

123 FERC ¶ 61,073
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

North Baja Pipeline, LLC	Docket Nos.	CP06-61-003
		CP01-23-004
		CP06-61-000
		CP06-61-001
		CP06-61-002
	and	CP01-23-003

ORDER DENYING REQUEST FOR REHEARING AND
MOTION FOR LIMITED STAY

(Issued April 24, 2008)

1. On October 2, 2007, in Docket No. CP06-61-000, the Commission issued a certificate of public convenience and necessity to North Baja Pipeline, LLC (North Baja) under section 7(c) of the Natural Gas Act (NGA) authorizing the company to construct facilities to increase its pipeline capacity and to make its system bi-directional.¹ Before the October 2007 Order, North Baja could only transport gas in a southerly direction for export to Mexico; however, the October 2007 Order authorized facilities making it possible for North Baja to reverse flow and transport gas imported from Mexico. The October 2007 Order also amended North Baja's Presidential Permit and NGA section 3 authorization to allow for modifications of its existing export facilities at the international border for purposes of accommodating the importation of natural gas.

¹*North Baja Pipeline, LLC*, 121 FERC ¶ 61,010 (2007). *See also North Baja Pipeline, LLC*, 117 FERC ¶ 61,022 (2006) (order setting forth preliminary determination on non-environmental issues) (October 2007 Order).

2. On October 30, 2007, the South Coast Air Quality Management District (Air District) filed a request for rehearing of the October 2007 Order on the grounds that, upon completion of the authorized facilities and system modifications, regasified liquefied natural gas (LNG) will be introduced into North Baja's pipeline system, and the Commission failed to adequately evaluate and mitigate the potential impacts on air quality as the result of consumption of the regasified LNG in the California South Coast Air Basin.² On November 14, 2007, the Air District also filed a motion seeking a limited stay of the October 2007 Order to the extent it permits North Baja to transport regasified LNG for delivery to end users in the Basin. North Baja, Sempra LNG Marketing Corp. (Sempra LNG), and Coral Energy Resources, LP (Coral) filed answers to the Air District's stay request, subsequently prompting additional rounds of responsive pleadings.

3. The Commission has examined the environmental impacts resulting from the construction and operation of North Baja's project. The Air District claims that we should have also analyzed air quality impacts in the Basin from the consumption of regasified LNG. We did not do such an analysis for several reasons. First, there is no way to know how much of the regasified LNG will actually be consumed in the Basin. Second, the California Public Utilities Commission (CPUC) is the agency with sole jurisdiction for setting standards for gas that can be consumed by electric generators and other end users in the Basin. In recognition that imported LNG can potentially increase emissions that can impact air quality because it generally has a higher Btu-content and, thus, a higher Wobbe Index (WI), than domestic gas supplies, the CPUC took such considerations into account in its recent proceeding in which it set the WI limit for gas consumed in California, after addressing the arguments raised by the Air District. The regasified LNG transported by North Baja's facilities will not exceed the WI limit established by the CPUC because the tariff we have approved for North Baja requires it to meet the CPUC's standards. Further, because the CPUC's recently modified WI standard made it stricter, largely in anticipation of the introduction of regasified LNG to meet California's supply requirements, gas supplies in the Basin historically have included gas with a higher WI than the gas that can be delivered by North Baja. Moreover, even if the Commission were to grant the Air District's request for a condition

²The South Coast Air Basin includes Orange County and the non-desert portions of Los Angeles, Riverside and San Bernadino Counties. The South Coast Air Basin and the portions of Riverside County in the Salton Sea Air Basin and in the Mojave Desert Air Basin make up the jurisdictional area of the Air District, the governmental body charged with regulating air pollution in the largest air pollution district in California. In this order, the term "Basin" denotes the Air District's entire jurisdictional area.

to prevent North Baja's delivery of regasified LNG for consumption in the Basin, the CPUC's standards nevertheless allow other gas supplies with WIs just as high to be consumed in the Basin. Thus, any link between North Baja's project and air impacts from the consumption of regasified LNG in the Basin is inherently tenuous and speculative. In view of all of these considerations, as explained further herein, the Commission denies the Air District's request for rehearing and its motion for a limited stay of the Commission's October 2007 Order.

I. Background

4. North Baja's existing natural gas pipeline system extends approximately 80 miles from an interconnection with the facilities of El Paso Natural Gas Company (El Paso) near Ehrenberg, Arizona through southeast California to a point on the international border between Yuma, Arizona and Mexicali, North Baja Mexico, where the pipeline interconnects with Sempra Energy's existing Gasoducto Bajanorte, S. de R.L. de C.V. (Gasoducto Bajanorte) pipeline. The North Baja system and the Gasoducto Bajanorte pipeline were built in 2002 to supply natural gas from the United States primarily to gas-fired electric generation facilities in Mexico.

5. The October 2007 Order granted North Baja authorizations to modify its existing pipeline system to increase its capacity and accommodate the northbound flow of gas imported from Mexico. North Baja also will continue to offer southbound gas transportation service for several existing shippers. Shippers' southbound volumes will be netted against shippers' northbound volumes. Thus, North Baja has designed its system modifications to ensure that capacity for transportation from south to north will be adequate when shippers' import volumes exceed shippers' export volumes and that capacity for transportation from north to south will be adequate when shippers' export volumes exceed shippers' import volumes.

6. North Baja is authorized to construct its new facilities in phases. As modified by the authorized Phase I facilities, North Baja's system will be capable of transporting up to 614,000 Dth per day of natural gas on a firm basis from the international boundary with Mexico to markets in California and Arizona. As modified by the authorized Phase II facilities, which will loop North Baja's existing pipeline, northbound capacity will increase to 2,932,000 Dth per day. North Baja anticipates placing the Phase II facilities into service by January 1, 2010.³

³ The October 2007 Order also authorized Phase I-A, involving construction of a lateral for North Baja to serve the Imperial Irrigation District's (IID) El Centro Generating Facility in Imperial County, California. However, the IID has exercised its
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7. North Baja has twenty-year agreements with Coral and Sempra LNG for a total of 312,000 Dth per day of firm northbound capacity when Phase I service commences, and some of North Baja's existing shippers have elected to receive Phase I service by reversing the primary path of 302,000 Dth per day of southbound capacity to northbound capacity. These shippers will use their northbound capacity on North Baja's system to transport regasified LNG that will originate from Sempra Energy's Energies Costa Azul (ECA) LNG terminal being constructed along the coast of Baja California, Mexico. Presently, the ECA LNG terminal has an anticipated in-service date of early 2008.⁴

8. North Baja also has twenty-year precedent agreements with Coral, Sempra LNG, and Chevron USA, Inc. for Phase II service when the Phase II facilities are complete. The combined firm northbound capacity subject to the Phase I and Phase II precedent agreements is 2,384,000 Dth per day, which is 548,000 Dth per day less than the 2,932,000 Dth per day northbound physical capacity of North Baja's system after the Phase II facilities are in service. North Baja anticipates placing the Phase II facilities into service by January 1, 2010, contemporaneous with the anticipated in-service date of a planned expansion of Sempra Energy's ECA LNG terminal.

A. Environmental Impact Statement

9. The environmental impacts of North Baja's proposed expansion project were evaluated in a draft and final environmental impact statement/environmental impact report (EIS) and proposed land use plan amendment prepared jointly by the staffs of the Commission and the California State Lands Commission (CSLC).⁵ The draft EIS (DEIS)

right to terminate its precedent agreement. Therefore, North Baja has stated that it no longer plans to construct the IID lateral. (*See* North Baja's January 11, 2007 tariff filing in Docket No. CP06-61-004 *et al.* at 4.) The Commission notes that North Baja has yet to seek issuance of an order vacating its certificate authority for the IID lateral. However, since the October 2007 Order approved incremental rates to recover the cost of service associated with the IID lateral, elimination of the lateral will have no bearing on the finding of a presumption that rolled-in rate treatment will be appropriate for other project costs.

⁴ FEIS at 1-2.

⁵ The CSLC has jurisdiction and management control over California's Sovereign and School Lands and used the FEIS to consider North Baja's application to amend its existing right-of-way lease across the State's Sovereign and School Lands in California. As such, the CSLC has the principal responsibility for carrying out and approving the project in California and is thus the lead agency in California for preparing the EIS,

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and final EIS (FEIS) were prepared to satisfy the requirements of the National Environmental Policy Act (NEPA), the California Environmental Quality Act, and the Federal Land Management and Policy Act.

10. The FEIS, issued on June 8, 2007, analyzed the environmental impacts of North Baja's proposed expansion project and addressed the issues and concerns raised in the comments on the DEIS. The primary concerns reflected in those comments related to the project's potential impacts on air quality and the adequacy of the DEIS's analysis of these impacts, particularly the alleged impacts on air quality from the end use in the Basin of the regasified LNG that will be transported by North Baja.

11. The FEIS determined that construction and operation of the North Baja expansion project would result in certain adverse environmental impacts. However, the FEIS concluded that implementation of the recommended environmental mitigation measures would reduce adverse environmental impacts to less than significant levels and that the project would be an environmentally acceptable action.

12. Regarding issues raised by the Air District addressed herein, the FEIS analyzed the cumulative air impacts resulting from the construction and operation of North Baja's proposed natural gas pipeline facilities;⁶ the construction and operation of two new compressor stations on the Gasoducto Bajanorte pipeline in Mexico (the Algodones Compressor Station and the Mexicali Compressor Station) to enable the LNG-source gas from the ECA Terminal to flow to the United States;⁷ and, since the Mexicali

complying with the California Environmental Quality Act and coordinating the review of the EIS by state and local agencies.

⁶ With respect to the construction and operation of North Baja's proposed pipeline facilities, the FEIS found that there would be intermittent and short-term dust emissions from soil disruption caused by construction activities and combustion emissions from construction equipment. However, the EIS determined that fugitive dust would be minimized by the implementation of North Baja's Dust Control Plan. The EIS also found that there would be no air emissions generated by North Baja's aboveground or pipeline facilities during their operation, with the exception of those emissions associated with emergency venting and maintenance operations. FEIS at 1-23.

⁷ With respect to the construction and operation of the Mexicali and Algodones Compressor Stations being constructed on the Gasoducto Bajanorte pipeline in Mexico, the EIS found that no emitted pollutants at either compressor station site would result in a predicted concentration above an established Significant Impact Level at the maximally impacted receptor located in the vicinity of the U.S.-Mexico border. Therefore, the FEIS

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Compressor Station will be located adjacent to one of two existing Mexican power plants (the La Rosita Power Complex and the Termoelectrica de Mexicali Power Plant), potential changes in emissions from those power plants.⁸

13. The EIS did not analyze the air quality impacts resulting from the end use of the natural gas that would be transported by the North Baja expansion project, finding that the end use of the gas was not a part of the project.⁹ The EIS addressed commenters' argument that the supplies of LNG-source gas could have a higher WI,¹⁰ and thus a higher Btu-content, than existing supplies, and therefore could increase emissions of nitrogen oxides (NOx) -- an ozone precursor -- in the Basin and directly affect air quality, making attainment of federal air quality standards more difficult. In addressing these comments, the EIS referenced the recent decision of the CPUC to reduce -- from 1,437 to 1,385 -- the maximum WI limit of gas that SoCalGas and San Diego Gas Electric Company (SDG&E) are allowed to receive into their systems. The EIS further explained that North Baja's precedent agreements with its shippers require that gas delivered to its system meet the most stringent gas quality standards of any of the pipelines to which North Baja might ultimately deliver gas. Thus, the EIS concluded that the gas North Baja delivers to SoCalGas and SDG&E, of necessity, will have to meet the more restrictive 1,385 WI limit and other gas quality and interchangeability standards required by the CPUC.¹¹

concluded that it is unlikely that emissions from the Mexican compressor stations would result in any significant cumulative ambient air quality impacts at receptors in the vicinity of or across the U.S. border. FEIS at 4-237.

⁸ FEIS at 4-232 to 4-237.

⁹ FEIS at 1-23 ("The end use of the natural gas that would be transported by the proposed Project is not considered part of the Project and, consequently, is outside the scope of the EIS/EIR.").

¹⁰The WI is a widely accepted indicator of the interchangeability of fuel gases and is frequently defined in the specifications of gas supply and transport utilities. The WI measures the heating potential, or potential Btu content, of the gas; the higher the WI, the higher the heat value. Combustion of natural gas with higher heating values and a higher WI results in increased combustion temperature and the possibility of increased NOx emissions.

¹¹ FEIS at 1-7 ("These requirements mean that either the gas delivered to Baja California would meet the most stringent gas quality standard, or the receiving terminal

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14. The EIS found that Imperial County, California is the only air quality non-attainment area in which North Baja's authorized pipeline facilities will be constructed and operated and that emissions from the construction and operation of these expansion facilities would not exceed the applicable conformity thresholds for that non-attainment area. Consequently, the EIS concluded that a full general conformity analysis was not required under the General Conformity Rule promulgated to implement the conformity provision of the Clean Air Act.

15. The EIS acknowledged that the Basin also is a non-attainment area and that some of the LNG-sourced gas transported by North Baja will likely be consumed in the Basin. However, the EIS stated that the end use of the gas that will be transported by North Baja's new facilities is not part of North Baja's pipeline expansion project. Since the General Conformity Rule applies to projects and none of North Baja's authorized new facilities or construction activities will be in the Basin, the EIS rejected the commenters' argument that the General Conformity Rule requires evaluation of the emissions generated by the end use of the gas that will be transported by North Baja.

B. The October 2007 Order

16. The October 2007 Order rejected arguments that the FEIS was inadequate under NEPA's statutory provisions and the regulations of the Council on Environmental Quality (CEQ) implementing NEPA, the California Environmental Quality Act, and the General Conformity Rule of the Federal Clean Air Act because it failed to analyze the air quality impacts of emissions resulting from the end use in the Basin of LNG-sourced gas that will be transported by North Baja's expansion facilities. In addition, the Commission addressed and rejected arguments that the FEIS failed to adequately address the cumulative air quality impacts from the two new compressor stations on the Mexican pipeline that meets North Baja's pipeline on the international border. The Commission also found that the FEIS was not required to analyze the cumulative air quality impacts of emissions from future natural gas-fired power and industrial plants constructed in Mexico.

17. The Commission emphasized in the October 2007 Order that power plants and other end users of the new LNG-source gas will be subject to all applicable local, state and federal air quality standards and permitting requirements, and that no prospective end users of the proposed gas in California have identified any concerns related to their

would have to process the gas before delivering it to the pipelines to meet this standard. Thus, North Baja would meet the gas quality and interchangeability standards of SoCalGas and SDG&E as required by the CPUC.").

continued ability to meet applicable air quality standards. Further, the Commission imposed a certificate condition on North Baja requiring it to modify its gas quality and interchangeability provisions to ensure that expansion shippers' volumes meet the most stringent gas quality and interchangeability standards of any of the local distribution companies (LDCs) or other pipeline systems to which North Baja may ultimately deliver gas.¹² However, the Commission rejected the Air District's request for a certificate condition to require that regasified LNG transported through North Baja's pipeline be treated to meet standards more restrictive than those already permitted by the CPUC.

II. Request for Rehearing and Request for Limited Stay

18. In its request for rehearing, the Air District reiterates its position in this proceeding that it is not opposed to the North Baja expansion project, provided the project is sufficiently conditioned to prevent harm to air quality in the Basin. The Air District is concerned that consumption in the Basin of regasified LNG transported by North Baja will increase NO_x emissions in the Basin and thereby increase ozone and PM_{2.5} levels. Since air quality in the Basin currently does not meet federal ozone standards, the Air District argues that any increase in NO_x emissions, without mitigation, will impede the Air District's efforts to meet federal air quality standards.

19. Consequently, the Air District seeks rehearing of the Commission's determination that (1) it is not necessary for the Commission to analyze the air quality impacts from the end use emissions of the regasified LNG; and (2) that it is not necessary the Commission to require mitigation of such impacts as a condition of its certificate authorization. The Air District argues that by failing to evaluate and mitigate the air quality impacts from the end use of the regasified LNG, the Commission has violated NEPA, the Clean Air Act, and the NGA.

20. The Air District argues that under NEPA, the Commission was required to consider in the EIS the environmental effects of emissions allegedly made possible by the Commission's approval of North Baja's expansion project because: (1) North Baja's pipeline construction activities and the end use combustion of the natural gas the pipeline will deliver are "connected actions" as defined by NEPA; and (2) the end use combustion and associated air emissions will result in "indirect impacts" on air quality in the Basin

¹² 121 FERC ¶ 61,010 at P 40, n.29 and Ordering Paragraph (F). On January 11, 2008, North Baja filed revised tariff sheets to comply with this condition. On January 29, 2008, the Director of the Commission's Division of Tariffs and Market Development – West issued a letter order accepting North Baja's compliance filing.

under NEPA. The Air District also argues that the end use emissions are “cumulative actions” or will result in “cumulative impacts” under NEPA.

21. With respect to the Clean Air Act, the Air District argues that the Commission erred in its findings that the project will not result in “indirect emissions” for purposes of the conformity analysis under the Clean Air Act and that a general conformity determination under the Clean Air Act is not required.

22. Further, the Air District argues that the Commission violated section 7 of the NGA by failing to analyze the environmental effects of the end use of gas transported by North Baja as a factor bearing on the public interest. The Air District argues that the Commission has a duty to consider environmental impacts of the end uses of gas, even where the end users and their facilities are non-jurisdictional. The Air District argues that the Commission should have added a condition to North Baja’s certificate requiring treatment of the gas prior to delivery to the Basin or weighed the air quality impacts against the benefits of an unconditioned certificate.

23. The Air District seeks a stay of the October 2007 Order to the extent it allows North Baja to transport regasified LNG via the project for end use in the Basin. The Air District asserts that once North Baja starts delivering the high-Btu gas for end use in the Basin in the first quarter of 2008, the end use of the gas will have immediate and irreversible consequences on the air quality of the Basin and cause immediate injury to the health of humans and animals living in the Basin.

III. Discussion

24. The Air District’s position in this case is that consumption in the Basin of regasified LNG transported by North Baja’s expansion facilities will result in adverse impacts on air quality in the Basin and, therefore, that the Commission’s certification of North Baja’s project will be the cause of such air quality impacts. Thus, the Air District devotes most of its rehearing request to arguing that the burning of the regasified LNG and associated emissions are “connected actions” to,¹³ and “indirect impacts” of,¹⁴ the Commission’s certification of this project, in an attempt to establish a causal link between the end use emissions and the Commission’s authorization of North Baja’s project.

¹³ Request for Rehearing at 21-25.

¹⁴ *Id.* at 25-30.

25. Many of the Air District's additional arguments, such as those addressing the Commission's substantive duty under NGA section 7 to consider the effects of the end use of gas transported in a pipeline, or the Commission's duty to prepare a general conformity analysis under the Clean Air Act, only have merit if one assumes that such a causal link exists – that the alleged air quality impacts from the end use of the regasified LNG are the result of North Baja's expansion project, or that the end use of this gas is a part of the project. The Air District has failed to establish this causal connection. Further, the Commission's action of issuing a certificate for the North Baja expansion project will have no material impact or effect on air quality in the Basin. While the Commission does not dispute that the consumption of regasified LNG with a relatively higher WI can have air quality impacts, to the extent such impacts in fact occur in the Basin, such impacts would not be the result of our authorizing North Baja's facilities to transport gas. Rather, any such impacts would be the result of the CPUC's having established what the Air District purports to be inadequate interchangeability and gas quality standards, specifically the CPUC's adoption of an outer WI limit of 1385 for California. The CPUC has the responsibility for determining the quality of gas to be consumed within California and has exercised that responsibility based on the best evidence available to it, as discussed further below. Thus, any air quality impacts resulting from the consumption of gas with a WI of up to 1385 would be a consequence of the CPUC earlier action.

26. In recognition of the increasing need for natural gas in California, the CPUC conducted proceedings to consider the impacts, including the potential air quality impacts, of introducing new sources of natural gas, particularly regasified LNG, into California. After considering all available evidence and parties' arguments, including the Air District's, the CPUC concluded that gas with a WI at or below 1385 will not materially increase harmful air emissions. Therefore, the CPUC established a new, stricter WI standard, adopting 1385 as the upper WI limit for gas supplies burned in California, establishing a new, stricter WI standard. There is no requirement that we substitute our judgment for that of the CPUC.

27. Below, we find, for purposes of NEPA, that the end use of natural gas in the Basin amounts to neither a connected action to, nor an indirect impact of, the Commission's certification of North Baja's pipeline project. Indirect effects "must be causally linked to the proposed federal action in order for NEPA to require consideration of those effects in an EA or EIS."¹⁵ Moreover, as discussed below, we find that the CPUC has determined

¹⁵ *Border Power Plant Working Group v. DOE*, 260 F. Supp. 2d 997, 1016 (S.D. Cal. 2003) (*Border Power*).

that the end use of the regasified LNG of the character to be transported by North Baja will not result in increased air pollutant emissions that would materially affect air quality in the Basin. Therefore, the Commission committed no error by failing to analyze in the EIS the air emissions and air quality impacts from the consumption of the regasified LNG, and denies the Air District's request for rehearing.

A. National Environmental Policy Act

28. NEPA requires federal agencies to prepare an EIS when undertaking "major Federal actions significantly affecting the quality of the human environment."¹⁶ The NEPA process of preparing an EIS requires consideration of three types of actions (connected, cumulative, and similar actions), three types of impacts (direct, indirect, and cumulative) and three types of alternatives (a no action alternative, other reasonable courses of action, and mitigation measures not in the proposed action).¹⁷ NEPA requires that the impacts of connected, cumulative, and similar actions be considered in the same EIS.¹⁸

29. In attempting to argue that the Commission violated NEPA by failing to analyze the air quality impacts of the end use of the gas transported by North Baja's expansion project, the Air District presents two separate rationales: (1) that the consumption of the regasified LNG by end users is a "connected action" to the project, i.e., a part of the major federal action of authorizing construction of the pipeline facilities; and (2) that the consumption of the regasified LNG and resultant effects on air quality are "indirect impacts" of the federal action of certificating the pipeline. The first rationale addresses the scope of the federal action, and the second addresses the scope of the impacts and environmental review of the federal action.

30. In the October 2007 Order granting a certificate for North Baja's project, the Commission concluded that the relevant issue is not whether the end use of the regasified LNG is part of the project or the proposed action because it is a "connected action," but whether it is an effect of or "indirect impact" of the proposed project.¹⁹ We did not,

¹⁶ 42 U.S.C. § 4332(2)(C).

¹⁷ 40 C.F.R. § 1508.25.

¹⁸ *Id. see also* 40 C.F.R. § 1502.4(a) ("Proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement").

¹⁹ 121 FERC ¶ 61,010 at P 54.

however, as the Air District asserts on rehearing, take the position that NEPA does not require us to consider whether any actions are “connected” to the approval of the project or whether the end use of the gas is “connected” to the project.

31. The Commission agrees with the Air District that, in determining the scope of the action to be evaluated in the EIS, the Commission is required to consider “connected actions” as contemplated by NEPA and that, once the Commission properly determines the scope of the action, the EIS must consider both direct and indirect effects of the action. However, in our October 2007 Order, we concluded, as discussed further below, that any air quality impacts from the end use of the regasified LNG transported by North Baja’s expansion facilities would be neither “connected actions” nor connected to North Baja’s project as indirect impacts as contemplated by the CEQ’s regulations implementing NEPA.²⁰ In its rehearing request, the Air District incorrectly blurs the distinction between connected actions and indirect impacts.²¹

32. We affirm, as discussed below, our finding in the October 2007 Order that the relevant issue in this case is not whether the end use of the regasified LNG to be transported by North Baja’s expansion facilities is part of the project for purposes of NEPA but whether emissions resulting from the consumption of that gas are indirect effects of North Baja’s expansion project that the Commission is required to analyze in the EIS. We also affirm, for the reasons discussed below, our findings that the scope of the project does not include the end use of the regasified LNG as a “connected action” and that such end use also is not an indirect effect of the project.

²⁰ 40 C.F.R. § 1508.25(a) (1). In defining “connected actions,” this section provides that actions are connected if they: “(i) [a]utomatically trigger other actions which may require environmental impact statements[;] (ii) [c]annot or will not proceed unless other actions are taken previously or simultaneously[; or] (iii) [a]re interdependent parts of a larger action and depend on the larger action for their justification” (this regulation is hereinafter referred to as the “connected action test”).

²¹ 121 FERC ¶ 61,010 at PP 61-82. In its original protest, the Air District argued that the Commission’s FEIS failed to do an analysis of whether the end use of the gas is “connected” to the project as an indirect impact. Therefore, in the October 2007 Order, we made such an analysis and found that the end use of the gas is not “connected” to the project as an indirect impact. On rehearing, the Air District argues we erred by undertaking this analysis in the October 2007 Order, rather than by doing a supplemental FEIS including that analysis. We reject this argument, as a substantive analysis requiring a supplemental EIS would have been necessary only if the Commission had concluded that end use emissions are indirect effects of the project.

1. Connected Action

33. The October 2007 Order held that the “connected action” analysis for determining if an action is sufficiently related to a proposed action to be deemed a part of the proposed action, and therefore required to be evaluated in a single EIS, is applicable only to multiple, related, federal actions.²² Thus, the Commission did not apply the “connected action” test, finding that the end use of the gas is not a federal action that could be “connected” to the proposed action of the expansion of North Baja’s pipeline within the meaning of the CEQ regulations, and concluding that the end use of the regasified LNG gas is not within the scope of the proposed project.

34. The Air District argues that the Commission erred by ruling that the “connected action” test set forth in NEPA is applicable only to multiple federal actions; it maintains that under settled case law, “connected actions” are not limited to federal actions.²³ Thus, the Air District argues that the Commission erred by failing to apply the connected action test and, consequently, by failing to find that the certification of North Baja’s project and the end use of the regasified LNG and resulting air emissions are connected actions. The Air District continues to advance its prior argument raised in comments to the FEIS that the delivery and end use of the LNG-source natural gas is the intended purpose of the project, and the end use of the gas therefore is an action “connected” to and part of, the project.

35. Regardless of whether the “connected action” test set forth in NEPA is applicable to non-federal actions, as asserted by the Air District, its arguments reflect an unreasonable interpretation and application of NEPA and the CEQ’s regulations implementing that statute. As stated above, NEPA requires the Commission to complete an EIS in cases of “major Federal actions significantly affecting the quality of the human environment.”²⁴ The CEQ regulations define a “[m]ajor Federal action” as “actions with effects that may be major and which are potentially subject to Federal control and responsibility.”²⁵ The Commission found that approval of North Baja’s proposed

²² 121 FERC ¶ 61,010 at PP 57 and 59.

²³ The Air District cites *Western Land Exchange Project v. U.S. Bureau of Land Management*, 315 F. Supp. 2d 1068 (D. Nev. 2004); *Morgan v. Wolter*, 728 F. Supp. 1483 (D. Id. 1989); and *Baykeeper v. U.S. Army Corps of Engineers*, 2006 WL 2711547, 36 Env’tl. L. Rep. 20,202 (E.D. Cal. September 20, 2006).

²⁴ 42 U.S.C. § 4332(2)(C).

²⁵ 40 C.F.R. § 1508.18.

expansion project would be a major federal action and therefore prepared an EIS. Further, our October 2007 Order acknowledged that the CEQ's regulations regarding "connected actions" define the circumstances under which related actions must be addressed in the same EIS as a proposed major federal action. While the Air District cites numerous cases to support its position that the end use of the regasified LNG to be transported by North Baja's expansion facilities is a "connected action" as contemplated by NEPA and CEQ's implementing regulations,²⁶ the cited cases actually address whether the impacts of other activities related to the proposed major federal action should be viewed and analyzed as indirect impacts of the proposed major federal action.

36. By characterizing North Baja's expansion project and the end use of the gas to be transported by its expansion facilities as connected *actions*, the Air District is attempting to apply the connected action provision in a way for which it was not designed.²⁷ The consumption of the gas by end users in southern California is not a federal "action," let alone a "connected" action, as that term is used in NEPA and the CEQ's implementing regulations.²⁸

²⁶ Request for Rehearing of Air District at 5 and 22-24.

²⁷ See *Hammond v. Norton*, 370 F. Supp. 2d 226, 256 (D.D.C. 2005) ("Unlike the proposed Equilon pipeline project, which would require DOI approval for rights-of-way across federal lands in New Mexico, the Holly pipeline expansion appears to have been an entirely private endeavor involving no federal "action" which might have required an environmental analysis under NEPA. Consequently, although the Court remands this matter to BLM for preparation of a supplemental EIS on the issue of the proper scope of its environmental analysis, . . . , this supplemental EIS need not address the Holly pipeline expansion as a "connected action" under 40 C.F.R. § 1508.25(a) because that pipeline involves no "major federal action" subject to NEPA").

²⁸ As defined by the CEQ, "action" refers to the types of actions generally undertaken by governmental agencies, such as adoption of policies, programs, or regulations, the approval of projects, or the issuance of permits. 40 C.F.R. § 1508.18. The consumption of natural gas would fall under none of these categories of "action." By using such terms as "projects," "programs," "rules, regulations, plans, policies, or procedures," and "legislative proposals," the CEQ's NEPA regulations set forth a more limited definition of "actions" than advocated by the Air District. Under the Air District's view, "actions" could mean any act or activity. This is an unreasonable interpretation.

37. Furthermore, the Commission rejects the Air District's argument that the introduction of regasified LNG into the Basin is so "connected," in the ordinary sense of the word, to North Baja's pipeline expansion project that the pipeline project and the ultimate use of the natural gas in the Basin constitute one whole federal action, and that the Commission therefore has inappropriately segmented its NEPA review by failing to analyze the environmental effects of the end use in conjunction with the environmental effects of the construction of the project. This argument by the Air District relies entirely on the fact that one of the purposes of North Baja's pipeline expansion project is to transport gas which likely will ultimately be delivered for consumption in southern California.

38. Regardless whether the "motivating force"²⁹ behind North Baja's proposal of its expansion project was to deliver natural gas to customers in southern California for their ultimate use, it is pure speculation on the Air District's part that "but for the expected use of the vaporized LNG [in the Basin], there would have been no Project to Analyze."³⁰ North Baja's expansion facilities will not bring gas only to the Basin, or even only to southern California. Rather, the expansion facilities will bring new supplies of gas to the entire southwest United States.³¹ Without the potential end use of the gas in the Basin, the project would still have utility as a means of transporting gas supplies for use in the rest of the southwest United States. Therefore, this case differs materially from the cases cited by the Air District,³² where non-federal, private activities would not have been possible but for, and therefore were inextricably intertwined with, the federal actions to approve the transfer of federal land and construction of access roads.³³

²⁹ Request for Rehearing of Air District at 25, quoting *Barnes v. Babbitt*, 329 F. Supp. 2d 1141, 1162 (D. Ariz. 2004).

³⁰ Request for Rehearing of Air District at 25.

³¹ FEIS at 1-5 (observing that gas transported on the North Baja project would "provide markets in California and the Southwest with access to LNG-source gas, either physically or through displacement").

³² *Id.* at 23-24.

³³ In *Western Land Exchange*, the entire and only reason for the Bureau of Land Management's transfer of federal desert land in Nevada to private citizens was to enable the aggressive development of the land. In *Barnes v. Babbitt*, 329 F. Supp. 1141 (D. Ariz. 2004), the grazing of livestock on certain land was the only purpose of the Bureau's proposal for the development of an access route to the land. Similarly, in *Thomas v.*

2. Indirect Impact

39. NEPA requires that agencies consider both direct and indirect environmental consequences of major federal actions.³⁴ Direct impacts "are caused by the action and occur at the same time and place."³⁵ Indirect impacts "are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable."³⁶ An impact is "reasonably foreseeable" if it is "sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision."³⁷ A cumulative impact "is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (federal or non-federal) or person undertakes such other actions."³⁸ The issue raised by the Air District is whether any increase in emissions as the result of the consumption of regasified LNG from Mexico would be an indirect effect of our approval of the North Baja expansion project that must be considered in assessing the environmental impacts of approving the project.

Peterson, 753 F.2d 754 (9th Cir. 1985), the road construction and contemplated timber sales were "inextricably intertwined" in a way that North Baja's expansion project and the ultimate end use of the gas are not.

³⁴ 40 C.F.R. §§ 1502.16(a) and (b).

³⁵ 40 C.F.R. § 1508.8(a).

³⁶ 40 C.F.R. § 1508.8(b). Thus, for an impact to be an indirect effect of a proposed federal action, it must be both (1) caused by the proposed federal action, and (2) reasonably foreseeable.

³⁷ *Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992).

³⁸ 40 C.F.R. § 1508.7. As discussed herein, the end use of the regasified LNG and any resulting emissions are neither the kinds of actions or impacts the NEPA regulations require the Commission to evaluate in its FEIS for North Baja's project. Therefore, the end use of the regasified LNG and resulting emissions do not need to be analyzed as part of a cumulative impact analysis.

a. Lack of Causal Link

40. In the October 2007 Order, the Commission held that the end use of the gas is not an indirect impact of North Baja's project that must be analyzed in the EIS.³⁹ The order found whether a particular activity or effect is an indirect impact which must be addressed in the environmental review of a project depends on whether the environmental impact or effect is caused by the proposed project, and how proximate the impact or effect is to the proposed action or project.⁴⁰ The October 2007 Order found that the end use of the higher Btu gas in the Basin and any resulting air emissions in the Basin will not be caused by North Baja's pipeline expansion project. The pipeline expansion project and the burning of relatively higher Btu gas by end users each could occur without the other.⁴¹ Thus, the order found that North Baja's expansion project will not be the "but for" cause of the burning of higher Btu gas in the Basin.

41. On rehearing, the Air District disputes the Commission's characterization of the issue as whether, but for North Baja's project, end use facilities in the Basin will be burning higher Btu gas. The Air District renews its argument that NEPA requires the Commission to analyze whether, but for North Baja's project, the end use facilities would be burning the particular Mexican LNG delivered from the ECA Terminal and whether the project is an essential catalyst to the *increased* consumption of high Btu-content gas, not merely to the operation of end use facilities or burning of high Btu-content gas *per se*.

42. We disagree. It is undisputed that there is an increasing demand for energy in the southwest United States, including the Basin. As noted above, in recognition of this increasing demand, the CPUC recently conducted proceedings to consider the potential impacts of introducing new sources of natural gas into the state. As described below, as a consequence of those proceedings, the CPUC revised the WI limits for natural gas permitted to be burned in California. Thus, we see the material issue as whether the Commission's authorization of North Baja's transportation of regasified LNG will bear a causal relationship to air quality impacts in the Basin; that is, will our authorization cause air quality to be worse than it would be if North Baja were not authorized to transport regasified LNG which may be ultimately delivered to end users in the Basin.

³⁹ 121 FERC ¶ 61,010 at P 79.

⁴⁰ *Id.* at P 61. *See Border Power* at 1015.

⁴¹ *Id.* at P 71. *See Wetlands Action Network v. U.S. Army Corps of Engineers*, 222 F.3d 1105 (9th Cir. 2000) and *Sylvester v. U.S. Army Corps of Engineers*, 884 F.2d 394 (9th Cir. 1989).

43. As noted, the CPUC has recently conducted proceedings to revisit the issue of WI limits for gas burned in California in recognition that imported LNG supplies will be needed to meet growing gas demand in California. At the conclusion of those proceedings, the CPUC actually lowered the upper WI limit to 1385, the same WI limit set forth in North Baja's tariff. Since the CPUC's current upper WI limit is 1385, the Commission's October 2007 Order found that end use facilities in the Basin likely will burn gas with a WI as high as 1385, regardless of North Baja's expansion project. A number of existing domestic supply sources have WI values comparable to those of the potential new LNG supplies being delivered to the ECA Terminal in Mexico, and other LNG-source gas from proposed offshore LNG deepwater port facilities may be delivered to California without using North Baja's pipeline as long as they can meet the CPUC's WI and other gas quality standards.

44. Thus, the order found that North Baja's project is not an "indispensable prerequisite" or "essential catalyst" to the end use of gas with a WI and Btu content as high as that of the gas to be transported by North Baja's expansion facilities.⁴² Under these circumstances, the Air District is being highly speculative in arguing that the average WI of gas burned in the Basin will be lower if North Baja is not allowed to deliver regasified LNG to end users in the Basin. Indeed, North Baja's expansion project will mitigate the need for the use of other fuels, such as coal, fuel oil and other hydrocarbon fuels, which have more potential than regasified LNG to increase NOx and other harmful emissions in the Basin.

45. The October 2007 Order also explained that regasified LNG transported by North Baja's expansion facilities will only be part of SoCalGas' aggregate supply pool and will be mixed with supplies by SoCalGas with gas from other sources. Further, while the expansion project will make North Baja's system bi-directional, shippers' volumes under service agreements for the southerly transportation of domestic supplies to Mexico will be netted against shippers' volumes under service agreements for the northerly transportation of volumes coming from Mexico. Thus, domestic gas will displace some of the regasified imported LNG that would otherwise come into the United States. In view of the above considerations, there is no basis for concluding that air quality impacts

⁴² 121 FERC ¶ 61,010 at P 77; *See City of Davis v. Coleman*, 521 F.2d 661 (9th Cir. 1975). The October 2007 order conversely found that North Baja's pipeline expansion project has a utility independent of the end users in the Basin, since the project will enable North Baja to receive gas from any source provided the gas meets North Baja's tariff's gas quality standards and to transport the gas to end use markets in the entire southwest area.

in the Basin will be worse if North Baja is allowed to deliver regasified LNG to end users in the Basin. To the extent that some of the gas transported by North Baja will be consumed in the Basin, consumption of gas in the Basin can be characterized as a “purpose” of the project, as argued by the Air District. However, as the Commission concluded in its October 2007 Order, the causal connection between North Baja’s pipeline expansion project and the end use of regasified LNG transported by its expansion facilities is too attenuated to support a finding that North Baja’s pipeline expansion project will have indirect air quality impacts in the Basin, given the need for North Baja’s project to deliver gas supplies to areas other than the Basin and the uncertainty over how much regasified LNG will be delivered from North Baja’s facilities to the Basin and how much gas with similar WI values would be used in any event. The fact that the Basin is one of the end use markets for the regasified LNG to be transported by North Baja’s expansion facilities is not enough to establish the necessary causal link.⁴³

46. Moreover, *Department of Transportation v. Public Citizen* demonstrates that a strict “but for” causal relationship “is insufficient to make an agency responsible for a particular effect under NEPA and the relevant regulations.”⁴⁴ Indeed, *Public Citizen* compels the conclusion that FERC was not required in its EIS to quantify air quality impacts from the consumption of the particular regasified LNG to be transported by North Baja from the Mexican border.

47. In *Public Citizen*, the Court considered whether NEPA required the Federal Motor Carrier Safety Administration (FMCSA) to “evaluate the environmental effects of cross-border operations of Mexican-domiciled motor carriers.”⁴⁵ The FMCSA had proposed regulations governing applications for operating authority and safety inspections for Mexican motor carriers entering the United States.⁴⁶ Following publication of the proposed regulations, the FMCSA issued an environmental assessment (EA).⁴⁷ The EA did not consider environmental impacts based on an assumption of increased trade volume between the United States and Mexico as a result of the FMCSA issuing the

⁴³ 121 FERC ¶ 61,010 at P 79.

⁴⁴ *Department of Transportation v. Public Citizen*, 541 U.S. 752, 767 (2004) (*Public Citizen*).

⁴⁵ *Public Citizen* at 756.

⁴⁶ *Id.* at 760.

⁴⁷ *Id.* at 761.

proposed rules.⁴⁸ While the FMCSA acknowledged that no Mexican motor carriers could operate in the United States without its issuance of regulations, it reasoned that the environmental impacts of increased Mexican truck traffic would be the result of the lifting of a Presidential moratorium on the granting of operating authority for Mexican motor carriers, rather than action of the FMCSA.⁴⁹ Thus, the FMSCA concluded that the entry of Mexican trucks was not an effect of its decision to issue regulations.⁵⁰ The EA concluded the regulations would have no significant impact on the environment, and the FMSCA, therefore, issued a finding of no significant impact the same day.⁵¹

48. The Ninth Circuit, however, took a different view of the matter. The Ninth Circuit reasoned, much like the Air District in this present case, that the President's lifting of the moratorium was reasonably foreseeable.⁵² Accordingly, the Ninth Circuit remanded the case for preparation of a full EIS on the matter.⁵³

49. The Supreme Court granted certiorari and reversed the Ninth Circuit. After reviewing the relevant legal and factual background, the Court framed the question as:

whether the increase in cross-border operations of Mexican motor carriers, with the correlative release of emissions by Mexican trucks, is an "effect" of FMCSA's issuance of the Application and Safety Monitoring Rules; if not, FMCSA's failure to address these effects in its EA did not violate NEPA, and so FMCSA's issuance of a FONSI cannot be arbitrary and capricious.⁵⁴

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 762.

⁵² *Id.* at 762-63.

⁵³ *Id.* at 763.

⁵⁴ *Id.* at 764.

The Court rejected a strict application of a "but for" causation test:

We hold that where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant "cause" of the effect. Hence, under NEPA and the implementing CEQ regulations, the agency need not consider these effects in its EA when determining whether its action is a "major Federal action." Because the President, not FMCSA, could authorize (or not authorize) cross-border operations from Mexican motor carriers, and because FMCSA has no discretion to prevent the entry of Mexican trucks, its EA did not need to consider the environmental effects arising from the entry.⁵⁵

50. In reaching its conclusion, the Court noted that the FMCSA had "no ability to countermand the President's lifting of the moratorium or otherwise categorically to exclude Mexican motor carriers from operating within the United States."⁵⁶ The Court stated: "[b]ecause FMCSA lacks discretion to prevent these cross-border operations, we conclude that these statutes impose no such requirement [to evaluate the environmental effects of the cross-border operations] on FMCSA."⁵⁷ The Court explained that the purpose of the NEPA EIS requirement is to ensure that the agency will have available and will carefully consider detailed information regarding significant environmental impacts to assist it in its decisionmaking, and that NEPA is guided by a "rule of reason" which ensures that agencies determine whether and to what extent to prepare an EIS based on the usefulness of any potential information to the decisionmaking process. The Court found that because the FMSCA has no ability to prevent the cross-border operations of Mexican motor carriers, "the environmental impact of the cross-border operations would have no effect on FMSCA's decisionmaking – FMSCA simply lacks the power to act on whatever information might be contained in the EIS."⁵⁸

51. Like the FMSCA in *Public Citizen*, the Commission has no authority over the importation and exportation of natural gas supplies. While the Secretary of Energy has

⁵⁵ *Id.* at 770.

⁵⁶ *Id.* at 766.

⁵⁷ *Id.* at 756.

⁵⁸ *Id.* at 768.

delegated to the Commission authority under section 3 of the NGA over the siting and construction of import and export facilities, the Department of Energy (DOE) has the sole authority to approve or disapprove applications to import and export gas.⁵⁹ Therefore, although we have placed appropriate conditions on North Baja's authorization,⁶⁰ we do not believe that it would be appropriate to exercise or condition our authority over the construction of pipeline facilities in a manner that would have the result of substituting our judgment for DOE's as to whether the importation and exportation of particular gas volumes is in the public interest. That is what the Air District is asking us to do by seeking a condition that would require North Baja to treat the imported regasified LNG in its system or prohibit delivery of the gas to end users in the Basin.

52. Moreover, the Commission has no authority to dictate the quality of gas consumed in California and would have no power to prevent gas supplies with WIs up to 1385 (the upper limit established by the CPUC) from being consumed in California in response to information indicating adverse environmental impacts would occur. Rather, as detailed below, it is the CPUC which has jurisdiction to set standards for the gas consumed in California, and which has permitted gas with a WI of up to 1385 to be consumed in California. Therefore, it is the action of the CPUC which is the proximate cause of the consumption of the regasified LNG from the ECA Terminal in Mexico and any associated emissions in the Basin, not the Commission's authorization of North Baja's expansion project.

53. A description of the CPUC's responsibilities for determining the quality of gas to be consumed within southern California was provided in the FEIS:

The California Public Utilities Commission (CPUC) is the regulatory agency responsible for setting the appropriate gas quality and interchangeability standards for gas on the Southern California Gas Company (SoCalGas) and San Diego Gas & Electric Company (SDG&E) pipeline systems. . . . In order for North Baja to deliver

⁵⁹ Following the transfer of Section 3 implementation to the Department of Energy in 1977, the Secretary of Energy specifically delegated responsibility to the Commission to approve or disapprove applications for the siting, construction, and operation of import/export facilities. *See* DOE Delegation Order No. 00-04.000A (2006) (reissuing, effective May 16, 2006, authorities contained in previous delegation orders).

⁶⁰ For a particularly relevant example, North Baja's approved tariff provisions require that gas in its system meet the strictest gas quality and interchangeability specifications, including WI, to which downstream pipelines are subject.

gas into the SoCalGas system, North Baja must deliver gas that meets the gas quality and interchangeability standards set by the CPUC.

. . . Tariff agreements, and the pipeline-quality gas specifications contained within, must be approved by the CPUC to ensure public health and safety for end users and of the environment (*particularly air quality*). Tariff agreements would be subject to renegotiation and change over the life of the Project if market conditions change or if regulatory requirements are modified. . . . Rule 30 includes the following specific requirements that must be met for any natural gas distributed in southern California, regardless of whether the gas is produced in California or imported from other U.S. or international gas reservoirs:

- concentration limits for a number of substances, including hydrogen sulfide, mercaptan sulfur, total sulfur, moisture or water content, CO₂, oxygen, inerts, and hydrocarbons;
- specific acceptance criteria for gross heating values;
- specific acceptance criteria to ensure interchangeability of natural gas from different sources, including the American Gas Association's Wobbe Index (WI) (also referred to as Wobbe Number), lifting index, flashback index, and yellow tip index; and

. . .

As a practical matter, North Baja must meet the CPUC's standards for gas to be accepted by SoCalGas at the new interconnect. North Baja, in its precedent agreements with its shippers, has stated that it will meet the strictest gas quality standards for interconnecting pipelines. Thus, North Baja would meet the gas quality and interchangeability standards of SoCalGas and SDG&E as required by the CPUC.⁶¹

54. As part of a proceeding initiated in 2004 to examine the sufficiency of natural gas supplies and infrastructure in California, the CPUC adopted new natural gas quality

⁶¹ FEIS, 6-12 through 6-13 (emphasis added).

standards, including a new WI standard, in an order issued on September 21, 2006.⁶² Prior to the adoption of the new standards, SoCalGas and SDG&E could accept and deliver natural gas with a WI as high as 1,437, although the five-year historical WI average of gas consumed in the Basin was 1332.⁶³ Further, as noted by the October 2007 Order, the tariffs of SDG&E and SoCalGas not only permitted higher WI gas, but “the Wobbe Index of supplies delivered into Southern California by Kern River Gas Transmission, a major interstate supplier, ha[d] ranged as high as 1380 over the past three years.”⁶⁴ Although the record does not reflect the exact WI of the initial supplies of regasified LNG coming from the ECA Terminal in Mexico, as that will depend on the WI levels of the various LNG supplies shipped to the ECA terminal, which is unknown at this time, international gas supplies generally have higher WI levels than North American gas. The Air District asserts that the WI of the imported gas North Baja will deliver would be close to 1385.⁶⁵

55. In its September 2006 Order, the CPUC revised its Rule 30 to establish a more restrictive WI limitation for gas consumed in California than the existing limit of 1,437. Prior to issuance of the CPUC's order, the Natural Gas Council (NGC)+ Interchangeability Work Group (NGC+ Work Group) issued on February 28, 2005, its “White Paper on Natural Gas Interchangeability and Non-Combustion End Use (NGC+ White Paper). The objective of the NGC+ White Paper was “to define acceptable ranges of natural gas characteristics that can be consumed by end users while maintaining safety, reliability, and environmental performance.”⁶⁶ In setting the new WI standards, the

⁶² *Order Instituting Rulemaking to Establish Policies and Rules to Ensure Reliable, Long-Term Supplies of Natural Gas to California, “Phase 2 Order Addressing Infrastructure Adequacy & Slack Capacity, Interconnection & Operational Balancing Agreements, an Infrastructure Working Group, Natural Gas Supply and Infrastructure Adequacy for Electric Generators, Natural Gas Quality, and Other Matters,”* R.04-01-25 (Decision 06-09-039, September 21, 2006).

⁶³ FEIS at 6-13.

⁶⁴ 121 FERC ¶ 61,010 at P 74, *quoting* Sempra LNG's and Coral's Comment Letter at 3 (January 10, 2007). *See also* Motion for Leave to Answer and Answer of SoCalGas and SDG&E, filed December 21, 2007, at 5 (“These [Kern River] supplies are, on average, within approximately 1% of the maximum acceptable Wobbe Number and Btu specifications for regasified LNG supplies from North Baja.”).

⁶⁵ July 6, 2007 Comments of Air District to FEIS at 9; *see also*, FEIS at 1-7.

⁶⁶ Interchangeability Report at 4; *see* CPUC Decision 06-09-039 at 148.

CPUC relied upon the recommendation of the NGC+ White Paper that a range equal to plus and minus four percent of the average WI of historical gas supplies is appropriate. Thus, the CPUC determined that gas meeting a plus and minus four percent band around the five-year WI historical average of 1332, i.e., a maximum and minimum WIs of 1385 and 1279, is acceptable for consumption in California:

It is prudent to adopt the interim gas quality specifications recommended in the NGC+ White Paper. The NGC+ White Paper is the consensus recommendation of a group that included representatives of all major segments of the natural gas industry. . . . The group reached its recommendation based on the available information and recommended specific additional studies. . . .

. . . As [Southern California Edison] points out, applying the NGC+ recommendation to the five-year historical average Wobbe Index in the SoCalGas service territory, 1332, results in a Wobbe range of 1279 to 1385. Since all of SDG&E's gas flows through the SoCalGas service territory, it is reasonable to assume that SDG&E's historical average is also near 1332. . . .

. . . While SDG&E/SoCalGas demonstrated that certain Btu Districts have experienced gas with a Wobbe Index over 1385, the utilities did not demonstrate that most districts have experience with higher than 1385 Wobbe Index, or even that a high Wobbe Index is typical for those areas that have experienced high Wobbe Index gas in the past. We therefore will adopt a maximum Wobbe Index range equal to plus and minus four percent of the historical average Wobbe Index. The minimum Wobbe Index will be 1279, and the maximum Wobbe Index will be 1385.⁶⁷

56. While SoCalGas, which serves the Basin, had accepted gas with a WI as high as 1,437 prior to the new standard, the CPUC's current standard still allows SoCalGas to accept gas supplies with WIs up to 1385. Thus, as observed above, the consumption of gas with a WI as high as 1385 will occur whether or not the Commission approves the North Baja expansion project, because the CPUC has exercised its authority to permit it. Like the FMSCA in *Public Citizen*, the Commission has no authority to keep gas with a WI of up to 1385 out of southern California or to place further WI restrictions on the gas

⁶⁷ CPUC Decision 06-09-039 at 157-60.

being consumed in southern California.⁶⁸ Further, as discussed above, the Department of Energy, not the Commission, has the authority under Section 3 of the NGA to permit or not permit imports and exports of natural gas. Thus, an EIS analysis of the air quality effects of the end use of the regasified LNG in the Basin would not aid in the Commission's decision whether to certificate the pipeline expansion to bring Mexican gas into the entire southwest United States. *Public Citizen* sends a clear message that the scope of an EIS does not expand to attribute to a federal agency responsibility for the acts of another entity.⁶⁹

57. Although the CPUC has exercised its jurisdiction over the quality of natural gas consumed in California in setting WI limitations, the Air District would have us substitute our judgment for that of the CPUC and usurp its jurisdiction by requiring that the regasified LNG be treated either prior to delivery to North Baja or prior to the LDCs so that it has a WI lower than that permitted by the CPUC. The Air District's arguments are essentially a collateral attack on the CPUC's September 2006 decision establishing WI standards that were not strict enough for the Air District.

58. The Air District actively participated in the CPUC proceedings, and the Air District seeks herein to litigate again those issues it unsuccessfully presented to the CPUC. Before the CPUC, the Air District advocated on behalf of a two percent band, rather than the four percent, wider band with a higher upper limit chosen by the CPUC, arguing that "the [CPUC] should adopt an interim Wobbe Index range of 1332, plus or minus two percent with a maximum of 1360, and apply this standard solely to the [Basin]."⁷⁰ In conflict with its arguments in this case, particularly with respect to its request for a stay, the Air District contended before the CPUC that the effects of introducing higher WI gas are uncertain, and that the two percent band would preserve the status quo while additional research and studies are performed on the environmental

⁶⁸ Further, the operation of, and air emissions from, power plants, manufacturing plants, or residential end users in California who potentially may burn the LNG-source gas are not federal actions, but actions subject to state and local jurisdiction.

⁶⁹ See *City of Shoreacres v. Waterworth*, 420 F.3d 440, 452 (5th Cir. 2005) (citing *Public Citizen*, 541 U.S. 752 (2004), for the proposition that "it is doubtful that an environmental effect may be considered as proximately caused by the action of a particular federal regulator if that effect is directly caused by the action of another entity over which the regulator has no control.").

⁷⁰ CPUC Decision 06-09-039 at 118.

impacts of burning high WI gas.⁷¹ However, the CPUC rejected the arguments of the Air District:

We are concerned with the potential impacts of high Wobbe gas on emissions and the performance of end use equipment. The NGC+ White Paper lists eleven different undesirable performance behaviors and emissions characteristics that can result from changing natural gas quality. The [Air] District correctly notes that many gaps remain in our understanding of precisely how different Wobbe Indices influence these [undesirable performance] behaviors. The [Air] District proposes a precautionary approach that would attempt to maintain the status quo until further studies have been completed.

We disagree with the [Air] District's conclusion that in the face of uncertainty, the Commission should adopt a policy that would only permit gas supplies that are similar to average historical gas supplies. The job of the Commission is to consider the available evidence and adopt a reasonable policy. We support the approach of the NGC+ White Paper, which explicitly acknowledges the data gaps and recommends a gas quality standard consistent with those gaps.

Given the potential impacts on gas supply, gas costs, emissions, and end use equipment performance, the [CPUC] should adopt a gas quality standard that is consistent with the best information currently available. We agree that further research is needed to fully understand the impacts of higher Wobbe Index gas on emissions and end-use equipment performance. However, the Commission cannot postpone implementing a new gas quality tariff until all additional research is complete. LNG developers need regulatory certainty today to design and build LNG import projects and arrange for sources of LNG supply. Federal and state agencies are also considering specific LNG projects, and since revising the gas quality tariff could have implications on those specific projects, it is in the interest of the reviewing agencies to have this issue settled sooner rather than later. Adopting a reasonable standard today, based on the best information available is therefore in the public interest.⁷²

⁷¹ *Id.* at 118-19.

⁷² *Id.* at 157-58.

59. It is clear from the above passage that the CPUC: (1) considered and rejected the arguments of the Air District; and (2) will continue to set natural gas quality standards based on the best evidence available.⁷³ If the CPUC further restricts the band of permissible natural gas, those restrictions will also apply to the natural gas transported by North Baja. In adopting the four percent band, the CPUC accepted the arguments of SDG&E and SoCalGas that the four percent band "would allow California to receive the full benefits of new gas supplies, without adversely affecting equipment performance or air quality."⁷⁴ Above, we have ruled that any increased emissions resulting from regasified LNG being consumed in the Basin is not caused, for purposes of NEPA, by the authorization of North Baja's expansion project and therefore such emissions would not be an indirect impact of the project that the Commission was required to analyze in the EIS for the project. Notwithstanding this fact, we find, as discussed below, that the consumption of regasified LNG transported by North Baja and meeting the CPUC's WI standard of 1385 or less, by definition, should not result in a material increase in air pollutant emissions and, therefore, should not result in material changes in air quality in the Basin.

b. Lack of Increased Air Emissions and Adverse Air Quality Impacts

60. On rehearing, the Air District argues that the Commission erred by relying on the fact that North Baja must meet the maximum WI of 1385 set by the CPUC, i.e., the most stringent gas quality and interchangeability standards of any of the pipelines to which North Baja may deliver gas. The Air District argues that the Commission incorrectly assumes that such standards will prevent natural gas with a Btu content higher than historically consumed from entering southern California, or will prevent increased air emissions, because, it maintains, such standards are not designed to protect air quality, but rather to guard pipeline safety and efficiency. The Air District contends that the Commission's analysis "is based on the unfounded assumption that the interoperability standards in pipeline tariffs are intended to and will protect air quality."⁷⁵

⁷³ The CPUC stated in its September 21, 2006 Order establishing new gas quality standards that parties may file petitions for further modifications if further studies suggest the need. CPUC Decision 06-09-039 at 166.

⁷⁴ *Id.* at 112.

⁷⁵ Request for Rehearing of Air District at 34.

61. The Commission does not assume, as the Air District asserts, that CPUC's new standards will prevent natural gas with a Btu content higher than historically consumed from entering southern California. We have discussed above the fact that, prior to the CPUC's adoption of the new standards, the five-year historical WI average of gas consumed in the Basin was 1332, notwithstanding that SoCalGas and SDG&E had accepted and delivered natural gas with a WI as high as 1,437 during that period.⁷⁶ However, we disagree with the Air District's suggestion that the CPUC's new interchangeability standards were designed solely to guard pipeline safety and efficiency, with no regard to air quality.

62. In its decision, the CPUC found that "[p]olicies that increase natural gas supply and lower natural gas costs help to address many of California's most critical environmental challenges."⁷⁷ Thus, the CPUC concluded that it needed to act to ensure that utilities and their customers will have access to new natural gas supply sources.⁷⁸ The CPUC determined that LNG was an important new source for gas supply.⁷⁹ However, the CPUC recognized the need to ensure that the use of regasified LNG or other higher Btu gas supplies would not have unacceptable effects on emissions. It stated that "[w]e are concerned with the potential impacts of high Wobbe gas on emissions and the performance of end-use equipment."⁸⁰ Thus, it appears one of the primary reasons for the CPUC's initiation of its 2006 proceeding in which it adopted new gas quality standards and the more restrictive WI limit was the anticipated "introduction of gas

⁷⁶ *Infra* at P 54, *citing* FEIS at 6-13.

⁷⁷ CPUC Decision 06-09-039 at 156. As an example, the CPUC explained that its policy of promoting sufficient, economical gas supplies is part of its aggressive efforts to address the threat of climate change. The CPUC stated that it is considering adopting a greenhouse gas emissions performance standard for new electricity procurement contracts entered into by investor-owned utilities that would limit greenhouse gas emissions to the level emitted by modern natural gas-fired generation. The CPUC further stated that if it confirms that promoting natural gas-fired generation over other types of generation is necessary to achieve its climate change goals, then it should clearly adopt policies that increase supplies of natural gas needed to fuel these plants. *Id.*

⁷⁸ *Id.* at 4.

⁷⁹ *Id.*

⁸⁰ *Id.* at 157.

supplies derived through liquefied natural gas (LNG)."⁸¹ The CPUC concluded in that proceeding that, given the potential impacts on gas supply, gas costs, end-use equipment and *emissions*, it should adopt a gas quality standard that is consistent with the best information available.⁸² The CPUC found that it was prudent to adopt the interim gas quality specifications recommended in the NGC+ White Paper.⁸³ The CPUC then cited the NGC+ White Paper's recommendation of a permissible WI range equal to plus and minus four percent of average historical gas, with a maximum WI of 1440.⁸⁴ Applying the NGC+ White Paper's recommendation to the five-year historical average WI in SoCalGas' service territory, the CPUC adopted a permissible WI range of 1279 to 1385.⁸⁵ Thus, in establishing its new gas quality standards, the CPUC took into account emissions, not just operational safety and performance. The CPUC struck a balance between setting a maximum permissible WI that was too high, which could have adverse impacts on emissions and air quality, and setting a maximum WI that was too low, which could thwart the goal of increasing the availability of economical, natural gas supplies, preventing California's environmental challenges from becoming even more formidable as a result of increased use of less environmentally-friendly alternative fuels, such as coal, diesel and fuel oil.⁸⁶

63. It is disingenuous of the Air District to argue that emissions and air quality were not taken into account by the CPUC in setting the WI standard. The CPUC's decision reflects that the effect of gas quality on air pollutant emissions was a key issue raised by

⁸¹ *Id.* at 2.

⁸² *Id.* at 158.

⁸³ *Id.*

⁸⁴ *Id.* at 159.

⁸⁵ *Id.* The NGC+ White Paper's recommendation of a plus or minus four percent range based on the historical average WI of supplies is based on its conclusion that a WI within that range will not prevent gas supplies from meeting the NGC+ White Paper's definition of "interchangeability," which is the "ability to substitute one gaseous fuel for another in a combustion application without materially changing operational safety, efficiency, performance *or materially increasing air pollutant emissions.*" NGC+ White Paper at 2.

⁸⁶ CPUC Decision 06-09-039 at 156.

the Air District in the CPUC's proceeding,⁸⁷ where the Air District argued for a lower upper WI limit based on its concerns over air quality. The CPUC fully considered the Air District's arguments for a lower upper WI limit. However, the CPUC arrived at a different WI standard that represented a tradeoff between impacts on air emissions and equipment performance and the need for new supply.

64. The CPUC's Rule 30 specifically provides that LDCs and interstate pipelines tariff agreements are subject to renegotiation if the CPUC modifies its regulatory requirements. The CPUC also has made it clear that it is fully aware of the need for further research to fully understand the impacts of higher WI gas on emissions. As noted above, the CPUC stated in its September 21, 2006 Order establishing the new gas quality standards, that parties may file petitions for modification of the standards if additional studies suggest that the standards need to be modified.⁸⁸

65. In view of the above considerations, it is clear that the CPUC considered emissions and air quality in its decision adopting new gas quality standards, including a maximum permissible WI of 1385 and that it stands ready to reconsider those standards should experience indicate they are inadequate. Thus, notwithstanding the Commission's view that any air quality impacts from the end use of the gas to be transported by North Baja are causally related not to this Commission's action of authorizing construction and operation of North Baja's expansion project, but rather to the standards established by the CPUC, the Commission nevertheless finds that the CPUC's actions should be sufficient to prevent the introduction of additional supplies of LNG into California from resulting in a material change in air quality in the Basin.

66. By approving tariff provisions which require North Baja to meet the strictest gas quality and interchangeability standards to which downstream pipelines are subject, the Commission has effectively conditioned approval of its expansion project on its compliance with the CPUC's gas quality and interchangeability standards. Since the CPUC's WI standard is based on a band around the historical average, the Commission has also followed the recommendation of the United States Environmental Protection Agency (EPA).

67. In its comments on the draft EIS, the EPA took issue with the draft EIS because it "does not describe, analyze, or mitigate, as appropriate, the significant air quality impacts

⁸⁷ *Id.* at 118-122 (CPUC's summary of the Air District's arguments advocating a maximum permissible WI of 1360 for the Basin).

⁸⁸ CPUC Decision 06-09-039 at 166.

that would result from burning increased quantities of hotter natural gas."⁸⁹ The EPA went on to say, however, that the Commission "states that the terms of the precedent agreements between [North Baja] and its shippers require that the gas delivered to the North Baja system meet the most stringent gas quality standard of any of the pipelines to which the North Baja system might ultimately deliver the gas (page 4-207) but does not provide additional information about the standard."⁹⁰ On this point, the EPA concluded: "One alternative is to require that the natural gas meet, within some reasonable level of variability, the quality of natural gas currently flowing in the Southwest natural gas transmission pipeline system."⁹¹

68. The "reasonable level of variability" recommended by the EPA is exactly what the CPUC adopted with its plus and minus four percent band based on the average WI of historical gas supplies consumed in Southern California. While the Air District attempts to misconstrue the record by suggesting that the revised standards adopted by the CPUC *increased* the variability of the WI,⁹² the fact is that the CPUC actually *reduced* the permissible level of variability to a four percent band around the five-year historical WI average -- in other words, a reasonable level of variability of the gas that has historically been consumed in southern California, as suggested by the EPA.⁹³ The four percent band

⁸⁹ January 22, 2007 Letter of EPA. *See* FEIS at 6-41.

⁹⁰ *See* FEIS at 6-41. The draft EIS in this case was issued on September 22, 2006 – only one day after the CPUC issued its order adopting the WI standards. As such, the draft EIS did not reflect the standards adopted by the CPUC.

⁹¹ *See* FEIS at 6-42.

⁹² *See* Request for Rehearing at 34, where the Air District states that "[u]nder a new California Public Utility Commission (CPUC) rule governing the interchangeability and quality of gas used on the SoCalGas system, gas would be able to enter the system up to a Wobbe Index of 1385." As discussed above, prior to the CPUC's adoption of its new standards, SoCalGas and SDG&E could accept and deliver natural gas with a WI as high as 1,437, although the five-year historical WI average of gas consumed in the Basin was 1332. FEIS at 6-13.

⁹³ While the EPA filed comments on the FEIS indicating that it does have continuing concerns, the EPA did not seek rehearing of our October 2007 order in which we relied on the CPUC's new standards by imposing a certificate condition on North Baja requiring it to modify its gas quality and interchangeability provisions to ensure that expansion shippers' volumes meet the most stringent gas quality and interchangeability

(continued)

is much more restrictive than the upper limit permissible before the CPUC order, a WI of 1437, which was actually a much greater (7.9 percent) deviation from the five-year average.

69. Moreover, although the Air District argues that the CPUC set the WI standard without taking into account air quality impacts and the protection of air quality, the Air District, itself, is advocating an upper WI limit of 1360 to protect air quality without any support for that particular standard. The record contains no analysis or evidence showing a material change in air quality impacts as a result of the consumption of natural gas with a WI of 1385 – the upper limit established by the CPUC – compared to that of the Air District’s proposed WI limit of 1360. Therefore, there is no justification for the Air District’s proposed two percent band, which would make it more difficult for SoCalGas and end users to find economical gas supplies and therefore could lead to increased consumption of other fuels associated with greater emissions.

B. Clean Air Act

70. The Air District seeks rehearing of the Commission’s finding that the project will not result in “indirect emissions” for purposes of the conformity analysis under the Clean Air Act and the Commission’s ruling that a general conformity determination under the Clean Air Act is not required.⁹⁴ The Air District continues to argue that the FEIS used the wrong conformity threshold based on an artificially narrow definition of the project and the project area that excluded the end use of the gas in the Basin and, therefore, asserts that the Commission erred by adopting the FEIS’s findings. The Air District also argues that the Commission erred by affirming the FEIS’s finding that emissions from the end use of the gas are not “reasonably foreseeable” and that the various factors necessary to be able to identify and quantify the end use emissions are unknown.⁹⁵ It argues that the Commission’s conclusion in this regard is inconsistent with its own findings regarding what is known about the source, use, quantity, and quality of the gas to be delivered by the project.⁹⁶

standards of any of the LDCs or other pipeline systems to which North Baja may ultimately deliver gas. 121 FERC ¶ 61,010 at P 40, n.29 and Ordering Paragraph (F).

⁹⁴ 121 FERC ¶ 61,010 at PP 87-88.

⁹⁵ *Id.* at PP 88 and 84.

⁹⁶ Request for Rehearing of Air District at 15 (Issue 22) and 11 (Issue 16).

71. "Indirect emissions" of a proposed project, as defined by the Clean Air Act's General Conformity Rule, are

emissions of a criteria pollutant or its precursors that:

(1) are caused by the Federal action, but may occur later in time and/or may be farther removed in distance from the action itself but are still reasonably foreseeable; and

(2) the Federal agency can practicably control and will maintain control over due to a continuing program responsibility of the Federal agency.⁹⁷

"Reasonably foreseeable" emissions are defined as "projected future indirect emissions that are identified at the time the conformity determination is made; the location of such emissions is known and the emissions are quantifiable, as described and documented by the Federal agency based on its own information and after reviewing any information presented to the Federal agency."⁹⁸

72. The FEIS identified the following unknown factors regarding emissions from the consumption of regasified LNG imported from Mexico:

These factors include: (1) the precise WI of the natural gas to be delivered, other than it would meet the existing standards set by the CPUC for SoCalGas and SDG&E; (2) the sector of the SoCalGas market to which the gas would be delivered (no specific end users have been identified with the exception of the El Centro Generating Station in El Centro, California, which North Baja proposes to serve through a new lateral pipeline); (3) the ultimate character of the natural gas at the end user (the gas received by North Baja may be blended within the SoCalGas distribution system and the resultant WI of such blend is unknown); and (4) whether or not the gas would be consumed within the SCAB.⁹⁹

⁹⁷ 40 C.F.R. § 51.852.

⁹⁸ *Id.*

⁹⁹ FEIS at 6-119.

73. As discussed in the FEIS,¹⁰⁰ the EPA asked in its 1993 rulemaking proceeding for comments on both an "inclusive" version and an "exclusive" version of a definition of indirect emissions.¹⁰¹ The EPA explained that the difference between the two was "the extent to which Federal agencies should be required to consider the effect of indirect emissions that may be caused by the Federal actions, where the Federal agency has little or no control over these emissions."¹⁰² In its final rule, the EPA adopted the exclusive definition.¹⁰³ Importantly, the EPA explained that the inclusive definition was rejected, in part, because "[m]itigation measures required under this approach may not be enforced."¹⁰⁴ As explained in the FEIS,¹⁰⁵ neither the Clean Air Act nor regulations implementing that Act "requires that a Federal agency attempt to 'leverage' its legal authority to influence or control nonfederal activities that it cannot practicably control, or that are not subject to a continuing program responsibility, or that lie outside the agency's legal authority."¹⁰⁶

74. In explaining its final rule, the EPA presented a hypothetical approval of an airport expansion by the FAA:

Assume that the FAA is considering approval of an airport expansion in a serious ozone nonattainment area and that adjacent development of an industrial park is known to depend on the FAA approval. Assume: (1) The airport expansion would result in an increase in emissions of 50 tons/year of volatile organic compounds (VOC) due to vehicle and airport related emissions, and (2) assume that the adjacent industrial park would emit 200 tons/year of VOC.

¹⁰⁰ FEIS at 6-118 through 6-120.

¹⁰¹ 58 Fed. Reg. 13,836, 13,839 (March 15, 1993) ("EPA is proposing two different definitions of 'indirect emissions' -- 'inclusive' and 'exclusive' -- and inviting comment on both versions.").

¹⁰² 58 Fed. Reg. at 13,839.

¹⁰³ 58 Fed. Reg. 63,214, 63,218.

¹⁰⁴ 58 Fed. Reg. at 63,218.

¹⁰⁵ FEIS at 6-118 through 6-119.

¹⁰⁶ 58 Fed. Reg. at 63,221.

Under the exclusive definition, the FAA must show that the 50 tons/year of VOC from the airport related activities conforms to the SIP. The FAA, however, is not responsible for the 200 tons/year of VOC from the industrial park. . . ."107

75. The validity of the EPA's reasoning is evident in this case. As explained above, an upper WI limit of 1385 has been set by the CPUC for gas consumed in California, and this Commission cannot prevent natural gas supplies with WIs up to 1385 from being consumed in California. Further, the record in this case supports the finding that natural gas at the upper end of the parameters adopted by the CPUC is currently being consumed in southern California.¹⁰⁸

76. The Air District's position is flawed because it is "based on its faulty assumptions both that the end use facilities and their burning of the gas transported by North Baja are part of the expansion project, and that the emissions from the end use facilities are caused by the project."¹⁰⁹ Natural gas with a WI as high as 1385 will be consumed in southern California regardless of the Commission's action in this case. The Commission reaffirms its finding that the consumption of natural gas is not part of the North Baja expansion project and that any increased emissions are not caused by the North Baja expansion project. The Commission, therefore, rejects the arguments advanced by the Air District that it erred by failing to prepare a general conformity analysis.

C. Natural Gas Act

77. The Air District argues that section 7 of the NGA requires that the Commission consider all factors bearing on the public interest, including the environmental effects of

¹⁰⁷ 58 Fed. Reg. at 63,222-23.

¹⁰⁸ As noted by the October 2007 order, prior to the CPUC's adoption of its current standards, the tariffs of SDG&E and SoCalGas not only permitted higher WI gas, but "the Wobbe Index of supplies delivered into Southern California by Kern River Gas Transmission, a major interstate supplier, ha[d] ranged as high as 1380 over the past three years." 121 FERC ¶ 61,010 at P 74, *quoting* Sempra LNG's and Coral's Comment Letter at 3 (January 10, 2007). *See also* Motion for Leave to Answer and Answer of SoCalGas and SDG&E, filed December 21, 2007, at 5 ("These [Kern River] supplies are, on average, within approximately 1% of the maximum acceptable Wobbe Number and Btu specifications for regasified LNG supplies from North Baja.").

¹⁰⁹ October 2007 Order, 121 FERC ¶ 61,010 at P 88.

the end use of gas transported by a pipeline, even when the end use involves non-jurisdictional transactions or facilities.¹¹⁰ The Air District asserts that the Commission has indirect control over non-jurisdictional transactions and facilities, and has a substantive duty under the NGA to consider the end use of gas by customers who receive gas transported in interstate commerce subject to the Commission's NGA jurisdiction.

78. The Air District also argues that the Commission's failure to consider the air quality impacts it raised is inconsistent with Commission precedent governing consideration of curtailment plans from the 1970s and 1980s, where the recognition that certificate approval of curtailment plans would lead to curtailed gas use by end users and increased consumption of more polluting fuels, required an analysis of the resultant air quality impacts in the EIS.¹¹¹ The Air District reasons that here, where the Commission is issuing a certificate that will also result in consumption of a more polluting fuel than current supplies (regasified LNG, albeit not from curtailment, but from use of a different fuel), the Commission must also consider whether its certification of North Baja's project will adversely affect the environment.

79. The Air District further asserts that the Commission in the October 2007 order failed to address its argument that North Baja's expansion project is required by the public convenience and necessity only if North Baja is required to mitigate the impact of the higher Btu gas that the pipeline would transport. The Air District argues that not only was the Commission's failure to consider its end use arguments and impose a mitigation condition on the North Baja's certificate arbitrary, but the failure to consider the air quality impacts of the end use of the gas violated the Commission's substantive obligation under the NGA to weigh those impacts against the benefits of an unconditioned certificate.

80. The Air District's arguments are unpersuasive. Section 7(c) of the NGA provides that no natural gas company shall transport natural gas or construct any facilities for such

¹¹⁰ The Air District cites *Henry v. FPC*, 513 F.2d 395, 404 (D.C. Cir. 1975) (where the court held that the Commission cannot "blind itself to the effects of the purchase and use of the gas when its authority to certificate the transportation of the gas was invoked"), *Panhandle Eastern Pipeline Co. v. FPC*, 359 F.2d 675, 683 (8th Cir. 1966), and *NE Hub Partners, L.P.*, 83 FERC ¶ 61,043, at 61,158 (1998).

¹¹¹ The Air District cites *State of Louisiana v. FPC*, 503 F.2d 844 (5th Cir. 1974) and *El Paso Natural Gas Co.*, 10 FERC ¶ 61,030, at 61,063 (1980).

transportation without a certificate of public convenience and necessity issued by the Commission.¹¹² The Commission has explained that:

In reaching a final determination on whether a project will be in the public convenience and necessity, the Commission performs a flexible balancing process during which it weighs the factors presented in a particular application. Among the factors that the Commission considers in the balancing process are the proposal's market support, economic, operational, and competitive benefits, and environmental impact.¹¹³

81. The Commission identifies and considers all factors bearing on the public interest, consistent with its mandate to fulfill the statutory purpose of the NGA, which is to encourage the development of adequate natural gas supplies at reasonable prices.¹¹⁴ In *AES Ocean Express LLC v. Florida Gas Transmission Co.*, the Commission addressed the proper interpretation of public interest under the NGA:

As the court explained in *Office of Consumers' Counsel v. FERC*, the Commission's "authority to consider all factors bearing on the public interest when issuing certificates means authority to look into those factors which reasonably relate to the purposes for which FERC was given certification authority." The court, quoting *FPC v. Louisiana Power & Light Co.*, explained that the authority to consider all factors bearing on the public interest must take into account what the "public interest" means in the context of the Natural Gas Act, and that this authority involves only the authority to look into those factors which reasonably relate to the purposes for which FERC was

¹¹² See 15 U.S.C. § 717h. See also *California Gas Producers Association v. FPC*, 383 F.2d 645, 648 (9th Cir. 1967) (stating that "Congress has vested considerable discretion in the Commission"); *Oklahoma Natural Gas Co. v FPC*, 257 F.2d 634, 639 (D. C. Cir. 1958) ("The granting or denial of a certificate of public convenience and necessity is a matter peculiarly within the discretion of the Commission.").

¹¹³ *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227, at 61,743 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement).

¹¹⁴ *National Association for the Advancement of Colored People v. FPC*, 425 U.S. 662, 669-70 (1976).

given certification authority; it does not imply authority to issue orders regarding any circumstance in which FERC's regulatory tools might be useful. The court further explained that the inclusion of the "the words 'public interest' in a regulatory statute is not a broad license to promote the general public welfare, but the words take meaning from the purposes of the regulatory legislation." The court further explained that in the case of the NGA, the purpose is to encourage the orderly development of plentiful supplies of natural gas at reasonable prices.¹¹⁵

82. The Commission agrees with the Air District that the Commission must consider all factors bearing on the public interest.¹¹⁶ Further, we have taken into consideration the Air District's concerns and arguments regarding the potential for air quality impacts in the Basin by ensuring that North Baja will only deliver gas that meets the strictest applicable gas quality standards imposed by state regulatory agencies on downstream LDCs and pipelines. This gives the Commission reasonable assurance that the environment will not be adversely affected by our approval of North Baja's expansion projects.

83. Moreover, even if the Air District is correct in its unsubstantiated and speculative claim that the four-percent WI band adopted by the CPUC will result in more air quality impacts than the two-percent WI band advocated by the Air District, then our approval of North Baja's expansion project under the NGA is nevertheless sound policy as it will increase gas supplies, thereby serving to make natural gas more economical and, consequently, a relatively attractive fuel when compared to more environmentally damaging alternatives.¹¹⁷

84. The FEIS compared the air emissions from the burning of fossil fuels, including natural gas, fuel oil, and coal.¹¹⁸ Following the analysis, the FEIS concluded that "[i]t is clear from the table that the use of either fuel oil or coal would increase emissions

¹¹⁵ *AES Ocean Express LLC v. Florida Gas Transmission Co.*, 121 FERC ¶ 61,267 (2007).

¹¹⁶ *See NE Hub Partners, L.P.*, 83 FERC ¶ 61,043, at 61,158 (1998).

¹¹⁷ FEIS at 3-3.

¹¹⁸ *Id.* at 3-5.

significantly."¹¹⁹ Further, the FEIS concluded that if new sources of natural gas are not developed, "it is conceivable that California's demand for electricity would increasingly be met by oil- or coal-fired facilities outside of California."¹²⁰

85. Indeed, when the CPUC decreased the allowable WI in California from 1437 to 1385, it recognized that lowering the permissible WI even further to the Air District's recommended 1360 would have more adverse environmental consequences because any further restrictions on the WI "could clearly discourage some [natural gas] supplies from entering the state."¹²¹ The CPUC went on to say that "[p]olicies that increase natural gas supply and lower natural gas costs help to address many of California's most critical environmental challenges."¹²²

86. The Commission's determination that it is not required to analyze and quantify the air quality impacts of the end use of the regasified LNG to be transported by North Baja is not inconsistent with the curtailment cases cited by the Air District.¹²³ In those cases, the action the Commission was taking to curtail natural gas usage would, of necessity, lead to greater use of dirtier fuels and therefore cause adverse effects on the environment. Here, our certification of North Baja's project to bring regasified LNG into the United States will lead to diminished use of dirtier fuels, and thus will benefit the environment. Moreover, in the curtailment cases, the connection between the approval of the curtailment plans and the impacts on end use and effects on the environment was much more direct than our approval of the project is on the end use of gas in the Basin. The Commission's curtailment plans directly involved and affected gas usage or the end use of the gas, as they curtailed gas usage based on who the end users were. Unlike the situation here, the diminished end use and reallocation of the gas was a very part of the Commission's action of curtailment, and therefore the Commission was required to examine the environmental impacts of such changes in end use.

¹¹⁹ *Id.* at 3-5.

¹²⁰ *Id.* at 3-5.

¹²¹ CPUC Decision 06-09-039 at 156.

¹²² *Id.* at 156.

¹²³ *See supra* note 112.

D. Request for Stay

87. In its November 14, 2007 motion, the Air District seeks a limited stay of the October 2007 Order insofar as it permits North Baja to transport regasified LNG to SoCalGas for delivery to end users in the Basin.¹²⁴ The Air District argues that all three stay criteria favor issuance of a stay: (1) the Air District and the health of its residents will be irreparably harmed absent a stay because humans and animals will inhale air containing increased levels of ozone and particulate matter 2.5 resulting from higher NOx emissions from the end use of the regasified LNG, which will lead to immediate and irreversible public health injury; (2) granting a stay will not result in harm to other parties since the Air District is seeking a stay only of deliveries of gas to markets in the Basin and North Baja's certificate authorizes it to serve several different markets in the southwest United States; and (3) granting a stay is in the public interest because it will avoid dire health and safety consequences while the Commission considers the issues on rehearing and judicial review. The Air District maintains that the fact it has raised substantial legal questions regarding the merits of project's impacts on air quality, together with the irreparable injury that will occur by allowing the regasified LNG to be consumed in the Basin, militates in favor of granting a stay pending rehearing and appeal.

88. The Air District emphasizes that it does not seek a stay of completion of the project facilities, or a stay of the pipeline's authorization to deliver gas to SoCalGas or to local distribution companies located outside of California. The Air District maintains that granting the requested limited stay will not preclude SoCalGas from receiving any regasified LNG. The Air District believes that SoCalGas can prevent the flow of regasified LNG to the Basin once it enters its system. The Air District asserts that the customers in the Basin would simply receive natural gas that would otherwise serve other customers, and those other customers would receive the regasified LNG that would otherwise have gone to the Basin.

89. Coral, Sempra LNG, and North Baja filed answers in opposition to the Air District's motion for stay, disputing the Air District's allegations of immediate and irreparable harm, and arguing that granting a stay would cause harm to natural gas consumers in California by depriving them of the benefits of the project since it is not operationally possible for SoCalGas to prevent deliveries of gas to the Basin once the regasified LNG enters its system, and still be able to deliver gas to other areas. On

¹²⁴ While the Air District couches its request in the manner above, it is essentially seeking a stay of the order to the extent it allows North Baja to transport any regasified LNG that will be ultimately distributed and consumed in the Basin, not just the LNG delivered by North Baja directly to SoCalGas.

December 6, 2007, the Air District filed reply comments to the answers. In turn, SoCalGas and SDG&E (jointly) and North Baja each filed answers to the Air District's reply comments. While Rule 385.213(a)(2) of the Commission's Rules of Practice and Procedure¹²⁵ prohibits answers to answers, we will admit these pleadings to ensure a complete record.

90. In its consideration of motions for a stay, the Commission applies the standards set forth in section 705 of the Administrative Procedure Act, which provides as follows:

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.¹²⁶

91. In deciding whether justice requires a stay, the Commission generally considers 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.¹²⁷ The Commission's general policy is to refrain from granting stays of its orders, in order to assure definiteness and finality in Commission proceedings.¹²⁸ If the party requesting a stay is

¹²⁵ 18 C.F.R. § 385.213(a)(2) (2007).

¹²⁶ 5 U.S.C. § 705. *See, e.g., Clifton Power Corp.*, 58 FERC ¶ 61,094 (1992); *United Gas Pipe Line Co.*, 42 FERC ¶ 61,388 (1988); *Trinity River Authority of Texas*, 41 FERC ¶ 61,300 (1987); *City of Centralia, Washington*, 41 FERC ¶ 61,028 (1987).

¹²⁷ *See, e.g., CMS Midland, Inc., Midland Cogeneration Venture Limited Partnership*, 56 FERC ¶ 61,177, at 61,631 (1991), *aff'd sub nom. Michigan Municipal Cooperative Group v. FERC*, 990 F.2d 1377 (D.C. Cir.), *cert denied.*, 510 U.S. 990 (1993); *NE Hub Partners, L.P.*, 85 FERC ¶ 61,105 (1998); *Boston Edison Company*, 81 FERC ¶ 61,102 (1997).

¹²⁸ *Id.* at 61,630. *See also, Sea Robin Pipeline Company*, 92 FERC ¶ 61,217 (2000).

unable to demonstrate that it will suffer irreparable harm absent a stay, the Commission need not examine the other factors.¹²⁹

92. Further, in *Wisconsin Gas v. FERC*¹³⁰ the court developed several principles to determine if the requirement of irreparable harm has been met for a judicial stay: First, the injury must be both certain and great; it must be actual and not theoretical. Injunctive relief "will not be granted against something merely feared as liable to occur at some indefinite time." It is also well settled that economic loss does not, in and of itself, constitute irreparable harm. . . . Implicit in each of these principles is the further requirement that the movant substantiate the claim that irreparable injury is "likely" to occur. Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will in fact occur. The movant must provide proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future.¹³¹

93. First, we note that it is not possible for SoCalGas to segregate particular supplies in its system to avoid delivery to a particular market in its distribution area, as the Air District suggests. As the parties have explained in response to the Air District's motion, the Air District misunderstands the operational capabilities of the SoCalGas and El Paso systems, and of natural gas systems in general.¹³² Because the gas transmission and distribution facilities in California are operated on an integrated basis, SoCalGas cannot segregate the gas it receives from North Baja at the Blythe interconnection to prevent it from reaching the Basin while still delivering to other parts of its service territory. The delivery of gas at various points on the SoCalGas system is governed by the law of physics such that SoCalGas cannot operate its system to control the physical delivery of natural gas supplies by directing particular molecules to one air basin or customer and other molecules to other air basins or customers. Thus, under the stay, SoCalGas would be unable to receive any gas from North Baja and the flow of gas from North Baja into any portion of the SoCalGas system would be precluded.

¹²⁹ *Id.*

¹³⁰ 758 F.2d 669 (D.C. Cir 1985) (*Wisconsin Gas*).

¹³¹ *Id.* at 674 (citations omitted).

¹³² See SoCal and SDG&E's December 21, 2007 Answer; Air District's December 6, 2007 Reply at 4-5; North Baja's November 29, 2007 Answer at 7-8; Sempra LNG's November 28, 2007 Answer at 6-7; and Coral's November 28, 2007 Answer at 7, n.21.

94. Further, North Baja will also deliver the regasified LNG to El Paso at the Ehrenberg interconnection, and El Paso delivers natural gas to SoCalGas. SoCalGas is similarly unable to direct the flow of the natural gas it receives from El Paso, which includes the regasified LNG, to avoid delivery to the Basin. Therefore, granting a stay of deliveries of gas that may reach the Basin would also effectively preclude any deliveries of regasified LNG to El Paso, since these volumes would ultimately be delivered to SoCalGas.¹³³ Thus, a grant of the “limited” stay to prevent ultimate delivery of the regasified LNG to the Basin will essentially stay all deliveries of the regasified LNG by North Baja and, thus, the operation of the expansion project facilities.

95. In any event, there simply is no need or basis for preventing the delivery of regasified LNG to SoCalGas -- either directly from North Baja or indirectly via El Paso -- for consumption in the Basin to avoid harm to its residents. As thoroughly explained above, the regasified LNG imported from Mexico must fall within the parameters set by the CPUC. As discussed above, the CPUC considered all of the arguments raised by the Air District regarding the relationship of WIs to emissions and air quality before approving a maximum permissible WI of 1385 based on the evidence available at the time. Further, the CPUC indicated it will modify its gas quality standards if further evidence shows that modification is warranted. Implicit in the CPUC’s determination, and particularly in its recognition that monitoring and further study of air emissions impacts was necessary for the future, was a determination that its setting of the WI limit at 1385 would not have “immediate and irreversible” consequences. Therefore, it is simply not credible for the Air District to argue that its requested stay is necessary because allowing North Baja to proceed with deliveries of regasified LNG for end use in the Basin will have “immediate and irreversible consequences on the air quality of the Basin and the health of people and animals who live there.”¹³⁴

96. The CPUC obviously believes that if it determines that emissions are increasing and may eventually cause a material change in air quality that will result in adverse health impacts, there will be enough time for the CPUC to address the potential problem

¹³³ North Baja’s November 29, 2007 Answer at 8. As North Baja explains, “[d]ue to the current configuration of the El Paso system and El Paso’s inability to physically move gas eastward from Ehrenberg, the gas delivered to El Paso from North Baja would simply displace other volumes flowing on El Paso from the Permian and San Juan Basins for delivery to SoCalGas,” resulting in the physical delivery of the LNG supplies to SoCalGas. *Id.*; *see also*, SoCalGas and SDG&E’s December 21, 2007 Answer at 3.

¹³⁴ Motion for Stay of Air District at 2.

before such adverse consequences occur.¹³⁵ Under these circumstances, the Commission finds that there is no basis for, and nothing to be gained by, granting the Air District's requested stay. However, granting the stay would cause substantial harm, since it would prevent North Baja from using its expansion facilities to deliver any gas supplies, supplies which are needed to meet needs throughout the southwest United States. Lack of sufficient gas supplies would result in increased use of other fossil fuels, including coal, diesel and fuel oil, which would have adverse impacts on air quality.¹³⁶ The CPUC decided not to set the WI limit lower than 1385, as the Air District requested, because it would unnecessarily constrain natural gas supplies, by preventing the use of gas not meeting the stricter standard, including California gas production and imported LNG, and thereby increasing the cost of supplies that do meet the standard. Because the lack of sufficient, economical gas supplies results in increased use of other fossil fuels, the CPUC found that "[p]olicies that increase natural gas supply and lower natural gas costs help to address many of California's most critical environmental challenges."¹³⁷

97. Accordingly, the Commission is denying the Air District's motion for a limited stay of the October 2007 Order to prevent North Baja from delivering regasified LNG for end use in the Basin.

¹³⁵ If the end use of the regasified LNG at the current WI limit was found to materially increase air emissions in the Basin such that air quality in the Basin began to be materially affected, creating the potential for health problems for the residents of the Basin, the CPUC could require end users to mitigate the impacts of the increased air emissions, or the CPUC could lower the permissible WI limit on gas consumed in California. As discussed *supra*, the CPUC stated that "[i]f additional studies suggest that [the CPUC] should modify the gas quality tariffs adopted herein, parties may file a Petition for Modification of this decision." CPUC Decision 06-09-039 at 166. In this event, SoCalGas and North Baja would have to renegotiate their contracts so that SoCalGas could meet the new standards, or SoCalGas would simply stop taking gas from North Baja.

¹³⁶ See FEIS at 3-4 to 3-5.

¹³⁷ CPUC Decision 06-09-039 at 156.

The Commission orders:

The Air District's request for rehearing and motion for limited stay are denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.