, are not linked to the Spectra Energy Companies' SCADA system or any other computer program, and are therefore not likely vulnerable to a similar cyber attack.

64. As more recent examples of cyber attacks, the parties seeking rehearing cite the 2010 Stuxnet computer worm attack on the SCADA system governing the operation of centrifuges and a DHS report of a series of cyber-intrusions targeting natural gas pipeline sector companies in March 2012.⁹⁹

(e.g., an earthquake) or by the hand of man." *Transwestern Pipeline Company, LLC*, 122 FERC ¶ 61,165, at P 56 (2008).

⁹⁷ As we commented in *Broadwater Energy LLC*, 124 FERC ¶ 61,225, at P 104 (2008): "The continuing need to construct facilities to support the future natural gas pipeline infrastructure is not diminished by the threat of any such unpredictable acts."

⁹⁸ See *Keeping America's Pipelines Safe and Secure: Key Issues for Congress (Keeping Pipelines Safe)*, Congressional Research Report R41536, at 4 (March 13, 2012), quoting *Pipeline Threat Assessment*, TSA Office of Intelligence, at 3 (January 18, 2011).

⁹⁹ Citing the *Industrial Control Systems – Cyber Emergency Response Team Monthly Monitor*, at 1 (April 2012). See http://www.us-cert.gov/control_systems/pdf/ICS-CERT_Monthly_Monitor_Apr2012.pdf.

65. In the EIS, we observe that the applicants participate in various activities to enhance security in close collaboration with TSA and industry groups, including the applicants' Information Technology and Corporate Security groups being certified and trained through the DHS and working closely with local, state, and federal agencies reviewing and developing safeguards against cyber threats. We observe in the May 2012 Order that "the project's facilities would be designed, constructed, operated, and maintained to meet the DOT Minimum Federal Safety Standards set forth in 49 C.F.R. Part 192 and in other applicable federal and state regulations."¹⁰⁰ Thus, the NJ-NY Project will be subject to compliance with all applicable state and federal cyber security provisions. Because the applicants are compelled to protect their facilities and operate their systems in accord with all applicable cyber security requirements, we find no need to impose additional Commission-specific directives at this time.

9. Issuing Certificate Authorization in Advance of Other Necessary Federal Authorizations

66. Jersey City believes the Commission erred by issuing certificate authorizations in advance of the applicants' receipt of a water quality certification under section 401(a)(1) of the Clean Water Act¹⁰¹ from the New York Department of Environmental Conservation. The applicants answer that the New York Department of Environmental Conservation issued a section 401 certificate on March 28, 2012, weeks before issuance of the Commission May 21, 2012 Order.

Commission Response

We verify that the New York Department of Environmental Conservation reached a favorable finding on the applicants' water quality certification request prior to issuance of our May 2012 Order. Thus, the parties' objection to the date of the Order's issuance is moot.

¹⁰⁰ May 2012 Order, 139 FERC ¶ 61,138 at P 85; *see also* P 122. These safety and security requirements are enforced by DOT's Pipeline and Hazardous Materials Safety Administration (PHMSA).

¹⁰¹ 33 U.S.C. § 1341(a)(1) (2006).

10. Rate Subsidization

67. Jersey City states that the May 2012 Order permits Texas Eastern to establish a new rate zone, which it contends is inconsistent with Commission policy¹⁰² because it will compel existing shippers to subsidize the costs of the new facilities.

Commission Response

68. We believe the approved incremental rate, and the invitation to Texas Eastern to create a new rate zone, are consistent with our Certificate Policy Statement's aim of preventing existing shippers from subsidizing an expansion that does not serve them. Expansion shippers will pay the full cost of the new facilities through the incremental rate, and our approval of an incremental recourse rate for firm service made available by the NJ-NY Project (a rate that is higher than Texas Eastern's existing Zone M3 rate) ensures existing shippers will not subsidize NJ-NY Project costs.

69. In addition, if Texas Eastern establishes a new rate zone for service on the new pipeline, existing shippers will not subsidize the pipeline's costs, because the new pipeline will make available a new 15.2-mile transportation path extending Texas Eastern's existing system to a new delivery point in Manhattan; i.e., the new pipeline will reach new delivery points that are not currently served by Texas Eastern's existing system with the costs for that expansion included in the incremental rate and recovered from expansion shippers. Existing shippers will only pay the additional cost of the new rate zone if they elect to transport gas to the new Manhattan delivery point on a secondary or interruptible basis. This is consistent with the Commission's policy that existing shippers be provided with secondary rights at no additional fee to points within a zone in which they are paying a reservation charge (for which the facility costs are included in the reservation rate) but pay an additional fee to access points on a secondary basis outside of the zone. Therefore, we affirm that the rate treatment approved for the NJ-NY Project in the May 2012 Order is consistent with our policy and will preclude any improper subsidization of the cost of the new facilities by existing shippers.

¹⁰² *Certification of New Interstate Natural Gas Pipeline Facilities (Certificate Policy Statement)*, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified* 92 FERC ¶ 61,094 (2000).

11. Property Values and Future Development

70. Jersey City asserts the NJ-NY Project will “cripple the City’s ability to continue its booming development,”¹⁰³ and rejects the assessment in the EIS that concludes otherwise. As evidence of “the pipeline’s likely destructive effect on Jersey City’s development,” Jersey City contends it would lose 6.5 million square feet of waterfront development as a result of the project.¹⁰⁴ Jersey City contends we failed to examine the impact of the pipeline on urban property values and future development and insists the physical intrusions of the pipeline and M&R station will cost it \$26 million annually in lost tax revenue.¹⁰⁵

Commission Response

71. In assessing these issues, we explained that because data examining the impact of the pipeline on urban property values was unavailable, we would extrapolate from studies of pipeline impacts in rural and suburban settings.¹⁰⁶ All the studies we examined showed that the presence of a pipeline does not drive down property values or resale prices and does not adversely affect homeowner insurance rates. While Jersey City challenges the applicability of these studies, it does not present any study to demonstrate a contrary outcome. We found that although the construction phase would impose temporary economic burdens (while also providing a temporary boost due to construction jobs and tax revenue), the project would have no long-term negative economic impacts, because once the underground pipeline is in place, aboveground impacts will be repaired and normal surface traffic and access to businesses will be restored.¹⁰⁷ We further found that the presence of the pipeline

¹⁰³ Jersey City’s *Request for Rehearing* at p. 32.

¹⁰⁴ *Id.* at p. 34.

¹⁰⁵ *Id.* at p. 33, referencing a Rutgers Economic Advisory Service model in support of its assessment of future financial losses, which it describes as a more reliable and less speculative prediction of the city’s future development than the material the Commission relied upon. *See also* Jersey City’s *Comment* at pp. 19-20 (January 26, 2011).

¹⁰⁶ *See* EIS section 4.9.6, Property Values, and PM3-76 at p. II-148.

¹⁰⁷ We noted that while the pipeline’s 50-foot-wide permanent right-of-way would preclude certain uses, such as installing permanent aboveground structures atop the pipeline, business owners would be compensated for such encumbrances. *See* final EIS at p. 4-184.

should not hamper future development, and based this finding in part on the inconsequential impact of an LNG terminal located in the urban setting of Everett, Massachusetts, on surrounding redevelopment.

72. Jersey City discounts the comparability of the potential economic impacts of the NJ-NY Project to those of the Everett LNG terminal, stating the Everett terminal was over a mile away from areas of redevelopment, whereas here the NJ-NY Project's new gas pipeline facilities will cut through established neighborhoods and areas of planned redevelopment. We continue to believe that the example of successful urban redevelopment around an LNG terminal, a structure far more substantial than the pipeline that will traverse Jersey City, is applicable here. As previously observed, after installation, the new pipeline will encumber only a 50-foot-wide right-of-way along its path through Jersey City, with next to no constraints on land use above the portions of the route that will be completed by horizontal directional drill (HDD), which represents a little over 20 percent of the pipeline route. In view of this relatively minor footprint of the pipeline and M&R station, we disagree with Jersey City's contention that the project will diminish potential waterfront development by 6.5 million square feet.

73. Jersey City complains about the project's potential impact on the Jersey Avenue Redevelopment Plan and the Newport Redevelopment Plan, but makes no claim that the project will preclude realization of either Redevelopment Plan. We do not expect the NJ-NY Project to deter future development; however, to the extent the project's construction and right-of-way could delay, disrupt, or diminish these Plans, compensation can be sought from the applicants via negotiation; otherwise a court will establish appropriate payment in an eminent domain proceeding.¹⁰⁸ The applicants point to recent indications that the project is not constraining investment or development in Jersey City.¹⁰⁹ We expect the availability of an additional supply of competitively priced energy will be more of a benefit than a burden to future development. In addition, given that New York City, Bayonne, and Jersey City do

¹⁰⁸ See May 2012 Order, 139 FERC ¶ 61,138 at P 114, in which we assure the Newport Associates Development Company (Newport) that the "applicants must compensate Newport, as well as all other landowners, for any constraints an easement may impose on a property's current and future use." We note that Newport, which heretofore has participated vigorously in this proceeding to protect its interests, has not sought rehearing.

¹⁰⁹ Texas Eastern's and Algonquin's *Answer to Request for Rehearing* at p. 52, n. 224, cites a Rutgers Economic Advisory Service *Forecast of April 2012: New Jersey: The Recovery is Underway* at 7, 14-16, which takes note of business entities moving into Jersey City and plans for commercial and residential building projects.

not currently meet health-based air quality standards, the cities should benefit by an improvement in air quality if gas delivered by the project is used in place of other fossil fuels.¹¹⁰

12. Alternatives

74. Jersey City renews its objection to (1) locating an M&R station in Jersey City, particularly in light of our decision to preclude placing such a station on the Gansevoort Peninsula on the New York City side of the Hudson River, and (2) rejecting the Brooklyn route alternative based on Brooklyn being a densely populated neighborhood with narrow streets and hundreds of buildings and buried utilities and other subsurface infrastructure, particularly in light of Jersey City's sharing the same urban characteristics.

Commission Response

75. We affirm that the rationale stated in the EIS for selecting a site for the M&R station was reasonable. Jersey City's objection reflects an imprecise reading of that rationale. Jersey City states that we "approved the construction of the M&R Station on Jersey City property despite advanced plans to build [a residential/commercial development] *on virtually the same land.*"¹¹¹ Jersey City's italicized distinction is crucial to our conclusion. As explained in the EIS, although "the city indicated that the proposed M&R station would conflict with a proposed development on the site of the old Van Leer Chocolate Factory at 110 Hoboken Avenue ... [w]e have determined that the proposed M&R station site would not be located on the 110 Hoboken Avenue property."¹¹² In other words, because "*virtually the same land*" is not the same as the same land, the M&R station and the planned development – which are close by but do not overlap one another – can go forward without conflict.¹¹³ By way of contrast, the Gansevoort Peninsula site would place the M&R

¹¹⁰ See May 2012 Order, 139 FERC ¶ 61,138 at P 23 and the final EIS at p. 3-4.

¹¹¹ Jersey City's *Request for Rehearing* at p. 19.

¹¹² Final EIS at p. 3-171.

¹¹³ The EIS observes that the development site runs adjacent to the approved pipeline route, and 1.6 acres of the development site would be used as a temporary workspace for eight months during the pipeline's construction. Texas Eastern states that the landowner has yet to propose a definitive time frame for construction and expects to coordinate with the landowner to resolve any conflicts that may arise. See final EIS at p. 3-171 and Appendix T, p. T-7.

station on the same land that the Hudson River Park Trust plans to develop into a park and ball field.

76. We accept that the Brooklyn Alternative and the route through Jersey City share similar urban characteristics and would suffer similar adverse impacts. We nevertheless affirm our rejection of the Brooklyn Alternative on the grounds that the scale of the impacts would be markedly greater. As discussed in the EIS: the Brooklyn Alternative is 3.8 miles longer than the approved route; nearly 70 percent of the Brooklyn Alternative (approximately 13.0 miles) would need to be constructed in city streets, whereas this would be the case for only 13.7 percent (approximately 2.77 miles) of the approved route; and the Brooklyn Alternative would pass close to an estimated 800 to 900 abutting structures comprising residences, multistoried apartment buildings, churches, stores, and warehouses, as compared to an estimated 85 to 95 abutting structures along the approved route.¹¹⁴ In view of this, we concur with the determination in the EIS that “the Brooklyn Alternative would be significantly more complex, costly, and time consuming to construct and would result in more residential, commercial, and traffic impacts than the proposed route.”¹¹⁵

13. Alternate Routes

77. Jersey City believes that route variations adopted to avoid existing utilities are insufficient, and concludes: “[I]t is clear that due to the location of the existing utilities and the age and condition of these utilities, it is not feasible to install the proposed pipeline in Jersey City.”¹¹⁶ Jersey City states that the Commission has not considered the prospect of utilities breaking or failing after the pipeline is in service, with the utilities’ collapse then undermining the safe operation of the pipeline.

Commission Response

78. We believe that the adopted route variations are a pragmatic compromise that permits the project to go forward while safeguarding utilities. We expect the applicants to first “work with local authorities to try to acquire applicable local

¹¹⁴ Final EIS at p. 3-56. *See also* the final EIS LC3-3 at p. II-482, LC3-34 at p. II-504, and the application’s Resource Report 10, Alternatives, section 10.6.8, Brooklyn Alternative, at pp. 10-76 to 10-77.

¹¹⁵ *Id.*

¹¹⁶ Jersey City’s *Request for Rehearing* at p. 37.

permits. This would include permits that address potential impacts on public utility infrastructure.”¹¹⁷ Then, as explained in the EIS, prior to construction:

Texas Eastern would identify and locate existing utility lines and other sensitive resources, identified in easement agreements or by federal and state agencies, to prevent accidental damage during construction. Texas Eastern’s contractors would contact the “Call Before You Dig” or “One Call” system, or state or local utility operators, to verify and mark all utilities along the Project workspaces to minimize the potential for damage to other buried facilities in the area.¹¹⁸

The EIS goes on to describe procedures that will be followed to ensure utilities are accurately located, properly protected during construction, and restored to stable condition after construction, with Texas Eastern responsible for the repair or replacement of any damaged existing sewer or water infrastructure to the satisfaction of the city or utility owner.

79. Jersey City has recently experienced, and is currently undergoing, extensive construction work, including commercial, residential, and utility projects. Jersey City does not note any damage to its utility infrastructure as a result of this construction, and if such efforts can proceed without any noteworthy incident, we are convinced that the NJ-NY Project can do so as well. Similarly, we anticipate utility operation, maintenance, repair, and replacement can proceed without disruption to the installed pipeline. We believe the route alternatives studied and the variations adopted, along with the mitigation measures and construction procedures we require, and the liability

¹¹⁷ Final EIS at p. II-491, LA3-14.

¹¹⁸ See EIS section 4.9.4, Public Utilities, at p. 4-175. In addition, Texas Eastern states it will post weekly construction updates and provide a detailed construction schedule on the Internet, so Jersey City and other communities will be able to see where construction will be occurring on an ongoing basis. Texas Eastern’s and Algonquin’s *Answer to Requests for Rehearing* at p. 55, n. 240. Also, to ensure Jersey City sewer lines are not affected, “Applicants will seek approval to perform an internal camera inspection of existing sewer lines in proximity to the Project route prior to construction to document the existing condition,” and “[a]fter construction is completed, Applicants will again perform an internal camera survey to check for any damage to the sewer lines that may have been caused by the pipeline construction”; further, any damage to “lines and other utilities encountered along the route” will be “repaired by Applicants to the satisfaction of the utility owner.” Texas Eastern’s and Algonquin’s *Response to Comments on the Draft EIS*, at p. 20 (November 11, 2011).

attributed to Texas Eastern, are adequate to ensure the project will not adversely impact the utility infrastructure in Jersey City or in other project locations.

14. Horizontal Directional Drilling (HDD) Alternative Routes

80. Jersey City asserts the applicants and the EIS neglected to completely evaluate alternative marine routes and the use of the HDD method to cross marine routes.

Commission Response

81. The EIS takes a hard look at alternative marine routes and methods of marine crossing and describes the use of the HDD method on alternative routes and on the approved route.¹¹⁹ We believe the applicants have presented adequate information on marine routes in the application and in response to comments and data requests.¹²⁰ In view of the wealth of information in the record, we do not agree that our evaluation was inadequate.

¹¹⁹ See, e.g., EIS section 2.3.2.3, HDD, in particular the Hudson River and 18th Street/Long Slip HDDs and Transition Area subsection on pp. 2-28 to 2-30; EIS Appendix J, HDD Crossing Plans; and EIS section 3.5.4, Marine Alternatives, which finds an all-water route could not work, then reviews and rejects three mostly marine options. The HDD portions of the alternate marine routes are described under the Route and Construction Methods subsections of section 3.4.5. For example, Option B is described as crossing “beneath two PATH tunnels and the Holland Tunnel utilizing two HDDs,” noting that “[t]he bulk of the pipeline including the portion under the tunnels would be installed by HDD but some dredging would be necessary at the ends of each HDD.” *Id.* at p. 3-110.

¹²⁰ See, e.g., the application’s Resource Report 10, which contains information on marine alternatives; the applicants’ *Response to Port Authority of New York and New Jersey* (March 18, 2011), which contains further information on marine alternatives; and the applicants’ *Response to December 2, 2011 Environmental Information Request* (December 12, 2012), which describes the Hackensack River and Bergen Arches Alternative and the Chevron Alternative, additional marine alternatives addressed in EIS sections 3.6.1.3 and 3.6.1.4, respectively.

15. HDD Contingency Plan

82. Jersey City observes that in other cases, the Commission has expected applicants to have backup plans in place in case an HDD operation fails.¹²¹ Jersey City claims that in this case if an HDD fails “the Commission merely allows for more invasive drilling procedures and leaves alternative strategies unmentioned.”¹²² Jersey City alleges the Commission has given a “blind endorsement” and “tacit approval of hammering, ripping, and blasting techniques” that may be employed if an HDD fails without looking at the environmental consequences and possible mitigation measures.¹²³

83. Jersey City describes the EIS as deficient because it does not address potential impacts of project drilling on public utilities, in particular, damage errant drilling could do to the city’s sewer system. Jersey City asks that prior to construction, the applicants specify what alternate methods will be used if an HDD fails, and asks the Commission to assess the impacts of these potential alternatives.

Commission Response

84. Although we have required applicants to prepare HDD contingency plans, we do not always do so. Such plans serve to inform the applicant and the Commission of options and alternatives in the event an approved HDD operation fails. Here, the HDD procedure was considered in detail, and the partial equivalent of a contingency plan can be found in Texas Eastern’s Best Drilling Practices, Monitoring and Clean-up of Horizontal Directional Drilling Inadvertent Returns for the New Jersey-New York Expansion Project. This HDD plan describes how the HDD operations will be monitored to minimize the potential for inadvertent releases of drilling fluids, and includes agency notification protocol and corrective actions Texas Eastern will take to clean up and dispose of any drilling mud releases.

85. Further, with this project, if an HDD fails, there is no obvious secondary route or open-cut option, so it would serve no purpose to ask Texas Eastern to describe an alternative approach. If an HDD fails, the applicants will need to confer with state

¹²¹ *Citing AES; Southeast Supply Header, LLC*, 120 FERC ¶ 61,257 (2007); *East Tennessee Natural Gas Company*, 101 FERC ¶ 61,188 (2002); *Georgia Strait Crossing Pipeline LP*, 100 FERC ¶ 61,280 (2002); and *Iroquois Gas Transmission System, L.P.*, 97 FERC ¶ 61,379 (2001).

¹²² Jersey City’s *Request for Rehearing* at p. 30.

¹²³ *Id.* at p. 31.

and federal agencies in order to request the necessary authorizations to proceed with another method. In the case of the Commission, for anything other than the most minor modification, the applicants will be obliged to submit an amended application, which will afford Jersey City and the public the opportunity to comment and voice concerns. Any construction undertaken in lieu of an HDD will have to adhere to all restrictions described in the EIS and May 2012 Order. Given our thorough review of and requirements imposed upon HDD operations, we find there was and is no need for an HDD Contingency Plan.

16. Safety

86. Jersey City acknowledges that the applicants “have agreed to use construction methods that exceed current PHMSA standards,” but dismisses this, declaring the “current PHMSA classifications are insufficient to account for the increased consequences that pipeline failures would have in densely populated urban areas.”¹²⁴ Jersey City argues that the Commission’s obligation to find a project is in the public interest compels us to impose additional safety standards.

Commission Response

87. We reject the proposition that we cannot find the project to be in the public interest unless we graft more stringent safety requirements on top of DOT’s PHMSA 49 C.F.R. Part 192 regulations. Federal oversight of pipeline operations is founded on the PHMSA regulations, and compliance with these regulations defines safe operation of a pipeline.¹²⁵ PHMSA’s regulations were consciously crafted to apply different standards to different settings, with requirements ratcheting up as population density increases. PHMSA’s highest Class Location 4 standards will apply in Jersey City, in addition to which, “Texas Eastern has committed to design more than half of its proposed pipeline to exceed DOT’s requirements.”¹²⁶ We have given detailed consideration to concerns arising out of locating facilities in a densely populated urban setting and remain convinced, for reasons discussed in the EIS and the

¹²⁴ Jersey City’s *Request for Rehearing* at pp. 35-36.

¹²⁵ See final EIS section 4.12.1, Safety Standards at pp. 4-235 to 4-236 and *Memorandum of Understanding Between DOT and FERC Regarding Natural Gas Transportation Facilities*, at p. 2 (January 15, 1993), acknowledging DOT’s “exclusive authority to promulgate Federal safety standards used for facilities used in the transportation of natural gas.”

¹²⁶ May 2012 Order, 139 FERC ¶ 61,138 at P 99.

May 2012 Order,¹²⁷ that the NJ-NY Project can be constructed and operated safely in an urban environment.

88. Jersey City asks for a description of how often the pipeline will be monitored, patrolled, and inspected, and requests the results of the inspections. These matters are discussed in EIS section 4.12.1, Safety Standards. The particulars of how to perform these activities, and how often, and how to report results are set forth in the PHMSA regulations. As noted above, since these are the federal regulations that govern the safety of gas facilities, compliance with these regulations monitoring, patrolling, inspection, and reporting requirements of the PHMSA regulations will be sufficient to satisfy all Commission requirements.

17. Contaminated Soil

89. Jersey City reasserts its contention that installing the pipeline through known and unknown contaminant sites could cause additional contamination and adversely affect the health and safety of the general public, and insists the Commission has not adequately addressed this issue.

Commission Response

90. Given the historic industrial land uses in the majority of the project area, parties were aware from the outset that construction would take place on contaminated sites. Accordingly, the applicants, in consultation with state agencies (including the New Jersey DEP), prepared an Excavation Management Plan for Handling Regulated Soil and Groundwater for the NJ-NY Project (Excavation Management Plan), which includes a Soil Management Plan and Groundwater Management Plan. Contaminated locations were identified and are described in EIS section 4.2.2 in Table 4.2.2-1, Soil Contamination/Hazardous Site Summary for the NJ-NY Project.¹²⁸ EIS section 4.2.3, General Impact and Mitigation, describes procedures to ensure unrecognized contamination is identified, with Environmental Condition No. 15 directing the applicants, prior to construction, to file “results of the soil and groundwater sampling program and any additional mitigation measures not

¹²⁷ See, e.g., May 2012 Order, 139 FERC ¶ 61,138 at PP 121-122. While locating gas facilities in a densely populated area can involve difficulties that might not arise with a project in a remote rural setting, we have considered and addressed these matters before, and found placing pipelines in urban areas can be consistent with the public convenience and necessity, for example, the projects described in the final EIS’ PM3-150 at II-218.

¹²⁸ Final EIS at pp. 4-16 to 4-18.

included in the Excavation Management Plan.”¹²⁹ Further, EIS section 4.8.6, Hazardous Waste Sites, notes the applicants will follow their Soil Management Plan and Groundwater Management Plan procedures when contaminated soil and groundwater are encountered during construction.¹³⁰ Finally, EIS sections 5.1.2, Soils, and 5.1.3, Water Resources, also addresses means to manage contamination.

91. Other than stating its general concern regarding contamination, Jersey City does not specify any adverse health and safety impacts on the general public attributable to recent and ongoing construction work in Jersey City. We anticipate the NJ-NY Project to similarly avoid engendering any adverse health and safety impacts. We believe the requirements we impose on the applicants will result in the safe handling and management of all contaminated soils in compliance with state and federal regulations.

92. Jersey City asks to be provided with information that is submitted as directed by Environmental Condition Nos. 15, 16, and 23. Because such submissions become part of the public record in this docket, Jersey City and others will have access to this information. For immediacy and ease, we suggest access via our on-line eLibrary database, and in particular via our eSubscription service.¹³¹

93. Jersey City proposes that the Environmental Condition No. 23 requirement that the applicants submit documentation of consultation with the New Jersey DEP

¹²⁹ May 2012 Order, 139 FERC ¶ 61,138 at P 64; *see also* the discussion of soil and groundwater contamination at PP 74-75 (potential groundwater contamination is addressed by Environmental Condition No. 16). The Excavation Management Plan is attached as Appendix I to the final EIS and as Appendix IP-23 to the applicants’ June 7, 2012 submission of their Implementation Plan.

¹³⁰ Components of the Soil Management Plan and Groundwater Management Plan are described in EIS sections 4.2.3 and 4.3.1.7, respectively.

¹³¹ The information described in Environmental Condition Nos. 15, 16, and 23 was submitted on June 7, 2012, and can be found under Accession No. 20120607-5069. In response to various requests by Jersey City for specific information, the applicants state they have filed or will file information required by the Commission; however, for information requested by Jersey City but not required by the Commission, they “are not planning a formal submission of the requested information to the Commission, but instead are willing to respond directly and provide a reasonable formulation of this information to Jersey City.” Texas Eastern’s and Algonquin’s *Answer to Requests for Rehearing* at p. 60.

regarding the Excavation Management Plan be altered to require a letter of support for the Plan from the New Jersey DEP.

94. We mandate consultation to ensure the New Jersey DEP will help to develop the Plan. If the New Jersey DEP has unresolved concerns following consultation, we expect those concerns will be conveyed to the Commission for further discussion and resolution. We believe this procedure is sufficient to guarantee the Plan is fully vetted by the interested parties; consequently, we see no need to require a letter of support from (and in effect confer veto authority upon) the New Jersey DEP. We note that project activities in New Jersey will be subject to the New Jersey DEP requirements regarding the management of contaminants uncovered during construction.¹³²

95. Jersey City asks to be provided with the applicants' Dust Control Plan required by Environmental Condition No. 27 for review. Jersey City states this Plan should include a requirement for monitoring if excavation is being performed in areas of contamination.

96. The Dust Control Plan is included as Appendix G to the Excavation Management Plan. Monitoring will be undertaken as described in these Plans and the EIS. We thus deem this request met.

97. Jersey City argues the applicants should indemnify Jersey City with respect to any liability for contaminated soil and groundwater encountered during the construction and any associated remediation. Jersey City acknowledges the comment in EIS section 4.2.3 that this issue would be addressed during easement negotiations,¹³³ but maintains it must be addressed now to assure that Jersey City will not be subject to any liability for contaminated material found within the city's rights-of-way or on municipal property.

98. We affirm that apportioning potential liability is a matter best resolved by negotiation. If a voluntary accord cannot be reached (as has been the case to date), then liability will be determined in court, in either an eminent domain or tort

¹³² See the New Jersey DEP's *Linear Construction Technical Guidance* (January 2012).

¹³³ Final EIS at p. 4-20.

proceeding.¹³⁴ The Commission plays no role in either negotiation or adjudication of such potential liabilities.

18. Gas Deliveries to New Jersey

99. Because Texas Eastern and Algonquin have yet to submit transportation agreements with the Public Service Electric and Gas Company (PSE&G), Jersey City questions whether the project will ever bring gas to New Jersey consumers. If not, Jersey City argues that the benefits of the project should be rebalanced against the burdens it will impose on New Jersey, and reconsider rerouting the pipeline to avoid Jersey City.

Commission Response

100. We do not expect the applicants to submit agreements for any prospective transportation services other than those described in the precedent agreements that were presented in support of the need for the project.¹³⁵ The applicants have declared their commitment to serve PSE&G, which is demonstrated by the project's inclusion of a new M&R station in Bayonne which can be used to facilitate deliveries to PSE&G.¹³⁶ In any event, we find no cause to rebalance the burdens and benefits of the NJ-NY Project.

19. Water Supplies

101. Having rejected the applicants' request for the city to supply it with 4.5 million gallons of water for testing and drilling operations, Jersey City asks the

¹³⁴ We note New Jersey's regulations, permits, and Linear Construction Technical Guidance set forth certain liabilities for remediation of contamination encountered during construction.

¹³⁵ See Ordering Paragraph (E) of the May 2012 Order, which states: "Prior to commencement of construction, Texas Eastern must execute contracts for service at levels and under terms and conditions equivalent to those which it represented was subscribed under precedent agreements." As discussed in the May 2012 Order at P 6, Texas Eastern signed binding precedent agreements for the full 800,000 Dth/d firm transportation capacity of the proposed NJ-NY Project with Chesapeake Energy Marketing, Inc. for 425,250 Dth/d, Statoil Natural Gas LLC for 204,750 Dth/d, and ConEd for 170,000 Dth/d.

¹³⁶ In addition, Texas Eastern declares it entered into an interconnection agreement with PSE&G on March 31, 2011. See final EIS at p. 3-39.

Commission to assess the environmental impacts of transporting water from another municipality for these purposes.

Commission Response

102. The EIS listed the Jersey City municipal supply as being one of the anticipated sources for volumes of water needed for the Merseles Street and 18th Street Long Slip HDD segments in Jersey City.¹³⁷ However, the EIS indicated Jersey City intended to limit use of its municipal supplies for the project to 330,000 gallons in order to maintain compliance with a maximum withdrawal volume of 12,000 gallon per week as specified by the Jersey City Municipal Utility Authority.

103. We recognize that the fact that Jersey City has now decided not to provide any municipal water to Texas Eastern will necessitate trucking in more water for construction purposes. However, this does not constitute cause, as Jersey City asserts, to assess the impacts of transporting more water from other areas, as all trucked water for the project will have to be obtained from permitted/approved sources and will have to be transported and disposed of in accord with all applicable federal, state, and local regulations.¹³⁸

20. Construction Procedures

104. Expressing concerns about construction methods, Jersey City: (1) advocates studying the alternative method installing the pipeline on piles and the effect this would have on existing utilities in the area; (2) requests Texas Eastern describe how it intends to monitor and control vibrations during construction; (3) requests the applicants provide a trench repair detail in the detailed design plans for it to review; (4) wants to confirm the type of backfill that will be used for in-street trenches, have the applicant indicate the strength of the flowable fill to determine if it would classify as excavatable, and be able to review and approve the backfill material; (5) requests Texas Eastern provide construction details and specifications for cathodic protection measures and locations in areas where stray electrical currents may be present; and (6) requests Texas Eastern describe how it will schedule construction work within roadways and crossings to avoid commuter traffic and school buses to the greatest extent practical.

¹³⁷ Final EIS, Table 4.3.1-5 at p. 4-31.

¹³⁸ See the EIS' consideration of Transportation and Traffic in section 4.9.5 and Increased Vehicle Traffic in section 4.9.5.2.

Commission Response

105. We have already undertaken an in-depth study of the route and the construction process, and have concluded that the NJ-NY Project's compliance with our numerous specific conditions will enable it to go forward without significant adverse environmental impacts. Jersey City's request to revisit construction methods has no bearing on our conclusion and our already-issued authorization.

106. In response to Jersey City's proposal to study installing the pipeline on piles, although we have already approved specific underground installation of the pipeline, we would be receptive to studying alternatives if the applicants propose using such methods, particularly if prompted by unanticipated difficulties encountered in the course of construction. Otherwise, unless we are presented with evidence that the approved methodology will not adequately protect against significant adverse impacts, we see no need to undertake additional studies.

107. With respect to vibrations caused by construction, Texas Eastern responds by noting that an acoustical engineer will oversee its vibration control measures.¹³⁹ With respect to trenching procedures, details and plans appear in the application¹⁴⁰ and EIS,¹⁴¹ and in view of this we see no need to permit Jersey City to inspect and

¹³⁹ The noise and vibration control measures are described in the applicants' Hudson River HDD Noise Mitigation and Noise Monitoring Plan, *see* Attachment II of their *Response to Comments on the Draft EIS* (November 15, 2011). *See also* the final EIS, HDD Vibration Noise at pp. 4-98 to 4-99.

¹⁴⁰ *See* the applications' Resource Report 1 at p. 1-33, describing backfilling and Resource Report 11 at p. 11-9, describing the flowable fill mixture that will be used as in-street backfill.

¹⁴¹ *See, e.g.*, the final EIS, Lowering-in and Backfilling at pp. 2-18:

All suitable material excavated during trenching would be redeposited into the trench using bladed equipment or backhoes. Excavated soils would be field-screened to determine whether or not the material is suitable for on-site reuse or requires additional chemical analyses to determine the level of contamination and appropriate disposal measures as outlined in the EMP. Where the previously excavated material contains large rocks or other materials that could damage the pipe and coating, padding consisting of relatively rock-free material would be placed around the pipe prior to backfilling.

approve the backfill of in-street trenches. Cathodic protection is also addressed in the application¹⁴² and EIS,¹⁴³ and we find no allegation or evidence that would merit revisiting this matter. We reach the same conclusion for the same reason regarding scheduling construction work to diminish interference with commuter traffic and school buses.¹⁴⁴

21. Noise Mitigation

108. Jersey City argues Environmental Condition No. 28, addressing noise mitigation and monitoring, should direct the applicants to evaluate the effects of all project construction noise that may be produced simultaneously in Jersey City. Jersey City asks to be provided with copies of the Noise Mitigation Plan and results of field measurements along with the appropriate time frame for the 18th Street/Long Slip, Hudson River, and Merseles Street HDDs. Jersey City also asks for a review copy of the Noise Mitigation Study for M&R stations described in Environmental Condition No. 30.

Commission Response

109. We affirm the finding in our assessment of the project's noise impacts that the simultaneous monitoring that Jersey City now proposes is not necessary. As stated in the EIS:

The impact of noise is highly localized and attenuates quickly as the distance from the noise source increases; therefore, cumulative impacts are unlikely except if one or more of the projects listed in Table 4.13-1 is constructed at the same time in the same location ... [in which case], since the majority of noise impacts associated with the Project would be limited to the

See also, Open-Cut Crossing Method at p. 2-32; In-Street Construction at pp. 2-35 to 2-36; section 4.2.3, General Impact and Mitigation at pp. 4-18 to 4-19; Hudson River Dredging at pp. 4-42 to 4-43; and Other Measures at pp. 4-244 to 4-245.

¹⁴² See the applications' Resource Report 11 at pp. 11-11 to 11-12.

¹⁴³ See, e.g., the EIS section 2.6, Operation, Maintenance, and Safety Controls at p. 2-43 and Response and Remediation at pp. 4-240 to 4-241.

¹⁴⁴ See, e.g., the applications' Resource Report 5 section 5.3.6.1, Pipeline and Aboveground Facilities at pp. 5-28 to 5-29 and the final EIS section 4.9.5.2, Increased Vehicle Traffic at p. 4-179, also see pp. 4-259 to 4-260.

period of construction and most construction activities would be intermittent rather than continuous, the Project's contribution to cumulative noise impacts would primarily be for only short periods of time when the construction activities are occurring at a given location.¹⁴⁵

110. The Noise Mitigation Plan was filed as directed on June 7, 2012, and is available in the public record.¹⁴⁶ As the remaining noise mitigation and monitoring information that Jersey City seeks is filed with the Commission, it too will be placed in the public record.

22. Traffic Management

111. Environmental Condition No. 24 directs Texas Eastern to file Traffic Management Plans for affected areas. Jersey City argues that to assess the project properly, these Plans should have been provided prior to issuance of the final EIS and certificate order. Jersey City states that based on the construction schedule, it is possible project work will occur simultaneously at different locations in Jersey City, in which case a close evaluation of the Traffic Impact Study must be performed to ensure the city is not adversely affected.

Commission Response

112. Because it can be impractical to prepare final Traffic Management Plans prior to issuance of a final EIS and final order, we routinely require, as a condition of our certificate authorization, that final plans be submitted prior to construction. In fulfillment of this requirement, the applicants submitted final plans on June 7, 2012, which may be found in the public record.

113. We believe the prior availability of draft plans,¹⁴⁷ plus the submission of final plans on June 7, 2012, have provided sufficient information and sufficient time for a

¹⁴⁵ Final EIS at p. 4-261.

¹⁴⁶ See eLibrary Accession No. 20120607-5069.

¹⁴⁷ The applicants submitted draft plans attached as Appendix IP-25 to their *Draft Implementation Plan* (May 18, 2012). The applicants observe that Jersey City, as a party on the service list in this proceeding, received a copy of their traffic management plans as a component of their May 13, 2011 data response, and add that plans were forwarded to Jersey City's Corporation Counsel on June 3, 2011; to Jersey City along with the applicants' application for Street Opening and Occupancy Permit on November 17, 2011; to Jersey City's Engineer on March 8, 2012; and to Jersey

full review of these plans before their implementation and commencement of construction activities. Given that traffic disruptions due to construction will be temporary and be limited in scope, we do not expect project work that takes place at different locations in Jersey City to have any significant adverse impact due to such work going on simultaneously.¹⁴⁸

23. Emergency Services

114. Jersey City repeats earlier concerns regarding emergency services, pointing to EIS section 4.12.1, Safety Standards, which acknowledges that the applicants will not necessarily compensate municipalities for expenses incurred by their police and fire personnel in preparing for or responding to a project-related incident. Jersey City doubts the tax revenue realized from the project will offset the municipal expenses that could be incurred as a result of an emergency. Jersey City questions whether municipalities will have the ability and capability to respond to an emergency, and seeks indemnification and protection from potential damages.

115. In particular, Jersey City is apprehensive that a pipeline explosion could damage the Jersey City Medical Center, which houses the city's the 911 Call Center, and argues that the Commission should have required Texas Eastern to study and fund improvements to the Medical Center needed to ensure it will be able to function in the event of a pipeline explosion.

Commission Response

116. Potential low-probability, high-impact events – accidental or deliberate – could cause damage to project facilities and thereby Jersey City, with damage to its Medical Center being one example. However, it is not possible to eradicate all potential for this project, or any other large utility infrastructure project, to impose costs on the community. We take this into account in acting on an application, and give full attention to the costs a project might impose, and weigh the probability and consequences of adverse events. If risks can be reduced to acceptable levels by modifications to the facilities or by mitigation measures, then we may approve the project. Subject to such modification and mitigation, we found this project to be acceptable.

City's Chief of Police on April 25, 2012. Texas Eastern' and Algonquin's *Answer to Requests for Rehearing*, Exhibit C at pp. 6-7.

¹⁴⁸ See final EIS at pp. 4-179 to 4-181 and pp. 4-259 to 4-260.

117. We affirm the finding in the EIS that in calculating costs Jersey City may incur as a result of the project, including those related to emergency services, the taxes that the applicants will pay to the city “should offset any required municipal expenses.”¹⁴⁹ In addition, the applicants will “carry insurance, which is commensurate with similarly sized corporations and similar types of assets, to appropriately respond in the event of a pipeline incident. The liability and the extent of liability for the pipeline owner/operator would be determined by the laws of the state in which an event occurs. There is no accident liability cap for the operator of a natural gas pipeline.”¹⁵⁰ In view of this – and the requirements we impose on the project’s authorization as well as the requirements other agencies impose on the project’s operation – we find the project will be constructed and operated safely and that there is no need to impose any additional requirements.

24. Jersey City M&R Station

118. With respect to the M&R station to be located in Jersey City, Jersey City requests information on the anticipated type and level of emissions, whether any pressure release valves are proposed, and details of procedures to release gas to air.

Commission Response

119. The Jersey City M&R Station will have gas-fired, inline gas heaters, with emissions similar to those from gas-fired home heating boilers. Heater emissions will require a Minor Source Air Emissions Permit from the New Jersey DEP, but will not represent a new major source and are not expected to result in any substantial changes in existing air quality. The anticipated type and level of emissions from the Jersey City M&R Station are itemized in EIS Tables 4.11.1-7, 4.11.1-9, and 4.11.1-10.¹⁵¹

120. Our consideration of the station focused on whether these emissions would comply with all applicable state and federal and air quality regulations. Having determined that the station would meet the regulatory standards, we had, and have, no cause for further consideration of the station’s facilities and operation, including whether the station will have any pressure release valves and details of procedures to release gas to air.

25. Requests for Information

¹⁴⁹ Final EIS at p. 4-224.

¹⁵⁰ *Id.*

¹⁵¹ Final EIS pp. 4-208, 4-210, and 4-211, respectively.

121. Environmental Condition No. 5 requires that all proposed realignments be submitted to the Commission prior to construction. Jersey City requests it be made aware of any proposed changes to the route and/or construction methods prior to changes being implemented.

122. Changes proposed pursuant to Environmental Condition No. 5 will be submitted to the Commission, and upon receipt the proposed changes will be placed in the public record in this docket. Thus, Jersey City will have the opportunity to monitor the record for proposed changes prior to their implementation.¹⁵² We note that proposed changes (other than extra workspace allowed by the applicants' Erosion and Sedimentation Control Plan, minor field realignments per landowner needs, and requirements that do not affect other landowners or sensitive environmental areas such as wetlands) require written Commission approval. If such approval is granted, notification thereof will be placed in the record, offering Jersey City another opportunity monitor the record for such a change prior to construction.

123. Jersey City claims the applicants are required to provide it with an Integrity Management Plan which indicates methods to assess the pipe condition along with time frames. The applicants state they will provide an overview of the requested plan to Jersey City, which will include the same information that will be provided to other municipalities.

124. Jersey City asks to be provided copies of the applicants' weekly status reports submitted to the Commission as required by Environmental Condition Nos. 8 and 9. As these weekly reports are submitted to the Commission, they are placed in our eLibrary database, where they may be viewed by Jersey City.¹⁵³

125. Jersey City asks for site-specific plans for the Hudson River Waterfront Walk, as specified in Environmental Condition No. 21. The applicants submitted these plans to the Commission on June 26, 2012¹⁵⁴ and state they have provided a copy to Jersey City.

¹⁵² As noted above, for immediacy and ease in monitoring new entries into the record in this proceeding, we suggest access via our on-line eLibrary database, and in particular via our eSubscription service.

¹⁵³ See, e.g., the report covering the week of August 6-12, 2012, submitted on August 15, 2012, and available in eLibrary, Accession No. 20120815-5161.

¹⁵⁴ See Texas Eastern's New Jersey-New York Expansion Project Hudson River HDD Hudson River Waterfront Walkway Closure Plan, Accession No. 20120626-5084.

V. Summary

126. For the reasons discussed above, requests for rehearing are denied or dismissed; the request for reconsideration is denied; requests for a stay are denied; and the motion to intervene late is denied.

The Commission orders:

- (A) The requests for rehearing are denied.
- (B) Conrail's and Jersey City's requests for stay are denied.
- (C) Conrail's motion to intervene out-of-time is denied.
- (D) Sane Energy's out-of-time request for rehearing is dismissed.
- (E) Sane Energy's request for reconsideration is denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.